

HOW DOES LAW PROTECT IN WAR?

Cases, Documents and Teaching Materials
on Contemporary Practice
in International Humanitarian Law

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[N.B.: Many articles of the International Review of the Red Cross referred to in bibliographies are online (<http://www.icrc.org>). Other journals are also online (See the list of Internet sites)]

Chapter 1

Concept and Purpose of International Humanitarian Law

I. PHILOSOPHY OF INTERNATIONAL HUMANITARIAN LAW

Introductory text

International Humanitarian Law (IHL) can be defined as the branch of international law limiting the use of violence in armed conflicts by:

- a) sparing those who do not^[12] or no longer^[13] directly^[14] participate in hostilities;
- b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for^[15] – can only be to weaken the military potential of the enemy.^[16]

It is from this definition that the basic principles of IHL may already be drawn, namely:

- the distinction between civilians and combatants,
- the prohibition to attack those *hors de combat*,
- the prohibition to inflict unnecessary suffering,
- the principle of necessity, and
- the principle of proportionality.

12 For example, civilians.

13 For example, those who have surrendered (i.e., in international armed conflicts, prisoners of war) or can no longer participate (such as the wounded and sick).

14 If International Humanitarian Law wants to protect anyone, it cannot consider merely any causal contribution to the war effort as participation, but only the contribution implementing the final element in the causality chain, i.e., the application of military violence.

15 The State fighting in self-defence has only to weaken the military potential of the aggressor sufficiently to preserve its independence; the aggressor has only to weaken the military potential of the defender sufficiently to impose its political will; the governmental forces involved in a non-international armed conflict have only to overcome the armed rebellion and dissident fighters have only to overcome the control of the government of the country (or parts of it) they want to control.

16 In order to «win the war» it is not necessary to kill all enemy soldiers; it is sufficient to capture them or to make them otherwise surrender. It is not necessary to harm civilians, only combatants. It is not necessary to destroy the enemy country, but only to occupy it. It is not necessary to destroy civilian infrastructure, but only objects contributing to military resistance.

This definition nevertheless also reveals the inherent limits of IHL:

- it does not prohibit the use of violence;
- it cannot protect all those affected by an armed conflict;
- it makes no distinction based on the purpose of the conflict;
- it does not bar a party from overcoming the enemy;
- it presupposes that the parties to an armed conflict have rational aims and that those aims as such do not contradict IHL.

Contribution The law of armed conflicts is characterized by both simplicity and complexity – simplicity to the extent that its essence can be encapsulated in a few principles and set out in a few sentences, and complexity to the extent that one and the same act is governed by rules that vary depending on the context, the relevant instruments and the legal issues concerned. [...] The law of armed conflicts – as we have stated repeatedly – is simple law: with a little common sense and a degree of clear-sightedness, anyone can grasp its basic tenets for himself without being a legal expert. To put things as simply as possible, these rules can be summed up in four precepts: do not attack non-combatants, attack combatants only by legal means, treat persons in your power humanely, and protect the victims. [...] At the same time, the law of armed conflicts is complex since it does apply only in certain situations, those situations are not always easily definable in concrete terms and, depending on the situation, one and the same act can be lawful or unlawful, not merely unlawful but a criminal offence, or neither lawful nor unlawful! ...

[Source: DAVID Éric, *Principes de droit des conflits armés*, Brussels, Bruylant, 3rd ed., 2002, pp. 921-922; original in French, unofficial translation.]

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II. CAN WARFARE BE REGULATED BY LAW?

Introductory text

In defending the acts of Milo in an internal armed conflict in Rome, Cicero pleaded, "...*silent enim leges inter arma*."^[17] To this day, many question or deny that law can regulate behaviour in such an exceptional, anarchic and violent situation as armed conflict – all the more so as all internal laws prohibit internal armed conflicts and international law has outlawed international armed conflicts. How can legal considerations be expected to restrict human behaviour when individual or collective survival is at stake?

Armed conflicts nevertheless remain a reality, one perceived by all those involved as being morally different from a crime committed by one side or a punishment inflicted by the other. There is no conceptual reason why such a social reality – unfortunately one of the most ancient forms of intercourse between organized human groups – should not be governed by law. History has shown that the appearance of any reality in a society – be it highly organized or not – sparks the concomitant appearance of laws applicable to it. The applicability of internal law – penal and disciplinary military law – to behaviour in armed conflict has, moreover, never been questioned. To the contrary, armed conflicts as distinct from anarchic chaos cannot be imagined without a minimum of uniformly respected rules, e.g., that the fighters of one side may kill those of the opposing side but not their own commanders or comrades.

In the reality of even contemporary conflicts, the expectations of belligerents, and the arguments (hypocritical or not) invoked by governments, rebels, politicians, diplomats, fighters, and national and international public opinion, are based on standards, not only on when armed violence may (or, rather, may not) be used, but also on how it may be used. When it comes to judging behaviour (and this is what law is all about) IHL is omnipresent in contemporary conflicts:^[18] in United Nations Security Council resolutions and on the banners of demonstrators, in politicians' speeches and in newspaper articles, in opposition movement political pamphlets and in NGO reports, in military manuals and in diplomatic *aide-mémoires*. People with completely different cultural and intellectual backgrounds, emotions, and political opinions agree that in an armed conflict killing an enemy soldier on the battlefield and killing women and

17 "Laws are silent among [those who use] weapons" (Cited in Cicero, *Pro Milone*, 4.11).

18 He or she who doubts this has a good reason to read this book, which does not consist of opinions of the authors but of a selection of the variety of instances in which International Humanitarian Law was invoked in recent conflicts.

children because they belong to the “enemy” are not equivalent acts.^[19] Conversely, no criminal justice system confers a different legal qualification on a bank robber who kills a security guard and one who kills a bank customer.

It can be objected that this only proves that behaviour even in war is subject to moral strictures, but not that it can be subject to legal regulation. Either this objection reserves the term “law” to rules regularly applied by the centralized compulsory system of adjudication and enforcement that is typical of any domestic legal system – in which case international law, and therefore also IHL, is not law – or it fails to understand that it is precisely during such controversial activity as waging war, where each side has strong moral arguments for its cause, that the function of law to limit the kind of arguments that may be deployed is essential to ensure minimum protection for war victims. As for the reality, every humanitarian worker will confirm that when pleading the victims’ cause with a belligerent, whether a head of State or a soldier at a roadblock, even the most basic moral arguments encounter a vast variety of counterarguments based on collective and individual experience, the culture, religion, political opinions and mood of those addressed, while reference to international law singularly restricts the store of counterarguments and, more importantly, puts all human beings, wherever they are and from wherever they come, on the same level.

Regarding the completely distinct question of why such law is, should be, or is not respected in contemporary conflicts, law can only provide a small part of the answer, which is discussed elsewhere in this book under “implementation.” The main part of the answer can by definition not be provided by law. As Frédéric Maurice, an International Committee of the Red Cross delegate wrote a few months before he was killed on 19 May 1992 in Sarajevo by those who did not want that assistance be brought through the lines to the civilian population there, as prescribed by International Humanitarian Law:

“War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has experienced war, particularly the wars of our times, knows that unleashed violence means the obliteration of standards of behaviour and legal systems. Humanitarian action in a war situation is therefore above all a legal approach which precedes and accompanies the actual provision of relief. Protecting victims means giving them a status, goods and the infrastructure indispensable for survival, and setting up monitoring bodies. In other words the idea is to persuade belligerents to accept an exceptional legal order – the law of war or humanitarian law – specially tailored to such situations. That is precisely why humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict.”^[20]

Quotation **Thucydides on might and right** “The Athenians also made an expedition against the Isle of Melos [...]. The Melians [...] would not submit to the Athenians [...], and at first remained neutral and took no part in the struggle, but afterwards upon the Athenians using violence and plundering their territory, assumed an attitude of open hostility. [...] [The Melians and the Athenians] sent envoys to negotiate. [...]

19 Even those who consider all soldiers as murderers in reality want to make an argument against war and not against the individual soldiers.

20 MAURICE Frédéric, “Humanitarian ambition”, in *JRRC*, Vol. 289, 1992, p. 371.

Melians: [...] [Y]our military preparations are too far advanced to agree with what you say, as we see you are come to be judges in your own cause, and that all we can reasonably expect from this negotiation is war, if we prove to have right on our side and refuse to submit, and in the contrary case, slavery. [...]

[...]

Athenians: For ourselves, we shall not trouble you with specious pretences [...] of how we [...] are now attacking you because of wrong that you have done us – and make a long speech which would not be believed [...] since you know as well as we do that right, as the world goes, is only in question between equals in power, while the strong do what they can and the weak suffer what they must.”

[Source: Thucydides, *History of the Peloponnesian War* (translated by Richard Crawley) (London: Everyman, 1993)
Online: <http://eserver.org/history/peloponnesian-war.txt>]

[N.B.: The Athenians finally lost the war.]

⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part B, paras 14-16]

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III. INTERNATIONAL HUMANITARIAN LAW AND CULTURAL RELATIVISM

[See also **Introductory Text** and **Quotations** under Part I, Chapter 3. Historical Development of International Humanitarian Law]

Introductory text

Up until the 1970s, IHL – or at least its codified norms – was strongly influenced by Western culture and European powers. However, the humanitarian ideas and concepts formalized in humanitarian law treaties are shared by many different schools of thought and cultural traditions.^[21]

These *international dimensions of IHL* should never be underestimated or forgotten: very often respect for and implementation of the rules will in fact depend on the establishment of a clear correlation between the applicable treaties and local traditions or customs.

Jean Pictet, one of the most famous scholars and practitioners of IHL, tried to explain the cultural universalism of this branch of public international law:

21 See *infra*, Part I, Chapter 3. Historical Development of International Humanitarian Law.

"[...] The modern world has placed its hopes in internationalism and therein no doubt its future lies. Now, in an international environment, man's rights can only be on what is universal, on ideas capable of bringing together men of all races. [...] Similarity alone can be the basis for universality and, although men are different, human nature is the same the world over.

International humanitarian law in particular has this universal vocation, since it applies to all men and countries. In formulating and perfecting this law, [...] the International Committee of the Red Cross has sought precisely this common ground and put forward rules acceptable to all because they are fully consistent with human nature. This is, moreover, what has ensured the strength and durability of these rules.

However, today the uniformity of human psychological make-up and the universality of standards governing the behaviours of nations are recognized, and no longer is there belief in the supremacy of any one civilization: indeed the plurality of cultures and the need to take an interest in them and study them in depth is recognized.

This leads to an awareness that humanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind."⁽²²⁾

Contribution Its relationship with universal values is probably one of the greatest challenges faced by humanity. The law cannot avoid addressing it. Unfortunately, the question of the universal nature of international humanitarian law has prompted little scholarly deliberation, unlike the body of human rights law, whose universal nature has been forcefully called into question – by anthropologists, among others, and particularly since the 1980s.

In fact, the debate seems at first glance to have been boxed into a corner, to have reached stalemate. The advocates of universalism and those of relativism have managed to pinpoint the weaknesses of the positions held by the opposite camp. Certainly the Western nature of the major texts of international humanitarian law and human rights law is evident, as is the danger of protection for the victims diminishing as a result of upholding any kind of tradition. Positivist legal experts and specialists in the social sciences also evidently have difficulty in finding a common set of terms.

Nonetheless, the great non-Western legal traditions present, both for international humanitarian law and for human rights law, obstacles which at first seem insurmountable, at least in terms of their legitimacy.

However, it cannot be denied that respect for human dignity is an eminently universal concept. The foundations of international humanitarian law, or at least their equivalents, are thus found in the major cultural systems on our planet: the right to life, the right to physical integrity, the prohibition of slavery and the right to fair legal treatment. However, a considerable problem is the fact that those principles are not universally applied. In the animist world, for instance, how a prisoner is treated is generally determined by the relationship between opposing clans and other groups.

22 PICTET Jean, "Humanitarian Ideas Shared by Different Schools of Thought and Cultural Traditions", in *International Dimensions of Humanitarian Law*, Geneva, Dordrecht, Henry Dunant Institute, M. Nijhoff, 1988, pp. 3-4

This does not, however, necessarily negate the universal foundations of international humanitarian law. Non-Western cultures cannot escape the steamroller of modern life, and the hybridization of human societies is very real. In a number of African countries, for example, three legal systems operate side by side: a modern system, an Islamic system and a customary system.

Moreover, the showing of respect for other cultural systems – a gift to us from anthropology – must not mean that we cast aside the greatest achievement of modern times: the critical faculty. Thus, if we came across a group of human beings who practised the systematic torture of prisoners in the name of tradition or religion, this would not make torture somehow more acceptable. In fact, a mistake has been made – particularly in the West – since the end of the colonial era: the discovery of the wealth of all those cultures previously crushed in the name of progress does not somehow exempt them from critical judgement. Universalism does not require unanimity.

Some supporters of radical relativism seem to have forgotten that humanity and culture cannot exist without prohibitions. In any society, individuals are taught from a very early age to control their aggressive and sexual drives. This is a necessary rite of passage from nature to culture. In fact, many lines that may not be crossed are precisely what makes us human. International humanitarian law represents precisely the limits that combatants must never exceed if they are not to sacrifice their humanity and revert to a state of raw nature.

Is the whole of international humanitarian law universal? The foundations of that law certainly are, since they derive from natural law. The fact that fundamental legal rules exist is based on an intuitive force and can even be said to be a requirement of the human condition, which causes killing, torture, slavery and unfair judgement to arouse repulsion not only among the vast majority of intellectuals but among ordinary people as well. Whether attributed to reason, universal harmony or the divine origin of mankind, sound assertions are made about human nature. International humanitarian law therefore attains a universal dimension by symbolizing common human values.

[**Contribution** by Louis Lafrance, who has masters degrees in psychology from the University of Montreal and in international law from the University of Quebec in Montreal. Mr Lafrance has spent time in many conflict countries, first as a journalist and then as a human rights specialist working for the United Nations. This text is based on his masters dissertation, which deals with the universal nature of international humanitarian law in conflicts in countries in which State structures have broken down. Original in French, unofficial translation]

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security [Opinion of Judge Englard]
 - ⇒ Case No. 176, Saudi Arabia, Use of the Red Cross Emblem by United States Forces
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen
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Chapter 2

International Humanitarian Law as a Branch of Public International Law

SUGGESTED READING: ABI-SAAB Georges, “The Specificities of Humanitarian Law”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 265-280.

I. INTERNATIONAL HUMANITARIAN LAW: AT THE VANISHING POINT OF INTERNATIONAL LAW

Introductory text

Public international law can be described as composed of two layers: a traditional layer consisting of the law regulating coordination and cooperation between members of the international society – essentially the States and the organizations created by States – and a new layer consisting of the constitutional and administrative law of the international community of 6.5 billion human beings. While this second layer tries to overcome the law’s typical traditional relativity, international law still retains a structure that is fundamentally different from that of any internal legal order, essentially because the society to which it applies and which has created it is, despite all modern tendencies, infinitely less structured and formally organized than any nation-State.

To understand IHL, one must start with the concepts and inherent features of the traditional layer: IHL was conceived as a body of law regulating belligerent inter-State relations. It is to a large extent irrelevant, however, to contemporary humanitarian problems unless understood within the second layer. Indeed, inter-State armed conflicts tend to have disappeared, except in the form of armed conflicts between the members of organized international society or, on the one hand, those who (claim to) represent it and, on the other hand, States outlawed by it – a phenomenon of the second layer.

From the perspective of both layers, IHL is perched at the vanishing point of international law, but is simultaneously a crucial test for international law. From the perspective of the first layer, it is astonishing but essential for our understanding of the nature and reality of international law to see that law governs inter-State relations even when they are belligerent, even when the very existence of a State is at stake, and even when the most important rule of the first layer – the prohibition of the use of force – has been violated or when a government has been unable to impose its monopoly of violence within the territory of the State. In the latter case, which is tantamount to a non-international armed conflict, what is most striking is not so much the fact that international law regulates a situation that transcends the axioms of the first layer, but the fact that its international rules apply not only to the use of force by the government but also directly to all violent human behaviour in the situation. From the perspective of the second layer, it is perhaps even more difficult to conceive – but essential to understand – that international law governs human behaviour, even when violence is used, and even when essential features of the organized structure of the international and national community have fallen apart. No national legal system contains similar rules on how those who violate its primary rules have to behave while violating them.

IHL exemplifies all the weakness and at the same time the specificity of international law. If the end of all law is the human being, it is critical for our understanding of international law to see how it can protect him or her even, and precisely, in the most inhumane situation, armed conflict.

Some have suggested – albeit more implicitly than explicitly – that IHL is different from the rest of international law, either because they wanted to protect international law against detractors claiming to have an obvious *prima facie* case proving its inexistence, or because they wanted to protect IHL from the basic political, conceptual or ideological controversies inevitably arising between States and between human beings holding diverging opinions on the basic notions of international law and its ever changing rules. This suggestion, however, cannot be accepted, as it fails to recognize the inherent inter-relation between IHL and other branches of international law. IHL, distinct from humanitarian morality or the simple dictates of public conscience, cannot exist except as a branch of international law, and international law must contain rules concerning armed conflict, as an unfortunately traditional form of inter-State relations. Indeed, law has to provide answers to reality, it has to rule over reality; it cannot limit itself to reflecting reality. The latter, the necessarily normative character of law, the inevitable distance between law, on the one hand, and politics and history, on the other, is even more evident for IHL, given the bleak reality of armed conflicts, which cannot possibly be called humanitarian.

Quotation 1 [I]n the matter of those parts of the law of war which are not covered or which are not wholly covered by the Geneva Conventions, diverse problems will require clarification. These include such questions as to implications of the principle, which has been gaining general recognition, that the law of war is binding not only upon states but also upon individuals i.e. both upon members of the armed forces and upon civilians; the changed character of the duties of the Occupant who is now bound, in addition to ministering to

his own interests and those of his armed forces, to assume an active responsibility for the welfare of the population under his control; the consequences, with regard to appropriation of public property of the enemy, of the fact that property hitherto regarded as private and primarily devoted to serving the needs of private persons, is subjected in some countries to complete control by the state; the resulting necessity for changes in the law relating to booty; the emergence of motorized warfare with its resulting effects upon the factual requirements of occupation and the concomitant duties of the inhabitants; the advent of new weapons such as flame-throwers and napalm when used against human beings a problem which may be postponed, but not solved, in manuals of land warfare by the suggestion that it raises a question primarily in the sphere of aerial warfare; the problems raised by the use of aircraft to carry spies and so-called commando troops; the limits, if any, of the subjection of airborne and other commando forces to the rules of warfare, for instance, in relation to the treatment of prisoners of war; the reconciliation of the obviously contradictory principles relating to espionage said to constitute a war crime on the part of spies and a legal right on the part of the belligerent to employ them; the humanization of the law relating to the punishment of spies and of so-called war treason; the prohibition of assassination in relation to so-called unarmed combat; authoritative clarification of the law relating to the punishment of war crimes, in particular with regard to the plea of superior orders and the responsibility of commanders for the war crimes of their subordinates; the regulation, in this connexion, of the question of international criminal jurisdiction; the elucidation of the law, at present obscure and partly contradictory, relating to ruses and stratagems, especially with regard to the wearing of the uniform of the enemy; the effect of the prohibition or limitation of the right of war on the application of rules of war, in particular in hostilities waged collectively for the enforcement of international obligations; and many others. In all these matters the lawyer must do his duty regardless of dialectical doubts – though with a feeling of humility springing from the knowledge that if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law. He must continue to expound and to elucidate the various aspects of the law of war for the use of armed forces, of governments, and of others. He must do so with determination though without complacency and perhaps not always very hopefully – the only firm hope being that a world may arise in which no such calls will claim his zeal.

[Source: LAUTERPACHT Hersch, "The Problem of the Revision of the Law of War," in *BYIL*, Vol. 29, 1952-53, pp. 381-382]

Quotation 2 [I]t is in particular with regard to the law of war that the charge of a mischievous propensity to unreality has been levelled against the science of international law. The very idea of a legal regulation of a condition of mere force has appeared to many incongruous to the point of absurdity. This view, which is entitled to respect, is controversial – at least so long as the law permitted or even authorized resort of war. And it may be argued that even if war were to be unconditionally renounced and prohibited – which is not as yet the case – juridical logic would have to stop short of the refusal to provide a measure of legal regulation, for obvious considerations of humanity, of hostilities which have broken out in disregard of the fundamental prohibition or recourse to war. The same applies to hostilities and measures of force taking place in the course of collective enforcement of international law or in the course of civil wars.

[Source: LAUTERPACHT Elihu (ed.), LAUTERPACHT Hersch, *International Law, Collected Papers: The Law of Peace*, Cambridge, Cambridge University Press, Part. 2, 1975, pp. 37-38]

SUGGESTED READING: LAUTERPACHT Hersch, “The Problems of the Revision of the Law of War”, in *BYIL*, Vol. 29, 1952, pp. 360-382. LAUTERPACHT Hersch, “The Limits of the Operation of the Law of War”, in *BYIL*, Vol. 30, 1953, pp. 206-243.

1. Is international law “law”?

Quotation 1 As “force” made giant strides, so “law” tried to keep abreast. Single laws have tried to turn aside the sword. Not only has a new world organisation been set up, the United Nations, which its founders hoped would prevent a repetition of the “Great New Fact” (expression Churchill coined in speaking of the atomic bomb). But legal rules have also been devised to help curb the new violence. However, pressure from conflicting economic and military interests and the clash of antagonistic ideologies has prevented this “new” law from shaping the actions of states. Today, “classic” or traditional law, which was realistic (because it faithfully reflected the balance of power among subjects of the international community), has been overlaid by “idealistic” law: a set of rules and institutions that, to a large extent, reflect the need to transform relations as they now stand and proclaim a duty to do more than merely consecrate things as they are. [...]

[I]t would be a great mistake to refuse to examine the relations that exist between these two poles [...] on the premise that states, those “cold monsters”, without souls, never listen to the voice of “law” since they are moved only by motivations of “power” and “force”. In my opinion, this premise is false. On closer examination, it is not true that, when their essential military, economic and political interests are at stake, states trifle with the Tables of the Law [...]. Their strategy is more subtle than simply transgressing the legal “commandments”. It consists in preventing their legal crystallisation, or – if the pressure of public opinion makes this impossible – in wording them in terms as ambiguous as possible. By so doing, they can then interpret these legal standards as best they please, adapting them to requirements of the moment and bending them to their contingent interests. If we thumb through the records of the last forty or fifty years, we can easily see that no state, great or small, has ever admitted to breaking the commonly accepted legal canons. (Take, for example, the ban on chemical warfare, or on weapons that cause unnecessary suffering; the ban on indiscriminate attacks on undefended towns, or, on a larger scale, on acts of genocide, and so on.) Whenever they are accused of violating these and other no less important international rules, states immediately make denials, or else they point to the exceptional circumstances which they feel legitimize their course of action; or they say that the international rules prohibit not their own but other forms of behaviour. [...]

The role of public opinion has grown over the years. Thus in 1931 the eminent English jurist J.L. Briery noted that within the state a breach of law can go unnoticed and, in any case, when it is noticed the transgressor is often indifferent to “social stigma”; on the other hand, in the international community it is almost impossible for states to perpetrate grave violations of hallowed standards of conduct and escape public disapproval, and besides, states are necessarily very sensitive to public censure. Today, the growing power of the press and of the mass media generally has greatly increased the importance of public opinion especially in democratic countries. But even states in which the media is manipulated by government authorities cannot ignore the repercussions of their political, military and economic action on the opinion of foreign governments, promptly alerted by the various (often western) channels of information.

By relying on these forces, as well as on many non-governmental organizations which are more and more committed and pugnacious, there is hope that something may as yet be achieved. By acting on the “twilight” area in which violations prevail and law seems to dissolve into air, jurists, and all those who are involved in the conduct of state affairs, can be of some use to the voices of dissent and above all, to those who have been, or may in future be, the victims of violence.

[Source: CASSESE Antonio, *Violence and Law in the Modern Age*, Princeton, Princeton University Press, 1988, p. 4-7]

Quotation 2 The Limitations of International Law. [...] To many an observer, governments seem largely free to decide whether to agree to new law, whether to accept another nation’s view of existing law, whether to comply with agreed law. International law, then is voluntary and only hortatory. It must always yield to national interest. Surely, no nation will submit to law any questions involving its security or independence, even its power, prestige, influence. Inevitably, a diplomat holding these views will be reluctant to build policy on law he deems ineffective. He will think it unrealistic and dangerous to enact laws which will not be used, to base his government’s policy on the expectation that other governments will observe law and agreement. Since other nations do not attend to law except when it is in their interest, the diplomat might not see why his government should do so at the sacrifice of important interests. He might be impatient with his lawyers who tell him that the government may not do what he would like to see done.

These depreciations of international law challenge much of what the international lawyer does. Indeed, some lawyers seem to despair for international law until there is world government or at least effective international organization. But most international lawyers are not dismayed. Unable to deny the limitations of international law, they insist that these are not critical, and they deny many of the alleged implications of these limitations, if they must admit that the cup of law is half-empty, they stress that it is half-full. They point to similar deficiencies in many domestic legal systems. They reject definitions (commonly associated with the legal philosopher John Austin) that deny the title of law to any but the command of a sovereign, enforceable and enforced as such. They insist that despite inadequacies in legislative method, international law has grown and developed and changed. If international law is difficult to make, yet it is made; if its growth is slow, yet it grows. If there is no judiciary as effective as in some developed national systems, there is an International Court of Justice whose judgements and opinions, while few, are respected. The inadequacies of the judicial system are in some measure supplied by other bodies: international disputes are resolved and law is developed through a network of arbitrations by continuing or *ad hoc* tribunals. National courts help importantly to determine, clarify, develop international law. Political bodies like the Security Council and the General Assembly of the United Nations also apply law, their actions and resolutions interpret and develop the law, their judgements help to deter violations in some measure. If there is no international executive to enforce international law, the United Nations has some enforcement powers and there is “horizontal enforcement” in the reactions of other nations. The gaps in substantive law are real and many and require continuing effort to fill them, but they do not vitiate the force and effect of the law that exists, in the international society that is.

Above all, the lawyer will insist, critics of international law ask and answer the wrong questions. What matters is not whether the international system has legislative, judicial or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations

between nations. The question is not whether there is an effective legislature; it is whether there is law that responds and corresponds to the changing needs of a changing society. The question is not whether there is an effective judiciary, but whether disputes are resolved in an orderly fashion in accordance with international law. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order. The fact is, lawyers insist, that nations have accepted important limitations on their sovereignty, that they have observed these norms and undertakings, that the result has been substantial order in international relations.

Is it Law or Politics?

The reasons why nations observe international law, in particular the emphasis I have put on cost and advantage, may only increase skepticism about the reality of the law and its influence in national policy. [...] Nations decide whether to obey law or agreements as they decide questions of national policy not involving legal obligation – whether to recognize a new regime, or to give aid to country X – on the basis of cost and advantage to the national interest. That nations generally decide to act in accordance with law does not change the voluntary character of these decisions. Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so and fear unpleasant consequences if they do not observe it. In fact, law may be largely irrelevant. Nations would probably behave about the same way if there were no law. The victim would respond to actions that adversely affect its interests and the threat of such reaction would be an effective deterrent, even if no law were involved.

