

JUR1730 International Humanitarian Law

Please respond to all **three** questions below. Each of the first two questions count for 25%, whereas the third question counts for 50% of the final grade. In answering the questions make use of the relevant provisions from the **1949 Geneva Conventions**, the **1977 Additional Protocols**, and the relevant rules contained in the **2005 ICRC Customary International Humanitarian Law Study**.

1. What is the main function of international humanitarian law?

Main function of IHL: placing limits on armed conflicts

History has shown that over centuries many societies from many different parts of the globe, have attempted to place limitations on conduct in armed conflict (Crawford and Pert, p. 30). The main function of IHL is to regulate the conduct of parties to an armed conflict and limit the latter's destructive effects on civilians, civilian objects and infrastructure, and the environment. To that aim, the main sources of IHL, namely the four 1949 Geneva Conventions, the two 1977 Additional Protocols, and the relevant customary international humanitarian law (CIHL) rules contained in the 2005 ICRC Customary International Humanitarian Law Study regulate the conduct of hostilities and provide general and specific protection for different categories of persons, civilian objects, and the environment.

Main sources of IHL and their application

The two historical branches of IHL, known respectively as 'The Hague law' and 'Geneva Law' have recently merged in the two 1977 Additional Protocols, API regulating international armed conflicts (IACs) and APII regulating non-international armed conflicts (NIACs). As mentioned above, the main IHL treaties are the four Geneva Conventions of 1949 and the three additional Protocols, two adopted in 1977 and the third in 2005. Also quite important is the 2005 ICRC Customary IHL Study prepared by the ICRC consisting in 161 CIHL rules, from which 148 apply to both IACs and NIACs. IHL is directed at all parties to an armed conflict, be they States or non-State armed groups, imposing on them binding legal obligations. IHL is distinct from *jus ad bellum* or the law on the use of force, which is regulated under the UN Charter and customary international law. Once IHL is triggered, it binds the parties to an armed conflict, independent on the lawfulness of the use of force. This separation is based on the idea of equality of belligerents (Crawford and Pert, p. 31).

Fundamental principles of IHL

In order to achieve its objectives, IHL makes use of certain fundamental principles, which include the principle of humanity, military necessity, distinction, proportionality, precautions in attack, prohibition of unnecessary suffering and superfluous injury, and chivalry (or honorable conduct). These fundamental principles, alongside the more precise rules of IHL included in treaty and customary IHL, place limitations of what the parties to an armed conflict are allowed to do (for a detailed discussion of these fundamental principles of IHL see Crawford and Pert, pp. 41-49).

2. What conditions does IHL require for the lawful exercise of reprisals? Can you mention any examples of lawful reprisals?

Belligerent reprisals are actions which would normally be contrary to the laws of war, but which are justified because they are taken by a party to an armed conflict against another party, in response to the latter's violation of the law of armed conflict (Crawford and Pert, p. 216).

Five conditions for lawful reprisals under CIHL

As summarized by Dinstein, the customary IHL rules on belligerent reprisals comprise five conditions (Crawford and Pert, p. 217):

- i) Protests or other attempts to secure compliance of the enemy with LOAC must be undertaken first (unless the uselessness of such steps 'is apparent from the outset');
- ii) A warning must generally be issued before resort to belligerent reprisals;
- iii) The decision to launch belligerent reprisals cannot be taken by an individual combatant, and must be left to higher authority;
- iv) Most significantly, belligerent reprisals must always be proportionate to the original breach of LOAC;
- v) Once the enemy desists from its breach of LOAC, belligerent reprisals must be terminated.

There are certain persons and objects against which belligerent reprisals may never be launched, including the wounded, sick, and shipwrecked, POWs, civilians and the civilian population, certain civilian objects, cultural property, the natural environment, works and installations containing dangerous forces, and objects indispensable to the survival of the civilian population (Crawford and Pert, p.217).

Practical effect of restrictions on reprisals

As noted by Corn et al, the practical effect of these limitations is to eliminate reprisals as viable options to respond to enemy non-compliance with LOAC (Crawford and Pert, p. 217). This is a controversial result for several States that have not become a party to API or APII. Although there exists some controversy regarding the extent of prohibitions of belligerent reprisals, the cases of *Martic* and *Kupreskic* decided by the ICTY can be seen as evidence of an emerging prohibition on reprisals against civilians. The ICTY itself has acknowledged that reprisals may be permitted provided they meet the strict conditions established under customary international law (*Martic*, Judgment, 12 June 2007, para. 465).

Prohibition of reprisals under CIHL

Reprisals are covered under the ICRC CIHL Study in Rules 145-148. Rule 145 states the general rule that where not prohibited by international law, belligerent reprisals are subject to stringent conditions. Rules 146 and 147 cover respectively reprisals against protected persons and protected objects. Rules 148 cover the issue of reprisals in NIACs. This rule states 'Parties to non-international armed conflicts do not have the right to resort to

belligerent reprisals. Other countermeasures against persons who do not or who have ceased to take a direct part in hostilities are prohibited.’

3. If a combatant pretends to be *hors de combat* or feigns death, only to attack an enemy soldier, would the later be committing a war crime if they shot the combatant? Would it be a violation of IHL if a unilateral policy of “double-tapping” (pre-emptively “shooting wounded or apparently dead enemy combatants to ensure that they are dead and not feigning death”) were implemented by a party to the armed conflict?

Q1

The language used in the situation at hand indicates the existence of an IAC. Certain methods of warfare are prohibited in an armed conflict, including perfidy. This crime is regulated under Article 37 of API and Rule 65 of the ICRC CIHL, which states ‘Killing, injuring or capturing an adversary by resort to perfidy is prohibited.’ The ICC Statute includes perfidy as a war crime in Article 8(2)(b)(xi). The essence of perfidy is the intentional misuse of a protected or particular status to invite or encourage an adversary to believe that the person acting perfidiously is immune from attack (Crawford and Pert, p. 212). In this case, if a person pretends to be *hors de combat* or feigns death in order to attack their opponent while trying to take advantage of a protected status, they are liable to be shot and that would not be considered a war crime.

Q2

In contrast, if a unilateral policy of “double-tapping” (pre-emptively “shooting wounded or apparently dead enemy combatants to ensure that they are dead and not feigning death”) were implemented by a party to the armed conflict, that would be a grave violation of IHL, practically amounting to denial of quarter. The prohibition of denial or quarter is included in treaty law in Article 23(d) of the HR and in Article 40 of API. Article 40 of API provides that ‘It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.’ This has become part of customary international law, identified under Rule 46 of the 2005 ICRC CIHL Study, applicable to both IACs and NIACs. Persons *hors de combat* are protected from attack, as long as they refrain from any hostile act or attempt to escape. Such a determination can only be done on a case by case basis and not as a matter of policy.

Remember to answer all the questions!