

Is Compliance with International Humanitarian Law Susceptible to Logical Measurement?

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Abstract

The application of international humanitarian law by States is necessarily dependent on factors such as “interests” as well as certain “qualities” of States, such as size or wealth. Despite their contractual undertakings, nations fully apply the jus in bello under the terms of a particular formula. This article depicts this formula in a very rudimentary manner, positing that compliance is measureable and corresponds to a number which is derived by adding a State’s interests and qualities.

A. Introduction

The literature on international humanitarian law (IHL) focuses exclusively on its positive rules (i.e. that civilians must not be made the subject of attack, that unnecessary suffering is prohibited etc), taking it for granted that the application of IHL is an ideal tool for all stakeholders. This is natural given the imperatives which the *jus in bello* aims to accommodate, thus rendering it subject to a strict *erga omnes* regime. During peacetime the majority of states will proclaim their adherence to the principles of IHL and will genuinely strive to instruct their armed forces and will themselves participate in the global effort to uphold and augment these principles. During situations of armed conflict, however, militarily weak states will no doubt experience such a degree of stress against powerful adversaries that *may* incline them to deviate from their prior declarations of adherence. The objective of this brief article is to test the presumption that compliance with IHL is beneficial for all states and at all times, irrespective of their particular qualities. This should in no way be taken to mean that I am advocating or supporting the violation of IHL in respect to some actors. My intention is simply to employ logic in order to test the validity of this assumption.

B. A Simple Compliance Formula

If states are seen as entities with varying political interests, but also as actors with different dynamic qualities (in terms of size, financial output, military strength, technological potential, strong alliances, etc), it becomes evident that they necessarily view IHL through a different lens. The observation, or the inten-

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tion to observe, IHL is thus measured by reference to two basic variables: interests (A)¹ and state qualities (B). As a result, A+B must at least be equal to a number that renders the application of IHL desirable to the country concerned. If the sum total of A+B does not translate into benefits for the state concerned, then it will have little interest in applying IHL. As a result, international law must play a very particular role. On the one hand, it must not ignore the tangible interests of states, while on the other hand, it must set boundaries to these interests by reference to logical criteria. Before we look for these criteria and optimal solutions let us illustrate this problem with an example. State X has a population of ten million and an average military capacity and is threatened by at least two neighboring states, Y and Z. Y has a population of 50 million, while Z has a population of 80 million. State X possesses true representative democracy whereas its threatening counterparts are mostly autocratic with few democratic credentials. As a result they both amass significant military arsenals and augment the duration of compulsory military service five years prior to the escalation of events. Country Y has an army and an armament 8 times the size and quality of country X, whereas country Z's analogy is 1 to 12. Country X is now planning its IHL policy in case of an armed conflict between either, or both, of its neighbors. A humanistic and human rights approach to this question, although clearly pedantic and self-evident, would posit that country X must obey all the precepts of IHL, irrespective of its particular circumstances on account of the very nature of the obligations inherent in the *jus in bello*. Ideally, this is the solution that this author would put forward. But, is it correct to argue that this is the logical solution, or simply the desired solution? The difference between the two is significant! The military engagement of country X with Z and Y cannot be contemplated on a one-to-one basis, or by any confrontational means of this nature because of the numerical and other superiority of Z and Y. Country X must weaken its enemy and attack him in such a way that negates his superiority. This may well implicate the use of surprise attacks, the launching of raids against ammunition or critical infrastructure installations that contain a very significant degree of collateral damage against civilians. Equally, it may include the use of weapons that are hardly precise or which cause large losses of combatant life (and which are the only weapons in the possession of the defending State X), or it may additionally be induced to follow a scorched earth policy that denies the enemy or its civilian population of sufficient feeding resources with a view to weakening them.² If

- 1 The concept of 'national interest' is of paramount importance in international relations, particularly advocated by the Realist School, referring to a country's goals and ambitions, whether they be military, financial or other. Its origins may succinctly be found in Machiavellian philosophy. See J.M. Coicaud & N.J. Wheeler (Eds.), *National Interest and International Solidarity: Particular and Universal Ethics in International Life*, UN University Press, 2008. See also a private effort to define the national interests of the US by the Commission on America's National Interests (July 2000), available at: <belfercenter.ksg.harvard.edu/files/amernatinter.pdf>.
- 2 In the conflict between Georgia and Russia that took place at the close of 2008 it was reported that Georgian armed forces committed numerous and extensive violations of IHL, particularly through the indiscriminate use of cluster bombs against civilian populations. See Human Rights Watch, *Georgia: More Cluster Bomb Damage than Reported* (4 Nov. 2008), available at: <www.hrw.org/en/news/2008/11/04/georgia-more-cluster-bomb-damage-reported>.