This skepticism is sometimes supported by contrasting international law with domestic law in a developed, orderly society. Domestic law, it is argued, is binding and domestic society compels compliance with it. No one has a choice whether to obey or violate law, even if one were satisfied that observance was not in one's interest. In international society, the critics insist, nations decide whether or not they will abide by law. Violations are not punished by representatives of the legal order acting in the name of the society. Any undesirable consequences of violation are political, not legal; they are the actions of other nations vindicating their own interests, akin to extra-legal consequences in domestic society, like "social stigma." The violator may even be able to prevent or minimize adverse consequences. In any event, he will continue to be a full member of international society, not an outlaw.

The arguments I have strung together command consideration. Some of them are mistaken. Others do indeed reflect differences between international and domestic law, the significance of which must be explored.

Much of international law resembles the civil law of domestic society (torts, contracts, property); some of it is analogous to "white collar crimes" (violations of antitrust or other regulatory laws, tax evasion) sometimes committed by "respectable" elements. Like such domestic law, international law, too, has authority recognized by all. No nation considers international law as "voluntary." If the system is ultimately based on consensus, neither the system nor any particular norm or obligation rests on the present agreement of any nation; a nation cannot decide that it will not be subject to international law; it cannot decide that it will not be subject to a particular norm, although it may choose to risk an attempt to have the norm modified; surely, it cannot decide to reject the norm that its international undertakings must be carried out. Like individuals, nations do not claim a right to disregard the law or their obligations, even though – like individuals – they may sometimes exercise the power to

do so. International society does not recognize any right to violate the law, although it may not have the power (or desire) to prevent violation from happening, or generally to impose effective communal sanction for the violation after it happens. [...]

Much is made of the fact that, in international society, there is no one to compel nations to obey the law. But physical coercion is not the sole or even principal force ensuring compliance with law. Important law is observed by the most powerful, even in domestic societies, although there is no one to compel them. In the United States, the President, Congress, and the mighty armed forces obey orders of a Supreme Court whose single marshal is unarmed.

Too much is made of the fact that nations act not out of “respect for law” but from fear of the consequences of breaking it. And too much is made for the fact that the consequences are not “punishment” by “superior,” legally constituted authority, but are the response of the victim and his friends and the unhappy results for friendly relations, prestige, credit, international stability, and other interests which in domestic society would be considered “extra-legal.” The fact is that, in domestic society, individuals observe law principally from fear of consequences, and there are “extra-legal” consequences that are often enough to deter violation, even where official punishment is lacking. (Where law enforcement is deficient, such consequences may be particularly material.) In the mainstreams of domestic society an illegal action tends to bring social opprobrium and other extra-legal “costs” of violation. This merely emphasizes that law often coincides so clearly with the interests of the society that its members react to antisocial behavior in ways additional to those prescribed by law. In international society, law observance must depend more heavily on these extra-legal sanctions, which means that law observance will depend more closely on the law’s current acceptability and on the community’s – especially the victim’s – current interest in vindicating it. It does not mean that law is not law, or that its observance is less law observance.

There are several mistakes in the related impression that nations do pursuant to law only what they would do anyhow. In part, the criticism misconceives the purpose of law. Law is generally not designed to keep individuals from doing what they are eager to do. Much of law, and the most successful part, is a codification of existing mores, of how people behave and feel they ought to behave. To that extent law reflects, rather than imposes, existing order. If there were no law against homicide, most individuals in contemporary societies would still refrain from murder. Were that not so, the law could hardly survive and be effective. To say that nations act pursuant to law only as they would act anyhow may indicate not that the law is irrelevant, but rather that it is sound and viable, reflecting the true interests and attitudes of nations, and that it is likely to be maintained.

At the same time much law (particularly tort law and “white collar crimes”) is observed because it is law and because its violation would have undesirable consequences. The effective legal system, it should be clear, is not the one which punishes the most violators, but rather that which has few violations to punish because the law deters potential violators. He who does violate is punished principally, to reaffirm the standard of behavior and to deter others. This suggests that the law does not address itself principally to “criminal elements” on the one hand or to “saints” on the other. The “criminal elements” are difficult to deter; the “saint” is not commonly tempted to commit violations, and it is not law or fear of punishment that deters him. The law is aimed principally at the mass in between – at those who, while generally law-abiding, may yet be tempted to some violations by immediate self-interest. In international society, too, law is not effective against the Hitlers, and is not needed for that nation which is content with its lot and has few temptations. International law aims at nations which are in principle law-abiding but which might be tempted to commit a violation if there were no threat of undesirable consequences. In international society, too,

the reactions to a violation – as in Korea in 1950 or at Suez in 1956 – reaffirm the law and strengthen its deterrent effect for the future.

In many respects, the suggestion that nations would act the same way if there were no law is a superficial impression. The deterrent influence of law is there, though it is not always apparent, even to the actor himself. The criticism overlooks also the educative roles of law, which causes persons and nations to feel that what is unlawful is wrong and should not be done. The government which does not even consider certain actions because they are “not done” or because they are not its “style” may be reflecting attitudes acquired because law has forbidden these actions.

In large part, however, the argument that nations do pursuant to law only what they would do anyhow is plain error. The fact that particular behavior is required by law brings into play those ultimate advantages in law observance that suppress temptations and override the apparent immediate advantages from acting otherwise. In many areas, the law at least achieves a common standard or rule and clarity as to what is agreed. The law of the territorial sea established a standard and made it universal. In the absence of law, a foreign vessel would not have thought of observing precisely a twelve-mile territorial sea (assuming that to be the rule), nor would it have respected the territorial sea of weaker nations which had no shore batteries. In regard to treaties, surely, it is not the case that nations act pursuant to agreement as they would have acted if there were none, or if it were not established that agreements shall be observed. Nations do not give tariff concessions, or extradite persons, or give relief from double taxation, except for some *quid pro quo* pursuant to an agreement which they expect to be kept. Nations may do some things on the basis of tacit understanding or on a conditional, reciprocal basis: If you admit my goods, I will admit yours. But that too is a kind of agreement, and usually nations insist on the confidence and stability that come with an express undertaking. [...]

The most common deprecation of international law, finally, insists that no government will observe international law “in the crunch, when it really hurts.” If the implication is that nations observe law only when it does not matter, it is grossly mistaken. Indeed, one might as well urge the very opposite: violations in “small matters” sometimes occur because the actor knows that the victim’s response will be slight; serious violations are avoided because they might bring serious reactions. The most serious violation – the resort to war – generally does not occur, although it is only when their interests are at stake that nations would even be tempted to this violation. On the other hand, if the suggestion is that when it costs too much to observe international law nations will violate it, the charge is no doubt true. But the implications are less devastating than might appear, since a nation’s perception of “when it really hurts” to observe law must take into account its interests in law and in its observance, and the costs of violation. The criticism might as well be levered at domestic law where persons generally law-abiding will violate laws, commit even crimes of violence, when it “really hurts” not to do so. Neither the domestic violations nor the international ones challenge the basic validity of the law or the basic effectiveness of the system.

The deficiencies of international law and the respects in which it differs from domestic law do not justify the conclusion that international law is not law, that it is voluntary, that its observance is “only policy.” They may be relevant in judging claims for the law’s success in achieving an orderly society. In many domestic societies, too, the influence of law is not always, everywhere, and in all respects certain and predominant; the special qualities of international society, different perhaps only in degree, may be especially conducive to disorder. Violations of international law, though infrequent, may have significance beyond their numbers: international society is a society of states, and states have power to commit

violations that can be seriously disruptive; also, the fact that the units of international society are few may increase the relative significance of each violation. Still, violations of international law are not common enough to destroy the sense of law, of obligation to comply, of the right to ask for compliance and to react to violation. Rarely is even a single norm so widely violated as to lose its quality as law. Agreements are not violated with such frequency that nations cease to enter into them, or to expect performance or redress for violation. Colonialism apart, even political arrangements continue to thrive and to serve their purposes, although they may not run their intended course. Over-all, nations maintain their multivaried relations with rare interruptions. There is, without doubt, order in small, important things.

Whether, in the total, there is an effective “international order” is a question of perspective and definition. Order is not measurable, and no purpose is served by attempts to “grade” it in a rough impressionistic way. How much of that order is attributable to law is a question that cannot be answered in theory or in general, only in time and context. Law is one force – an important one among the forces that govern international relations at any time; the deficiencies of international society make law more dependent on other forces to render the advantages of observance high, the costs of violation prohibitive. In our times the influence of law must be seen in the light of the forces that have shaped international relations since the Second World War.

The Law’s Supporters and its Critics

International law is an assumption, a foundation, a framework of all relations between nations. Concepts of statehood, national territory, nationality of individuals and associations, ownership of property, rights and duties between nations, responsibility for wrong done and damage inflicted, the fact and the terms of international transactions – all reflect legal principles generally accepted and generally observed. The law provides institutions, machinery, and procedures for maintaining relations, for carrying on trade and other intercourse, for resolving disputes, and for promoting common enterprise. All international relations and all foreign policies depend in particular on a legal instrument – the international agreement – and on a legal principle – that agreements must be carried out. Through peace treaties and their political settlements, that principle has also helped to establish and legitimize existing political order as well as its modifications – the identity, territory, security, and independence of states, the creation or termination of dependent relationships. Military alliances and organizations for collective defense also owe their efficacy to the expectation that the undertakings will be carried out. International law supports the numerous contemporary arrangements for cooperation in the promotion of welfare, their institutions and constitutions. Finally, there is the crux of international order in law prohibiting war and other uses of force between nations.

The law works. Although there is no one to determine and adjudge the law with authoritative infallibility, there is wide agreement on the content and meaning of law and agreements, even in a world variously divided. Although there is little that is comparable to executive law enforcement in a domestic society, there are effective forces, internal and external, to induce general compliance. Nations recognize that the observance of law is in their interest and that every violation may also bring particular undesirable consequences. It is the unusual case in which policy-makers believe that the advantages of violation outweigh those of law observance, or where domestic pressures compel a government to violation even against the perceived national interest. The important violations are of political law and agreements, where basic interests of national security or independence are involved, engaging passions,

prides, and prejudices, and where rational calculation of cost and advantage is less likely to occur and difficult to make. Yet, as we have seen, the most important principle of law today is commonly observed: nations have not been going to war, unilateral uses of force have been only occasional, brief, limited. Even the uncertain law against intervention, seriously breached in several instances, has undoubtedly deterred intervention in many other instances. Where political law has not deterred action it has often postponed or limited action or determined a choice among alternative actions.

None of this argument is intended to suggest that attention to law is the paramount or determinant motivation in national behavior, or even that it is always a dominant factor. A norm or obligation brings no guarantee of performance; it does add an important increment of interest in performing the obligation. Because of the requirements of law or of some prior agreement, nations modify their conduct in significant respects and in substantial degrees. It takes an extraordinary and substantially more important interest to persuade a nation to violate its obligations. Foreign policy, we know, is far from free; even the most powerful nations have learned that there are forces within their society and, even more, in the society of nations that limit their freedom of choice. When a contemplated action would violate international law or a treaty, there is additional, substantial limitation on the freedom to act. [...]

[Source: HENKIN Louis, *How Nations Behave: Law and Foreign Policy*, New-York, Columbia University Press, 2nd ed., 1979, pp. 25-26; 89-90; 92-95, and 320-321; footnotes omitted.]

Quotation 3 [A] third idea of rules or norms may be emphasized: that of prescriptive statements which exert, in varying amounts, a psychological “pressure” upon national decision-makers to comply with their substantive content. For example, the norms relating to “freedom of the seas” probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, and not to interfere with numerous foreign shipping or fishing activities on the high seas. The idea of a rule of law as an indicator of a psychological pressure upon the person to whom it is addressed might be illustrated by a hypothetical example of one of the simplest of all possible rules of law – a “stop” sign on a street or highway. Imagine that one of these traffic signs exists in a community where every driver habitually does not bring his motor vehicle to a full “stop” at the particular sign, but rather shifts into low gear or otherwise slows down his motor vehicle when approaching the sign and then passes it. Has the traffic ordinance represented by the sign been violated? Yes, from a technical, as well as a legal, point of view. A policeman could, if he so desired, arrest any or all of the drivers in that community for failing to observe the “stop” sign. But does the violation of the “stop” sign mean that the sign is of no value in that particular community? Here the answer would have to be in the negative, for the sign functions as a kind of “pressure” upon drivers to *slow down*. If its purpose was to help to prevent traffic accidents, it may have succeeded admirably by getting motor vehicles to slow down and proceed with caution. [...] [O]ne might very well interpret many international rules relating to rights of neutrals, prisoners of war, and so forth, as “pressures” that have some influence in shaping the conduct of war, no matter how many outright violations of those rules occur. [...]

[Source: D’AMATO Anthony, *The Concept of Custom in International Law*, Ithaca, Cornell University Press, 1971, pp. 31-32]

2. International Humanitarian Law: the crucial test of international law

3. International Humanitarian Law in an evolving international environment

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.1.1]
 - ⇒ Case No. 46, ICRC's Approach to Contemporary Security Challenges
 - ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts
 - ⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 - ⇒ Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 288, United States, The September 11 2001 Attacks
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- a) increasing number of non-international armed conflicts
- b) peace operations

⇒ Case No. 225, The Netherlands, Responsibility of International Organizations

- c) non-State armed groups not even aspiring to become States
- d) criminalization of armed conflict and of violations of IHL

4. Application of International Humanitarian Law by and in failed States

⇒ **Case No. 45, ICRC, Disintegration of State Structures [Part II. 2]**

⇒ Document No. 52, First Periodical Meeting, Chairman’s Report [Part II. 2]

⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. A. and C.]

⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Parts 1 and 2]

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5. International Humanitarian Law in asymmetric conflicts

Both sides consider that they cannot “win” without violating (or “reinterpreting”) IHL.

[See *supra*, Part I, Chapter 1. II. **Quotation:** Thucydides on might and right, *supra*, p. 96]

⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]

⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions

⇒ Case No. 150, Israel, Report of the Winograd Commission [Paras 38-45]

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II. FUNDAMENTAL DISTINCTION BETWEEN *JUS AD BELLUM* (ON THE LEGALITY OF THE USE OF FORCE) AND *JUS IN BELLO* (ON THE HUMANITARIAN RULES TO BE RESPECTED IN WARFARE)

Introductory text

IHL developed at a time when the use of force was a lawful form of international relations, when States were not prohibited from waging war, when they had the right to make war (i.e., when they had *jus ad bellum*). It did not appear illogical for international law to oblige them to respect certain rules of behaviour in war (*jus in bello*) if they resorted to hostilities. Today, the use of force between States is prohibited by a peremptory rule of international law^[23] (*jus ad bellum* has changed into *jus contra bellum*). Exceptions are admitted in the case of individual and collective self-defence,^[24] based upon Security Council resolutions^[25] and, arguably, the right of peoples to self-determination^[26] (national liberation wars). Logically, at least one side of an international armed conflict is therefore violating international law by the sole fact of using force, however respectful it is of IHL. By the same token, all municipal laws anywhere in the world prohibit the use of force against (governmental) law enforcement agencies.

Although armed conflicts are prohibited, they happen, and it is today recognized that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to ensure a minimum of humanity in this inhumane and illegal situation. For practical, policy and humanitarian reasons, however, IHL has to be the same for both belligerents: the one resorting lawfully to force and the one resorting unlawfully to force. From a practical point of view, respect for IHL could otherwise not be obtained, as, at least between the belligerents, which party is resorting to force in conformity with *jus ad bellum* and which is violating *jus contra bellum* is always a matter of controversy. In addition, from the humanitarian

23 Expressed in Art. 2(4) of the UN Charter.

24 Recognized in Art. 51 of the UN Charter.

25 As foreseen in Chapter VII of the UN Charter.

26 The legitimacy of the use of force to enforce the right of peoples to self-determination (recognized in Art. 1 of both UN Human Rights Covenants) was recognized for the first time in Resolution 2105 (XX) of the UN General Assembly (20 December 1965).

point of view, the victims of the conflict on both sides need and deserve the same protection, and they are not necessarily responsible for the violation of *jus ad bellum* committed by “their” party.

IHL must therefore be respected independently of any argument of, and be completely distinguished from, *jus ad bellum*. Any past, present and future theory of just war only concerns *jus ad bellum* and cannot justify (but is in fact frequently used to imply) that those fighting a just war have more rights or fewer obligations under IHL than those fighting an unjust war.

The two Latin terms were coined only in the last century, but Emmanuel Kant already distinguished the two ideas. Earlier, when the doctrine of just war prevailed, Grotius’ *temperamenta belli* (restraints to the waging of war) only addressed those fighting a just war. Later, when war became a simple fact of international relations, there was no need to distinguish between *jus ad bellum* and *jus in bello*. It is only with the prohibition of the use of force that the separation between the two became essential. It has since been recognized in the preamble to Protocol I:

“The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimizing or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict. [...]”

This complete separation between *jus ad bellum* and *jus in bello* implies that IHL applies whenever there is *de facto* an armed conflict, no matter how that conflict is qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used to interpret it; it also implies, however, that the rules of IHL are not to be drafted so as to render *jus ad bellum* impossible to implement, e.g., render efficient self-defence impossible.

Some consider that the growing institutionalization of international relations through the United Nations, concentrating the legal monopoly of the use of force in its hands or a hegemonic international order, will return IHL to a state of *temperamenta belli* addressing those who fight for international legality. This would fundamentally modify the philosophy of existing IHL.

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1. The prohibition of the use of force and its exceptions

⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 21 and 25 and Commentary]

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2. The complete separation between *jus ad bellum* and *jus in bello*

P I, Preamble, para. 5

Quotation PUBLIC LAW II – International Law

Paragraph 53:

[...] The public Right of States [...] in their relations to one another, is what we have to consider under the designation of the Right of Nations. Wherever a State, viewed as a Moral Person, acts in relation to another existing in the condition of natural freedom, and consequently in a state of continual war, such Right takes its rise.

The Right of Nations in relation to the State of War may be divided into: 1. The Right of *going to War*; 2. Right *during War*; and 3. Right *after War*, the object of which is to constrain the nations mutually to pass from this state of war, and to found a common Constitution establishing Perpetual Peace. [...]

Paragraph 57:

The determination of what constitutes Right in War is the most difficult problem of the Right of Nations and International Law. It is difficult even to form a conception of such a Right, or to think of any Law in this lawless state without falling into a contradiction. *Inter arma silent leges*. It must then be just the right to carry on War according to such principles as render it always still possible to pass out of that natural condition of states in their external relations to each other, and to enter into a condition of Right.

[Source: Kant, I., *The Philosophy of Law. An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right*. Translated from the German by W. Hastie BD, Edinburgh, 1887, paras 53 & 57]

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- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 1]
 - ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I
 - ⇒ **Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part B.]**
 - ⇒ Case No. 192, Inter-American Commission on Human Right, Tablada [Para. 173]
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Judgement, para. 345(1); Separate opinion, paras 55-63]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Para. 26]
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a) Historical development

- aa) *temperamenta belli* only for those fighting a *bellum justum* (just war)
- bb) war as a fact of international life – *jus durante bello* (law during war)
- cc) the prohibition of the use of force

Quotation **Laws of War. 18.** The Commission considered whether the laws of war should be selected as a topic for codification. It was suggested that, war having been outlawed, the regulation of its conduct had ceased to be relevant. On the other hand, the opinion was expressed that, although the term “laws of war” ought to be discarded, a study of the rules governing the use of armed force – legitimate or illegitimate – might be useful. The punishment of war crimes, in accordance with the principles of the Charter and Judgment of the Nürnberg Tribunal, would necessitate a clear definition of those crimes and, consequently, the establishment of rules which would provide for the case where armed force was used in a criminal manner. The majority of the Commission declared itself opposed to the study of the problem at the present stage. It was considered that if the Commission, at the very beginning of its work, were to undertake this study, public opinion might interpret its action as showing lack of confidence in the efficiency of the means at the disposal of the United Nations for maintaining peace.

[Source: *Yearbook of the International Law Commission*, New York, UN, 1949, p. 281]

- dd) peace operations and international police operations: return of *temperamenta belli*?

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- ⇒ Case No. 231, UN, A Multinational Force to Facilitate Humanitarian Aid
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SUGGESTED READING: DAILLIER Patrick, “Les opérations multinationales consécutives à des conflits armés en vue du rétablissement de la paix”, in *Recueil des cours [de l’] Académie de droit international*, T. 314, 2005 pp. 424-431. FLECK Dieter, “Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?”, in *Frieden in Freiheit = Peace in Liberty = Paix en liberté: Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos; Zürich, Dike, 2008, pp. 391-407. ZWANENBURG Martin, “Pieces of the Puzzle: Peace Operations, Occupation and the Use of Force”, in *The Military Law and the Law of War Review*, Vol. 1-2, No. 45, 2006, pp. 239-248.

b) Reasons

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- ⇒ Document No. 40, ICRC, Protection Policy [Para. 3.1]
 - ⇒ Case No. 93, United States Military Tribunal at Nuremberg, The Justice Trial
-

- aa) Logical reasons: once the primary rules prohibiting the use of force (i.e. *jus ad bellum*) have been violated, the subsidiary rules of *jus in bello* must apply, as they are foreseen specifically for situations in which the primary rules have been violated.
- bb) Humanitarian reasons: war victims are not responsible for the fact that “their” State has violated international law (i.e. *jus ad bellum*) and need the same protection, whether they are on the “right” or on the “wrong” side.
- cc) Practical reasons: during a conflict, belligerents never agree on which among them has violated *jus ad bellum*, i.e. who is the aggressor; IHL has to apply during the conflict. It will only be respected if both sides have to apply the same rules.

c) Consequences of the distinction

- aa) The equality of belligerents before IHL

PI, Art. 96(3)(c)

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- ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part B.]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
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SUGGESTED READING: MEYROWITZ Henri, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pedone, 1970, 418 pp. ROBERTS Adam, “The Equal Application of the Laws of War: A Principle under Pressure”, in *IRRC*, Vol. 90, No. 872, December 2008, pp. 931-962.

- bb) IHL applies independently of the qualification of the conflict under *jus ad bellum*

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- ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Case No. 125, Israel, Applicability of the Fourth Convention to Occupied Territories
 - ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction [Part B.]
 - ⇒ Case No. 158, United States, United States v. Noriega [Part B. II. A.]
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [26]
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- cc) Arguments under *jus ad bellum* may not be used to interpret IHL

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 31(1)(c)]
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 25 and Commentary]

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- ⇒ Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Paras 30, 39, 43, 96, 97, and 105]
 - ⇒ Document No. 73, France, Accession to Protocol I [Part A.]
 - ⇒ Case No. 93, United States Military Tribunal at Nuremberg, The Justice Trial,
 - ⇒ Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfred Krupp *et al.* [Part 4 (iii)]
 - ⇒ Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part 3 (v)]
 - ⇒ Case No. 105, Singapore, Bataafsche Petroleum v. The War Damage Commission
 - ⇒ Case No. 125, Israel, Applicability of the Fourth Convention to Occupied Territories
 - ⇒ Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated
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dd) *Jus ad bellum* may not render application of IHL impossible

ee) IHL may not render the application of *jus ad bellum*, e.g. self-defence, impossible

d) Contemporary threats to the distinction

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ Case No. 23, The International Criminal Court [Parts B., C. and D.]
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Case No. 197, UN, UN Forces in Somalia
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [19 and 26]
 - ⇒ Case No. 207, Bosnia and Herzegovina, Using Uniforms of Peacekeepers
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aa) New concepts of “just” (or even “humanitarian”) war

bb) “International police action”: international armed conflicts turn into law enforcement operations directed by the international community, those who represent it (or claim to represent it) against “outlaw States”.

cc) In many asymmetric conflicts, the means available to the parties are materially so different, and those they actually use morally so distinct, that it appears increasingly unrealistic to subject them to the same rules.

SUGGESTED READING: BURKE Anthony, “Just War or Ethical Peace?: Moral Discourses of Strategic Violence after 9/11”, in *International Affairs*, Vol. 80/2, March 2004, pp. 329-353. SKERKER Michael, “Just War Criteria and the Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones”, in *Journal of Military Ethics*, Vol. 3/1, 2004, pp. 27-39. SUBEDI Surya, “The Concept in Hinduism of ‘Just War’”, in *Journal of Conflict and Security Law*, Vol. 8/2, October 2003, pp. 339-361.

3. The distinction in non-international armed conflicts

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- ⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II [Part B.]
 - ⇒ Case No. 85, United States, The Prize Cases

- ⇒ Case No. 153, ICJ, Nicaragua v. United States [Para. 246]
 - ⇒ **Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 174]**
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 20 and 21]**
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- a) International law does not prohibit non-international armed conflicts; domestic law does.
- b) IHL treats parties to a non-international armed conflict equally, but cannot oblige domestic laws to do so.

SUGGESTED READING: BUGNION François, “*Jus ad Bellum, Jus in Bello* and Non-International Armed Conflicts”, in *YIHL*, Vol. 6 (2003), 2007, pp. 167-198.

III. INTERNATIONAL HUMANITARIAN LAW: A BRANCH OF INTERNATIONAL LAW GOVERNING THE CONDUCT OF STATES AND INDIVIDUALS

1. Situations of application

Introductory text

IHL applies in two very different types of situations: *international armed conflicts* and *non-international armed conflicts*. Technically, the latter are called “armed conflicts not of an international character”. It has been held, but is not entirely uncontested, that every armed conflict which “does not involve a clash between nations” is not of an international character, and that the latter phrase “bears its literal meaning”.^[27] All armed conflicts are therefore either international or non-international, and the two categories have to be distinguished according to the parties involved rather than by the territorial scope of the conflict.

A) International armed conflict

The IHL relating to international armed conflicts applies “to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.”^[28]

The notion of “armed conflict” has, from 1949 onwards, replaced the traditional notion of “war”.

²⁷ See Case No. 263, United States, Hamdan v. Rumsfeld.

²⁸ See GC I-IV, Art. 2(1)

According to the Commentary,^[29] "[t]he substitution of this much more general expression ('armed conflict') for the word 'war' was deliberate. One may argue almost endlessly about the legal definition of 'war'. A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression 'armed conflict' makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [...] even if one of the Parties denies the existence of a state of war [...]." The ICTY confirmed in the *Tadic* case that "an armed conflict exists whenever there is a resort to armed force between States [...]".^[30] This definition has since been used several times by the ICTY's Chambers and by other international bodies.^[31] When the armed forces of two States are involved, suffice it for one shot to be fired or one person captured (in conformity with government instructions) for IHL to apply, while in other cases (e.g. a summary execution by a secret agent sent by his government abroad), a higher level of violence is necessary.

