
THE EFFICACY OF INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICT ZONES: A LEGAL ANALYSIS OF HUMAN RIGHTS VIOLATIONS IN PALESTINE AND IRAQ

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1. ABSTRACT

The international humanitarian law (IHL) and especially the Geneva Convention and the Additional Protocols are designed to protect civilian population and to restrain the excesses of armed conflict. Nevertheless, in long-term war conflict countries like Palestine and Iraq, the extensive and repeated disrespect to the humanitarian principles has posed serious issues to the applicability and efficiency of the IHL systems. The current paper is a comparative legal analysis of the recorded human rights abuses perpetrated in the Israeli occupation of the Palestinian lands and the intervention of foreign military and insurgencies in Iraq. It examines the extent to which applicable laws have been properly used, honoured and enforced by the state and non-state actors in these countries. This paper also investigates the loopholes in the institutional responsibility, the problems of international institutions like the United Nations and the International Criminal Court, and the incapability of applying legal solutions to the populations that are affected. Specific attention is paid to such violations as indiscriminate attacks, civilian displacement, arbitrary detention, and targeted killings. Although many reports and scholarly works have been done on human rights violations in Palestine and Iraq, little has been done to analytically analyses the efficacy of IHL enforcement mechanisms in these conflict areas. These areas are commonly addressed differently in existing literature and the literature does not contain a comparative legal analysis of how and why IHL has failed repeatedly to prevent violations in these situations. The study bridges that gap by critically analysing the legal framework as well as operational failures of the framework and provides recommendations on how to ensure enforcement and accountability under international law.

Keywords: International Humanitarian Law, Human Rights Violation, Armed Conflict, Palestine, Iraq.

1.1 Introduction

The law of armed conflict or the law of war, also known as International Humanitarian Law (IHL), is an important part of the public international law. It is mainly aimed at governing the performance of hostilities and safeguarding those who do not or no longer take part in armed conflict, including civilians, medical workers, and prisoners of war. The development of IHL originated in customary norms as well as the initial treaties of the 19th and 20th centuries, especially the four Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005. These legal tools enshrine the rules of distinction, proportionality, military necessity and precaution, which forms the foundation of humanitarian immunities in armed conflicts. The traditional international law has also been key in expanding the use of IHL to non-international armed conflicts and also to non-state actors which is relevant in the case of asymmetric warfare. In the contemporary world, irregular warfare, transnational terrorism operations, foreign occupation, and civil wars are the common characteristics of conflicts. Even within the occupied Palestinian territories and war-torn Iraq, the conventional structures of IHL are becoming more of a challenge.¹

Palestine and Iraq have experienced a long and severe type of armed conflict, both state and non-state. In Palestine, the Israeli occupation, military activities in Gaza, and settlements have provoked severe alarm, with the IHL, the treatment of civilians, and the exercise of excessive force. Decades of foreign military intervention, sectarian violence and insurgency in Iraq have left thousands of civilians dead, banned weapons used, torture of prisoners and cultural heritage destroyed. Such humanitarian crises create the dire necessity of re-examining the use, practice, and application of IHL in these two complicated conflict regions.²

1.2 Problem Statement

Though the legal framework of IHL is strong and extensively ratified, its practical application is extremely weak. In Palestine as well as Iraq, there have been repeated abuses of the most basic standards of humanitarianism with near impunity. The gap between legal requirement and compliance has disintegrated the protective role of IHL significantly.

¹ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Vol. I, ICRC and Cambridge University Press, 2005).

² UN Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, including East Jerusalem, and Israel, A/HRC/50/21 (9 May 2022).

The politicisation of the enforcement mechanisms, lack of credible accountability of grave breaches and limited jurisdiction of international tribunals such as the International Criminal Court (ICC) compound the situation. This has been caused by the immunity of powerful state actors especially in Palestine and the disintegrated sovereignty in Iraq which has led to a gap in legal responsibility. As a result, the victims are left without any access to justice and the principles of IHL as a humanitarian law are stripped of their legal substance leaving only moral statements. The driving force behind this research is to question why such systemic failure has occurred and whether there are any legal and institutional solutions.³

1.3 Study Objectives

The general objective of this research is to evaluate critically the effectiveness of the International Humanitarian Law in the cases of Palestine and Iraq where there has been a host of armed conflicts that have resulted in huge civilian casualties and infrastructural devastation. The first aim is to find out how far IHL has been formally invoked, interpreted and applied in these zones. These involve examination of duties under the Geneva Conventions, general international law as well as certain Security Council resolutions or fact-finding reports.

Secondly, the research aims at finding the structural, political, and legal barriers which have impeded the successful implementation of the IHL norms in these jurisdictions. These are, *inter alia*, jurisdictional problems, political vetoes, institutional bias and non-cooperation among states.

Finally, the dissertation will propose normative and procedural changes that may increase the effectiveness of humanitarian law, its protection of victims, and close the gap between legal standards and realities on the ground in long-lasting conflicts.