these, otherwise illegal, means are not employed by the weaker opponent, then his annihilation is certain. If this is true, it follows that the strict observance of IHL is not beneficial to all combatants, as previously presumed. The prospect of international criminal liability is not a strong enough deterrent under such dire circumstances. On the contrary, in respect to powerful military nations a direct confrontation with a weaker enemy does not encounter the application of IHL as a disadvantage. Instead, IHL may be used as a weapon of war, in the form of a propaganda tool, by which the powerful state can argue that while it is compliant with the laws of war its opponents are not. On a balance of priorities between applying IHL fully and preserving the life of a nation, which one should less powerful military nations choose? Here lies a paradox, for if a state opts for the observance of IHL it risks annihilation, but if it defeats annihilation it will have contravened IHL. It is clear that there is no win-win situation to this conundrum. This very question was posed to the International Court of Justice (ICJ) in the *Use of Nuclear Weapons* case and the Court was criticized heavily for failing to provide a clear and unambiguous answer to the question whether a state could use nuclear weapons in extreme circumstances, particularly where its very survival was at stake. The ICJ argued, rather diplomatically it is true, that under such circumstances there is no rule in international law forbidding it from using nuclear weapons.³ Although it is true that the ICJ placated its final argument on legal considerations (having come to the conclusion that state practice was so diverse on nuclear weapons that no customary or *jus cogens* rule excluded their application in extreme circumstances, not even IHL or the provisions on the prohibition of force and self-defense in the UN Charter), its final argument is also a logical one. By implication, what is true of nuclear weapons must necessarily be true of other means of warfare when the very survival of a nation is at stake. This means that if defending country X is to attain its objective which is its physical survival (symbolized with Σ), then $A+B$ must equal at least Σ . This is legitimate, as any lesser objective than physical survival of a nation would have to demonstrate a value that is superior to collateral civilian deaths and other infractions of human rights and IHL. Let us symbolize all those objectives that fall below the survival of a nation and which may involve infractions of IHL as Π . Our basic hypothesis is thus that $\Sigma > \Pi$. As a result, where $A+B > \Pi$ the country under consideration possesses no legitimate authority or justification to violate IHL. It is not the premise of this brief essay to explain in more detail or to provide exhaustive numeric criteria to A or B, albeit I do offer a small sample of possible quantifiable variables. This may be useful for strategists and policy makers when assessing claims of legality from defending states. Perhaps, those opposed to any exceptions to the application of IHL, will find this suggestion offensive and regressive, but this is not for me to judge as it would be self-referential. By way of a very brief illustra-

3 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, 1996 ICJ Rep. 226, para. 96, where the ICJ proclaimed that it cannot lose sight of the “fundamental right of every state to survival” and its right to resort to self-defense in such cases. It also stated, somewhat confusingly, that the use of nuclear weapons in circumstances giving rise to self-defense was not out of the question. *Id.*, para. 97.

tion, let us construct a scale from 1 to 5 that depicts a country's political interests (symbolized as aforementioned with A) were: 1) economic progress and growth; 2) regional security; 3) freedom from hegemonic ambitions of third countries; 4) freedom from military intervention; 5) freedom from annexation and take over. Let us now construct another scale equally from 1-5, that depicts a State's qualities (symbolized as B). This could look something like this: 1) weak economy; 2) weak military alliances; 3) inferior military power on a scale of 1 to 2 vis-à-vis its adversary; 4) inferior military power on a scale 1 to 4 vis-à-vis its adversary; 5) inferior military power on a scale of 1 to 8 vis-à-vis its adversary. If we agreed that $\Sigma=8$, it follows that $A+B=8$. What this very simplistic figure demonstrates is only that the wholesale application of IHL is not always in the best interests of states, at least as far as their bilateral relations with their adversary are concerned. It is indeed possible to come up with other variables, such as the backing of the international community for those countries observing IHL, but it is not always certain that these variables will prevent a nation's annihilation. This is particularly true in those situations where the UN Security Council is prevented from adopting measures to physically lift an annexation of occupied territory or to reverse the effects of a genocidal campaign. These considerations become all the more evident when one examines the benefits of militarily superior states in complying with IHL. Because the very survival of these nations is not in doubt, the aforementioned formula is of no use to ascertaining their particular compliance benefits. Powerful nations, particularly those whose adversary is weak, must necessarily be seen to be IHL compliant. It is generally expected through the processes of public opinion that powerful actors must always comply with the fundamental rules of a given game, whether the game is war, politics, or other. This is because powerful nations never strive for mere survival, but have wider global perspectives to contend with. They have to make themselves likeable, or as setting moral standards because they are forced to enter into relations with most countries in the world and if they fail to establish a moral face they risk popular resentment which translates into reluctant bilateral and multilateral relations with third states. There are few fields beyond humanitarian law that are more important in this respect because it reflects the sincerity of the country concerned in the treatment of persons other than its own nationals. More importantly, it reflects the level of respect for other cultures. It is for this reason that even the most democratic of states make every effort to avert IHL violations committed by their troops. The USA suffered significant damage to its external relations with Arab and Muslim states in the aftermath of the Abu Ghraib scandal, or the series of other violations by occupying forces and private security companies. President Obama recently delivered a speech at Cairo University in order to remedy the US image in the Muslim world and offered a hand of reconciliation towards that purpose.⁴ No doubt, the recent literature on the concept of 'lawfare' perfectly encapsulates the idea that international law is a potent tool in the arsenal of states – as well as non-state actors – in the sense that it can be