The same set of provisions also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance [...]".^[32]

In application of a standard rule of the law of State responsibility on the attribution of unlawful acts, a conflict between governmental forces and rebel forces within a single country becomes of international character if the rebel forces are *de facto* agents of a third State. In this event, the latter's conduct is attributable to the third State^[33] and governed by the IHL of international armed conflicts.

According to the traditional doctrine, the notion of international armed conflict was thus limited to armed contests between States. During the Diplomatic Conference of 1974-1977, which led to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognized that "wars of national liberation"^[34] should also be considered as international armed conflicts.

B) Non-international armed conflict

Traditionally, non-international armed conflicts (or, to use an outdated term, "civil wars") were considered as purely internal matters for States, in which no international law provisions applied.

This view was radically modified with the adoption of Article 3 common to the four Geneva Conventions of 1949. For the first time the society of States agreed on a set of minimal guarantees to be respected during non-international armed conflicts.

29 See PICTET Jean S., *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952, p. 32.

30 See *Case No. 211*, ICTY, *The Prosecutor v. Tadic* [Part A., para. 70].

31 See for instance *Case No. 211*, ICTY, *The Prosecutor v. Tadic* [Part E., para. 37]; *Case No. 220*, ICTY, *The Prosecutor v. Boskoski* [Para. 175].

32 See GC I-IV, Art. 2(2)

33 See *Case No. 53*, International Law Commission, *Articles on State Responsibility* [Art. 8 and Commentary].

34 Situations defined, in Article 1(4) of Protocol I, as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination [...]".

Unlike violence between the armed forces of States, not every act of violence within a State (even if directed at security forces) constitutes an armed conflict. The threshold of violence needed for the IHL of non-international armed conflicts to apply is therefore higher than for international armed conflicts. In spite of the extreme importance of defining this lower threshold below which IHL does not apply at all, Article 3 does not offer a clear definition of the notion of non-international armed conflict.^[35]

During the Diplomatic Conference, the need for a comprehensive definition of the notion of non-international armed conflict was reaffirmed and dealt with accordingly in Article 1 of Additional Protocol II.

According to that provision, it was agreed that Protocol II “[s]hall apply to all armed conflicts not covered by Article 1 [...] of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol [...]”.

It should be noted that this fairly restrictive definition applies only to Protocol II. It does not apply to Article 3 common to the four Geneva Conventions.^[36] Practically, there are thus situations of non-international armed conflict in which only common Article 3 will apply, because the level of organization of the dissident groups is insufficient for Protocol II to apply, or the fighting is between non-State armed groups. Conversely, common Article 3 will apply to all situations where Protocol II is applicable.

Moreover, the ICC Statute provides an intermediary threshold of application. It does not require that the conflict be between governmental forces and rebel forces, that the latter control part of the territory, or that there be a responsible command.^[37] The conflict must, however, be protracted and the armed groups must be organized. The jurisprudence of the ICTY has, in our view correctly, replaced the conflict’s protracted character by a requirement of intensity. It requires a high degree of organization and violence for any situation to be classified as an armed conflict not of an international character.^[38]

Today, there is a general tendency to reduce the difference between IHL applicable in international and in non-international armed conflicts. The jurisprudence of international criminal tribunals, the influence of human rights and even some treaty rules adopted by States have moved the law of non-international armed conflicts closer to the law of international armed conflicts, and it has even been suggested in some quarters that the difference be eliminated altogether. In the many fields where the treaty rules still differ, this convergence has been rationalized by claiming that under customary international law the differences between the two categories of conflict

35 Art. 3 merely states that it is applicable “[i]n the case of armed conflict not of an international character occurring on the territory of one of the High Contracting Parties [...]”.

36 See P II, Art. 1: “This Protocol, which develops and supplements Article 3 common to the Geneva Conventions [...] without modifying its existing conditions of application [...]”.

37 See Case No. 23, The International Criminal Court [Part A., Art. 8(2)(f)].

38 For a relatively high, but probably realistic threshold, see Case No. 211, ICTY, The Prosecutor v. Tadic [Part E., paras 49 and 60], and for an even more detailed analysis, based upon a vast review of the jurisprudence of the ICTY and of national courts, see Case No. 220, ICTY, The Prosecutor v. Boskoski [Paras 177-206].

have gradually disappeared. The ICRC study on customary International Humanitarian Law^[39] comes, after ten years of research, to the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

C) Other situations

IHL is not applicable in situations of internal violence and tension which do not meet the threshold of non-international armed conflicts. This point has been clearly made in Article 1(2) of Additional Protocol II, which states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts [...]"^[40] The non-applicability of IHL does not necessarily mean lesser protection for the persons concerned. In such cases, human rights rules and peacetime domestic law would apply; they are more restrictive, for instance, regarding the use of force and detention of enemies, while IHL gives States greater latitude on these two aspects.

⇒ **Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art 8 and Commentary]**

- ⇒ Case No. 85, United States, The Prize Cases
- ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 28-67; Part II, paras 273-283]
- ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006
- ⇒ Case No. 153, ICJ, Nicaragua v. United States [Paras 115, 116, and 219]
- ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
- ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 67-70 and 96; Part E., paras 37-100]**
- ⇒ **Case No. 220, ICTY, The Prosecutor v. Boskoski**
- ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivu
- ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 601]**
- ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo
- ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 7-15]

39 See Case No. 43, ICRC, Customary International Humanitarian Law.

40 The notions of internal disturbances and tensions have not been the object of precise definitions during the 1974-1977 Diplomatic Conference. These notions have been defined by the ICRC as follows: "[Internal disturbances]: '[t]his involve[s] situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.' As regards internal tensions, these could be said to include in particular situations of serious tension (political, religious, racial, social, economic, etc.), but also the sequels of armed conflict or of internal disturbances. Such situations have one or more of the following characteristics, if not all at the same time:

- large scale arrests;
- a large number of "political" prisoners;
- the probable existence of ill-treatment or inhumane conditions of detention;
- the suspension of fundamental judicial guarantees, either as part of the promulgation of a state of emergency or simply as a matter of fact;
- allegations of disappearances [...]" See *Commentary* to Article 1(2) of Additional Protocol II, paras 4475-4476.

⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 2-27]

SUGGESTED READING: BARTELS Rogier, “Timelines, Borderlines and Conflicts: the Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 35-67. CARSWELL Andrew J., “Classifying the Conflict: a Soldier’s Dilemma”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 143-161. DAHL Arne Willy & SANDBU Magnus, “The Threshold of Armed Conflict”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 45, 2006, pp. 369-388. GREENWOOD Christopher, “Scope of Application of Humanitarian Law”, in FLECK Dieter (ed.), *Handbook of Humanitarian Law*, Oxford, OUP, 2nd ed., 2008, pp. 201-263. KWAKWA Edward K., *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht, Kluwer, 1992, 208 pp. O’CONNELL Mary Ellen, “Defining Armed Conflict”, in *Journal of Conflict & Security Law*, Vol. 13, No. 3, 2008, pp. 393-400. SASSÒLI Marco, “The Legal Qualification of the Conflicts in the former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?”, in WANG Tieya & YEE Sienho (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, pp. 307-333. SCHINDLER Dietrich, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 163, 1979, pp. 119-163. SIOTIS Jean, *Le droit de la guerre et les conflits armés d’un caractère non international*, Paris, LGDJ, 1958, 248 pp. SIVAKUMARAN Sandesh, “Identifying an Armed Conflict not of an International Character”, in STAHN Carsten & SLUITER Göran (eds), *The Emerging Practice of the International Criminal Court*, Leiden, Boston, M. Nijhoff, 2009, pp. 363-380. THAHZIB-LIE Bahia & SWAAK-GOLDMAN Olivia, “Determining the Threshold for the Application of International Humanitarian Law”, in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & THAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 239-253. VITE Sylvain, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 69-94.

FURTHER READING: BALENDRA Natasha, “Defining Armed Conflict”, in *Cardozo Law Review*, Vol. 29, No. 6, 2008, pp. 2461-2516. BYRON Christine, “Armed Conflicts: International or Non-International?”, in *Journal of Conflict and Security Law*, Vol. 6, No. 1, June 2011, pp. 63-90. CRAWFORD Emily, “Blurring the Lines Between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15, 2008, pp. 29-54. GAVSHON Daniela, “The Applicability of IHL in Mixed Situations of Disaster and Conflict”, in *Journal of Conflict and Security Law*, Vol. 14, No. 2, 2010, pp. 243-263. KÜEFNER Stefanie, “The Threshold of Non-International Armed Conflict: the Tadic Formula and its First Criterion Intensity”, in *Militair-Rechtelijk Tijdschrift*, Vol. 102, Issue 6, 2009, pp. 301-311. LA HAYE Eve, *War Crimes in Internal Armed Conflicts*, Cambridge, CUP, 2008, 424 pp. STEWART James G., “Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict”, in *IRRC*, No. 850, June 2003, pp. 313-349. VERHOEVEN Sten, “International and Non-International Armed Conflicts”, in *Institute for International Law K.U. Leuven*, Working Paper No. 107, 2007, 22 pp.

a) qualification not left to the parties to the conflict

⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II [Part B.]
 ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 603]

b) international armed conflicts

GC I-IV, Art. 2

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 29-33, 51-52, 178, 217-218]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Para. 9]
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aa) inter-State conflicts

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- ⇒ Case No. 114, Malaysia, Osman v. Prosecutor
 - ⇒ Case No. 125, Israel, Applicability of the Fourth Convention to Occupied Territories
 - ⇒ **Case No. 158, United States, United States v. Noriega [Part B. II. A.]**
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [26]
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., paras 87-162]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part 3. A.]
 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Parts I. and II.]**
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- old concept of war abandoned

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- ⇒ Case No. 85, United States, The Prize Cases
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- necessary level of violence?
- belligerent occupation (even in the absence of armed resistance)

(See *infra*, Part I, Chapter 8. IV. Special Rules on Occupied Territories, in particular 2. The Applicability of the Rules of IHL Concerning Occupied Territories)

GC I-IV, Art. 2(2)

bb) national liberation wars

PI, Art. 1(4)

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- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 4]
 - ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ **Case No. 167, South Africa, Sagarius and Others**
 - ⇒ **Case No. 168, South Africa, S. v. Petane**
 - ⇒ Case No. 169, South Africa, AZAPO v. Republic of South Africa
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [23 and 24]
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict

- ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
 - ⇒ Case No. 284, The Netherlands, Public Prosecutor v. Folkerts
 - ⇒ Case No. 286, The Conflict in Western Sahara
 - ⇒ Case No. 287, United States, United States v. Marilyn Buck
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SUGGESTED READING: ABI-SAAB Georges, “Wars of National Liberation in the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 165, 1979, pp. 353-445. KOENIG Christian, *Wars of National Liberation and Modern International Humanitarian Law. A Consideration of the Scope of Application of Article I, para. 4 of Additional Protocol I to the 1949 Geneva Conventions*, Frankfurt, Peter Lang, Europäische Hochschulschriften, Vol. 752, 1988, 209 pp.

FURTHER READING: DE SAINT MAURICE Thomas, “Sahara occidental 2001: prélude d’un fiasco annoncé”, in *Actualité et Droit International*, February 2002, <http://www.ridi.org/adi>, 10 pp. DRAPER Gerald I.A.D. “Wars of National Liberation and War Criminality”, in HOWARD Michael, *Restraints on War*, Oxford, OUP, 1979, pp. 135-162. DUNBAR Charles, “Sahara Stasis: Status and Future Prospects of the Western Sahara Conflict”, in *The Middle East Journal*, Vol. 54/4, 2000, pp. 522-545. HIGGINS Noelle, “The Regulation of Armed Non-State Actors: Promoting the Application of the Laws of War to Conflicts Involving National Liberation Movements”, in *Human Rights Brief*, Vol. 17, Issue 1, 2009, pp. 12-18. HIGGINS Noelle, *Regulating the Use of Force in Wars of National Liberation: the Need for a New Regime: a Study of the South Moluccas and Aceh*, Leiden, Boston, M. Nijhoff, 2010, 266 pp. WERNER Walter G., “Self-determination and Civil War”, in *Journal of Conflict and Security Law*, Vol. 6/2, 2001, 171-190 pp. WILSON Heather A., *International Law and the Use of Force by National Liberation Movements*, Oxford, Clarendon Press, 1988, 209 pp.

c) non-international armed conflicts

- aa) necessary level of violence: higher than for international armed conflicts
- bb) necessary degree of organization of rebel groups

(See *infra*, Part I, Chapter 12. The Law of Non-International Armed Conflicts)

- ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 67-70 and 96; Part E., paras 37-100]
 - ⇒ Case No. 220 ICTY, The Prosecutor v. Boskosk
-

d) Acts of terrorism?

Introductory text

IHL only applies to armed conflicts and therefore covers terrorist acts only when they are committed within the framework or as part of an armed conflict. Acts of terrorism committed in situations of internal violence or in time of peace are not covered by IHL. However, acts of terrorism are also prohibited by internal and international criminal law.^[41] Violence does not constitute an armed conflict simply because it is committed

41 For an exhaustive list of international instruments on terrorism, see the Internet site UN action against terrorism, <http://www.un.org/terrorism>

with terrorist means. As shown above, international armed conflicts are characterized by the fact that two States use violence against each other, while non-international armed conflicts are characterized by the degree of violence and organization of the parties. In both cases it does not matter whether lawful or unlawful means are used. Terrorist acts may therefore constitute (and trigger) an international armed conflict (when committed by a State – or its *de jure* or *de facto* agents – against another State) or a non-international armed conflict (when committed by an organized armed group fighting a State and its governmental authorities).

In both cases (or when terrorist acts are committed during a pre-existing armed conflict), IHL prohibits the most common and typical acts of terrorism, even if committed for the most legitimate cause: attacks against civilians,^[42] indiscriminate attacks,^[43] acts or threats whose main aim is to spread terror among the civilian population^[44] and acts of “terrorism” aimed against civilians in the power of the enemy.^[45] In most cases, such acts are considered war crimes that must be universally prosecuted.^[46]

There is, however, no universally recognized definition of an act of terrorism. The two main controversies preventing States from reaching a consensus on this point are related to armed conflicts. On the one hand, some States want to exclude acts committed in national liberation wars and in resistance to foreign occupation from the definition (which conflates, from an IHL perspective, *jus ad bellum* and *jus in bello*). On the other hand, it is suggested that the definition should cover not only attacks against civilians and indiscriminate acts, but also attacks on government agents and property the purpose of which is to compel the government to do or to abstain from doing something. As this is the essence of any warfare, this would label as “terrorist” and criminalize acts which are not prohibited in armed conflicts by IHL (and would therefore not encourage compliance by armed groups).

IHL applies equally to those who commit acts of terrorism (regular armed forces, national liberation movements, resistance movements, dissident armed forces engaged in an internal armed conflict or groups who, as their main action consists of terrorist acts, can be considered as terrorist groups) and to their opponents. Recourse to armed force against groups considered as terrorist is therefore subject to the same rules as in any other armed conflict.

⇒ **Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts**

- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 4]
- ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Reservation (d)],
- ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
- ⇒ Case No. 185, United States, The Schlesinger Report
- ⇒ **Case No. 220, ICTY, The Prosecutor v. Boskoski [Paras 184-190]**

42 See P I, Art. 51(2); P II, Art. 13(2)

43 P I, Art. 51(4) and (5)

44 See P I, Art. 51(2); P II, Art. 13(2)

45 See GC IV, Art. 33(1). In non-international armed conflicts Art. 4(2) of Protocol II extends this protection to all individuals who do not or no longer directly participate in the hostilities.

46 See *infra* Part I, Chapter 13. X. Violations by Individuals; GC IV, Art. 147; P I, Art. 85(3)(a); ICC Statute, Art. 8(2)(e)(i) [See **Case No. 23, The International Criminal Court [Part A.]**]

- ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
- ⇒ **Case No. 288, United States, The September 11 2001 Attacks**

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e) The global war on terror?

Following the attacks of 11 September 2001 against New York and Washington D.C., perpetrated by members of the terrorist group al-Qaeda, the administration of

President George W. Bush declared that the United States was engaged in a global “war on terror”,^[47] an international armed conflict against a non-State actor (al-Qaeda) and its associates. That “war” comprised not only a military campaign against Afghanistan (which harboured al-Qaeda leaders), but also attacks directed at and arrests of suspected members of al-Qaeda or other “terrorists” elsewhere in the world. While the United States claimed in this conflict all the prerogatives that IHL confers upon a party to an international armed conflict, in particular to attack “unlawful enemy combatants” without necessarily trying to arrest them, and to detain them without benefit of a court decision, it denied these detainees protection by most of IHL, arguing that their detention was governed neither by the rules applying to combatants nor by those applicable to civilians.^[48]

In 2006, the US Supreme Court held that every armed conflict which “does not involve a clash between nations” is not of an international character, and that the latter phrase “bears its literal meaning”.^[49]

Under President Barack Obama, the United States has abandoned the terms “war on terror” and “unlawful combatants”. While its position was still under review in 2010, it continued to argue that an armed conflict exists (and that IHL applies) between the United States, on the one hand, and al-Qaeda, the Taliban and “associated” forces, on the other. While not explicitly classifying this “novel type of armed conflict” as international or non-international, it holds that, at least by analogy, the IHL of international armed conflicts applies, and that those who provide “substantial support” to the enemy may be attacked and detained under “the laws of war”, just as enemy combatants could under the law of international armed conflicts.^[50]

Critics object that a conflict between a State or a group of States, on the one hand, and a non-State group such as al-Qaeda, on the other, could at best be a non-international armed conflict, if the requirements of intensity of violence and of organization of the non-State armed group are fulfilled.^[51] The IHL of non-international armed conflicts, they argue, does not have a worldwide geographical field of application. Non-international armed conflicts with al-Qaeda may exist in Afghanistan and in Pakistan, but not elsewhere. Even if and where the IHL of non-international armed conflicts applies, its rules on the admissibility of the detention of, and attacks against, enemy fighters are not the same as those applicable in international armed conflicts to enemy combatants.

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part IV]
 - ⇒ Case No. 262, United States, President’s Military Order

47 *National Strategy for Combating Terrorism* (September 2006), obtainable from <<http://www.globalsecurity.org>>.

48 For a legal explanation of the US position, see: The White House, *Memorandum of February 7th, 2002* [Case No. 185, United States, The Schlesinger Report, [Part A, Appendix C.], p. xxx]; BELLINGER John, *Legal Issues in the War on Terrorism – A Reply to Silja N. U. Vöneky*, 8 GERMAN L J (2007), pp. 847-860; *Reply of the Government of the United States of America to the Report of the Five UNCHR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba* (March 10, 2006) [See Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part IV]]

49 See Case No. 263, United States, *Hamdan v. Rumsfeld*.

50 See Case No. 267, United States, *The Obama Administration’s Internment Standards*.

51 See *supra*, III. 1. **Introductory text**, Situations of application.

- ⇒ **Case No. 263, United States, Hamdan v. Rumsfeld**
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ Case No. 266, United States, Habeas Corpus for Guantanamo Detainees
 - ⇒ Case No. 267, United States, The Obama Administration's Internment Standards
 - ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities
 - ⇒ Document No. 269, United States, Treatment and Interrogation in Detention
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f) Other situations

P II, Art. 1(2)

2. Personal scope of application

Introductory text

As IHL developed as the law of international armed conflicts covering, in conformity with the traditional function of international law, inter-State relations, it aimed essentially to protect “enemies” in the sense of enemy nationals. IHL therefore defines a category of “protected persons,” consisting basically of enemy nationals, who enjoy its full protection.^[52] Nevertheless, the victims of armed conflicts who are not “protected persons” do not completely lack protection. In conformity with and under the influence of international human rights law, they benefit from a growing number of protective rules, which, however, never offer to those who are in the power of the enemy the full protection foreseen for “protected persons”. As far back as 1864, the initial Geneva Convention prescribed that “[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for”.^[53] The rules on the conduct of hostilities apply equally to all hostilities in international armed conflicts, and all victims benefit equally from them.^[54] The law of non-international armed conflicts by definition protects persons against their fellow citizens, i.e., it applies equally to all persons equally affected by such a conflict. Finally, a growing number of IHL rules provide basic, human rights-like guarantees to all those not benefiting from more favourable treatment under IHL.^[55] A 1999 ICTY judgement suggested adjusting the

52 See GC IV, Art. 4. As far as Convention III is concerned, it is often considered that customary law permits a detaining power to deny its own nationals, even if they fall into its hands as members of enemy armed forces, prisoner-of-war status. In any event, such persons may be punished for their mere participation in hostilities against their own country.

53 Art. 6 (1) of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864.

54 See GC IV, Art. 13, on the field of application of Arts 14-26 and Arts 49 and 50 of Protocol I.

55 See, e.g., P I, Art. 75

concept of “protected persons”, beyond the text of Convention IV, to the reality of contemporary conflicts, where allegiance could be determined more by ethnicity than by nationality. The ICTY renounced using the latter as a decisive criteria and replaced it with the criteria of allegiance to the enemy.^[56] It remains to be seen if this criteria can be applied in actual conflicts, not only *a posteriori* by a tribunal, but also by the parties to a conflict, by the victims and by the humanitarian actors on the ground.

a) passive personal scope of application: who is protected?

⇒ Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*

aa) the concept of “protected persons”

GC I, Art. 13; GC II, Art. 13; GC III, Art. 4; GC IV, Art. 4

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- ⇒ Case No. 104, Netherlands, *In re Pilz*
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [2, 9, and 15]
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 81; Part C., paras 163-169]**
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., paras 34-37]
 - ⇒ Case No. 216, ICTY, The Prosecutor v. Blaskic [Part A., paras 127-146]
 - ⇒ Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III.]
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]
 - ⇒ Case No. 264, United States, Trial of John Phillip Walker Lindh
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SUGGESTED READING: SASSÒLI Marco & OLSON Laura M., “The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?”, in *IRRC*, No. 839, September 2000, pp. 733-769.

bb) growing importance of rules deviating from the concept: persons protected by IHL not having “protected person” status

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- ⇒ Case No. 117, United States, *United States v. William L. Calley, Jr.*
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 629]**
 - ⇒ Case No. 241, Switzerland, *The Niyonteze Case* [Part B. III., ch. 3.D.1]
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⁵⁶ See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part C., para. 166].

b) active personal scope of application: who is bound?

(See *infra*, Part I, Chapter 2. III. 5. c) individual – individual. p. 138 and Chapter 12. VIII. 2. All those belonging to one party, p. 349)

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- ⇒ **Case No.221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part B., paras 71-74]**
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 425-446]**
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part A., para. 9 and Part B. III., ch. 3.D.2]
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3. Temporal scope of application

GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6; P I, Art. 3; P II, Art. 2(2)

Introductory text

With the exception of the rules already applicable in peacetime,^[57] IHL starts to apply as soon as an armed conflict arises, e.g., in international armed conflicts as soon as the first (protected) person is affected by the conflict, the first segment of territory occupied, the first attack launched, and for non-international armed conflicts as soon as the necessary level of violence and of organization of the parties is reached.

When those rules of IHL cease to apply is much more difficult to define. One difficulty arises in practice, as in an international society where the use of force is outlawed, armed conflicts seldom end with the *debellatio* (total defeat) of one side or a genuine peace. Most frequently, contemporary armed conflicts result in unstable cease-fires, continue at a lower intensity, or are frozen by an armed intervention by outside forces or by the international community. Hostilities, or at least acts of violence with serious humanitarian consequences, often break out again later. It is difficult for humanitarian actors to plead with parties that have made declarations ending the conflict that the fighting in reality continues.

Another difficulty results from the texts, as they use vague terms to define the end of their application, e.g., “general close of military operations”^[58] for international armed conflicts and “end of the armed conflict”^[59] for non-international armed conflicts. For the latter, the ICTY has held that once the necessary level of violence and of organization of the parties is such that the IHL of non-international armed conflicts is applicable, that law continues to apply until the end of the conflict, even when those levels are no longer met.^[60] As for occupied territories, Protocol I has extended the applicability of IHL until the termination of the occupation,^[61] while under Convention IV it ends one year after the general close of military operations, except for important provisions applicable as long as the occupying power “exercises the functions of

57 See in particular the provisions on preparatory measures in the field of implementation to be taken already in peacetime (such as dissemination of its rules) and the obligations of all States relating to armed conflicts affecting third States. (See *infra*, Part I, Chapter 13. II. Measures to be Taken in Peacetime and V. The obligation to ensure respect (Common Article 1))

58 See GC IV, Art. 6(1) and (2); P I, Art. 3(b)

59 See P II, Art. 2(2)

60 See Case No. 211, ICTY, The Prosecutor v. Tadic [Part E., para. 100].

61 See P II, Art. 3(b)

government”^[62]. What limits the inconveniences resulting from such vagueness and the grey areas appearing in practice (e.g. when a new government agrees with the continued presence of the (former) occupying power or the UN Security Council authorizes the continued military presence of the (former) occupying power) – and is therefore very important in practice – is that IHL continues to protect persons whose liberty is restricted^[63] until they are released, repatriated or, in particular if they are refugees, resettled.^[64] This does not resolve, however, the regime applying to those who refuse to be repatriated. Furthermore, in the law of international armed conflicts, this extension concerns only persons who were arrested during the conflict, while only the law of non-international armed conflict applies the same to the quite frequent cases of persons arrested after the end of the conflict – but even here only if their arrest is related to the conflict and not if it is related to the post-conflict tension.^[65]

⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 67-69; Part E., para. 100]**

SUGGESTED READING: ARY Vaughn A., “Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements”, in *Military Law Review*, Vol. 148, 1995, pp. 186-273. CAMPBELL Colm, “Peace and the Laws of War: the Role of International Humanitarian Law in the Post-conflict Environment”, in *IRRC*, No. 839, September 2000, pp. 627-652. DINSTEIN Yoram, “The Initiation, Suspension and Termination of War”, in SCHMITT Michael N. (ed.), *International Law Across the Spectrum of Conflict*, Newport, R.I., 2000, pp. 131-159. KOUTROULIS Vaivos, *Le début et la fin du droit de l’occupation*, Paris, Pedone, 2010, 334 pp.

a) beginning of application

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- ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part E.]**
 ⇒ **Case No. 220, ICTY, The Prosecutor v. Boskoski [Paras 239-291]**
 ⇒ Case No. 288, United States, The September 11 2001 Attacks
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b) end of application

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- ⇒ Case No. 110, India, Rev. Mons. Monteiro v. State of Goa
 ⇒ **Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 125]**
 ⇒ Case No. 190, Iraq, The End of Occupation
 ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni
 ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part E.]**
 ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region
 ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [para. 9]
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62 See GC IV, Art. 6(2)

63 After international armed conflicts, this protection continues, even if the restriction of liberty of a protected person that started during the conflict was not related to the conflict.