1.4 Research questions

The following will be the key questions that will guide this research:

1. What extent of International Humanitarian Law has been used and adhered to in armed conflicts in Palestine and Iraq?

³ Michael N. Schmitt, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed., Cambridge University Press, 2014) 45–60.

2. What are the legal mechanisms (international and national) to hold the perpetrators of the violation of IHL accountable?
3. What are the structural, political, and doctrinal constraints that have hindered the application of IHL in these zones of armed conflicts?
4. Is it possible to reinforce the already existing institutions like the United Nations or the ICC or national courts and provide more effective humanitarian justice?

1.5 Methodology of Research

The study is a doctrinal approach to law, which entails extensive study of international treaties, customary principles, case law, and official reports. The main sources are the four Geneva Conventions of 1949, their Additional Protocols, and jurisprudence of the International Court of Justice (ICJ) and International Criminal Court (ICC) as well as national courts.

Secondary sources like scholarly commentaries, human rights report, and policy briefs will be used to place in context the implementation and effectiveness of IHL. The use of Case study methodology will be applied to evaluate some of the most important cases of alleged IHL violations in Palestine and Iraq, such as the attack on civilians, torture, siege methods, and unlawful detention. Moreover, the essential element of the study will be the comparative and critical approach, which will assess the differentiation in the use of IHL norms in the two regions, and how the dynamics of world power influence enforcement.

1.6 Scope and Limits

This study is limited to International Humanitarian Law and how it has been used in Palestine and Iraq armed conflicts. Even though human rights law is frequently overlapping with IHL on the battlefield, the main legal framework that can be considered is humanitarian law as established in the international treaties and customary practices.

Palestine and Iraq are selected because of the long-term conflict history, complicated legal framework and diverse roles of the state and non-state actors. The research does not aim at describing all the armed conflicts in the world, nor does it entail generalised information about human rights abuse that are not under the scope of the IHL. The limitations are possible because of the inability to access certain primary documents, political sensitivities in accessing verified

data, and the narrow jurisdiction of the international courts. However, all the attempts will be made to resort to proven legal documents, official sources, and reliable scholarly and institutional literature.

2. International Humanitarian Law- Framework and enforcement

2.1 The Knowledge of the Principles of the International Humanitarian Law

The law of armed conflict is a form of international law, also called International Humanitarian Law (IHL), governing the behaviour of parties to an armed conflict. Its main purpose is to protect individuals not engaged in hostilities, that is, civilians, humanitarian workers, and the injured and to limit the ways and means of warfare. IHL is legitimate, as it is based on the treaty law and customary international law, which was formed throughout centuries as a reaction to the horrors of war. The contemporary codification of IHL is based on Geneva Conventions of 1949 and their Additional Protocols of 1977, which constitute the basic legal framework to be used in the period of war.⁴

The Geneva Conventions deal with the safeguarding of wounded and ill members of armed forces at sea and on land, prisoners of war and civilians in the event of armed conflict. These conventions have been universally ratified and this strengthens their authority and international validity. The Additional Protocols extend the rights to the victims of non-international armed conflicts and an increase in the range of the legal requirements to the modern types of warfare, such as internal disturbances and occupations. Besides treaties, the customary international law, which is based on the general state practice considered law (*opinio juris*), remains very important in the regulation of the conduct of hostilities where there is silence in relevant treaties or where states are not parties to relevant instruments.⁵

2.2 Principles of Humanitarian Protection

The core of IHL consists in a series of cardinal principles that govern the conduct of hostilities and allow humanitarian protection. The principle of distinction obliges parties to a war to distinguish between combatants and civilians, between military objects and civilian objects.

⁴ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Vol. I, ICRC and Cambridge University Press, 2005) 3–15.

⁵ Jean Pictet (ed), The Geneva Conventions of 12 August 1949: Commentary (International Committee of the Red Cross, 1952) Vol. I.

This is a fundamental principle since it forbids direct attacks against non-combatants and requires that military action should be directed against only those who take part in hostilities. Very similar is the principle of proportionality, which forbids attacks likely to result in incidental injury to civilians that would be excessive in comparison to the direct military advantage that is likely to be gained.

The other key principle is the principle of military necessity which only allows measures which are necessitated to reach a legitimate military objective and which are not otherwise restricted by IHL. Moreover, the principle of precaution means that all the sides should do everything possible to prevent or, at least, reduce the number of incidental civilian casualties when planning and executing attacks. The principles are universally accepted and constitute the customary international humanitarian law, i.e. they are binding even to those states that have not ratified certain conventions.