4 Speech of 4 June 2009, available at: <www.whitehouse.gov/the_press_office/Remarks-by-the-President-at-Cairo-University-6-04-09/>.

employed to weaken the arguments of one's adversary.⁵ There certainly does exist the psychological imperative for the stronger of two adversaries to comply with the rules of the game. This is without doubt. The weaker adversary, on the other hand, when its existence is threatened gives little attention to external appearances because it does not have to preserve an international image with the entirety of the international community. Its leaders will care little, if any, were it to be perceived as a violator of international humanitarian law. On the other hand, were a country to be branded as a persistent violator of its contractual obligations, particularly in the fields of commerce and investment, it has no valid or justifiable excuse for such violation. As a result, it will suffer the full gamut of consequences arising from its behavior, which will generally include reluctant investment in that country and sever its ties with existing or prospective investors. The violation of IHL does not generally bring about such consequences, at least from one's allies. Certainly, some words of caution will be voiced and perhaps some condemnation, but this will have no repercussions in other areas of bilateral or multilateral undertakings. Even if they did, the survival of a nation is perceived by its government and its people as the only imperative. This is true also in cases where the government yields little or no support from its people. Thus, during the NATO campaign against Yugoslavia (now Serbia), although its people opposed in their vast majority the government of Slobodan Milosević, they nonetheless rallied behind their government against the NATO bombing. This included support for the violation of IHL, if necessary, in order to avert the breakup of their country, particularly the secession of Kosovo.⁶ It should not, therefore, be thought that all states, irrespective of size or other elements, share the same interests in the application and compliance with IHL. These vary considerably from country to country and from situation to situation. IHL protects human life from the calamities of war and is aimed at humanizing warfare. I am not advocating that some states can flout it while others cannot because of their powerful status. Equally, I am not advocating that IHL should be used as a political tool by some states, rather I am simply exposing the obvious in the practice of states. This brief article aims to explain through the process of logic the expediency of compliance with IHL. It is thus not concerned with legality or legitimacy in any direct manner. It is hoped that the reader will make up his or her own conclusions about these issues.

- 5 The 2005 US National Defense Strategy claimed that "the USA will continue to be challenged by those who employ a strategy of the weak using international fora, judicial processes and terrorism", available at: <www.defenselink.mil/news/Mar2005/d20050318nds1.pdf>, p. 5. Israeli resentment of lawfare, on the other hand, is directed at the employment of international humanitarian law by human rights NGOs and pro-Palestinian groups and their sympathisers in order to allegedly discredit Israel's defense of its homeland. Thus many of its senior political and military figures have been accused as war criminals and applications have been lodged before domestic and international tribunals in respect of both criminal and civil cases. See A. Herzberg, 'NGO Lawfare: Exploitation of Courts in the Arab-Israeli Conflict', NGO Monitor Monograph Series, 2008.
- 6 J.M. Post, *Leaders and their Followers in a Dangerous World*, Cornell UP, 2004, p. 183. It should be noted that according to Post the popularity of Milosevic was premised on image manipulation and not so much the Kosovo cause in the Serb psyche.

C. What, if Any, Conclusions May Be Drawn?

Let me make it absolutely clear that no formula, however mathematically or logically proven and articulated, can give rise to an immutable truth. This is all the more true in respect of formulae that purport to describe social phenomena, such as the subject matter of this brief essay; i.e. endogenous and exogenous factors that convince a state to contravene IHL. The aforementioned considerations are not static and even when encountered they do not necessarily give rise to the exact same reactions by all affected actors. One government may feel safe that its allies will rally to its support and thus it need not violate IHL. Another may equally be convinced that the Security Council will immediately and effectively authorize the use of force against the recalcitrant state and act in like manner. Yet another may choose to adopt a very altruistic position whereby it decides to comply with IHL irrespective of its impending demise. These exceptions cannot be underestimated nor indeed dismissed. They are very real. What the formula does demonstrate, however, is that militarily weaker states must never be allowed to feel threatened with annihilation, extinction or occupation. The prevention of this state of affairs must be of paramount concern to those engaged with collective security. The Security Council must be proactive as regards such countries and ensure them that their full compliance with the dictates of IHL will be rewarded and that any efforts to extinguish their nationhood or identity through occupations will never be tolerated.