64 See GC I, Art. 5; GC III, Art. 5; GC IV, Art. 6(3); P I, Art. 3(b)

65 See P II, Art. 2(2)

4. Geographical scope of application

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- ⇒ Document No. 32, The Seville Agreement [Art. 5.1.A)a]
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 68 and 69]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 635]**
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B. III., ch. 3.B.]
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5. Relations governed by International Humanitarian Law

Introductory text

International Humanitarian Law (IHL) protects individuals against the (traditionally enemy) State or other belligerent authorities. IHL of international armed conflicts, however, also corresponds to the traditional structure of international law in that it governs (often by the very same provisions) relations between States. Its treaty rules are therefore regulated, with some exceptions, by the ordinary rules of the law of treaties. In addition, it prescribes rules of behaviour for individuals (who must be punished if they violate them) for the benefit of other individuals.

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- ⇒ Case No. 108, Hungary, War Crimes Resolution [Part IV.]
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a) Individual – State

- including his or her own State in international armed conflicts?

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- ⇒ **Case No. 107, United States, United States v. Batchelor**

- ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 54-60]
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SUGGESTED READING: CLAPHAM Andrew, “Non-State Actors”, in CHETAIL Vincent (ed.), *Post-conflict Peacebuilding: a Lexicon*, Oxford, OUP, 2009, pp. 200-213.

b) State – State: International Humanitarian Law in the law of treaties

- applicability of treaties based on reciprocity, but no reciprocity in respect for treaties

(See *infra*, Part I, Chapter 13. IX. 2. c) applicability of the general rules on State responsibility, dd) but no reciprocity)

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- ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.3]**

- ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict
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– ways to be bound

GC I, Arts 56-57 and 60; GC II, Arts 55-56 and 59; GC III, Arts 136-137 and 139; GC IV, Arts 151-152 and 155; P I, Art. 92-94; P II, Arts 20-22

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- ⇒ Case No. 71, Russian Federation, Succession to International Humanitarian Law Treaties
 - ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.3]**
 - ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 124-128]
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict
 - ⇒ Case No. 284, The Netherlands, Public Prosecutor v. Folkerts
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– declarations of intention

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- ⇒ Case No. 168, South Africa, *S. v. Petane*
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict
-

– interpretation

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- ⇒ **Case No. 132, Israel, Cases Concerning Deportation Orders [3, and Separate Opinion Bach]**
 - ⇒ Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A., paras 71-93 and Part C., paras 282-304]
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– reservations

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- ⇒ Case No. 72, USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III
 - ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part C.]
 - ⇒ Case No. 185, United States, *The Schlesinger Report*
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SUGGESTED READING: GAUDREAU Julie, “Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre”, in *IRRC*, No. 849, March 2003, pp. 143-184. PILLOUD Claude, “Reservations to the Geneva Conventions of 1949”, in *IRRC*, No. 180, April 1976, pp. 107-124; No. 181, June 1976, pp. 163-187.

– denunciation

GC I-IV, Arts 63/62/142/158 respectively; P I, Art. 88; P II, Art. 25

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- ⇒ **Case No. 152, Chile, Prosecution of Osvaldo Romo Mena**
-

– amendment and revision process

P I, Art. 97; P II, Art. 24

-
- ⇒ Case No. 44, ICRC, *The Question of the Emblem*
-

– role of the depositary

GC I-IV, Arts 57/56/136/158; 61/60/140/156; 64/63/143/159 respectively; P I, Arts 100-102; P II, Arts 26-28

⇒ Case No. 139, UN, Resolutions and Conference on the Respect of the Fourth Convention,

SUGGESTED READING: SASSÒLI Marco, “La Suisse et le droit international humanitaire une relation privilégiée?”, in *ASDI*, Vol. XLV, 1989, pp. 47-71.

c) Individual – individual

aa) uncontroversial for criminalized rules

bb) controversial for other rules

⇒ **Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [Paras 4 (ii) and (vii)]**

⇒ Document No. 98, The Tokyo War Crimes Trial

⇒ Case No. 222, United States, Kadic et al. v. Karadzic

SUGGESTED READING: ALDRICH George H., “Individuals as Subjects of International Humanitarian Law”, in MAKARCZYK Jerzy (ed.), *Theory of International Law at the Threshold of the 21st Century*, The Hague, Kluwer Law International, 1996, pp. 851-858.

Chapter 3

Historical Development of International Humanitarian Law

Introductory text

It is commonly agreed that modern, codified International Humanitarian Law (IHL) was born in 1864, when the initial Geneva Convention was adopted. The Convention's rules (and those set out in subsequent treaties) were not completely new, however, but derived to a large extent from customary rules and practices.

The laws of war are probably as old as war itself. Even in ancient times, there existed interesting – though primitive – customs and agreements containing “humanitarian” elements, and almost everywhere in the world and in most cultures, these customs had very similar patterns and objectives.

This global phenomenon proves the existence of two things:

- a common understanding of the need for regulations of some kind even during wars;
- the feeling that, in certain circumstances, human beings, *friend or foe*, deserve some protection.

As early as 3000 BC, there existed rules protecting certain categories of victims of armed conflicts and regulations limiting or prohibiting the use of certain means and methods of warfare. These ancient rules may not have been adopted for a humanitarian *purpose* but rather with a purely tactical or economic objective; their *effect*, however, was humanitarian. For instance (to give but two examples), the *prohibition to poison wells* – very common in African traditional law and reaffirmed in modern treaties – most probably emerged to permit the exploitation of conquered territories rather than to spare the lives of the local inhabitants. Similarly, the main objective of the *prohibition to kill prisoners of war* was to guarantee the availability of future slaves, rather than to save the lives of former combatants.

The existence of such customs, which can be found in cultures, regions and civilizations as diverse as Asia, Africa, pre-Columbian America and Europe, is of fundamental

importance. This should always be kept in mind when studying the modern rules of IHL, for it demonstrates that although most of the modern rules are not universal by *birth* – they have until recently been drafted and adopted mainly by European powers – they are universal by nature, since the principles they codify can be found in most non-European systems of thought.

In spite of their humanitarian importance, all these ancient rules and customs suffered serious shortcomings. In most cases, their applicability was restricted to specific regions, traditions, ethnic or religious groups, did not cover those who did not belong to the same religion or group, and were very often limited to a specific war. Additionally, their implementation was the sole responsibility of the belligerents.

The inception of modern IHL dates back to the battle of Solferino, a terrible battle in northern Italy between French, Italian and Austrian forces in 1859.

A witness to the carnage, Geneva businessman Henry Dunant was struck, not so much by the violence of the fighting as by the miserable fate of the wounded abandoned on the battlefield. Together with the women of the surrounding villages, he tried to alleviate their suffering.

Back in Geneva, Dunant published a short book in 1862, *A Memory of Solferino*,^[66] in which he vividly evoked the horrors of the battle, but also tried to find remedies to the suffering he had witnessed. Among other proposals, he invited the States “to formulate some international principle, sanctioned by a Convention inviolate in character” and giving legal protection to wounded soldiers in the field.

Dunant’s proposals met with enormous success all over Europe. A few months after the publication of his book, a small committee, the precursor of the International Committee of the Red Cross,^[67] was founded in Geneva. Its main objective was to examine the feasibility of Dunant’s proposals and to identify ways to formalize them. After having consulted military and medical experts in 1863, the Geneva Committee persuaded the Swiss Government to convene a diplomatic conference.

This conference was held in Geneva in August 1864 and adopted the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

For the first time, States agreed to limit – in an international treaty open to universal ratification – their own power in favour of the individual and, also for the first time, war was subject to written, general law.

Modern IHL was born.

The diagram on p. 144 illustrates the spectacular development experienced by IHL since the adoption of the 1864 Geneva Convention. This development has been marked by three main characteristics, which, without entering into the details, can be described as follows:

66 DUNANT Henry, *A Memory of Solferino*, ICRC, Geneva, 1986, 147 pp. (also available online at <http://www.icrc.org>)

67 See *infra*, Part I, Chapter 15, The International Committee of the Red Cross (ICRC).

- a) *the categories of war victims protected* by humanitarian law (military wounded, sick and shipwrecked, prisoners of war, civilians in occupied or “enemy” territories, the whole civilian population) and *of situations in which victims are protected* (international and non-international armed conflicts) *have been steadily expanded*;
- b) *the treaties have been regularly updated and modernized* to take account of the realities of recent conflicts; for example, the rules protecting the wounded adopted in 1864 were revised in 1906, 1929, 1949 and 1977 (some critics therefore charge that IHL is always “one war behind reality”);
- c) *the existence, up until 1977, of two separate branches of law*:
 - Geneva Law, which is mainly concerned with the protection of the victims of armed conflicts, i.e., non-combatants and those who no longer take part in the hostilities;
 - Hague Law, the provisions of which relate to limitations or prohibitions of specific means^[68] and methods^[69] of warfare.

These two branches of law were merged with the adoption of Protocols I and II in 1977. Today, some people claim that IHL is ill-adapted to contemporary conflicts, but no specific suggestions have been made as to which rules should be replaced or modified, or what should be the content of any new rules. These people implicitly request that exceptions be made to the detriment of some persons (such as “terrorists”) and that the existing rules be softened when fighting enemies who systematically violate IHL, in particular those who do not distinguish themselves from the civilian population. Others, however, hold that IHL is not protective enough: according to them, IHL rules on the use of force and on detention should be brought closer to those of human rights law and additional categories of weapons should be prohibited. Finally, some people wonder whether it is realistic to expect armed groups to implement the existing rules of the IHL of non-international armed conflicts. In formal international forums, States nevertheless continue to discuss and adopt protective rules for additional categories of persons and additional prohibitions of means and methods of warfare.

⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions

⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 9]

SUGGESTED READING: BEST Geoffrey, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfeld and Nicholson, 1980, 400 pp. DRAPER Gerald I.A.D., “The Development of International Humanitarian Law”, in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 67-90. DARCY Shane, MAGLIVERAS Konstantinos D. & HANKEL Gerd, “Reforming the Laws of War”, in QUENIVET Noëlle & SHAH-DAVIS Shilan (eds), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague, T.M.C. Asser Press, 2010, pp. 317-360. GOLDSTONE Richard, “Reflections on the Development of the Law of War”, in *McGill Law*

68 See *infra*, Part I, Chapter 9, III. 2. Prohibited or restricted use of weapons.

69 See *infra*, Part I, Chapter 9, III. 3. Prohibited methods of warfare.

Journal, Vol. 46/1, 2000, pp. 279-290. HAGGENMACHER Peter, "Just War and Regular War in Sixteenth Century Spanish Doctrine", in *IRRC*, No. 290, September-October 1992, pp. 434-445. HAGGENMACHER Peter, *Grotius et la doctrine de la guerre juste*, Paris, PUF, 1983, 682 pp. HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp. MERIBOUTE Zidane, "Humanitarian Rules and Sanctions in the Major Philosophical and Religious Traditions", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 365-384. PICTET Jean, "La formation du droit international humanitaire", in *IRRC*, No. 321, June 2002, pp. 321-344. SCHINDLER Dietrich, "International Humanitarian Law: Its Remarkable Development and its Persistent Violation", in *Journal of the History of International Law*, Vol. 5, 2003, pp. 165-188.

FURTHER READING: BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 158 pp. BEST Geoffrey, "Restraints on War by Land Before 1945", in HOWARD Michael (ed.), *Restraints on War*, Oxford, OUP, 1979, pp. 17-37. BUGNION François, "The International Committee of the Red Cross and the Development of International Humanitarian Law", in *Chicago Journal of International Law*, Vol. 5/1, Summer 2004, pp. 191-215. CLASTRES Pierre, *Archéologie de la violence : la guerre dans les sociétés primitives*, Marseille, Éditions de l'Aube, 1997, 94 pp. DÖRMANN Knut & MARESCA Louis, "The International Committee of the Red Cross and its Contribution to the Development of International Humanitarian Law in Specialized Instruments", in *Chicago Journal of International Law*, Vol. 5/1, Summer 2004, pp. 217-232. DRAPER Gerald I.A.D., "The Contribution of the Emperor Asoka Maurya to the Development of the Humanitarian Ideal in Warfare", in *IRRC*, No. 305, June 1995, pp. 192-206. HOFFMANN Michael H., "The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War", in *IRRC*, No. 277, July-August 1990, pp. 322-382. JIN Xu, "The Evolution of International Laws of War", in *Chinese Journal of International Politics*, Vol. 2(2), October 2008, pp. 171-203. KOSIRNIK René, "The 1977 Protocols: a Landmark in the Development of International Humanitarian Law", in *IRRC*, No. 320, September-October 1997, pp. 483-505. NOONE Gregory P., "The History and Evolution of the Law of War Prior to World War II", in *Naval Law Review*, Vol. 47, 2000, pp. 176-207. ÖGREN Kenneth, "Humanitarian Law in the Articles of War Decreed in 1621 by King Gustavus II Adolphus of Sweden", in *IRRC*, No. 313, July-August 1996, pp. 438-442. PICTET Jean, "The New Geneva Conventions for the Protection of War Victims", in *AJIL*, Vol. 45/3, 1951, pp. 462-475. SARKIN Jeremy, "The Historical Origins, Convergence and Interrelationship of International Human Rights Law, International Humanitarian Law, International Criminal Law and Public International Law and their Application since the Nineteenth Century", in *Human Rights and International Legal Discourse*, Vol. 1, No.1, 2007, pp. 125-172. SUBEDI Surya P., "The Concept in Hinduism of 'Just War'", in *Journal of Conflict and Security Law*, Vol. 8/2, October 2003, pp. 339-361. VALENCIA VILLA Alejandro, "'Dialogos Militares' by Diego Garcia de Palacio: the First American Work on the Law of Nations", in *IRRC*, No. 290, September-October 1992, pp. 446-451. VAN CREVELD Martin, *The Transformation of War*, New York, Free Press, 1991, 254 pp.

Quotation 1 **The Torah and love for mankind. "Thou shalt love thy neighbour as thyself: I am the Lord."**

[Source: Moses Leviticus XIX, 18]

"It is not this (rather) the fact that I will choose? To open the snares of wickedness, to undo the bands of the yoke, and to let the oppressed go free, and that ye should break asunder every yoke? It is not to distribute thy bread to the hungry, and that thou bring the afflicted

poor into thy house? When thou seest the naked, that thou clothe him: and that thou hide not thyself from the own flesh?"

[Source: Isaiah, LVIII, 6-7]

Quotation 2 Chinese moderation and Confucian culture. "Zigong (Tzu-Kung) asked: 'is there a simple word which can be a guide to conduct throughout one's life?'

The master said, 'It is perhaps the word "Shu". Do not impose on others what you yourself do not desire.'

[Source: Confucius (Kong Zi) (551-479 BC), *The Analects*, XV, 2L]

"Where the army is, prices are high, when prices rise, the wealth of the people is exhausted."

"Treat the captives well, and care for them."

"Chang Yu: All the soldiers taken must be cared for with magnanimity and sincerity, so that they may be used by us."

[Source: Sun Zi (Sun Tzu) (Fourth century BC) "The Art of War" II, 12, 19]

Quotation 3 Buddhist India and the condemnation of war. "Thus arose His Sacred Majesty's remorse for having conquered the Kalingas, because the conquest of a country previously unconquered involves the slaughter, death and carrying away captive of the people. This is a matter of profound sorrow and regret to His Sacred Majesty."

[Source: Asoka (Third Century BC), Girnar inscription, Rock Edict XII, Gujarat Province]

Quotation 4 The Gospel and Christian charity. "Then shall the King say unto them on his right hand: Come ye blessed of my Father, inherit the Kingdom prepared for you from the foundation of the world:

For I was and hungered, and ye gave me meat; I was thirsty, and ye gave me drink; I was a stranger, and ye took me in; Naked, and ye clothed me; I was sick, and ye visited me; I was in prison, and ye came unto me."

[Source: "The Gospel according to St. Matthew", 25:34-36, Biblia, King James version, *The Holy Bible Containing the Old and New Testaments*, Cambridge, University Press, 1234 pp.]

Quotation 5 Allah's mercy in the Islamic culture. "The Prophet said:

[...], one of the basic rules of the Islamic concept of humanitarian law enjoins the faithful, fighting in the path of God against those waging war against them, never to transgress, let alone exceed, the limits of justice and equity and fall into the ways of tyranny and oppression (Ayats 109 *et seq.* of the second Sura of the Koran, and the Prophet's instructions to his troops.)

[Source: SULTAN Hamed, "The Islamic Concept" in *International Dimensions of Humanitarian Law*, Geneva, Henry Dunant Institute, UNESCO, 1988, p. 32]

"When you fight for the glory of God, behave like men, do not run away, nor let the blood of women or children and old people stain your victory. Do not destroy palm trees, do not burn houses or fields of wheat, never cut down fruit trees and kill cattle only when you need to eat

it. When you sign a treaty, make sure you respect its clauses. As you advance, you will meet men of faith living in monasteries and who serve God through prayer; leave them alone, do not kill them and do not destroy their monasteries ..."

[Source: ABU BAKR, first successor to the Prophet; quoted in BOISARD Marcel A., "De certaines règles islamiques concernant la conduite des hostilités et de la protection des victimes de conflits armés," in *Annales d'études internationales*, 1977, vol. 8, Geneva, p. 151; unofficial translation; see also BEN ACHOUR Zagh, "Islam et droit international humanitaire," in *IRRC*, vol. 722, March-April 1980, p.67]

Development of International Humanitarian Law

3000 BC	Customs, Bilateral treaties, Customary law
1859	Henry Dunant assists the wounded on the battlefield of Solferino
1863	Lieber Code (Instructions for the Government of Armies of the United States in the Field)
1863	Foundation of the ICRC and of the first National Societies
1864	First Geneva Convention
1868	Saint Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles
1880	Oxford Manual on The Laws of War on Land
1899/1907	Hague Conventions

⇒ Document No. 1, The Hague Regulations

1913	Oxford Manual of the Laws of Naval War
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First World War

1925	Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.
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⇒ Document No. 9, The Geneva Chemical Weapons Protocol

1929	First Geneva Convention on prisoners of war
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⇒ Document No. 97, United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb *et al.*

⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 97]

Second World War

1945/1948	Establishment of the International Military Tribunals in Nuremberg and Tokyo for the Prosecution and Punishment of the Major War Criminals
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- 1949 Geneva Conventions:
 I on Wounded and Sick in the Field
 II on Wounded, Sick and Shipwrecked at Sea
 III on Prisoners of War
 IV on Civilians (in the hands of the enemy)
 Common Article 3 on non-international armed conflicts

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- ⇒ Documents Nos 2-5, Geneva Conventions
 ⇒ Document No. 50, Sixtieth Anniversary of the Geneva Conventions
 ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Para. 3.2.2]**
-

- 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict

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- ⇒ Document No. 10, Conventions on the Protection of Cultural Property
-

Decolonisation, guerrilla wars

- 1977 Protocols Additional to the Geneva Conventions

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- ⇒ Documents Nos 6-7, The First and Second Protocols Additional to the Geneva Conventions
 ⇒ Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 75]
 ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Para 3.2.3]**
 ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II**
-

Protocol I: applicable in international armed conflicts (including national liberation wars)

- Contents:
- Development of the 1949 rules
 - Adaptation of International Humanitarian Law to the realities of guerrilla warfare
 - Protection of the civilian population against the effects of hostilities
 - Rules on the conduct of hostilities

Protocol II: applicable to non-international armed conflicts

- Contents:
- Extension and more precise formulation of the fundamental guarantees protecting all those who do not or no longer actively participate in hostilities
 - Protection of the civilian population against the effects of hostilities

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- ⇒ Document No. 73, France, Accession to Protocol I

- ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I
 - ⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II
 - ⇒ **Case No. 77, United States, President Rejects Protocol I**
 - ⇒ Case No. 168, South Africa, *S. v. Petane*
-

1980 UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons

- ⇒ Document No. 11, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons
 - ⇒ Document No. 13, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)
 - ⇒ Document No. 14, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)
-

1993 Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction

- ⇒ Document No. 21, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
-

“Ethnic cleansing” in the former Yugoslavia and genocide in Rwanda

1993/1994 Establishment of International Criminal Tribunals for the former Yugoslavia (ICTY), in The Hague, and Rwanda (ICTR) in Arusha

- ⇒ Case No. 210, UN, Statute of the ICTY
 - ⇒ Case No. 230, UN, Statute of the ICTR
-

1995/96 Protocols to the 1980 Weapons Convention:
- Protocol IV on Blinding Laser Weapons

- ⇒ Document No. 15, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
 - ⇒ Case No. 80, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons
-

- New Protocol II on Anti-Personnel Land Mines

- ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on May 3 1996 (Protocol II to the 1980 Convention)
-

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- 1997 Ottawa Convention Banning Anti-Personnel Land Mines
-
- ⇒ Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
-
- 1998 Adoption in Rome of the Statute of the International Criminal Court
-
- ⇒ Case No. 23, The International Criminal Court
-
- 1999 Protocol II to the Convention on the Protection of Cultural Property
-
- ⇒ Document No. 10, Conventions on the Protection of Cultural Property
-
- 2000 Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts (amending article 38 of the Convention)
-
- ⇒ Document No. 24, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict
-
- 2001 Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts
-
- ⇒ Document No. 12, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts
-
- 2002 Entry into force of the Statute of the International Criminal Court, on July 1 2002
-
- ⇒ Case No. 23, The International Criminal Court
-
- 2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003
-
- ⇒ Document No. 18, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)
-
- 2005 Publication of the ICRC Study on Customary International Humanitarian Law
-
- ⇒ Case No. 43, ICRC, Customary International Humanitarian Law
-

2005 Protocol III additional to the Geneva Conventions relating to the
Adoption of an Additional Distinctive Emblem

⇒ Document No. 8, The Third Protocol Additional to the Geneva Conventions

2008 Convention on Cluster Munitions

⇒ Document No. 19, Convention on Cluster Munitions

Chapter 4

Sources of Contemporary International Humanitarian Law

I. TREATIES

(For a more complete list of International Humanitarian Law treaties and reference to Cases and Documents referring specifically to each treaty, *see supra*, Part I, Chapter 3, Historical Development of International Humanitarian law. The text of International Humanitarian Law treaties and the current status of participation in those treaties are also available on the ICRC website at <http://www.icrc.org>)

Introductory text

Historically, the rules of International Humanitarian Law (IHL) (in particular on the treatment and exchange of prisoners and the wounded) have long been laid down in bilateral treaties. The systematic codification and progressive development of IHL in general multilateral treaties also started relatively early compared with other branches of international law – in the mid-19th century. Most often a new set of treaties supplemented or replaced less detailed, earlier conventions in the wake of major wars, taking into account new technological or military developments. IHL treaties are therefore sometimes charged with being “one war behind reality”. This is true for all law, however. Only rarely has it been possible to regulate or even to outlaw a new means or method of warfare before it becomes operational.^[70]

Today, IHL is not only one of the most codified branches of international law, but its relatively few instruments are also well coordinated with each other. Generally the more recent treaty expressly states that it either supplements or replaces the earlier treaty (among the States parties).

IHL treaties have the great advantage that their rules are relatively beyond doubt and controversy, “in black and white”, ready to be applied by soldiers without first obliging

70 The rare examples are the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight and the 1995 Protocol IV on Blinding Laser Weapons to the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. [See **Document No. 15**, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)]

them to conduct extensive research on practice. Furthermore, the majority of “new States” have accepted the rules contained in these treaties as legitimate, because they were given the possibility to express themselves during the drafting process. Often following a voluntarist approach, such States agree more readily to be bound by treaties than by other sources of international law.

The disadvantage of IHL treaties, as of all treaty law, is that they are technically unable to have a general effect – to be automatically binding on all States. Fortunately, most IHL treaties are today among the most universally accepted and only few States are not bound by them.^[71] This process of acceptance nevertheless generally takes decades and is usually preceded by years of “*travaux préparatoires*”. This is one of the reasons why the 1977 Additional Protocols, which are so crucial for the protection of victims of contemporary armed conflicts, are still not binding for nearly 30 States – among them, unsurprisingly, a number of major powers frequently involved in armed conflicts.

The traditional process of drafting new international treaties, which is based on the rule of consensus between nearly 200 States, ends up conferring a “triple victory” on those who have been described as “digging the grave of International Humanitarian Law”, i.e. those who do not want better protection to exist in a given domain. “They slow the process, they water down the text, and then do not even ratify the treaty once adopted.”^[72] They thus leave the States parties that had desired a revision of the law with a text that falls short of their original wishes. To avoid this unsatisfactory state of affairs, some States that genuinely want an improvement have resorted to what is referred to as the “Ottawa procedure”, because it was applied for the first time during the deliberations on the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-personnel Mines and on Their Destruction of 18 September 1997. Only those States that wished to achieve the result indicated in the title of that treaty were involved in negotiating it. Its opponents were then free to agree to the standards that were set by that method or not. The same method was used in the Oslo process leading to the adoption of the Convention on Cluster Munitions.^[73]

However important the treaty rules of IHL may be – and even though compliance is not subject to reciprocity – as treaty law they are only binding on States party to those treaties and, as far as international armed conflicts are concerned, only in their relations with other States party to those treaties.^[74] The general law of treaties^[75] governs the conclusion, entry into force, application, interpretation, amendment and modification of IHL treaties,^[76] reservations to them, and even their denunciation; the latter, however, only takes effect after the end of the armed conflict in which the denouncing State is involved.^[77] The main exception to the general rules of the law of treaties for IHL

71 For the most updated table of participation to the major International Humanitarian Law treaties, see <http://www.icrc.org>

72 SANDOZ Yves, “Le demi-siècle des Conventions de Genève”, in *IRRC*, No. 834, 1999, p. 241. Our translation.

73 See Document 19, Convention on Cluster Munitions

74 See *supra*, Part I, Chapter 2, III. 5. b), State – State: International Humanitarian Law in the law of treaties. Customary law, including the numerous rules of the International Humanitarian Law treaties which reflect customary law or have grown into customary law, is obviously binding on all States in relation to all States.

75 As codified in the 1969 Vienna Convention on the Law of Treaties.

76 See the final provisions of the four Geneva Conventions and of the two Additional Protocols.

77 See GC I-IV, Arts 63/62/142/158 respectively; P I, Art. 99; P II, Art. 25. In practice there has never been such a denunciation. The aforementioned articles of the Geneva Conventions explicitly refer to the Martens clause (See *infra* Part I, Chapter 4, III. 1. The Martens Clause) to clarify the legal situation after such a denunciation has become effective.

treaties is provided by the law of treaties itself: once an IHL treaty has become binding on a State, not even a substantial breach of its provisions by another State – including by its enemy in an international armed conflict – permits the termination or suspension of the treaty’s application as a consequence of that breach.^[78]

1. The Hague Conventions of 1907

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- ⇒ Document No. 1, The Hague Regulations
 - ⇒ Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.2.2]
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 89]
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict [Para. 8]
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SUGGESTED READING: EYFFINGER Arthur, “A Highly Critical Moment: Role and Record of the 1907 Hague Peace Conference”, in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 197-228. SCOTT James Brown, *The Hague Peace Conferences of 1899 and 1907*, Baltimore, The Johns Hopkins Press, 1909, 2 Vol.