2.3 States and Armed Group Legal Responsibilities

According to the IHL, state and non-state actors are subject to legal obligations in the event of armed conflicts. States have a positive obligation not only to respect IHL but also to make others respect it. This involves the training of armed forces in the principles of IHL, integrating humanitarian norms into national law, and prosecuting those individuals who have committed serious violations. This obligation to respect and to ensure respect is embodied in Common Article 1 of the Geneva Conventions, which is of collective nature binding all High Contracting Parties. Humanitarian law also applies to non-state actors such as insurgent forces, armed militias, and other actors; Common Article 3 in particular provides a minimum standard of humane treatment in non-international conflicts. Judicial interpretations, UN Security Council resolutions, and state practice have all confirmed the duty of these groups to observe IHL. They are not signatories to international treaties but their actions are still regulated by customary IHL, and considered violations of international criminal law and therefore a war crime.⁶

2.4 Mechanisms of Enforcement and its constraints

Although IHL is well codified and widely accepted, the implementation of IHL is one of its main weaknesses. The international law does not have a centralised enforcement authority as

⁶ Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law (Vol. I, ICRC and Cambridge University Press, 2005).

it is the case in the domestic legal systems. The main organizations with the mandate of enforcing IHL are the International Criminal Court (ICC), ad hoc tribunals, national courts and international monitoring organizations such as the International Committee of the Red Cross (ICRC). The ICC is an institution that was developed under the Rome Statute of 1998 and has the authority to prosecute individuals on crimes against humanity and genocide, as well as war crimes. But it can only exercise its jurisdiction over crimes committed on its territory or by its nationals unless a situation is referred to it by the UN Security Council.

This is a major restriction to the jurisdiction of the Court, particularly in disputes that are political and pertain to major non-ratifying states. Temporary and specific to individual conflicts, ad hoc tribunals such as the International Criminal Tribunal for the former Yugoslavia (ICTY) and Rwanda (ICTR) have played a major role in the development of IHL jurisprudence. Universal jurisdiction gives national courts in some jurisdictions the possibility to prosecute people on charges of serious violations of IHL without being limited by the location where the offense took place or the citizenship of the accused and victim. Nonetheless, such prosecutions are sometimes constrained by political and practical obstacles such as diplomatic immunity and state cooperation. As an enforcement agency, the ICRC is important as a humanitarian agency that oversees the implementation of the laws and serves as an impartial intervener in conflicts. Moreover, UN fact-finding missions and commissions of inquiry are important sources of documentation of IHL violations, but they cannot be enforced, and their effectiveness usually relies on voluntary cooperation by states.⁷

2.5 Structural Vacuums and Political Problems

There are a number of structural and political barriers to the implementation of the IHL. The most prominent of them is the arbitrary use of the legal norms, which is frequently supported by the geopolitical factors. As an example, the states that possess veto power in the UN Security Council have a chance to prevent the development of the accountability process in relation to their allies, thus protecting the violators of international law. This can be seen both in the case of Palestine and Iraq where serious breaches of IHL have been well documented, but prosecutions are scarce or non-existent, because of political immunity. The other consistent problem is the absence of political will by states to carry out humanitarian duties especially

⁷ International Committee of the Red Cross (ICRC), *The Fundamental Principles of the International Red Cross and Red Crescent Movement* (Geneva: ICRC, 2019).

when it can be perceived to put their military practices or foreign policy interests at stake. The sovereignty principle is often used to deny the international investigation or to oppose the collaboration with tribunals.⁸

Even in cases where accountability systems are in place either in a domestic court or international institutions, key obstacles including procedural issues, evidence, and unwillingness of the accused to cooperate make such systems ineffective. These issues reveal the inherent paradox of IHL, as it has been stated that the norms of IHL are widely accepted and its goals are universally accepted, but the mechanisms of enforcement are weak, divided and highly politicised. In cases of armed conflicts, the victims do not find effective remedies and perpetrators operate with impunity. It has led to an increasingly cynical view concerning the ability of IHL to fulfil its fundamental humanitarian mission in the actual conflict areas. In sum, The International Humanitarian Law is still one of the most ethical and legally advanced realms of international law. It is powerful because of its universal values, coded protections, and specifications of obligations that have to be met by states as well as armed organizations.⁹

Nonetheless, the current humanitarian catastrophes in such areas as Palestine and Iraq prove the inefficiency of the law without its enforcement and political determination. The discrepancy between the legal principles and the reality requires a re-evaluation of both institutional mechanisms and political tactics, the basis of which is accountability in the case of violations. In the following chapters, the practical functioning of these legal frameworks will be considered in both Palestine and Iraq and the ways towards the enhancement of humanitarian law in safeguarding human dignity in armed conflict will be attempted to be established.

3: Occupation of Palestine and the Humanitarian Law

3.1 Legal status of the Occupied Palestinian Territories

The Palestinian territories, which include the West Bank, including East Jerusalem, and the Gaza Strip, have been under prolonged international legal dispute with regard to their legal status. Following the Six-Day War in 1967, Israel has exercised effective control over these lands, a fact admitted to by a broad majority of legal experts to be an act of military occupation.