2. The Four Geneva Conventions of 1949

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- ⇒ Documents Nos 2-5, Geneva Conventions I to IV
 - ⇒ Document No. 50, The Sixtieth Anniversary of the Geneva Conventions
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SUGGESTED READING: Département Fédéral des Affaires Etrangères (DFAE), CICR, *60 ans des Conventions de Genève et les décennies à venir = 60 Years of the Geneva Conventions and the Decades Ahead*, Geneva, CICR; Berne, DFAE, 2010, 104 pp. HOSNI Lori, “The ABCs of the Geneva Conventions and their Applicability to Modern Warfare”, in *New England Journal of International and Comparative Law*, Vol. 14, No. 1, 2007, pp. 135-167. PERRIGO Sarah & WITHMAN Jim, *The Geneva Conventions under Assault*, London, New York, Pluto, 2010, 252 pp. MERON Theodor, “The Geneva Conventions and Public International Law: British Foreign and Commonwealth Office Conference Commemorating the 60th Anniversary of the 1949 Geneva Conventions, London, 9 July 2009”, in *IRRC*, Vol. 91, No. 875, pp. 619-625. PICTET Jean (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Geneva ICRC, 4 Vol.: Vol. I, *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 1952, 466 pp.; Vol. II, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1960, 320 pp.; Vol. III, *Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, 764 pp.; Vol. IV, *Geneva Convention for the Protection of Civilian Persons in Time of War*, 1958, 660 pp. [See Commentaries online: <http://www.icrc.org/ihl>]. SANDOZ Yves, “Le demi-siècle des Conventions de Genève”, in *IRRC*, No. 834, 1999, pp. 246-263. SOLIS Gary & BORCH Fred, *Geneva Conventions*, New York, Kaplan, 2010, 316 pp.

⁷⁸ See Vienna Convention on the Law of Treaties, Art. 60(5) (See *infra*, Part I, Chapter 13. IX. 2. c) applicability of the general rules on State responsibility, also for the distinct question of the prohibition of reprisals)

3. The Two Additional Protocols of 1977 and the Third Additional Protocol of 2005

⇒ Documents Nos 6-8, The First, Second and Third Protocols Additional to the Geneva Conventions

SUGGESTED READING: BOTHE Michael, PARTSCH Karl J. & SOLF Waldemar A., with the collaboration of EATON Martin, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, M. Nijhoff, 1982, 746 pp. KOSIRNIK René, “The 1977 Protocols: a Landmark in the Development of International Humanitarian Law”, in *IRRC*, No. 320, September–October 1997, pp. 483-505. LEVIE Howard S., *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, New York, Oceana Publications, 2 Vol., 1979-1981. LEVIE Howard S. (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Dordrecht, M. Nijhoff, 1987, 635 pp. PERNA Laura, *The Formation of the Treaty Law of Non-International Armed Conflicts*, Leiden, M. Nijhoff, 2006, 168 pp. PULLES Gerrit Jan, “Crystallising an Emblem: on the Adoption of the Third Additional Protocol to the Geneva Conventions”, in *YIHL*, Vol. 8 (2005), 2007, pp. 296-319. QUEGUINER Jean-François, “Introductory Note to the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)”, in *International Legal Materials*, Vol. 45, No. 3, May 2006, pp. 555-561. QUEGUINER Jean-François, “Commentary on the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Adoption of an Additional Distinctive Emblem (Protocol III)”, in *IRRC*, Vol. 89, No. 865, March 2007, pp. 175-207. SANDOZ Yves, SWINARSKI Christophe & ZIMMERMANN Bruno (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht, ICRC, M. Nijhoff, 1987, 1625 pp. [See Commentaries online: <http://www.icrc.org/ihl>]. JUNOD Sylvie S., “Additional Protocol II: History and Scope”, in *American University Law Review*, Vol. 33/1, 1983, pp. 29-40.

FURTHER READING: DINSTEIN Yoram, “Comments on Protocol I”, in *IRRC*, No. 320, September–October 1997, pp. 515-519. ROBERTS Guy B., “The New Rules for Waging War: The Case Against Ratification of Additional Protocol I”, in *Virginia Journal of International Law*, Vol. 26, 1985, pp. 109-170. SOFAER Abraham D., “Agora: The US Decision not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims, The Rationale for the United States Decision”, in *AJIL*, Vol. 82, 1988, pp. 784-787.

II. CUSTOMARY LAW

Introductory text

Those who uphold the traditional theory of customary law and consider that it stems from the actual behaviour of States in conformity with an alleged norm face particular difficulties in the field of IHL. First, for most rules this approach would limit practice to that of belligerents, i.e., a few subjects whose practice it is difficult to qualify as “general” and even more as “accepted as law”.^[79] Second, the actual practice of belligerents

⁷⁹ This is however the definition of custom in Art. 38(1)(b) of the Statute of the International Court of Justice.

is difficult to identify, particularly as it often consists of omissions. There are also additional difficulties, e.g., war propaganda manipulates truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate. Finally, States are responsible for the behaviour of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such behaviour is also State practice constitutive of customary law. It is therefore particularly difficult to determine which acts of soldiers count as State practice.

Other factors must therefore also be considered when assessing whether a rule is part of customary law: whether qualified as practice *lato sensu* or as evidence for *opinio juris*, statements of belligerents, including accusations against the enemy of violations of IHL and justifications for their own behaviour, should also be taken into account.

To identify “general” practice, statements of third States on the behaviour of belligerents and abstract statements on an alleged norm in diplomatic forums also have to be considered. Military manuals are even more important, because they contain instructions by States restraining their soldiers’ actions, which are somehow “statements against interest”. Too few States – and generally only Western States – have sophisticated manuals the contents of which are open to public consultation as evidence for “general” practice in the contemporary international community. Moreover, some of those manuals are said to reflect policy rather than law.^[80]

For all these reasons, particular consideration has to be given in the field of IHL to treaties as a source of customary international law – in particular to the general multilateral conventions codifying the law and the process leading to their preparation and acceptance. Taking an overall view of all practice, it may, for example, be found that a rule set out in the two 1977 Additional Protocols corresponds today to customary law binding on all States and belligerents, either because it codifies (*stricto sensu*) previously existing general international law,^[81] because it translates a previously existing practice into a rule, because it combines, interprets or specifies existing principles or rules,^[82] because it concludes the development of a rule of customary international law or because it was a catalyst for the creation of a rule of customary IHL through subsequent practice and multiple consent of States to be bound by the treaty. It is therefore generally agreed today that most, but clearly not all, of the rules set out in the Additional Protocols formulate parallel rules of customary international law. Whether such customary rules necessarily also apply in non-international armed conflicts is in our view another issue, one which must be decided on the basis of the practice and *opinio juris* of States (and, some would add, armed groups) in non-international armed conflicts. Even persistent objectors cannot escape from their obligations under *jus cogens*, i.e. from most obligations under IHL.

Although IHL is widely codified in broadly accepted multilateral conventions, customary rules remain important to protect victims on issues not covered by the treaties, when non-parties to a treaty (or even entities which cannot become

80 See Case No. 43, ICRC, Customary International Humanitarian Law [Part D.], on the US response to the ICRC Study.

81 See, e.g., P I, Art. 48

82 See, e.g., P I, Art. 57(2)(a)(iii)

parties because they are not universally recognized) are involved in a conflict, where reservations have been made to the treaty rules, because international criminal tribunals prefer – rightly or wrongly – to apply customary rules, and because in some legal systems only customary rules are directly applicable in domestic law.

The ICRC's comprehensive study^[83] has found, after ten years of research on "State practice" (mostly in the form of "official practice", i.e. declarations rather than actual behaviour), 161 rules of customary International Humanitarian Law. It considers that 136 (and arguably even 141) of those rules, many of which are based on rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts. The study in particular leads to the conclusion that most of the rules on the conduct of hostilities – initially designed to apply solely to international armed conflicts – are also applicable as customary rules in non-international conflicts, thus considerably expanding the law applicable in those situations.

Given the time-consuming nature and other difficulties of treaty-making in an international society with some 200 members and the rapidly evolving needs of war victims for protection against new technological and other inhumane phenomena, the importance of custom – redefined or not – may even increase in this field in the future.

Custom, however, also has very serious disadvantages as a source of IHL. It is very difficult to base uniform application of the law, military instruction and the repression of breaches on custom, which by definition is in constant evolution, is difficult to formulate and is always subject to controversy. The codification of IHL began 150 years ago precisely because the international community found the actual practice of belligerents unacceptable, and custom is – despite all modern theories – also based on the actual practice of belligerents.

Quotation 1 Perhaps it is time to face squarely the fact that the orthodox tests of custom – practice and *opinio juris* – are often not only inadequate but even irrelevant for the identification of much new law today. And the reason is not far to seek: much of this new law is not custom at all, and does not even resemble custom. It is recent, it is innovatory, it involves topical policy decisions, and it is often the focus of contention. Anything less like custom in the ordinary meaning of that term it would be difficult to imagine. [...]

[Source: JENNINGS Robert Y., "What Is International Law and How Do We Tell It When We See It?," in *Annuaire suisse de droit international*, Vol. 37, 1981, p. 67]

Quotation 2 PRESCRIPTION. [T]he method of explicit agreement, particularly in the field of management of combat, has never been able to achieve much more in formulation than a general restatement of pre-existing consensus about relatively minor problems. Negotiators, seated about a conference table contemplating future wars and aware of the fluid nature of military technology and technique, imagine too many horrible contingencies, fantastic or realistic, about the security of their respective countries to permit much commitment.

Much more effective than explicit agreement in the prescription of the law of war has been the less easily observed, slow, customary shaping and development of general consensus or community expectation. Decision-makers confronted with difficult problems, frequently presented to them in terms of principles as vague and abstract as “the laws of humanity and the dictates of the public conscience” and in terms of concepts and rules admitting of multiple interpretations, quite naturally have had recourse both to the experience of prior decision-makers and to community expectation about required or desired future practice and decision. [...]

[Source: McDOUGAL Myres S. & FELICIANO Florentino P., *Law And Minimum World Public Order: The Legal Regulation of International Coercion*, New Haven and London, Yale University Press, 1961, p.50; footnotes omitted.]

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- ⇒ **Case No. 43, ICRC, Customary International Humanitarian Law**
 - ⇒ Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Paras 66, 82]
 - ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee**
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Para. 3(ii)]
 - ⇒ Document No. 122, ICRC Appeals on the Near East
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 132, Israel, Cases Concerning Deportation Orders [Paras 4 to 7]
 - ⇒ Case No. 153, ICJ, Nicaragua v. United States [Para. 186]
 - ⇒ **Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 156-165]**
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ **Case No. 168, South Africa, S. v. Petane**
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 99]**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic *et al.* [Paras 527-534 and 540]**
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 6-10]
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SUGGESTED READING: BOTHE Michael, “Customary International Humanitarian Law: Some Reflections on the ICRC Study”, in *YIHL*, Vol. 8 (2005), 2007, pp. 143-178. BUGNION François, “Customary International Humanitarian Law”, in *African Yearbook on International Humanitarian Law 2008, 2007*, pp. 59-99. DINSTEIN Yoram, “The ICRC Customary International Humanitarian Law Study”, in *IYHR*, Vol. 36, 2006, pp. 1-15. GREENWOOD Christopher, “Customary Law Status of the 1977 Additional Protocols”, in DELISSEN Astrid J.-M. & TANJA Gerard J. (eds), *Humanitarian Law of Armed Conflicts, Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 119-126. HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge/Geneva, CUP/ICRC, 2005, 3 Vol., 5032 pp. HENCKAERTS Jean-Marie, “Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology”, in *IRRC*, No. 835, September 1999, pp. 660-668. HENCKAERTS Jean-Marie, “International Humanitarian Law as Customary International Law”, in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 186-193. HENCKAERTS Jean-Marie, “Importance actuelle du droit coutumier”, in TAVERNIER Paul & BURGORGUE-LARSEN Laurence, *Un siècle de droit international humanitaire*, Bruxelles, Bruylant, 2001, pp. 21-28. HENCKAERTS Jean-Marie, “Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict”, in *IRRC*, No. 857, March 2005, pp. 175-212. HENCKAERTS Jean-Marie,

“The Importance of Customary International Humanitarian Law Today”, in *Humanitäres Völkerrecht: Informationsschriften*, Vol. 22, 3/2009, 2009, pp. 125-130. LAUCCI Cyril, “Customary International Humanitarian Law Study: Fundamental Guarantees”, in *Slovenian Law Review*, Vol. 6, No. 1-2, December 2009, pp. 191-204. KÄLIN Walter, “The ICRC’s Compilation of the Customary Rules of Humanitarian Law”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 417-428. MERON Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, 263 pp. MERON Theodor, “The Continuing Role of Custom in the Formation of International Humanitarian Law”, in *AJIL*, Vol. 90/2, 1996, pp. 238-249. SASSÒLI Marco, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Basel, Frankfurt am Main, Helbing & Lichtenhahn, 1990, 590 pp. TAVERNIER Paul & HENCKAERTS Jean-Marie (Dir.), *Droit international humanitaire coutumier : enjeux et défis contemporains*, Brussels, Bruylant, 2008, 289 pp. VALE MAJERUS Isabel, *De quel droit ? Le droit international humanitaire et les dommages collatéraux*, Paris, Le Serpent à Plumes, 2002, 229 pp. WILMSHURST Elizabeth & BREAU Susan (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, CUP, 2007, 433 pp.

FURTHER READING: ALDRICH George H., “Customary International Humanitarian Law: an Interpretation on Behalf of the International Committee of the Red Cross”, in *BYIHL*, 76, 2006, pp. 503-532. BELLINGER John & HAYNES William J., “A US Government Response to the International Committee of the Red Cross Study on Customary International Humanitarian Law”, in *IRRC*, Vol. 89, No. 866, June 2007, pp. 443-471. BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 158 pp. BRUDERLEIN Claude, “Customs in International Humanitarian Law”, in *IRRC*, No. 285, November-December 1991, pp. 579-595. CASSESE Antonio, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts”, in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318. CRAWFORD Emily, “Blurring the Lines Between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15, 2008, pp. 29-54. FLECK Dieter, “International Accountability for Violations of the *Ius in Bello*: the Impact of the ICRC Study on Customary International Humanitarian Law”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 179-199. HENCKAERTS Jean-Marie, “The ICRC Customary International Humanitarian Law Study: a Rejoinder to Professor Dinstein”, in *IYHR*, Vol. 37, 2007, pp. 259-270. HENSEL Howard M. (ed.), *The Legitimate Use of Military Force: the Just War Tradition and the Customary Law of Armed Conflict*, Hampshire, Ashgate, 2008, 300 pp. HOFFMANN Michael H., “State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats”, in *IYHR*, Vol. 34, 2004, pp. 231-249. KRIEGER Heike, “A Conflict of Norms: the Relationship between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, pp. 265-291. ROWE Peter, “The Effect on National Law of the Customary International Humanitarian Law Study”, in *Journal of Conflict and Security Law*, Vol. 11, No. 2, 2006, pp. 165-177. TURNS David, “Weapons in the ICRC Study on Customary International Law”, in *Journal of Conflict & Security Law*, Vol. 11, No. 2, 2006, pp. 201-237.

1. Sources of customary International Humanitarian Law

2. International Humanitarian Law treaties and customary International Humanitarian Law

Quotation For the contention that a treaty becomes binding upon all nations when a great majority of the world has expressly accepted it would suggest that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe. The untenability of that view is quite clear in the case of treaties establishing the basic law of an international organization or laying down detailed rules concerning such matters as copyrights or customs duties or international commercial arbitration [...] Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States. The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague. These observations, however, are directed to a distinction which might be made but which is not yet reflected in State practice or in other sources of the positive law.

[Source: BAXTER Richard R., "Multilateral Treaties as Evidence of Customary International Law", in *The British Year Book of International Law*, 1965-66, pp. 285-286]

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- ⇒ **Case No. 76, Sweden, Report of the Swedish International Humanitarian Law Committee [Part 3.2.2]**
 - ⇒ **Document No. 97, United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb *et al.***
 - ⇒ Document No. 122, ICRC Appeals on the Near East
 - ⇒ Case No. 127, Israel, Ayub v. Minister of Defence
 - ⇒ Case No. 132, Israel, Cases Concerning Deportation Orders, [Paras 4-7]
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 174-178, 181, 185 and 218]**
 - ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 29-32, 56-62]
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ **Case No. 168, South Africa, S. v. Petane**
 - ⇒ Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 177]
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part A., para. 2]
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar [Part A.]
 - ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Paras 608-610]
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SUGGESTED READING: CASSESE Antonio, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", in *UCLA Pacific Basin Law Journal*, Vol. 3/1-2, 1984, pp. 55-118. GREENWOOD Christopher, "Customary Law Status of the 1977 Geneva Protocols", in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 93-114. MERON Theodor, "The Geneva Conventions as Customary Law", in *AJIL*, Vol. 81/2, 1987, pp. 348-370.

FURTHER READING: ABI-SAAD Georges, “The 1977 Additional Protocols and General International Law: Preliminary Reflexions”, in *Humanitarian Law of Armed Conflict Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, M. Nijhoff, 1991, pp. 115-126. KASTO Jalil, “*Jus Cogens* and Humanitarian Law”, in *International Law Series*, Vol. 2, Kingston, Kall Kwik, 1994, 95 pp.

III. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

Introductory text

“General principles of law recognized by civilized nations”^[84] may first be understood as those principles of domestic law which are common to all legal orders. Given the large number of States and the great variety of their legal systems, only very few such principles can be formulated precisely enough to be operational. Such principles, e.g., good faith and proportionality, which have also become customary law and have been codified, nevertheless also apply in armed conflicts and can be useful in supplementing and implementing IHL.

Other principles may be seen as intrinsic to the idea of law and based on logic rather than a legal rule. Thus if it is prohibited to attack civilians, it is not law but logic which prescribes that an attack directed at a military objective has to be stopped when it becomes apparent that the target is (exclusively) civilian.^[85]

Even more important for IHL than the foregoing are *its* general principles, e.g., the principle of **distinction** (between civilians and combatants, civilian objects and military objectives), the principle of **necessity**,^[86] and the **prohibition on causing unnecessary suffering**. These principles, however, are not based on a separate source of international law, but on treaties, custom and general principles of law. On the one hand, they can and must often be derived from the existing rules, expressing the rules’ substance and meaning. On the other, they inspire existing rules, support them, make them understandable, and have to be taken into account when interpreting them.

Express recognition of the existence and particularly important examples of the general principles of IHL are the “elementary considerations of humanity”^[87] and the so-called “Martens clause”, which prescribes that in cases not covered by treaties (and traditional customary international law) “civilians and combatants remain under the protection and authority of the principles of international law derived from established

84 Referred to in Art. 38(1)(c) of the Statute of the International Court of Justice as one of the sources of international law.

85 This has now been codified in P I, Art. 57(2)(b)

86 As a limit to military action, codified, e.g., in P I, Art. 57(3)

87 First recognized in the Nuremberg Judgement over the major Nazi war criminals (See The Trial of German Major War Criminals, Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany, HMSO, London, 1950, Part 22, p. 450); the International Court of Justice has invoked those considerations first in the *Corfu Channel Case Judgment of April 9th 1949*, ICJ Reports, 1949, p. 22.

custom, from the principles of humanity and from the dictates of public conscience”.^[88] It is recognized that this clause itself is part of customary international law. It is very important that both clauses underline that not everything that is not prohibited is lawful in war and that answers to questions relating to the protection of war victims cannot be found exclusively through a purely positivist approach; it is, however, not easy to find precise answers to real problems arising on the battlefield through these clauses. In a world with extremely varied cultural and religious traditions, in which people have diverging interests and different historical perspectives, those clauses can generally no more than indicate in which direction to look for a solution.

Quotation The International Conventions contain a multitude of rules which specify the obligations of states in very precise terms, but this is not the whole story. Behind these rules are a number of principles which inspire the entire substance of the documents. Sometimes we find them expressly stated in the Conventions, some of them are clearly implied and some derive from customary law.

We are acquainted with the famous Martens clause in the preamble to the Hague Regulations, referring to the “principles of the law of nations, as they result from usages established among civilized peoples”. A number of articles in the Geneva Conventions of 1949 also refer to such principles, which are as vitally important in humanitarian law as they are in all other legal domains. They serve in a sense as the bone structure in a living body, providing guidelines in unforeseen cases and constituting a complete summary of the whole, easy to understand and indispensable for the purposes of dissemination.

In the legal sector now under consideration, the minimum principles of humanitarian law are valid at all times, in all places and under all circumstances, applying even to states which may not be parties to the Conventions, because they express the usage of peoples, [...].

The principles do not in any sense take the place of the rules set forth in the Conventions. It is to these rules that jurists must refer when the detailed application of the Conventions has to be considered.

Unfortunately we live in a time when formalism and logorrhea flourish in international conferences, for diplomats have discovered the advantages they can derive from long-winded, complex and obscure texts, in much the same way as military commanders employ smoke screens on battlefields. It is a facile way of concealing the basic problems and creates a danger that the letter will prevail over the spirit. It is therefore more necessary than ever, in this smog of verbosity, to use simple, clear and concise language.

In 1966, the principles of humanitarian law were formulated for the first time based in particular on the Geneva Conventions of 1949. [...]

[Source: PICTET Jean S., *Development and Principles of International Humanitarian Law*, Geneva, M. Nijhoff, 1985, pp. 59-60; footnotes omitted.]

⇒ Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [Preamble, para. 10]

88 This clause was first introduced based on a compromise proposal by the Russian delegate at the 1899 Hague Peace Conference into the preamble of Hague Convention No. II of 1899 and appears now in the preambles of Hague Convention No. IV of 1907 and of the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons and in GC I-IV, Arts 63/62/142/158 respectively (concerning the consequences of a denunciation) and in P I, Art. 1(2). P II, Preamble, para. 4 contains similar wording.

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- ⇒ **Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 78]**
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 215, 218 and Separate Opinion Judge Ago, para. 6]**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 525-527]**
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1. The Martens Clause

GC IV, Arts 63/62/142/158 respectively

PI, Art. 1(2)

PII, Preamble, para. 4

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- ⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part B., paras 84 and 85]
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Para. 218]**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 525-526]**
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 22]**
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in *IRRC*, No. 317, March-April 1997, pp. 125-134. VEUTHEY Michel, “Public Conscience in International Humanitarian Law Today”, in FISCHER Horst, FROISSART Ulrike, HEINTSCHEL VON HEINEGG Wolff & RAAP Christian (eds), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 611-642.

2. Principles of International Humanitarian Law

a) humanity

⇒ Case No. 153, ICJ, *Nicaragua v. United States* [Para. 242]

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b) necessity

aa) historically: a general circumstance precluding unlawfulness

bb) today:

- an exception, justifying conduct contrary to an IHL rule: only where explicitly provided for in that rule
- a restrictive principle:
 - behind many rules
 - directly applicable to battlefield behaviour?

SUGGESTED READING: DRAPER Gerald I.A.D., “Military Necessity and Humanitarian Imperatives”, in *RDMDG*, Vol. 12/2, 1973, pp. 129-151. DUNBAR N.C.H., “The Significance of Military Necessity in the Law of War”, in *Juridical Review*, Vol. 67/2, 1955, pp. 201-212. GARDHAM Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, CUP, 2004, 259 pp. O'BRIEN William V., *Military Necessity: The Development of the Concept of Military Necessity and its Interpretation in the Modern Law of War*, Georgetown University, Thesis, 1953, 318 pp. RAUCH Elmar, “Le concept de nécessité militaire dans le droit de la guerre”, in *RDMDG*, Vol. 18, 1980, pp. 205-237. SCHMITT Michael N., “Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance”, in *Virginia Journal of International Law*, Vol. 50, No. 4, 2010, pp. 795-839.

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c) proportionality

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part B., paras 36-85]
 - ⇒ Case No. 124, Israel, Operation Cast Lead [Part I, paras 120-126; Part II, paras 230-232]
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 40-46]
 - ⇒ Case No. 257, Afghanistan, Goatherd Saved from Attack
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 28-30, 41-47]
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(See also *infra*, Part I, Chapter 9, II. 6. c) dd) principle of proportionality)

d) distinction

(See *infra*, Part I, Chapter 5, The Fundamental Distinction between Civilians and Combatants)

e) prohibition on causing unnecessary suffering

(See *infra*, Part I, Chapter 9, III. 1. The basic rule: Article 35 of Protocol I)

f) independence of *jus in bello* from *jus ad bellum*

(See *supra*, Part I, Chapter 2, II. Fundamental Distinction between *Jus ad bellum* (Legality of the Use of Force) and *Jus in bello* (Humanitarian Rules to be Respected in Warfare))

Chapter 5

The Fundamental Distinction Between Civilians and Combatants

Introductory text

The basic axiom underlying International Humanitarian Law (IHL), i.e. that even in an armed conflict the only acceptable action is to weaken the military potential of the enemy, implies that IHL has to define who that potential is deemed to comprise and who, therefore, may be attacked and participate directly in the hostilities, but may not be punished for such participation under ordinary domestic law. Under the principle of distinction, all involved in the armed conflict must distinguish between the persons thus defined (the combatants) and civilians. Combatants must distinguish themselves (i.e., allow their enemies to identify them) from all other persons (civilians), who may not be attacked nor directly participate in the hostilities.

The dividing line between the two categories has developed over time, reflecting the conflicting interests between, on the one hand, powerful, well-equipped States that wanted a strict definition of clearly identified combatants, and, on the other, weaker States that wanted to retain the option to use additional human resources flexibly and thereby continue the hostilities even when their territory was under enemy control, which is practically impossible if combatants have to identify themselves permanently. The IHL of non-international armed conflicts does not even refer explicitly to the concept of combatants, mainly because States do not want to confer on anyone the right to fight government forces. Nevertheless, in such conflicts as well, a distinction must exist if IHL is to be respected: civilians can and will only be respected if government soldiers and rebel fighters can expect those looking like civilians not to attack them.

Today, the axiom itself is challenged by reality on the ground, in particular by the increasing “civilianization of armed conflicts”. If everyone who is not a (lawful) combatant is a civilian, in many asymmetric conflicts the enemy consists exclusively of civilians. Even if, in non-international armed conflicts, members of an armed group with a fighting function are not to be considered as civilians,^[89] it is in practice very

difficult to distinguish them from the civilian population. Furthermore, private military and security companies, whose members are usually not combatants, are increasingly present in conflict areas. On all these issues of “civilianization”, the concept of direct participation in hostilities is crucial, because civilians lose their protection against attacks while they so participate and may therefore be treated in this respect like combatants. The ICRC has tried to clarify this concept,^[90] but its findings have sparked controversy.

“Civilianization” is not the only phenomenon challenging the principle of distinction. If the aim of the conflict is “ethnic cleansing”, the parties will logically and of necessity attack civilians and not combatants. If some fighters’ aim is no longer to achieve victory, but rather to earn a living – by looting or controlling certain economic sectors – they will logically attack defenceless civilians instead of combatants. Finally, if the aim of a party is to change the enemy country’s regime without defeating its army or occupying its territory, it may be tempted to pressure the enemy civilian population into overthrowing its own government. If the pressure takes the form of attacks or starvation tactics, it constitutes a violation of IHL. In any event, the effectiveness of such methods is doubtful. Indeed, experience shows that, when confronted with such constraints, the population tends to support its government rather than foment rebellion.