⁸ Christine Gray, *International Law and the Use of Force* (4th ed., Oxford University Press, 2021).

⁹ Michael N. Schmitt, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed., Cambridge University Press, 2014).

According to the conditions of Article 42 of the Hague Regulations of 1907 and Article 2 of the four Geneva Conventions of 1949, an occupation occurs when a territory falls into the control of a hostile army, although no annexation as defined in the law has occurred. Despite the fact that Israel does not recognize the relevance of the Fourth Geneva Convention in the Palestinian territories, the international community, comprising the International Court of Justice (ICJ), the United Nations, and the International Committee of the Red Cross (ICRC) has repeatedly stated that the legal instruments do apply de jure to the Occupied Palestinian Territories (OPT).¹⁰

This classification has certain legal obligations to the occupying power especially the Geneva Convention IV which provides the protection that civilians receive during occupation. The occupying power should maintain the order of the people and civil life without changing the demographic, legal and territorial status of the occupied territory. These obligations notwithstanding, systemic violations of IHL in the OPT have been reported in many state and non-state reports, which raises doubts regarding the effectiveness of humanitarian protection there.

3.2 Occupying Power IHL Obligations

The International Humanitarian Law puts in place a strong set of obligations on an occupying power. These are the ban on collective punishment, safeguards on civilian infrastructure and the sustenance of vital services. Geneva Convention IV Article 49 is an express prohibition of forcible transfer or deportation of the protected persons and prohibits transfer of the civilian population of the occupying power into the occupied territory. This provision is especially applicable in the case of Israeli settlements that have dramatically increased in the West Bank and East Jerusalem, in a glaring violation of this provision. Additionally, the occupying power must take steps to provide food, medical services and hygienic conditions to the civilian population particularly where there are no such resources locally. Blockades, selective destruction, and limitations on the flow of goods and people, especially in Gaza, have contributed to the occurrence of humanitarian crises on a mass scale that contradict the very purpose of IHL.¹¹

¹⁰ John Quigley, *The Statehood of Palestine: International Law in the Middle East Conflict* (Cambridge University Press, 2010).

¹¹ Sarah M. H. Nouwen, *Accountability for Violations of International Humanitarian Law: The International Community's Role* (Oxford University Press, 2018).

These actions have been described in many reports by UN organizations and international NGOs as collective punishment, which is forbidden in Article 33 of the Fourth Geneva Convention. Also, Article 53 forbids the damage of real or personal property of individuals or the state, unless it becomes absolutely essential due to military actions. This provision has attracted interest in the recurrent destruction of Palestinian homes, schools and infrastructure. In its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the ICJ reiterated that the construction of the separation barrier and the regime correlated with it infringed various provisions of IHL, and among them Article 49 and Article 53, thus making a further case of the ongoing applicability and violation of the IHL obligations by Israel as the occupying power.¹²

3.3 Civilian Protection and the use of Force

The other important aspect of the analysis is the use of force by the occupying power and its implication on the protection of the civilians. The use of force in occupied territories is strictly regulated in IHL and the presumption should be in favour of law enforcement paradigms as opposed to combat operations. The principles of distinction and proportionality, which have been inferred within the customary IHL and codified in Protocol I to the Geneva Conventions, can still be applied under the circumstances when military actions are carried out on the territory of occupied areas. Targeted assassinations, frequent firing of live ammunition, and air bombardment in heavily populated areas especially during the Israeli military operation in Gaza have been of serious legal concern under these principles. Such investigatory organizations as the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report, 2009) and other subsequent inquiries have reported patterns of excessive deployment of force that had an unbalanced effect on civilians, including women, children, and medical workers. This can amount to war crimes and serious violation of the provisions of the Geneva Conventions, as well as a violation of Article 8 of the Rome Statute of the International Criminal Court. Moreover, the focus on civilian objects, such as hospitals, schools, and UN facilities, is contrary to the precaution principle and it is a violation of the protective role of IHL.¹³

¹² International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004.

¹³ United Nations Human Rights Council, Report of the United Nations Fact-Finding Mission on the Gaza Conflict (Goldstone Report), A/HRC/12/48, 2009.

3.4 Problems with IHL Enforcement and Accountability

The application of IHL in the Palestinian context, despite the existing well-established legal norms, is extremely weak. The *de jure* applicability of the Fourth Geneva Convention has been contested by Israel, as well as its reservations on the jurisdiction of the International Criminal Court, with the effect of hindering legal accountability in the alleged violation. Even though Palestine became a state party to the Rome Statute in 2015 and gave the ICC jurisdiction over crimes committed in the OPT, geopolitical challenges and inability to cooperate with the state have hampered the investigations. Also, international instruments of collective enforcement have been undermined by political interference by the United Nations Security Council, especially by the use of veto by permanent members. The political coalitions have often thwarted any attempts to set up independent commissions of inquiries or to refer cases to the ICC, and the victims are left without any justice. Although national courts are theoretically authorized under universal jurisdiction, they have hardly used their powers because of diplomatic pressure and problems of evidence.¹⁴

The International Committee of the Red Cross, along with a number of human rights organisations are still watching the situation and offering humanitarian aid. These bodies however have no powers to enforce their recommendations and, in many cases, the occupying power ignores their advice. The net effect is a state of structural impunity, with repeated breach of IHL going with little or no legal penalty and therefore undermining the integrity of the international humanitarian system.

3.5 Influence of Occupation on Human Dignity and the Norms of Law

The length of the occupation, paired with the systematic violation of the humanitarian law, contributed to the gradual degradation of the human dignity and the legalisation of exceptions. The occupation of Palestine is now not temporary and the continued military occupation, settlements, and annexation threats have resulted in a *de facto* annexation and are of grave concern both in the IHL and in the international human rights law. The legal system placed on Israeli settlers and Palestinian inhabitants of the West Bank is discriminatory since it violates the principles of equality and non-discrimination, which are embedded in humanitarian and

¹⁴ United Nations Human Rights Council, Report of the Independent International Commission of Inquiry on the Occupied Palestinian Territory, 2021.

human rights law.¹⁵

Additionally, the occupation has seriously challenged the right of the Palestinian people to self-determination as a fundamental principle of the UN Charter and the customary international law. In its advisory opinion, the International Court of Justice observed the relationship between the occupation and the denial of self-government and noted that the construction of the wall, as well as the settlements, were used to hamper the exercise of this fundamental right. More generally, within the framework of IHL, the occupation has shown how a protracted military domination, when it is not accompanied by a political solution, can result in a breakdown of the legal framework and humanitarian safeguards. The non-observance of duties in terms of Geneva Conventions, the excessive application of violent force in relation to civilians, and the growth of settlements contrary to the international law demonstrate the inefficiency of IHL in the face of deeply rooted political confrontation and non-enforcement. Although the legal framework is quite advanced, it is still effective only when there is cooperation at the international level, political neutrality, and strong enforcement tools, which are not the case with Palestine. The current occupation is a severe challenge to the reputation and durability of IHL in the modern battlefields.¹⁶

4: The International Humanitarian Law and Armed Conflict in Iraq

4.1 Concise background of Armed Conflicts in Iraq

Over the last 40 years Iraq has been the scene of various superimposed armed conflicts: the Iran-Iraq War (1980-1988), the Gulf War (1990-1991), the 2003 US-led invasion, the ensuing occupation, and the long-term insurgency and sectarian violence that ensued. Most recently, the armed confrontation between the Iraqi state and the Islamic State of Iraq and Syria (ISIS) in 2014-2017 once again attracted the attention of the international community to the dire humanitarian situation and the extensive infringement of International Humanitarian Law (IHL). These wars have been a combination of international and non-international armed conflicts, in which foreign occupying powers were involved, Iraqi government forces, sectarian

¹⁵ International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, ICJ Reports 2004.

¹⁶ Human Rights Watch, Occupation, Settlements and the Law: The Case of Palestine, 2020.

militias, and transnational terrorist organisations.¹⁷

Every stage of war has brought different problems to the use and implementation of IHL. The US-led occupation that followed the year 2003 has been treated as an occupation under the laws of occupation with the Hague Regulations of 1907 and the Geneva Convention IV, the subsequent stages with ISIS and local militias have been described as non-international armed conflict where Common Article 3 of the Geneva Conventions and Additional Protocol II is primarily applicable. The presence of a large number of actors, the decentralization of power, and the lack of the systems of stable governance have added to the legal and humanitarian challenges on the ground.¹⁸

4.2 Legal Responsibilities of the State and Non - State Actors

The state and non-state actors have been responsible under IHL in the post 2003 legal environment in Iraq. The United States as an occupying power was law-bound to maintain public order and civil life, protect civilian infrastructure, and avoid collective punishment, under Article 43 of the Hague Regulations, and Article 27 of the Fourth Geneva Convention. Civilian casualties and maltreatment of prisoners and infrastructure destruction during the initial years of occupation were reported and were criticized as a violation of these duties. The most infamous one was the maltreatment of detainees in Abu Ghraib prison, which was an egregious breach of the ban on torture and inhuman treatment of Common Article 3 and Convention Against Torture.

The IHL also applied to non-state actors such as sectarian militias and insurgents to the extent that they were involved in protracted hostilities and exercised territorial control. The emergence of ISIS became a major increase in scale and cruelty of IHL violations. ISIS was in the habit of targeting civilians, destroying cultural heritage and engaging in mass executions, which are all considered war crimes by Article 8 of the Rome Statute. In addition, the fact that they use civilians as human shields, conscript children, and target medical facilities is a sign of a blatant disrespect to fundamental humanitarian standards. Other militias including the Popular Mobilization Forces (PMF) which are affiliated to the government have also been involved in gross violations in the course of anti-ISIS campaigns. These are extrajudicial executions,

¹⁷ International Committee of the Red Cross (ICRC), Iraq: International Humanitarian Law and Armed Conflict, Report, 2017.