SUGGESTED READING: WATKIN Kenneth, “The Notion of Combatant, Armed Group, Civilians and Civilian Population in International Armed Conflicts”, in BERUTO Gian Luca (ed.), *The Conduct of Hostilities: Revisiting the Law of Armed Conflict: 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007: Proceedings*, Milano, Nagard, 2008, pp. 59-69.

FURTHER READING: WARD Christopher, “Distinction: the Application of the Additional Protocols in the Theatre of War”, in *Asia-Pacific Yearbook of International Humanitarian Law*, Vol. 2 (2006), 2007, pp. 36-45.

DEFINITION AND CHARACTERISTICS OF CIVILIANS AND COMBATANTS

CIVILIANS

= all persons other than combatants

COMBATANTS

= members of armed forces *lato sensu*

(for a definition, see *infra*, Part I, Chapter 6. I. Who is a combatant?)

I. ACTIVITIES

Do not take a direct part in hostilities

Take a direct part in hostilities

II. RIGHTS

Do not have the right to take a direct part
in hostilities
(but have the right to be respected)

Have the right to take a direct part in
hostilities
(but have the obligation to observe IHL)

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- ⇒ **Case No. 99, United States, *Ex Parte Quirin et al.***
 - ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
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III. PUNISHABLE

May be punished
for their mere participation in hostilities

May not be punished
for their mere participation in hostilities

*(See infra Part I, Chapter 6, III. Treatment of prisoners
of war)*

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ **Case No. 99, United States, *Ex Parte Quirin et al.***
 - ⇒ **Case No. 120, Nigeria, Pius Nwaoga v. The State**
 - ⇒ Case No. 168, South Africa, *S. v. Petane*
 - ⇒ Case No. 265, United States, Military Commissions
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IV. PROTECTION

Are protected because they do not participate:

- as civilians in the hands of the enemy
(See infra Part I, Chapter 8, II. Protection of civilians against arbitrary treatment and IV. Special rules on occupied territories)
- against attacks and effects of hostilities
(See infra, Part I, Chapter 9, II. The protection of the civilian population against the effects of hostilities)

Are protected when they no longer participate:

- if they have fallen into the power of the enemy
(See infra Part I, Chapter 6, III. Treatment of prisoners of war)
- if wounded, sick or shipwrecked
(See infra Part I, Chapter 7, Protection of the wounded, sick and shipwrecked)
- if parachuting out of an aircraft in distress
(See P I, Art. 42)
- are protected against some means and methods of warfare even while fighting
(See infra Part I, Chapter 9, III. Means and methods of warfare)

Relativity of the difference: everyone in enemy hands is protected.

⇒ **Case No. 117, United States, United States v. William L. Calley, Jr.**

SUGGESTED READING: MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp.
PRIMORATZ Igor, *Civilian Immunity in War*, Oxford, OUP, 2007, 263 pp.

V. FULL COMPLEMENTARITY

Is everyone who is not a combatant a civilian (or is there an intermediate category of “unlawful combatant”)?

- in the conduct of hostilities?
- in enemy hands?

⇒ Case No. 49, ICRC, *The Challenges of Contemporary Armed Conflicts* [Part B.]
 ⇒ **Document No. 51, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities**
 ⇒ Case No. 109, ECHR, *Korbely v. Hungary*
 ⇒ Case No. 136, Israel, *The Targeted Killings Case*

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- ⇒ Case No. 138, Israel, Detention of Unlawful Combatants [Part A., paras 11-17; Part B.]
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 267, United States, The Obama Administration's Internment Standards
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VI. THE FUNDAMENTAL OBLIGATION OF COMBATANTS TO DISTINGUISH THEMSELVES FROM THE CIVILIAN POPULATION

P I, Art. 44(3) [CIHL, Rule 106]

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- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 8]
 - ⇒ **Case No. 114, Malaysia, Osman v. Prosecutor**
 - ⇒ **Case No. 120, Nigeria, Pius Nwaoga v. The State**
 - ⇒ Document No. 122, ICRC Appeals on the Near East [Part B.]
 - ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Art. 63]
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 132-138]
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SUGGESTED READING: FERRELL William H., “No Shirt, No Shoes, No Status: Uniforms, Distinction and Special Operations in International Armed Conflict”, in *Military Law Review*, Vol. 178, Winter 2003, pp. 94-140, online: <http://www.fas.org/man/eprint/ferrell.pdf>. PFANNER Toni, “Military Uniforms and the Law of War”, in *IRRC*, No. 853, March 2004, pp. 93-130.

VII. RELATIVITY OF THE DISTINCTION IN MODERN CONFLICTS

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
 - ⇒ **Document No. 51, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities**
 - ⇒ Case No. 109, ECHR, Korbely v. Hungary
 - ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
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SUGGESTED READING: DINSTEIN Yoram, “Distinction and Loss of Civilian Protection in International Armed Conflicts”, *IYHR*, Vol. 38, 2008, pp. 1-16. PETERS Ralph, “The New Warriors Class”, in *Parameters*, Summer 1994, pp. 16-26. SCHMITT Michael N., “The Impact of High and Low-Tech Warfare on the

Principle of Distinction”, in ARNOLD Roberta & HILDBRAND Pierre-Antoine (eds), *International Humanitarian Law and the 21st Century’s Conflicts*, Lausanne, Edis, 2005, pp. 169-189. WENGER Andreas & MASON Simon J. A., “The Civilianization of Armed Conflict: Trends and Implications”, in *IRRC*, Vol. 90, No. 872, December 2008, pp. 835-852.

FURTHER READING: BELT Stuart Walters, “Missiles over Kosovo: Emergence, *Lex Lata*, of a Customary Norm Requiring the Use of Precision Munitions in Urban Areas”, in *Naval Law Review*, Vol. 47, 2000, pp. 115-175. BLANK Laurie & GUIORA Amos, “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare”, in *Harvard National Security Journal*, Vol. 1, 2010, 44 pp. BROWN Kenneth B., “Counter-Guerrilla Operations: Does the Law of War Proscribe Success?”, in *Naval Law Review*, Vol. 44, 1997, pp. 123-173. DAVID Eric, “Respect for the Principle of Distinction in the Kosovo War”, in *YIHL*, Vol. 3, 2000, pp. 81-107. GILADI Rotem, ““Undercover” Operations and IHL Advocacy in the Occupied Palestinian Territories”, in *Journal of Conflict and Security Law*, Vol. 14, No. 3, 2009, pp. 393-439. GROSS Michael L., “Asymmetric War, Symmetrical Intentions: Killing Civilians in Modern Armed Conflict”, in *Global Crime*, Vol. 10, No. 4, November 2009, pp. 320-336. KLEFFNER Jann K., “From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities: on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 315-336. PLAW Avery, “Upholding the Principle of Distinction in Counter-Terrorist Operations: a Dialogue”, in *Journal of Military Ethics*, Vol. 9, No. 1, 2010, pp. 3-22. VEUTHEY Michel, *Guérilla et droit humanitaire*, Geneva, ICRC, 1983, 451 pp.

1. Guerrilla warfare

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- ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 35]
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2. Wars of extermination

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- ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part G.II.2]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region, [Parts I. A. and III. C.]
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3. Situations where structures of authority have disintegrated

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- ⇒ **Case No. 45, ICRC, Disintegration of State Structures**
 - ⇒ **Document No. 52, First Periodical Meeting, Chairman’s Report [Part II.2]**
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. A. and C.]
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea, [Parts 1 and 2]
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SUGGESTED READING: CAIN Kenneth L., “The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant”, in *Human Rights Quarterly*, Vol. 21/2, 1999, pp. 265-307. THUERER Daniel, “The ‘Failed State’ and International Law”, in *IRRC*, No. 836, December 1999, pp. 731-761. THUERER Daniel, “Der Wegfall effektiver Staatsgewalt: Der ‘failed State’”, *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34, 1995, pp. 9-47.

4. Conflicts aimed at overthrowing a regime or a government

5. Terrorism, the “war on terror”, and in particular the status of “unlawful combatants”

i.e. persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status

[See also Part I, Chapter 2, III. 1. e) The global war on terror?]

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- ⇒ **Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]**
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 24-40]
 - ⇒ **Case No. 138, Israel, Detention of Unlawful Combatants**
 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 - ⇒ Case No. 265, United States, Military Commissions
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SUGGESTED READING: BORELLI Silvia, “Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the ‘War on Terror’”, in *IRRC*, No. 857, March 2005, pp. 39-68. BORELLI Silvia, “The Treatment of Terrorist Suspects Captured Abroad: Human Rights and Humanitarian Law”, in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 39-61. BYERS Michael, “Terrorism, the Use of Force and International Law after 11 September”, in *ICLQ*, Vol. 51/2, 2002, pp. 401-414. CASSESE Antonio, “Terrorism is also Disrupting Crucial Legal Categories of International Law”, in *EJIL*, Vol. 12-5, 2001, pp. 993-1001. CONDORELLI Luigi & NAQVI Yasmin, “The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?”, in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 25-37. CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp. DÖRMANN Knut, “The Legal Situation of ‘Unlawful/Unprivileged Combatants’”, in *IRRC*, No. 849, March 2003, pp. 45-74. FERNANDO-SANCHEZ Pablo Antonio (ed.), *International Legal Dimension of Terrorism* (See in particular Part IV, “Terrorism and Armed Conflicts”), Leiden, M. Nijhoff, 2009, 512 pp. FINAUD Marc, “L’abus de la notion de “combattant illégal” : une atteinte au droit international humanitaire”, in *RGDIP*, Tome 110, No. 4, 2006, pp. 861-890. GASSER Hans-Peter, “International Humanitarian Law, the Prohibition of Terrorist Acts and the Fight against Terrorism”, in *YIHL*, Vol. 4, 2004, pp. 329-347. GREENWOOD Christopher, “International Law and the ‘War against Terrorism’”, in *International Affairs*, Vol. 78/2, 2002, pp. 301-317. KING Faiza Patel & SWAAK-GOLDMAN Olivia, “The Applicability of International Humanitarian Law to the ‘War on Terrorism’”, in *Hague Yearbook of International Law*, 2003, Vol. 15, 2002, pp. 39-49. MCDONALD Neil & SULLIVAN Scott, “Rational Interpretation in Irrational Times: The Third Geneva Convention and War on Terror”, in *Harvard International Law Journal*, Vol. 44/1, 2003, pp. 301-316. LIETZAU William, “Combating Terrorism: The Consequences of Moving from Law Enforcement to War”, in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New*

Laws? Applying the Laws of War in 21st Century Conflicts, New York, Transnational Publishers, 2005, pp. 31-51. NEUMAN Gerald L., "Humanitarian Law and Counterterrorist Force", in *EJIL*, Vol. 14/2, April 2003, pp. 283-298. PAUST Jordan J., "War and Enemy Status After 9/11: Attacks on the Laws of War", in *The Yale Journal of International Law*, Vol. 28, 2003, pp. 325-335. PEJIC Jelena, "'Unlawful/Enemy Combatants:' Interpretations and Consequences", in SCHMITT Michael & PEJIC Jelena (eds), *International Law and Armed Conflict: Exploring the Faultlines, Essays in Honour of Yoram Dinstein*, M. Nijhoff, Leiden/Boston, 2007, pp. 335-357. PFANNER Toni, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", in *IRRC*, No. 857, March 2005, pp. 149-174. PLAW Avery, *Targeting Terrorists: A License to Kill?*, Aldershot, Ashgate, 2008, 294 pp. RATNER Steven R., "Predator and Prey: Seizing and Killing Suspected Terrorists Abroad", in *Journal of Political Philosophy*, September 2007, Vol. 15, Issue 3, pp. 251-275. ROBERTS Adam, "The Laws of War in the War on Terror", in *IYHR*, Vol. 32, 2002, pp. 193-245. SASSÒLI Marco, "La définition du terrorisme et le droit international humanitaire", in *Revue québécoise de droit international*, Vol. 19, hors-série, 2007, pp. 29-48. SASSÒLI Marco, "La 'guerre contre le terrorisme', le droit international humanitaire et le statut de prisonnier de guerre", in *CYIL*, Vol. 39, 2001, pp. 211-252. SASSÒLI Marco, "Terrorism and War", in *Journal of International Criminal Justice*, Vol. 4, Issue 5, 2006, pp. 969-981. SASSÒLI Marco, "Query: Is There a Status of 'Unlawful Combatant'?", in JACQUES Richard B. (ed.), "Issues in International Law and Military Operations", in *International Law Studies*, Vol. 80, 2006, pp. 57-69. SPEROTTO Federico, "Targeted Killings in response to Security Threats: Warfare and Humanitarian Issues", in *Global Jurist*, Vol. 8, Issue 3, 2008, pp. 1-32. TIGROUDJA Hélène, "Quel(s) droit(s) applicable(s) à la 'guerre au terrorisme'?", in *AFDI*, Vol. 48, 2002, pp. 81-102. VEUTHEY Michel, "Le droit international humanitaire face à la guerre contre le terrorisme", in DOUCET Ghislaine (ed.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Calmann-Lévy, 2003, pp. 516-529. WATKIN Kenneth, "Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict", in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 137-179. YOO John C. & HO James C., "The Status of Terrorists", in *Virginia Journal of International Law*, Vol. 44, Fall 2003, pp. 207-228.

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a) In the conduct of hostilities

Can they be attacked until they are “*hors de combat*” (like combatants) or only while they directly participate in hostilities (like civilians)?

⇒ **Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities**

b) Once in enemy hands

Are they protected civilians or can they be detained like combatants without any individual decision, but not benefit from POW status?

⇒ **Case No. 138, Israel, Detention of Unlawful Combatants**
 ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 ⇒ Case No. 265, United States, Military Commissions
 ⇒ Case No. 266, United States, Habeas Corpus for Guantanamo Detainees
 ⇒ Case No. 267, United States, The Obama Administration's Internment Standards
 ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities
 ⇒ Case No. 289, United States, Public curiosity

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6. “Civilianization” of armed conflicts

a) growing involvement of private military and security companies

Introductory text

A growing number of States (and sometimes international organizations, NGOs or businesses) use private military and security companies (PMSCs) for a wide variety of tasks traditionally performed by soldiers in the fields of logistics, security, intelligence gathering and protection of persons, objects and transports.

The international legal obligations of contracting States, territorial States, home States, all other States and PMSCs and their personnel have been restated (together with recommendations of best practices) in a document^[91] accepted by most of the States concerned. Contracting States remain bound by IHL even if they contract out certain activities to PMSCs. In many cases, the conduct of PMSCs can be attributed to the contracting State by virtue of the general rules on State responsibility, or the State has at least a due diligence obligation in this respect and must ensure that the PMSCs it contracts act in accordance with IHL. Beyond the few cases of activities IHL rules specifically assign to State agents,^[92] it may be argued that IHL implicitly prohibits States from outsourcing direct participation in hostilities to persons who are not combatants.

PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL.^[93] Most of them are not *de jure* or *de facto* incorporated into the armed forces of a party and are therefore not combatants but civilians. As such, their conduct linked to an armed conflict is governed at least by the rules of IHL criminalizing certain types of conduct. The main problem is that they often benefit from *de facto* or *de jure* immunity in the country where they work and that criminal jurisdiction over them in third countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement system.

As civilians, PMSC staff may not directly participate in hostilities. PMSCs and major contracting States often stress that PMSCs have only defensive functions. The performance of such functions may nevertheless constitute direct participation in hostilities. This is undisputed if they defend combatants or military objectives against the adverse party. On the other extreme, it is uncontroversial that the defence of military targets against common criminals or the defence of civilians and civilian objects against unlawful attacks does not constitute direct participation in hostilities. The most critical, difficult and frequent situation is when PMSC staff guard objects, transports or persons. If those objects, transports or persons are not protected against attacks in IHL (combatants, civilians directly participating in hostilities), guarding or defending them against attacks constitutes direct participation in hostilities and not

91 Montreux Document on Pertinent International Legal Obligations and Good Practices of States related to Operations of Private Military and Security Companies During Armed Conflict [See Document No. 30, Montreux Document on Private Military and Security Companies]

92 See e.g. GC III, Art. 39, on who may exercise the power of responsible officer of a POW camp

93 See P I, Art. 47, and *infra* Part I, Chapter 6, I.3.c) mercenaries

criminal law defence of others. In our view, this is always the case when the attacker is a person belonging to a party to the conflict, even if he or she does not benefit from or has lost combatant status – the unlawful status of the attacker does not give rise to self-defence. If the person attacked – and under the domestic legislation of some countries even if the object attacked – is civilian, criminal law self-defence may justify the use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others and by doubts whether the criminal law defence of self-defence which avoids conviction may be used *ex ante* as a legal basis for an entire business activity. It must in addition be stressed that self-defence may only be exercised against attacks, not against arrests or the seizure of objects. Indeed the criteria determining when a civilian may be arrested or objects may be requisitioned are too complicated in IHL to allow PMSC staff to determine when they have been met. In our view, self-defence as an exception to the classification of certain conduct as direct participation in hostilities must be construed very narrowly. In addition, PMSC staff providing security for an object will often not be able to know whether that object constitutes a military objective (which excludes self-defence, because the attack would not be unlawful) and whether the attackers do not belong to a party (which would not classify resistance against such attackers as direct participation in hostilities, even when the object attacked is a military objective). At the same time, it is difficult for the enemy to distinguish between combatants, PMSC staff who directly participate in hostilities (whom they may attack and who may attack them) and PMSC staff who do not directly participate in hostilities, may not be attacked and will not attack the enemy. To maintain a clear distinction between civilians and combatants and to ensure that PMSC staff do not lose their protection as civilians, they should therefore not be put in ambiguous situations.

⇒ **Case No. 20, The Issue of Mercenaries [Part D.]**

⇒ **Document No. 30, Montreux Document on Private Military and Security Companies**

⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]

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b) the increasing number of civilians (i.e. persons who are not combatants) directly and indirectly participating in hostilities

(See *infra* Part I, Chapter 9, II. 7. Loss of protection: The concept of direct participation in hostilities and its consequences)

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
 - ⇒ **Document No. 51, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities**
 - ⇒ Case No. 109, ECHR, Korbely v. Hungary
 - ⇒ **Case No. 136, Israel, The Targeted Killings Case [Paras 29-40]**

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- ⇒ Case No. 138, Israel, Detention of Unlawful Combatants [Part A., paras 13, 21; Part B.]
 - ⇒ Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo [Paras 259-267]
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 7-15, 42, 52-56]
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Chapter 6

Combatants and Prisoners of War

Introductory text

Combatants are members of armed forces. The main feature of their status in international armed conflicts is that they have the right to directly participate in hostilities. If they fall into enemy hands, they become prisoners of war who may not be punished for having directly participated in hostilities. It is often considered that customary law allows a detaining power to deny its own nationals prisoner-of-war status, even if they fall into its hands as members of enemy armed forces. In any event, such persons may be punished under domestic law for their mere participation in hostilities against their own country.

Combatants have an obligation to respect International Humanitarian Law (IHL), which includes distinguishing themselves from the civilian population. If they violate IHL they must be punished, but they do not lose their combatant status and, if captured by the enemy, remain entitled to prisoner-of-war status, except if they have violated their obligation to distinguish themselves.

Persons who have lost combatant status or never had it, but nevertheless directly participate in hostilities, may be referred to as “unprivileged combatants” – because they do not have the combatant’s privilege to commit acts of hostility – or as “unlawful combatants” – because their acts of hostility are not permitted by IHL. The status of such persons has given rise to controversy.

Some argue that they must perforce be civilians. This argument is based on the letter of IHL treaties. In the conduct of hostilities, Art. 50(1) of Protocol I defines civilians as all those who are not “referred to in Article 4(A)(1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol”. Once they have fallen into enemy hands, Art. 4 of Convention IV defines as protected civilians all those who fulfil the nationality requirements and are not protected by Convention III. This would mean that any enemy who is not protected by Convention III falls under Convention IV.

Those who oppose that view argue that a person who does not fulfil the requirements for combatant status is an “unlawful combatant” and belongs to a third category. Like “lawful combatants”, it is claimed, such “unlawful combatants” may be attacked

until they surrender or are otherwise *hors de combat* and may be detained without judicial decision. The logic of this argument is that those who do not comply with the conditions set for a status should not be privileged compared to those who do.

Those who insist on the complementarity and exclusivity of combatant and civilian status reply that lawful combatants can be easily identified, based on objective criteria, which they will normally not deny (i.e. membership in the armed forces of a party to an international armed conflict), while the membership and past behaviour of unprivileged combatants and the future threat they represent can only be determined individually. As “civilians”, unprivileged combatants may be attacked while they unlawfully directly participate in hostilities. If they fall into the power of the enemy, Convention IV does not bar their punishment for unlawful participation in hostilities. In addition, it permits administrative detention for imperative security reasons. From a teleological perspective, it is feared that the concept of “unlawful combatants”, denied the protection of Convention IV, could constitute an easy escape category for detaining powers, as the Geneva Conventions contain no rule about the treatment of someone who is neither a combatant nor a civilian (*see, however, P I, Art. 75*).

⇒ **Document No. 51, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities**

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I. WHO IS A COMBATANT?

Introductory text

A combatant is either:

- a member of the armed forces *stricto sensu* of a party to an international armed conflict:^[94]
 - respecting the obligation to distinguish himself/herself from the civilian population

94 See GC III, Art. 4(A)(1) a

or

- a member of another armed group:^[95]
 - belonging to a party to the international armed conflict,
 - fulfilling, as a group, the following conditions:
 - operating under responsible command
 - wearing a fixed distinctive sign
 - carrying arms openly
 - respecting IHL
- and
- individually respecting the obligation to distinguish himself/herself from the civilian population

or

- a member of another armed group^[96] who is:
 - under a command responsible to a party to the international armed conflict and
 - subject to an internal disciplinary system,
 - on condition that he/she respects, individually, at the time of his/her capture^[97] the obligation to distinguish himself/herself from the civilian population:^[98]
 - usually, while engaged in an attack or a military operation preparatory to an attack, by a clearly visible item of clothing;
 - in exceptional situations (e.g. occupied territories, national liberation wars) by carrying his/her arms openly
 - during each military engagement, and
 - as long as he/she is visible to the enemy while engaged in a military deployment preceding the launching of an attack in which he/she is to participate.

⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]

⇒ Case No. 260, Afghanistan, Code of Conduct of the Mujahideen [Arts 7-9]

⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 52-56]

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95 See Art. GC III, 4(A)(2)

96 See P I, Art. 43

97 See P I, Art. 44(5)

98 See P I, Art. 44(3)

Essays in Honour of Yoram Dinstein, M. Nijhoff, Leiden/Boston, 2007, pp. 317-335. LAPIDOTH Ruth, “Qui a droit au statut de prisonnier de guerre?”, in *RGDIP*, Vol. 82/1, 1978, pp. 170-210. NAHLIK Stanislaw E., “L’extension du statut de combattant à la lumière du Protocole I de Genève de 1977”, in *Collected Courses*, Vol. 164, 1979, pp. 171-249. SASSÒLI Marco, “La ‘guerre contre le terrorisme’, le droit international humanitaire et le statut de prisonnier de guerre”, in *CYIL*, Vol. 39, 2001, pp. 211-252.

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1. Members of armed forces *lato sensu*

GC III, Art. 4(A)(1)-(3); P I, Art. 43 [CIHL, Rules 3 and 4]

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 7]
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Case No. 99, United States, *Ex Parte Quirin et al.*
 - ⇒ Case No. 100, United States, Johnson v. Eisentrager
 - ⇒ **Case No. 114, Malaysia, Osman v. Prosecutor**
 - ⇒ Case No. 116, United States, Screening of Detainees in Vietnam
 - ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 237-248; Part II, paras 393-437]
 - ⇒ **Case No. 126, Israel, Military Prosecutor v. Kassem and Others**
 - ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 422]
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 19]
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 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 - ⇒ Case No. 287, United States, United States v. Marilyn Buck
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2. *Levée en masse*

GC III, Art. 4(A)(6)

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 9 and Commentary]
 - ⇒ Document No. 87, German Invasion of Crete
 - ⇒ Case No. 126, Israel, Military Prosecutor v. Kassem and Others
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a) spies

HR, Arts 29-31; P I, Art. 46 [CIHL, Rule 107]

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- ⇒ **Case No. 99, United States, *Ex Parte Quirin et al.***
 - ⇒ Case No. 260, Afghanistan, Code of Conduct of the Mujahideen [Arts 12-18]
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b) saboteurs

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- ⇒ Case No. 99, United States, *Ex Parte Quirin et al.*
 - ⇒ **Case No. 114, Malaysia, *Osman v. Prosecutor***
 - ⇒ Case No. 120, Nigeria, Pius Nwaoga v. The State
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SUGGESTED READING: MEYROWITZ Henri, “Le statut des saboteurs dans le droit de la guerre”, in *RDMDG*, Vol. 5/1, 1966, pp. 121-174.

c) mercenaries

P I, Art. 47 [CIHL, Rule 108]

⇒ Case No. 20, The Issue of Mercenaries

⇒ Case No. 119, Nigeria, Operational Code of Conduct

⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 1.B. (1).]

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d) terrorists?

(See *supra* Part I, Chapter 2, III. 1. d) Acts of terrorism?)

⇒ Case No. 138, Israel, Detention of Unlawful Combatants

⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base

⇒ Case No. 265, US, Military Commissions

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e) members of private military and security companies?

(See *supra* Part I, Chapter 5, VII. 6. a) growing involvement of private military and security companies)

⇒ **Case No. 20, The Issue of Mercenaries [Part D.]**

⇒ **Document No. 30, Montreux Document on Private Military and Security Companies**

II. WHO IS A PRISONER OF WAR?

GC III, Art. 4; P I, Art. 44 [CIHL, Rule 106]

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- ⇒ Case No. 72, USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 8]
 - ⇒ Case No. 100, United States, *Johnson v. Eisentrager*
 - ⇒ Case No. 104, Netherlands, *In re Pilz*
 - ⇒ Case No. 111, Cuba, Status of Captured "Guerrillas"
 - ⇒ Case No. 113, Malaysia, Public Prosecutor v. Oie Hee Koi
 - ⇒ **Case No. 114, Malaysia, Osman v. Prosecutor**
 - ⇒ Case No. 116, United States, Screening of Detainees in Vietnam
 - ⇒ Case No. 124, Israel, Operation Cast Lead [Part II, paras 1336-1344]
 - ⇒ Case No. 136, Israel, The Targeted Killings Case
 - ⇒ **Case No. 157, Inter-American Commission on Human Rights, Coard v. United States [Paras 30-32 and 48-50]**
 - ⇒ **Case No. 158, United States, United States v. Noriega [Part B. II. A.]**
 - ⇒ Case No. 167, South Africa, *Sagarius and Others*
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 29]
 - ⇒ Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland
 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 - ⇒ Case No. 264, United States, Trial of John Phillip Walker Lindh
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 99-101]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 83-89]
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of *International Law*, Vol. 21, No. 1, April 2009, pp. 29-91. CARVIN Stéphanie, “Caught in the Cold: International Humanitarian Law and Prisoners of War during the Cold War, in *Journal of Conflict & Security Law*, Vol. 11, No. 1, 2006, pp. 67-92. TSE Ka Ho, “The Relevancy of Nationality to the Right to Prisoner of War Status”, in *Chinese Journal of International Law*, Vol. 8, No. 2, pp. 395-421. MURPHY Ray & EL ZEIDY Mohammed, “Prisoners of War: a Comparative Study of the Principles of International Humanitarian Law and the Islamic Law of War”, in *International Criminal Law Review*, Vol. 9, No. 4, 2009, pp. 623-649. NAERT Frederik, “Detention in Peace Operations: the Legal Framework and Main Categories of Detainees”, in *Revue de droit militaire et de droit de la guerre*, Vol. 1-2, No. 45, 2006, pp. 51-78.