¹⁸ Michael N. Schmitt, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed., Cambridge University Press, 2014)

displacement and reprisals against Sunni communities who are believed to be collaborators. When they are committed in the framework of an armed conflict, such violations are also covered by IHL, and may also be subject to international criminal jurisdiction.¹⁹

4.3 Targeting, Use of Forced and Civilian Damage

The tension between military necessity and humanitarian protection was created in urban areas like Mosul, Fallujah and Ramadi. This deployment of heavy artillery, aerial bombardment, and the use of indiscriminate weapons in the heavily populated civilian areas were a violation of the principle of distinction, the need to distinguish between combatants and civilians, and the principle of proportionality, which forbids an attack which is likely to cause excessive incidental civilian loss as compared to the expected military gain. Inquiries by the international organizations, such as UNAMI (United Nations Assistance Mission for Iraq) and Human Rights Watch, have reported extensive civilian killings and damage to vital infrastructure. Although part of such casualties can be classified as collateral damage, the magnitude and frequency is cause of concern as to whether IHL is being adhered to. Specifically, the absence of the effective warning to civilians, and the seeming neglect of all possible precautions in the attack, can constitute the breaches of Article 57 of Additional Protocol I, which codifies the responsibility to protect civilians in the course of military actions.²⁰

The humanitarian crisis was also worsened by the use of explosive weapons in civilian areas that have a wide area effect. Hostilities hit hospitals, schools, and religious places repeatedly, and millions of Iraqi people became displaced, which left long-term vulnerability and reliance on humanitarian assistance. Such after-effects highlight the importance of following the IHL principles more closely when conducting counter-insurgency and urban conflicts.

4.4 Responsibility and Systemic Collapses

The incapacitation of IHL violations in Iraq has been greatly challenged by lack of strong institutional mechanisms, political instability and selective international justice. Iraq is not a signatory member of the Rome Statute of the International Criminal Court, but the ICC has shown an interest in the activities that take place within its jurisdiction, particularly those

¹⁹ Michael N. Schmitt, *The Law of Armed Conflict: International Humanitarian Law in War* (2nd ed., Cambridge University Press, 2014).

²⁰ United Nations Assistance Mission for Iraq (UNAMI), *Human Rights Report*, 2017; Human Rights Watch, *Iraq: Civilian Deaths in Mosul and Fallujah*, 2017.

involving foreign fighters of the State Parties. Nevertheless, there has been no broad-based international tribunal that has been set up to deal with war crimes committed in the course of the conflicts in Iraq and prosecutions at the domestic level have been mainly aimed at the members of ISIS, which have been prone to lack due process protections. In addition, several of the perpetrators of the IHL violations (such as foreign militaries, private security contractors, and sectarian militias) have acted with functional impunity. The 2007 Blackwater incident in which 17 Iraqi civilians were killed in Nisour Square by private contractors brought the legal grey area of non-state corporate actors in armed conflict to the fore. Even though the perpetrators have since been tried and sentenced in the U.S courts, the larger question of regulating such entities under IHL still lies open. Political fragmentation and sectarian influence have hindered efforts to enhance the domestic accountability mechanisms. Iraqi courts have been criticised as lacking transparency, detaining arbitrarily, and using torture. Within this context, the victims of IHL violation, especially of marginalised groups, cannot find a way of redress or recognition. A lack of independent, independent judicial system weakens the deterrence effect of IHL and encourages criminals.²¹

4.5 Impact on the long-run on Humanitarian Norms and Rule of Law

The rule of law and humanitarian values have been undermined to a great extent in Iraq due to the resultant impact of the long-running armed conflict and the repetitive breaches of IHL. An impunities legacy has been established by the weakening of the public institutions, general suspicion of the legal and security systems, and the normalisation of violence. The fact that medical workers, journalists, and even aid convoys are targeted during military action undermines the protective nature of IHL and discourages the involvement of humanitarians during future crisis.

Also, the sectarian identity as a basis to target civilians or deny services violates the principle of non-discrimination under the IHL and threatens to turn armed conflict into a chain of revenge and structural violence. The legalisation of politics and division of power compounds the difficulties of restoration of humanitarian protection and justice. The on-going role of international actors is to assist Iraq in reconstruction of its legal system, incorporation of IHL training into military practice, and in assisting in the support of victim-centred justice systems.

²¹ Amnesty International, Iraq: Human Rights in the Administration of Justice, 2018.