1. Presumption of combatant and prisoner-of-war status

GC III, Art. 5; P I, Art. 45(1)-(2)

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- ⇒ Case No. 113, Malaysia, Public Prosecutor v. Oie Hee Koi
 - ⇒ Case No. 114, Malaysia, Osman v. Prosecutor
 - ⇒ Case No. 116, United States, Screening of Detainees in Vietnam
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., para. 207]
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 287, United States, United States v. Marilyn Buck [Part IV.5]
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2. The status of “unlawful combatants”

(See *supra* Part I, Chapter 5, VII. 5. b) once in enemy hands, p. 171)

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 24-40]
 - ⇒ **Case No. 138, Israel, Detention of Unlawful Combatants [Part A., paras 11-14]**
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ Case No. 289, United States, Public curiosity
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Para. 56]
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III. TREATMENT OF PRISONERS OF WAR

Introductory text

Those who have prisoner-of-war status (and the persons mentioned in GC III, Art. 4(B); GC I, Art. 28(2); P I, Art. 44(5)) enjoy prisoner-of-war treatment. Prisoners of war may be interned without any particular procedure or for no individual reason. The purpose of this internment is not to punish them, but only to hinder their direct participation in hostilities and/or to protect them. Any restriction imposed on them under the very detailed regulations of Convention III serves only this purpose. The protection afforded by those regulations constitutes a compromise between the interests of the detaining power, the interests of the power on which the prisoner depends, and the prisoner's own interests. Under the growing influence of human rights standards, the latter consideration is gaining in importance, but IHL continues to see prisoners of war as soldiers of their country. Due to this inter-State aspect and in their own interest, they cannot renounce their rights or status.^[99]

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- ⇒ Document No. 97, United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb *et al.*
 - ⇒ Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others
 - ⇒ Case No. 107, United States, United States v. Batchelor
 - ⇒ Case No. 118, United States, Former Prisoner of War on a Mission to Hanoi
 - ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs**
 - ⇒ **Case No. 170, ICRC, Iran/Iraq, Memoranda**
 - ⇒ Case No. 184, United States, The Taguba Report
 - ⇒ Case No. 255, Afghanistan/Canada, Agreements on the Transfer of Detainees
 - ⇒ Case No. 260, Afghanistan, Code of Conduct of the Mujahideen [Arts 7-9 and 10]
 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 - ⇒ Case No. 267, United States, The Obama Administration's Internment Standards, p. 2396
 - ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities
 - ⇒ Document No. 269, United States, Treatment and Interrogation in Detention
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 98-101]
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99 See GC III, Art. 7

War”, in FLECK Dieter (ed.), *Handbook of Humanitarian Law*, Oxford, OUP, 1995, pp. 321-367. LEVIE Howard S., “The Employment of Prisoners of War”, in *AJIL*, Vol. 57/2, 1963, pp. 318-353. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Paris, UNESCO, 1987, 374 pp. ROSAS Allan, *The Legal Status of Prisoners of War: A Study of International Humanitarian Law Applicable in Armed Conflicts*, Helsinki, Suomalainen Tiedeakatemia, 1976, 523 pp. TURNS David, “The Treatment of Detainees and the “Global War on Terror”: Selected Legal Issues”, in *IYHR*, Vol. 38, 2008, pp. 145-167.

FURTHER READING: DROEGE Cordula, “Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 669-701. GILLARD Emanuela-Chiara, “There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 703-750. LEVIE Howard S., “Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India”, in *AJIL*, Vol. 67 (3), 1973, pp. 512-516. MEYER Michael A., “Liability of POWs for Offences Committed Prior to Capture – The Astiz Affair”, in *ICLQ*, Vol. 32, 1983. Ministry of Foreign Affairs of Denmark, “The Copenhagen Process on the Handling of Detainees in International Military Operations”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 46, 2007, pp. 363-392. POCAR Fausto, “Violence on Civilians and Prisoners of War in the Jurisprudence of International Criminal Tribunals”, in *Anuário brasileiro de direito internacional = Brazilian Yearbook of International Law*, Vol. 2, No. 4, 2009, pp. 11-30. PREUX Jean de, “L’homme de confiance des prisonniers de guerre”, in *IRRC*, No. 414, 1953, pp. 449-475. RISIUS Gordon & MEYER Michael A., “The Protection of Prisoners of War against Insults and Public Curiosity”, in *IRRC*, No. 295, October 1993, pp. 288-299. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Oxford, OUP, 3rd ed., 2009, 697 pp. SADAT Leila Nadya, “International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces”, in *ASIL Insight Newsletter*, May-July 2004, online: <http://www.asil.org/insights/insigh134.htm>. WILHELM René-Jean, “Peut-on modifier le statut des prisonniers de guerre?”, in *IRRC*, No. 415 & 417, July & September 1953, pp. 516-543 & 681-690. YIN Tung, *Distinguishing Soldiers and Non-State Actors: Clarifying the Geneva Convention’s Regulation of Interrogation of Captured Combatants through Positive Inducements*, University of Iowa Legal Studies Research Paper, No. 08-42, September 2008, 55 pp.

a) protected as prisoners of war as soon as they fall into the power of the adverse party

GC III, Art. 5

⇒ Document No. 98, The Tokyo War Crimes Trial

⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 68-80]**

b) including in exceptional circumstances

PI, Art. 41(3)

⇒ Document No. 88, Germany/United Kingdom, Shackling of Prisoners of War

c) no transfer to a power which is unwilling or unable to respect Convention III

GC III, Art. 12

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- ⇒ Case No. 116, United States, Screening of Detainees in Vietnam
 - ⇒ **Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 672-674; Part B., paras 71-75]**
 - ⇒ **Case No. 255, Afghanistan/Canada, Agreements on the Transfer of Detainees**
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d) respect for their allegiance towards the power on which they depend

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- ⇒ Case No. 107, United States, United States v. Batchelor
 - ⇒ Case No. 111, Cuba, Status of Captured "Guerrillas", p. 924
 - ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 84-86]**
 - ⇒ **Case No. 170, ICRC, Iran/Iraq, Memoranda**
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e) no punishment for participation in hostilities

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ **Case No. 114, Malaysia, Osman v. Prosecutor**
 - ⇒ Case No. 120, Nigeria, Pius Nwaoga v. The State
 - ⇒ **Case No. 126, Israel, Military Prosecutor v. Kassem and Others**
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ Case No. 265, United States, Military Commissions
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f) rules on treatment during internment

GC III, Arts 12-81 [CIHL, Rules 118-123 and 127]

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- ⇒ Document No. 86, Switzerland Acting as Protecting Power in World War II
 - ⇒ Document No. 88, Germany/United Kingdom, Shackling of Prisoners of War
 - ⇒ Document No. 97, United States Military Tribunal at Nuremberg, United States v. Wilhelm von Leeb *et al.*
 - ⇒ Case No. 111, Cuba, Status of Captured "Guerrillas"
 - ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
 - ⇒ **Case No. 158, United States, United States v. Noriega [Parts A. III. and B. III.]**
 - ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 75-150 and Part B., paras 59-142]**
 - ⇒ Case No. 184, United States, The Taguba Report
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ **Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 201-252]**
 - ⇒ Case No. 286, The Conflict in Western Sahara [Part A.]
 - ⇒ Case No. 289, United States, Public curiosity
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g) rules on penal and disciplinary proceedings

GC III, Art. 82-108 [CIHL, Rules 100-102]

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- ⇒ Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others
 - ⇒ Case No. 111, Cuba, Status of Captured “Guerrillas”
 - ⇒ **Case No. 114, Malaysia, Osman v. Prosecutor**
 - ⇒ **Case No. 158, United States, United States v. Noriega [Part A. III.]**
 - ⇒ Case No. 168, South Africa, S. v. Petane
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda,
 - ⇒ Case No. 262, United States, President’s Military Order
 - ⇒ **Case No. 263, United States, Hamdan v. Rumsfeld**
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ Case No. 266, United States, Habeas Corpus for Guantanamo Detainees
 - ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities
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h) punishment for acts committed prior to capture

GC III, Art. 85

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- ⇒ Case No. 72, USSR, Poland, Hungary and the Democratic People’s Republic of Korea, Reservations to Article 85 of Convention III
 - ⇒ Case No. 99, United States, *Ex Parte Quirin et al.*
 - ⇒ Case No. 100, United States, Johnson v. Eisentrager
 - ⇒ Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others
 - ⇒ **Case No. 158, United States, United States v. Noriega [Part A. III.]**
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base**
 - ⇒ Case No. 264, United States, Trial of John Phillip Walker Lindh
 - ⇒ Case No. 265, United States, Military Commissions
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i) limits to punishment for escape

GC III, Arts 91-94

⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case

IV. TRANSMISSION OF INFORMATION

⇒ Document No. 34, ICRC, Tracing Service [Para. 4]

SUGGESTED READING: DJUROVIC Gradimir, *The Central Tracing Agency of the International Committee of the Red Cross*, Geneva, Henry-Dunant Institute, 1986, 259 pp. SASSÒLI Marco, “The National Information Bureau in Aid of the Victims of Armed Conflicts”, in *IRRC*, No. 256, January 1987, pp. 6-24.

a) capture cards (to be sent to the family and the Central Tracing Agency)

GC III, Art. 70 and Annex IV B.

⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda

b) notification (to the power of origin through the Central Tracing Agency)

GC III, Arts 69, 94, 104, 107, 120 and 122

⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case

⇒ **Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated**

c) correspondence

GC III, Arts 71, 76 and Annex IV C. [CIHL, Rule 125]

⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda

V. MONITORING BY OUTSIDE MECHANISMS

1. Protecting Powers

(See *infra* Part I, Chapter 13, IV, Scrutiny by Protecting Powers and the ICRC)
GC III, Arts 8 and 126; P I, Art. 5

⇒ Case No. 168, South Africa, *S. v. Petane*

SUGGESTED READING: LEVIE Howard S., “Prisoners of War and the Protecting Power”, in *AJIL*, Vol. 55, 1961, pp. 374-397. WYLIE Neville, “Protecting Powers in a Changing World”, in *Politorbis, revue de politique étrangère*, No. 40, 2006, pp. 6-14.

2. ICRC

(See *infra* Part I, Chapter 15, The International Committee of the Red Cross)
GC III, Arts 9 and 126(4); P I, Art. 5(3)-(4) [CIHL, Rule 124]

⇒ Document No. 34, ICRC, Tracing Service [Para. 4]
 ⇒ Case No. 159, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
 ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 55-62]**
 ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
 ⇒ Case No. 255, Afghanistan/Canada, Agreements on the Transfer of Detainees [Part A., paras 4, 7, 10; Part B., para. 10]

VI. REPATRIATION OF PRISONERS OF WAR

Introductory text

As prisoners of war are only detained to stop them from taking part in hostilities, they have to be released and repatriated when they are unable to participate, i.e. during the conflict for health reasons and of course as soon as active hostilities have ended. Under the influence of human rights law and refugee law it is today admitted that those fearing persecution may not be forcibly repatriated. As this exception offers the Detaining Power room for abuse and risks rekindling mutual distrust, it is suggested that the prisoner’s wishes are the determining factor, but it can be difficult to ascertain those wishes and what will happen to the prisoner if the Detaining Power is unwilling to grant him/her asylum. On the latter point, many argue that a prisoner of war who

freely expresses his/her will not to be repatriated loses prisoner-of-war status and becomes a civilian who remains protected under Convention IV until resettlement.^[100]

SUGGESTED READING: DINSTEIN Yoram, “The Release of Prisoners of War”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 37-45. SASSÒLI Marco, “The Status, Treatment and Repatriation of Deserters under International Humanitarian Law”, in *Yearbook of the International Institute of Humanitarian Law*, 1985, pp. 9-36. SCHAPIRO L. B., “Repatriation of Deserters”, in *BYIL*, Vol. 29, 1952, pp. 310-324. SHIELDS DELESSERT Christiane, *Release and Repatriation of Prisoners of War at the End of Active Hostilities: A Study of Article 118, paragraph 1, of the Third Geneva Convention Relative to the Treatment of Prisoners of War*, Zurich, Schulthess, *Études suisses de Droit international*, Vol. 5, 1977, 225 pp.

FURTHER READING: BAXTER Richard R., “Asylum to Prisoners of War”, in *BYIL*, Vol. 30, 1953, pp. 489-498. MURPHY Sean D., “Evolving Geneva Convention Paradigms in the ‘War on Terrorism’: Applying the Core Rules to the Release of Persons Deemed ‘Unprivileged Combatants’”, in *The George Washington Law Review*, Vol. 75, No. 5/6, August 2007, pp. 1105-1164.

1. During hostilities

GC III, Art. 109-117

⇒ Case No. 111, Cuba, Status of Captured “Guerrillas”

a) medical cases

GC III, Annexes I and II

⇒ **Case No. 170, ICRC, Iran/Iraq, Memoranda**

b) agreements between the parties

⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 18]

2. At the end of active hostilities

GC III, Arts 118-119 [CIHL, Rule 128 A.]

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- ⇒ Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement [Arts 3-11 and 13-15]
 - ⇒ Case No. 159, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
 - ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 143-163]**
 - ⇒ **Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated [Parts B., C. and D.]**

- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 8 and 21]
 - ⇒ **Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities**
 - ⇒ Case No. 286, The Conflict in Western Sahara [Parts A. and C.]
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a) when do active hostilities end?

- ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 144-163]
-

b) no reciprocity

- ⇒ **Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 148-163]**
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c) fate of POWs who refuse repatriation

- ⇒ Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated [Part D.]
 - ⇒ Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities [Part A.]
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3. Internment in neutral countries

GC III, Arts 110(2)-(3), 111 and Annex I

- ⇒ Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland
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SUGGESTED READING: OZERDEN Kemal, *Le sort des militaires belligérants, victimes de la guerre, débarqués dans un port neutre, d'après la Convention de Genève*, Paris, Pedone, 1971, 237 pp. STEINER M., *Die Internierung von Armeeeingehörigen kriegführender Mächte in neutralen Staaten, insbesondere in der Schweiz während des Weltkrieges 1939/45*, Ernst Lang, Zurich, 1947, 103 pp. REICHEL Daniel, "L'internement et le rapatriement des militaires soviétiques réfugiés en Suisse pendant le Seconde Guerre Mondiale", in *Actes du symposium 1982*, Lausanne, Éditions du Centre d'Histoire, 1982, pp. 77-90.

FURTHER READING: HOFFER Henri-P., "L'internement des malades et blessés dans les pays neutres", in *IRRC*, No. 2, 1919, pp. 159-171. FAVRE E., *L'internement en Suisse des prisonniers de guerre*, Geneva, Bâle, Lyon, Georg & Cie, Libraires-Éditeurs, 1917-1919.

Chapter 7

Protection of the Wounded, Sick and Shipwrecked

Introductory text

The sight of thousands of wounded soldiers on the battlefield at Solferino moved Henry Dunant to initiate the process that resulted in the Geneva Conventions. Conventions I and II are entirely given over to safeguarding not only the wounded, sick and shipwrecked, but also the support services (personnel and equipment) needed to come to their aid. Once wounded, sick or shipwrecked and provided that they refrain from any act of hostility, even former combatants become “protected persons”.^[101] They may not be attacked and must be respected and cared for, often by removing them from the combat zone for impartial care. Protocol I extends this protection to wounded, sick and shipwrecked civilians refraining from any acts of hostility.^[102]

The necessary care can often only be given, however, if the people who provide it are not attacked. On the battlefield this will only work if they constitute a separate category, never participating in hostilities and caring for all the wounded without discrimination, and if they are identifiable by an emblem.

SUGGESTED READING: DE CURREA-LUGO Victor, “Protecting the health sector in Colombia: A step to make the conflict less cruel”, in *IRRC*, No. 844, December 2001, pp. 1111-1126. PERRIN Pierre (ed.), *Handbook on War and Public Health*, Geneva, ICRC, 1996, 446 pp.

I. THE IDEA OF SOLFERINO

SUGGESTED READING: DUNANT Henry, *A Memory of Solferino*, Geneva, ICRC, 1986 (1862), 147 pp., online: <http://www.icrc.org>.

101 Protected persons are defined in GC I-II, Art. 13

102 See P I, Art. 8(a) and (b); GC IV, Art. 16

II. RESPECT, PROTECTION AND CARE FOR THE WOUNDED, SICK AND SHIPWRECKED, WITHOUT ANY ADVERSE DISTINCTION

GC II, Art. 12 [CIHL, Rules 109-111]

SUGGESTED READING: JUNOD Sylvie S., *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, Geneva, ICRC, 1985, 45 pp. SOLF Waldemar A., “Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 237-248.

1. Beneficiaries

Provided that they refrain from any act of hostilities.

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- ⇒ Document No. 87, German Invasion of Crete
 - ⇒ Document No. 89, British Policy Towards German Shipwrecked
 - ⇒ Case No. 147, Israel, Navy Sinks Dinghy off Lebanon
-

a) under Conventions I and II: military personnel

GC II, Art 13

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- ⇒ Case No. 104, Netherlands, *In re Pilz*
-

b) under Protocol I: extension to civilians

P I, Art. 8(a) and (b)

2. Respect

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- ⇒ Document No. 87, German Invasion of Crete
 - ⇒ Document No. 89, British Policy Towards German Shipwrecked
 - ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 147, Israel, Navy Sinks Dinghy off Lebanon
 - ⇒ **Case No. 170, ICRC, Iran/Iraq, Memoranda**
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3. Protection

4. Care

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- ⇒ Case No. 104, Netherlands, *In re Pilz*
 - ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
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- equal treatment

GC I-II, Art. 12 [CIHL, Rule 110]

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- ⇒ **Case No. 187, Iraq, Care for Wounded Enemies**
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
-

- evacuation

GC I-II, Art. 15 [CIHL, Rule 109]

-
- ⇒ Case No. 135, Israel, The Rafah Case [Paras 40-44.]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 3]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
-

III. MEDICAL AND RELIGIOUS PERSONNEL

Introductory text

Conventions I and II, which aim to protect the wounded, sick and shipwrecked, also extend protection to medical personnel, administrative support staff and religious personnel.^[103] They are not to be attacked on the battlefield and must be allowed to perform their medical or religious duties.^[104] If they fall into the hands of the adverse party, medical and religious personnel are not to be considered prisoners of war and may only be retained if they are needed to care for prisoners of war.^[105] Conventions I and IV provide protection for civilians caring for sick and wounded combatants and civilians.^[106] Protocol I further expanded the category of persons (permanent or temporary personnel, military or civilian) protected by virtue of their medical or religious functions.^[107] Aid societies are granted the same protection if they meet the requirements laid out in the Conventions.^[108]

103 See GC I, Arts 24 and 25; GC III, Arts 36 and 37

104 See GC I, Arts 24-27; GC II, Arts 36 and 37; P I, Arts 15-20; P II, Art. 9

105 See GC I, Arts 28 and 30; GC II, Art. 37; GC III, Art. 33

106 See GC I, Art. 18; GC IV, 20(1)

107 See P I, Art. 8(c) and (d)

108 See GC I, Arts 26 and 27; GC II, Arts 25 and 36; P I, Art. 9(2)

SUGGESTED READING: BACCINO-ASTRADA Alma, *Manual on the Rights and Duties of Medical Personnel in Armed Conflicts*, Geneva, ICRC/League, 1982, 77 pp. DE CURREA-LUGO Victor, “Protecting the Health Sector in Colombia: A Step to Make the Conflict Less Cruel”, in *IRRC*, No. 844, December 2001, pp. 1111-1126. O’BRIEN R., *A Manual of International Humanitarian Law for Religious Personnel*, Adelaide, Australian Red Cross, 1993, 31 pp. PICTET Jean, “The Medical Profession and International Humanitarian Law”, in *IRRC*, No. 247, July 1985, pp. 191-209.

FURTHER READING: HIEBEL Jean-Luc, “Human Rights Relating to Spiritual Assistance as Embodied in the Geneva Conventions of 1949”, in *IRRC*, No. 214, January 1980, pp. 3-28. LUNZE Stefan, “Serving God and Caesar: Religious Personnel and their Protection in Armed Conflict”, in *IRRC*, No. 853, March 2004, pp. 69-91. TOOLE Mike, “Frontline Medicine”, in Médecins Sans Frontières (ed.), *World in Crisis*, New York, Routledge, 1996, pp. 16-36.

1. Definition

a) military (permanent or temporary) medical personnel

GC I, Arts 24-25; GC II, Arts 36-37

b) civilian medical personnel assigned by a party to the conflict

GC IV, Art. 20; P I, Art. 8

c) religious personnel attached to the armed forces or medical units

P I, Art. 8

d) medical personnel made available by third States or organizations to a party to the conflict

P I, Art. 8

e) personnel of a National Society recognized and specifically authorized by a party to the conflict

GC I, Art. 26; GC II, Art. 24; P I, Art. 8

SUGGESTED READING: “Technical Note: The Red Cross and its Role as an Auxiliary to Military Medical Services”, in *IRRC*, No. 234, May 1983, pp. 139-141.

2. Protection

a) on the battlefield (including inhabitants of the combat zone)

- may not be attacked

GC I, Arts 24-25; GC II, Arts 36-37; P I, Arts 15-16 [CIHL, Rules 25 and 30]

- ⇒ Case No. 146, Lebanon, Helicopter Attack on Ambulances
- ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 43-47]

- may perform medical duties in conformity with medical ethics

⇒ **Case No. 209, United Kingdom, Misuse of the Emblem**

b) once in enemy hands

GC I, Arts 28-32

- immediate repatriation, or
- employment caring for prisoners of war

c) under control of the enemy

P I, Arts 15-16 [CIHL, Rule 26]

- right to perform their medical mission

⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 9]

- right not to perform acts contrary to medical ethics
- right to confidentiality in patient relationships (medical privilege), except as required by the law of their party

⇒ **Case No. 209, United Kingdom, Misuse of the Emblem**

3. Duties of medical personnel

SUGGESTED READING: BOTHE Michael, “International Medical and Humanitarian Law”, in *ILA Report*, Vol. 59, 1980, pp. 520-530. HIEBEL Jean-Luc, “Human Rights Relating to Spiritual Assistance as Embodied in the Geneva Conventions of 1949”, in *IRRC*, No. 214, January 1980, pp. 3-28. PICTET Jean, “The Medical Profession and International Humanitarian Law”, in *IRRC*, No. 247, July 1985, pp. 191-209. SCHOENHOLZER Jean-Pierre, *Nurses and the Geneva Conventions of 1949*, Geneva, ICRC, 1957, 32 pp. SCHOENHOLZER Jean-Pierre, “The Doctor in the Geneva Conventions of 1949”, in *IRRC Supplement*, Vol. VI, No. 11, 1953, pp. 191-213. TORRELLI Maurice, *Le médecin et les droits de l’homme*, Paris, Berger-Levrault, 1983, 466 pp.

FURTHER READING: HIEBEL Jean-Luc, *Assistance spirituelle et conflits armés: droit humain*, Geneva, Henry-Dunant Institute, 1980, 463 pp.

a) no direct participation in hostilities

- they may be armed, but only with light weapons
- and may only use them for their own defence or for that of the wounded and sick under their care

⇒ **Case No. 91, British Military Court at Hamburg, The Peleus Trial**

b) respect for medical ethics

⇒ **Case No. 186, Iraq, Medical Ethics in Detention**

⇒ Case No. 187, Iraq, Care for Wounded Enemies

SUGGESTED READING: Board of Science of the British Medical Association, *The Use of Drugs as Weapons: the Concerns and Responsibilities of Healthcare Professionals*, London, British Medical Association, May 2007, 34 pp. ENEMARK Christian, “Triage, Treatment and Torture: Ethical Challenges for US Military Medicine in Iraq”, in *Journal of Military Ethics*, Vol. 7, Issue 3, 2008, pp. 186-201. GOODMAN Ryan & ROSEMAN Mindy Jane (eds), *Interrogations, Forced Feedings, and the Role of Health Professionals: New Perspectives on International Human Rights, Humanitarian Law and Ethics*, Cambridge (USA): Human Rights Program at Harvard Law School, 2009, 228 pp.

c) give care without discrimination

⇒ **Case No. 186, Iraq, Medical Ethics in Detention**

⇒ Case No. 187, Iraq, Care for Wounded Enemies

d) respect principle of neutrality**e) identification**

GC I, Annex II

IV. PROTECTION OF MEDICAL GOODS AND OBJECTS (INCLUDING HOSPITALS AND AMBULANCES)

Introductory text

International Humanitarian Law (IHL) establishes comprehensive and detailed protection for medical units,^[109] medical transports^[110] and medical material.^[111]

These goods must be respected and protected at all times by the belligerents^[112] and are not to be the object of attack. Under no circumstances are protected installations to be used in an attempt to shield military objectives from attack.

The protection to which medical installations are entitled does not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy.^[113] In such instances their protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone

⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 5]

SUGGESTED READING: RUFIN Jean-Christophe, “The Paradoxes of Armed Protection”, in *Médecins Sans Frontières* (ed.), *Life, Death and Aid*, New York, Routledge, 1993, pp. 111-123.

FURTHER READING: CASSESE Antonio, “Under What Conditions May Belligerents Be Acquitted of the Crime of Attacking an Ambulance?”, in *Journal of International Criminal Justice*, Vol. 6, No. 2, 2008, pp. 385-397.

1. Protection

GC I, Arts 19 and 35 [CIHL, Rules 28, 29 and 30]

⇒ Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name “Red Cross” [Arts 7-9]

109 See GC I, Arts 19-23; GC IV, Art. 18; P I, Arts 8(e) and 12-14. According to P I, Art. 8(e): “Medical units” means establishments and other units, whether military or civilian, organised for medical purposes, namely the search for, collection, transportation, diagnosis or treatment – including first-aid treatment – of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medicine centres and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary.”

110 See GC I, Arts 35-37; GC II, Arts 38-40; GC IV, Arts 21-22; P I, Arts 8(g) and 21-31 According to P I, Art. 8(g): “Medical transports” means any means of transportation, whether military or civilian, permanent or temporary, assigned exclusively to medical transportation and under the control of a competent authority of a Party to the conflict.”