Unless such reforms are affected, the humanitarian effects of the conflicts in Iraq will be experienced even after active hostilities have ceased to exist.²²

The example of Iraq demonstrates the difficult situation of implementing and enforcing the International Humanitarian Law in the context of multi-actor, asymmetrical, and urban warfare. Although the legal framework presents an undisputed duty of the state and non-state actors, the existence of impunity, lack of effective judicial processes, and politicised interventions has grossly limited the protective role of IHL. Whether it be the invasion and occupation or the fight against ISIS, the breach of humanitarian law has been a feature of the military environment. The inability to enforce accountability and compensation to victims is constantly weakening the normative soundness of IHL and creates an imperative to reform the institutions and collaborate internationally. When it comes to learning lessons in Palestine and Iraq, as the next chapter will discuss, there are lessons that need to be taken with regard to the future design of more effective mechanisms of enforcing humanitarian law in protracted and complex conflicts.²³

5: Comparative Analysis and Proposals of Reforms

This Comparative Analysis provides a comparative legal argument of the use and implementation of the International Humanitarian Law (IHL) in the war zones of Palestine and Iraq. Although the contexts are different in legal terms, Palestine being an occupied territory, and Iraq a mixture of international and non-international armed conflict, both cases have similar issues in regard to humanitarian protection, adherence to IHL principles, and accountability mechanisms. The ongoing breaches of IHL in both areas, and frequently without any punishment, highlight the flaws of the systems not only in the legal systems, but also in political and institutional application. Based on the comparative reflections of the previous chapters, this section provides practical suggestions of reforms to enhance the practice and application of IHL in protracted and asymmetric conflicts as well.²⁴

²² United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in Armed Conflict, 2017.

²³ United Nations Assistance Mission for Iraq (UNAMI), Human Rights Reports on the Protection of Civilians in Armed Conflict.

²⁴ International Committee of the Red Cross (ICRC), International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, 2019.

Comparative Evaluation of Law Systems

The legal frameworks of Palestine and Iraq are quite different in the codification of obligations and the character of warfare. In Palestine, the IHL law is based on the law of occupation as presented in the Fourth Geneva Convention of 1949 and the Hague Regulations of 1907. These tools create obligations of occupying powers to uphold the rights of the civilian population, ban collective punishment and ban annexation of occupied territory. Israeli long occupation, settlement expansion and dual legal regime applied to the Israelis and Palestinians have created serious legal issues, especially in the principles of proportionality, distinction and non-discrimination.

Comparatively, the legal system governing Iraq involves international armed conflicts and internal armed conflicts. The U.S.-led invasion of 2003 involved application of principles in Additional Protocol I and Geneva Conventions, whereas the subsequent insurgency and the emergence of ISIS were within the scope of Common Article 3 and Additional Protocol II. These layers of multiple conflicts brought overlapping legal obligations by state actors, foreign military forces, and non-state armed groups. Nonetheless, serious breaches, including torture, indiscriminate bombing and attacks on civilians, have continued, often without either legal redress or institutional responsibility.²⁵

Enforcement and Accountability failures

One of the most important weaknesses shared by Palestine and Iraq is the inability to ensure the consistent and impartial application of IHL norms. The international institutions of the United Nations, International Criminal Court (ICC) and other UN fact-finding missions have been subjected to significant political and jurisdictional constraints in both regions. In Palestine, the stalemate of the Security Council through veto politics, particularly on the resolutions that condemn the acts of Israel, has hindered effective intervention or sanction. Despite the ICC having initiated a preliminary examination into crimes in Palestine, there has been little and slow development.²⁶

²⁵ International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004.

²⁶ Victor Kattan, "Israel, Palestine and the ICC: On Territorial Jurisdiction and Triggering Mechanisms," *Journal of International Criminal Justice*, Vol. 14, Issue 1 (2016).

The problem is more on the disunity of governance and lack of independent domestic institutions which can investigate or prosecute IHL violations in Iraq. ISIS has been engaging in systematic crimes of atrocity like mass executions, forced displacement, and targeting religious and cultural sites, among others, which amounts to war crimes since it is committed by non-state actors. But even state and paramilitary forces have been involved in extrajudicial killings and collective reprisals, questioning the credibility and independence of domestic justice systems. Moreover, legal impunity has been a major issue with foreign military and private security companies in Iraq as exemplified by the case of the Nisour Square massacre by Blackwater contractors in 2007.²⁷

Special Legal and Institutional Reforms

The structural reform is necessary in the light of such systemic challenges. To begin with, more regionalisation of IHL enforcement is needed. Setting up of independent humanitarian tribunals, or monitoring agencies in conflict-prone areas like West Asia, would be more localised and culturally contextualised in terms of recording violations and enforcement of accountability. Second, it is possible to reform the Rome Statute of the ICC in such a way that it would allow automatic jurisdiction in circumstances involving grave breaches of IHL, especially in cases when the international community is unable to intervene because of political stalemate. Third, on the national level, more IHL has to be implemented in the military training, law codes, and the judicial system. States should create autonomous military ombudsmen and make sure that the violation of IHL is punished by means of transparent and fair trials. Fourth, satellite imagery, AI-based analysis, and digital witness platforms are technological means that should be used to record violations, particularly in conflict areas that are not accessible. This type of evidence needs to be admissible in the national and international courts of law. Finally, collective sanctions should be applied by multilateral means against states that repeat violators of IHL even in instances where there is no consensus at the UN Security Council level.²⁸

Civil Society and the Victim-Centred Approaches

In addition to reforming institutions, a strong system of enforcement should also be based on the experience of victims. The two countries (Iraq and Palestine) have experienced suppression

²⁷ United Nations Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in the Context of the Ninewa Operations and the Retaking of Mosul, 2017.

²⁸ Emily Crawford and Alison Pert, International Humanitarian Law (Cambridge University Press, 2015).

of the voices of the civilians, failure to involve the marginalised groups in the justice systems, and loss of faith in legal solutions. Community based truth commissions, reparations schemes, and public memorialisation are therefore, necessary as victim-centred approaches. Civil society actors make an invaluable contribution to ensuring the maintenance of documentary evidence, the mobilisation of international opinion, and the demand of a system change. Their input should not be left at the margins or in informal positions, but institutionalised in the IHL enforcement strategies.²⁹

It also needs to inculcate IHL awareness in school books, journalistic writing and discussions to develop a culture of humanitarian respect in the societies facing a long conflict. Humanitarian protections can be significantly achieved only by establishing a legal norm in the consciousness of the population. The fact that the comparative analysis of Palestine and Iraq shows that the deepest failure of IHL is not the insufficiency of its legal norms but the lack of effective, impartial and consistent enforcement. In both scenarios, there is a prevalent and repeated breach of IHL, but there is little and selective accountability. Such imbalance undermines moral and legal legitimacy of humanitarian law and creates cycles of violence. The reforms should thus be geared towards reinforcing the institutional framework of IHL enforcement and at the community level its legitimacy. The key to ensuring that IHL is not only aspirational, but functional and fair is international cooperation, regional participation, technological advancement, and civil society integration.³⁰

6: Conclusion

The International Humanitarian Law (IHL) is one of the foundations of the modern legal framework that regulates the armed conflicts, and the reduction of human suffering and the preservation of civilian populations is the key goal of this law. Its values, which are based on the Geneva Conventions, Additional Protocols, and the customary international law, reflect the international humanitarian conscience of the international community as a whole. Nevertheless, the results of the current dissertation show that there is a huge gap between what the law promises and how it will be implemented in conflict regions like Palestine and Iraq. The paper shows that even though the IHL norms are clear and universal, they have been

²⁹ Beth Van Schaack, "Engaging Civil Society in International Criminal Law," *American Journal of International Law Unbound*, Vol. 113 (2019).

³⁰ Rupert Ticehurst, "The Role of Dissemination in Promoting Compliance with International Humanitarian Law," *International Review of the Red Cross*, No. 317 (1997).

continuously flaunted by state and non-state actors in Palestine and Iraq. Israeli occupation of Palestine has been noted with the following practices; annexation of territory, collective punishment and discriminatory treatment of the civilians; practices that are in contravention of the legal requirements of an occupying power. In the meantime, the war in Iraq has highlighted the inadequacies of IHL in situations of divided authority and multiple-actor violence, as both insurgents and foreign military forces have indulged in practices that erode fundamental humanitarian safeguards. One of the most important lessons that this comparative analysis can teach is the systematic ineffectiveness of enforcement mechanisms. Geopolitical interests and jurisdictional barriers have frequently become a bane of international institutions like the UN Security Council and the International Criminal Court. At home, the legal system in the two regions has been unable or unwilling to vigorously pursue offenses, particularly in cases where those perpetrated by influential political or military organizations. Consequently, the victims of these conflicts are mostly left without redress and in most cases, offenders are left to go scot-free. In order to improve the effectiveness of IHL in protracted and asymmetric conflicts, the current dissertation suggests a multi-faceted strategy: the creation of regional monitoring systems, the reforms aimed at enhancing the international criminal jurisdiction in the context of grave breaches, the incorporation of IHL into the national legal and military systems, and the use of modern technologies to document and collect evidence. The participatory role of civil society and the advocacy of victim-centred justice are also quite significant as these two can contribute to the creation of a culture of humanitarian awareness and legal responsibility. To sum up, although the body of International Humanitarian Law is rather solid in its framework and ethical outlook, its effective application in the conflict regions such as Palestine and Iraq is fatally flawed. It is necessary to have legal reform, political will and international solidarity to restore confidence in IHL and make sure that it is not just the protection that is enshrined in paper but realised in practice. In the absence of these concerted efforts, IHL will be reduced to mere symbolic rhetoric incapable of dispensing justice where it is most needed.