111 See GC I, Arts 33-34

112 See GC I, Arts 19, 33, and 35; GC II, Arts 22-27; P I, Art. 12(1)

113 See GC I, Art. 21; GC II, Art. 34; P I, Art. 13(1)

- ⇒ Case No. 146, Lebanon, Helicopter Attack on Ambulances
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Part A., Annex, paras 41 and 44]
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 17-22]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 61-64]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 43-47]
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2. Loss of protection

GC I, Arts 21 and 22

V. POSSIBLE CONSTITUTION OF HOSPITAL, SAFETY AND NEUTRALIZED ZONES

GC I, Art. 23; GC IV, Arts 14-15 [CIHL, Rules 28 and 29]

(See also *infra*, Part I, Chapter 9. II. 13. Zones created to protect war victims against the effects of hostilities, p. 277)

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- ⇒ **Case No. 194, Sri Lanka, Jaffna Hospital Zone**
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 5]
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SUGGESTED READING: BOUVIER Antoine, “Zones protégées, zones de sécurité et protection de la population civile”, in BOUSTANY Katia & DORMOY Daniel, *Perspectives humanitaires entre conflits, droit(s) et action*, Brussels, Bruylant, 2002, pp. 251-269. LAVOYER Jean-Philippe, “International Humanitarian Law, Protected Zones and the Use of Force”, in BIERMANN Wolfgang & VADSET Martin (eds), *UN Peacekeeping in Trouble: Lessons Learned from the former Yugoslavia*, Aldershot, Ashgate, 1998, pp. 262-279. SANDOZ Yves, “Localités et zones sous protection spéciale”, in *Quatre études du droit international humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 35-47.

VI. THE EMBLEM OF THE RED CROSS/RED CRESCENT/ RED CRYSTAL

Introductory text

The Conventions and Additional Protocols authorize the use of four emblems – the red cross, the red crescent, the red crystal and the red lion and sun – on a white background.^[114] However, today only the first three authorized emblems are utilized.

114 See GC I, Art. 38; GC II, Art. 41; PI, Art. 8(1); P II, Art. 12; and, for the red crystal, P III

For a number of years the International Red Cross and Red Crescent Movement has encountered problems arising from the use of a host of other emblems. This threatens the emblem's essential universality, neutrality and impartiality, and ultimately undermines the protection it provides. Hopefully, these problems have been solved with the entry into force of Protocol III enabling States to adopt the red crystal.

The emblem serves both protective and indicative functions. It is used mainly as a protective device in times of conflict to distinguish combatants from certain persons and objects protected by the Conventions and the Additional Protocols (e.g., medical personnel, medical units and medical means of transport^[115]),^[116] To be effective in such circumstances the emblem must be visible and therefore large.^[117] It may only be displayed for medical purposes, and such use must be authorized by and under the control of the State.

The emblem is used as an indicative device mainly in peacetime, as such use does not signify protection but rather identifies persons, equipment and activities (in conformity with Red Cross principles) affiliated with the Red Cross or the Red Crescent.^[118] Utilization for indicative purposes must comply with national legislation, and ordinarily the emblem must be small in size. In contrast to the above-mentioned limitations placed on National Red Cross or Red Crescent Societies and other users, International Red Cross organizations may use the emblem at all times and for all their activities.

In order to avoid undermining the protection the emblem provides, abuse and misuse of the emblem, which in certain situations constitutes a war crime,^[119] must be prevented; thus, the emblem may be neither imitated nor used for private or commercial purposes.^[120] States Parties have an obligation to implement national legislation, consistent with the Conventions and Additional Protocols, regarding not only appropriate authorization of the emblem's use but also punishment of abuse and misuse of the emblem.^[121]

⇒ **Document No. 35, ICRC, Model Law Concerning the Emblem**

⇒ Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross"

⇒ Case No. 247, Colombia, Misuse of the Emblem

SUGGESTED READING: BOUVIER Antoine, "Special Aspects of the Use of the Red Cross or Red Crescent Emblem", in *IRRC*, No. 272, September-October 1989, pp. 438-458. BUGNION François, *The Emblem of the Red Cross: a Brief History*, Geneva, ICRC, 1977, 81 pp. & in *IRRC*, No. 193/194/195, April/May/June 1977, pp. 167-190/229-256/283-296. MACCORMACK Timothy L.H., "What's in an Emblem? Humanitarian Assistance under any other Banner Would be as Comforting", in *Melbourne Journal of International Law*,

115 For transport by land see GC I, Art. 35; by sea see GC II, Art. 22, 24, 26, 27 and 43; and by air see GC I, Art. 36 and GC II, Art. 39

116 See GC I, Arts 39-43; GC II, Art. 41-43; P I, Art. 18; P II, Art. 12

117 For technical means of identification see P I, Annex I, Arts 4-5

118 See GC I, Art. 44(2)-(4)

119 See P I, Arts 37(1) and 85(3)(f)

120 See HR, Art. 23(f); GC I, Art. 53; GC II, Art. 45; P I, Arts 38 and 85(3)(f); P II, Art. 12

121 See GC I, Art. 54; GC II, Art. 45

Vol. 1/1, 2000, pp. 175-183. MERIBOUTE Zidane, “The Emblems of the 1949 Geneva Conventions: their Content and Meaning”, in *YIHL*, Vol. 3, 2000, pp. 258-272. SLIM Habib, “Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse”, in *IRRC*, No. 272, September-October 1989, pp. 420-437.

FURTHER READING: CAUDERAY Gérald C, “Visibility of the Distinctive Emblem on Medical Establishments, Units, and Transports”, in *IRRC*, No. 277, July-August 1990, pp. 295-321. EBERLIN Philippe, *Protective Signs*, Geneva, ICRC, 1983, 73 pp. PICTET Jean, “The Sign of the Red Cross”, in *IRRC Supplement*, Vol. II, No. 4, April 1949, pp. 143-175.

1. Three distinctive signs

GC I, Art. 38

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- ⇒ **Document No. 8, The Third Protocol Additional to the Geneva Conventions**
 - ⇒ **Case No. 44, ICRC, The Question of the Emblem**
 - ⇒ Case No. 78, Iran, Renouncing Use of the Red Lion and Sun Emblem
 - ⇒ Case No. 176, Saudi Arabia, Use of the Red Cross Emblem by United States Forces
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SUGGESTED READING: BUGNION François, “The Red Cross and Red Crescent Emblems”, in *IRRC*, No. 272, September-October 1989, pp. 408-419. BUGNION François, *Towards a Comprehensive Solution to the Question of the Emblem*, Geneva, ICRC, 4th ed., 2006, 99 pp. BUGNION François, *Red Cross, Red Crescent, Red Crystal*, Geneva, ICRC, May 2007, 111 pp. PULLES Gerrit Jan, “Crystallising an Emblem: on the Adoption of the Third Additional Protocol to the Geneva Conventions”, in *YIHL*, Vol. 8 (2005), 2007, pp. 296-319. SANDOZ Yves, “The Red Cross and Red Crescent Emblems: What is at Stake?”, in *IRRC*, No. 272, September-October 1989, pp. 405-407. SOMMARUGA Cornelio, “Unity and Plurality of the Emblems”, in *IRRC*, No. 289, July-August 1992, pp. 333-338.

FURTHER READING: BUGNION François, “The 29th International Conference of the Red Cross and Red Crescent, Geneva, 20-22 June 2006: Challenges and Outcome”, in *IRRC*, Vol. 89, No. 865, March 2007, pp. 163-173. EBERLIN Philippe, “Technical Note on the Colours of the Red Cross and Red Crescent Emblem”, in *IRRC*, No. 233, March 1983, pp. 77-80. LANORD Christophe, “Quelques considérations sur le projet de Protocole III additionnel aux Conventions de Genève de 1949”, in *L'observateur des Nations Unies*, No. 10, Spring-Summer 2001, pp. 13-34. ROSENNE Shabtai, “The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David”, in *IYHR*, Vol. 5, 1975, pp. 9-54.

2. Technical means of identification

PI, Annex I

SUGGESTED READING: BOUVIER Antoine, “Humanitarian Protection and Armed Conflicts at Sea: Means and Methods of Identifying Protected Craft”, in *Syracuse Journal of International Law and Commerce*, Vol. 14, 1988, pp. 759-765. CAUDERAY Gérald C., “Means of Identification for Protected Medical

Transports”, in *IRRC*, No. 300, May-June 1994, pp. 266-278. CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. EBERLIN Philippe, “La modernisation de la signalisation protectrice et les communications des unités et moyens de transport sanitaires”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/M. Nijhoff, 1984, pp. 47-75. EBERLIN Philippe, “Underwater Acoustic Identification of Hospital Ships”, in *IRRC*, No. 267, November-December 1988, pp. 505-518.

3. Protective use

GC I, Arts 39-43 and 53-54 [CIHL, Rule 30]

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- ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Arts 3-5, 8, and 9]
 - ⇒ **Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name “Red Cross” [Arts 7-9]**
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a) to distinguish medical personnel and units

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- ⇒ Case No. 44, ICRC, The Question of the Emblem
 - ⇒ Case No. 78, Iran, Renouncing Use of the Red Lion and Sun Emblem
 - ⇒ Case No. 146, Lebanon, Helicopter Attack on Ambulances
 - ⇒ Case No. 176, Saudi Arabia, Use of the Red Cross Emblem by United States Forces
 - ⇒ **Case No. 194, Sri Lanka, Jaffna Hospital Zone**
 - ⇒ Case No. 209, United Kingdom, Misuse of the Emblem
-

b) to be displayed with the permission and under the control of the competent authority

c) may be used at all times by the ICRC and the International Federation

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- ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Art. 7]
 - ⇒ Case No. 209, United Kingdom, Misuse of the Emblem
 - ⇒ Case No. 247, Colombia, Misuse of the Emblem
 - ⇒ Case No. 253, Afghanistan, Operation “Enduring Freedom” [Part B.]
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4. Indicative use

GC I, Art. 44

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- ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Art. 6]
 - ⇒ Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name “Red Cross” [Arts 4-6]

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- ⇒ **Case No. 82, United Kingdom, Labour Party Campaign - Misuse of the Emblem**
 - ⇒ Case No. 92, United States Military Court in Germany, Trial of Skorzeny and Others
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SUGGESTED READING: BOUVIER Antoine, “Special Aspects of the Use of the Red Cross or Red Crescent Emblem”, in *IRRC*, No. 272, September-October 1989, pp. 438-458.

5. Repression of abuse and misuse

GC I, Arts 53-54

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- ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Arts 10-12]
 - ⇒ Case No. 82, United Kingdom, Labour Party Campaign - Misuse of the Emblem
 - ⇒ Case No. 209, United Kingdom, Misuse of the Emblem
 - ⇒ Case No. 247, Colombia, Misuse of the Emblem
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SUGGESTED READING: MEYER Michael, “Protecting the Emblems in Peacetime: The Experiences of the British Red Cross”, in *IRRC*, No. 272, September-October 1989, pp. 459-464. SLIM Habib, “Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse”, in *IRRC*, No. 272, September-October 1989, pp. 420-437.

VII. PROVISIONS ON THE DEAD AND MISSING

Introductory text

It is not primarily to protect the dead and the missing themselves that IHL contains specific rules concerning them. The main concern is “the right of families to know the fate of their relatives”.^[122] Persons are considered missing if their relatives or the power on which they depend have no information on their fate. Each party has an obligation to search for persons who have been reported as missing by the adverse party.^[123]

In reality, missing persons are either dead or alive. If they are alive, they are missing either because they have been detained by the enemy or separated from their families by front-lines or borders. In that case, they benefit from the protection IHL offers to the category to which they belong (civilian, prisoner of war, wounded and sick, etc.). In any case, IHL contains rules designed to ensure that they do not remain missing – except if they wish to sever their links with their family or country.^[124]

122 See P I, Art. 32

123 See P I, Art. 33(1)

124 The problems raised by such a wish are not covered by IHL – except that it has to avoid notifications which may be detrimental to the persons concerned. See GC IV, Art. 137(2)

If the person is missing because, as is regularly the case in armed conflicts, postal services have been interrupted or groups of people displaced, family links should soon be re-established, *inter alia* through the ICRC Central Tracing Agency, as long as the parties respect their obligation to promote the exchange of family news and reunification of families.^[125] If a person is missing because he or she has been detained or hospitalized by the enemy, the family's uncertainty should not last for long, as IHL prescribes that information on their hospitalization or detention be forwarded rapidly to their family and the authorities through three channels: notification of hospitalization, capture or arrest,^[126] transmission of capture or internment cards,^[127] and the right to correspond with the family.^[128] A lawfully detained person can therefore not be missing for long, as the detaining authorities are also under an obligation to answer inquiries about protected persons.^[129]

If the missing person is dead, it is as important but more difficult to inform the family. There is no obligation for each party to identify every dead body found, as this would be an impossible task. Every party has to simply try and collect information serving to identify dead bodies,^[130] – which is easier to do if the deceased wear identity cards or tags as prescribed for combatants by IHL^[131] – including by agreeing to establish search teams.^[132] If such identification is successful, the family has to be notified. In any case, the remains must be respected and given decent burial, and the gravesites marked.^[133] Understandably, relatives will wish to have access to the graves and often even to have the remains of their loved ones returned to them. This requires an agreement between the parties concerned, which can generally only be reached once the conflict has ended.^[134]

[See "The Missing: Documentation of Reference Database" available on http://www.icrc.org/The_Missing_docref]

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- ⇒ Document No. 34, ICRC, Tracing Service [5]
 - ⇒ Case No. 118, United States, Former Prisoner of War on a Mission to Hanoi
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey [Paras 129-157]
 - ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 159-160]
 - ⇒ Document No. 193, ICRC, Request to Visit Gravesites in the Falklands/Malvinas
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 22]
 - ⇒ **Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities**
 - ⇒ Case No. 286, The Conflict in Western Sahara
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125 See GC IV, Arts 25 and 26

126 See GC I, Art. 16; GC II, Art. 19; GC III, Arts 122 and 123; GC IV, Arts 136 and 140; P I, Art. 33(2)

127 See GC III, Art. 70; GC IV, Art. 106

128 See GC III, Art. 71; GC IV, Art. 107

129 See GC III, Art. 122(7); GC IV, Art. 137(1)

130 See GC I, Art. 16; P I, Art. 33(2)

131 See GC III, Art. 17(3)

132 See P I, Art. 33(4)

133 See GC I, Art. 17; P I, Art. 34(1)

134 See P I, Art. 34(2) and (4)

SUGGESTED READING: Special Issue “Missing Persons”, in *IRRC*, No. 848, December 2002, pp. 720-902. SASSÒLI Marco, “Les disparus de guerre : Les règles du droit international et les besoins des familles entre espoir et incertitude”, in *Frontières*, vol. 15/2, Spring 2003, pp. 38-44. ICRC & Inter-Parliamentary Union, *Missing Persons: A Handbook for Parliamentarians*, Geneva, ICRC, 2009, 92 p. ICRC, *Missing people, DNA analysis and identification of human remains: a guide to best practice in armed conflicts and other situations of armed violence*, Geneva, ICRC, 2009, 48 p. PETRIG Anna, “The War Dead and their Gravesites”, in *IRRC*, Vol. 91, No. 874, June 2009, pp. 341-369.

1. Relationship between the dead and the missing

⇒ Case No. 180, UN Compensation Commission, Recommendations

2. Obligation to identify dead bodies and notify deaths

GC I, Art. 16; P I, Art. 33(2) [CIHL, Rules 112 and 116]

⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin
 ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila

3. Obligation to search for persons reported missing

P I, Art. 33(1) [CIHL, Rule 117]

⇒ Case No. 151, ECHR, Cyprus v. Turkey [Paras 129-150]
 ⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*,
 ⇒ Case No. 286, The Conflict in Western Sahara [Parts A. and B.]

4. Treatment of remains

⇒ Case No. 187, Iraq, Care for Wounded Enemies

a) respect

GC I, Art. 15; P I, Art. 34(1) [CIHL, Rule 113]

⇒ Document No. 87, German Invasion of Crete
 ⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin

b) decent burial

GC I, Art. 17; P I, Art. 34(1) [CIHL, Rule 115]

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- ⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin
⇒ Case No. 135, Israel, The Rafah Case [Paras 46-53]
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c) marking of gravesites

d) access to gravesites

e) agreements on the return of remains

P I, Art. 34(2) and (4)

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- ⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin
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VIII. TRANSMISSION OF INFORMATION

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- ⇒ Document No. 34, ICRC, Tracing Service [5]
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1. Recording of information

GC I, Art. 16; GC II, Art. 19

2. Notification (to the power of origin through the Central Tracing Agency)

GC I, Art. 16; GC II, Art. 19

3. Transmission of death certificate and belongings (to the next-of-kin through the Central Tracing Agency)

GC I, Art. 16; GC II, Art. 19 [CIHL, Rule 114]

Chapter 8

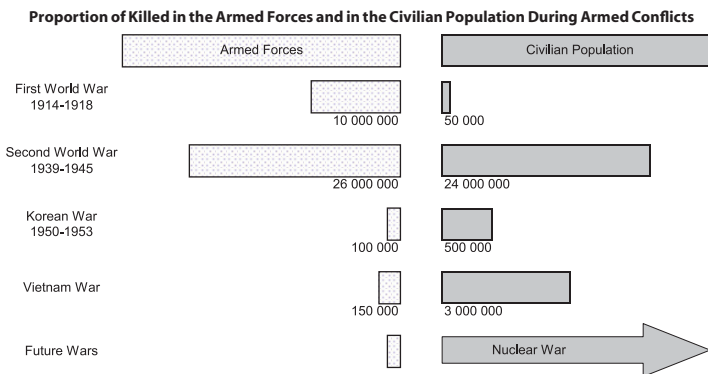
The Protection of Civilians

Introductory text

Increasingly, civilians make up the overwhelming majority of the victims of armed conflict,^[135] even though International Humanitarian Law (IHL) stipulates that attacks should only be directed at combatants and military objectives and that civilians and civilian objects should be respected. However, even if IHL is scrupulously respected, civilians can become victims of armed conflicts, as attacks and military operations directed at military objectives are not prohibited merely because they may also affect civilians.

Civilians in war need to be respected by those into whose hands they have fallen, those who could, for example, arrest, ill-treat or harass them, confiscate their property, or deprive them of food or medical assistance. Under IHL, some of those protections are prescribed for all civilians,^[136] but most apply only to “protected civilians”,^[137] i.e.

135 The figures of this table have been taken from the Office fédéral de la Protection civile, Berne (Switzerland), 1988. The scale of the different sections of the chart is only illustrative of the figures mentioned. ICRC. 1999.



136 See GC IV, Part II (Arts 13-26) and P I, Section II of Part IV (Arts 72-79, in particular the fundamental guarantees provided for in Art. 75)

137 While IHL protects all civilians, this is a term of art defined in Art. 4 of Convention IV in line with the traditional inter-State structure of IHL and does not therefore cover those who are in the hands of a belligerent of which they are nationals (see *supra* Part I, Chapter 2, III, 2. personal scope of application).

basically those who are in enemy hands. The rules on the treatment of protected civilians are subdivided into three groups: the first applies to civilians who find themselves on enemy territory,^[138] the second contains more detailed and protective rules applying to protected civilians whose territory is occupied by the enemy,^[139] while the third encompasses provisions common to the enemy's own territory and occupied territories.^[140] This means that no rules cover civilians who are neither (enemy civilians) on the territory of a belligerent nor on an occupied territory. "Occupied territory" is therefore to be understood as a functional concept as far as civilians in enemy hands are concerned, one that applies as soon as civilians fall into enemy hands outside the enemy's own territory. The most detailed rules concern the treatment of civilians interned in connection with the conflict, in both the enemy's own and occupied territories, for imperative security reasons and not in view of a trial.^[141] This detailed regime for civilian internees is justified by the fact that such internment is an exception to the general rule that enemy civilians, unlike combatants, may not be detained. It is broadly similar to the regime provided for by Convention III for prisoners of war.

Civilians in war also need to be respected by the belligerent opposing the party in whose hands they are, who could, for example, bomb their towns, attack them on the battlefield, or hinder the delivery of food supplies or family messages. These rules on the protection of the civilian population against the effects of hostilities, which are set out for the most part in Protocol I^[142] and customary law (partly based on the 1907 Hague Regulations), are part of the law of the conduct of hostilities and benefit all civilians finding themselves on the territory of parties to an international armed conflict.^[143]

⇒ **Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict**

⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia

SUGGESTED READING: BEST Geoffrey, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfels & Nicholson, 1980, 400 pp. DOSWALD-BECK Louise, "The Value of the 1977 Protocols for the Protection of Civilians", in MEYER Michael A. (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, London, British Institute of International and Comparative Law, 1989, pp. 137-172. KALSHOVEN Frits, "Reaffirmation and Development of International Humanitarian Law in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part II", in *Netherlands Yearbook of International Law*, Vol. 9, 1978, pp. 107-171. POCAR Fausto, "Violence on Civilians and Prisoners of War in the Jurisprudence of International Criminal Tribunals", in *Anuário brasileiro de direito internacional = Brazilian Yearbook of International Law*, Vol. 2, No. 4, 2009, pp. 11-30. PRIMORATZ Igor, *Civilian Immunity in War*, Oxford, OUP, 2007, 263 pp. TIGROUDJA Hélène, "La Cour suprême israélienne et la protection des personnes en temps de conflit", in *RGDIP*, T. 113, 2009, pp. 555-588.

138 See GC IV, Arts 35-46

139 See GC IV, Arts 47-78

140 See GC IV, Arts 27-34

141 See GC IV, Arts 79-135

142 See in particular, P I, Arts 48-71

143 See P I, Arts 49(2) and 50(1)

I. THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES

(See *infra*, Part I, Chapter 9. II. The Protection of the Civilian Population against Effects of Hostilities, p. 250)

II. THE PROTECTION OF CIVILIANS AGAINST ARBITRARY TREATMENT

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- ⇒ Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part E.II.2]
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1. The structure of Convention IV

- a) Part II: rules benefiting all civilians
- b) Part III: rules benefiting “protected persons” (as defined in GC IV, Art. 4)
 - aa) Section II: rules protecting foreigners on a party's own (= non-occupied) territory
 - bb) Section III: rules applicable to occupied territory
 - cc) Section I: rules common to the enemy's own and occupied territories
 - dd) Section IV: rules protecting civilian internees in the enemy's own and occupied territories

2. Rules benefiting all civilians

a) aid and relief

(See *infra*, Part I, Chapter 9. IV. International Humanitarian Law and Humanitarian Assistance)

b) special protection of women

GC I-II, Art. 12; GC III, Arts 14, 25, 88, 97 and 108; GC IV, Arts 14, 16, 21-27, 38, 50, 76, 85, 89, 91, 97, 124, 127 and 132; P I, Arts 70 and 75-76; P II, Arts 5(2) and 6(4) [CIHL, Rule 134]

IHL first protects women if they are wounded, sick or shipwrecked, as civilians, as members of the civilian population or as combatants, according to their status. As such, women must benefit from the same protection as that given to men and may not be discriminated against.^[144] However, IHL also takes into account the fact that women are more vulnerable, and gives them preferential treatment in some particular

144 GC IV, common Art. 3; GC I-II, Art. 12; GC III, Art. 16; GC IV, Arts 13 and 27(3)

cases. First, women are specially protected against any attack on their sexual integrity, in particular against rape, enforced prostitution or any form of indecent assault.^[145] The International Criminal Tribunal for Rwanda (ICTR) and the International Criminal Court (ICC) have included rape and other forms of sexual violence in their list of war crimes,^[146] and although the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) does not explicitly mention rape as a war crime, a Trial Chamber nevertheless recognized it as a grave breach of the Geneva Conventions.^[147]

Moreover, IHL specially protects pregnant women and maternity cases against the effects of war,^[148] and stipulates that, during occupation, such preferential treatment is not to be hindered by the occupying power.^[149]

Finally, female prisoners of war or female civilian internees also benefit from specific rules.^[150] Here again, IHL seeks to protect women's sexual integrity^[151] and to ensure that due attention is paid to pregnant and nursing mothers,^[152] while preventing States from discriminating against women belonging to the enemy party.^[153]

The special protection afforded to women in time of war and the prohibition of rape and other forms of sexual violence were both recently recognized as having attained customary status.^[154]

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- ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 208, Germany, Government Reply on Rapes in Bosnia
 - ⇒ Case No. 217, ICTY, *The Prosecutor v. Kunarac, Kovac and Vukovic* [Paras 127-186]
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
 - ⇒ Case No. 270, India, Press release, Violence in Kashmir
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SUGGESTED READING: CARPENTER Charli R., *Innocent Women and Children: Gender, Norms and the Protection of Civilians*, Hampshire (England), Burlington (USA), Ashgate, 2006, 217 pp. KRILL Françoise, “The Protection of Women in International Humanitarian Law”, in *IRRC*, No. 249, November 1985, pp. 337-363. LINDSEY Charlotte, “Women and War”, in *IRRC*, No. 839, September 2000, pp. 561-580. NUMMINEN Jutta, “Violence à l’égard des femmes en situation de conflit armé : analyse effectuée selon le point de vue féminin sur la protection de la femme dans le droit international humanitaire”, in *The Finnish Yearbook of International Law*, Vol. 9, 1998, pp. 453-473.

145 GC IV, Art. 27

146 ICTR Statute, Art. 4(e) [See Case No. 230, UN, Statute of the ICTR]; ICC Statute, Art. 8(2)(b)(xxii) [See Case No. 23, The International Criminal Court].

147 The Trial Chamber in the *Celebici* case declared that rape could constitute torture, thus amounting to a grave breach of the Geneva Conventions. See ICTY, *The Prosecutor v. Delalic et al.*, paras 475 ff. Rape was also condemned by the ICTY as a crime against humanity. [See Case No. 217, ICTY, Kunarac, Kovac and Vukovic, paras 127-186]

148 GC IV, Arts 14, 16, 21 and 22

149 GC IV, Art. 50

150 See, for instance, P I, Art. 76(2)

151 See, for instance, GC III, Arts 25, 97 and 108; GC IV, Arts 76, 85, 119 and 124

152 See, for instance, GC IV, Arts 89 and 132; P I, Art. 76(3); P II, Art. 6(4)

153 GC III, Art. 88

154 See Case No. 43, ICRC, Customary International Humanitarian Law [Part C., Rules 134 and 93]

FURTHER READING: BARROW Amy, “UN Security Council Resolutions 1325 and 1820: Constructing Gender in Armed Conflict and International Humanitarian Law”, in *IRRC*, Vol. 92, No. 877, March 2010, pp. 221-234. BENNOUNE Karima, “Do We Need International Law to Protect Women in Armed Conflict?”, in *Case Western Reserve Journal of International Law*, No. 38, 2006, pp. 363-391. DURHAM Helen & O’BYRNE Katie, “The Dialogue of Difference: Gender Perspectives on International Humanitarian Law”, in *IRRC*, Vol. 92, No. 877, March 2010, pp. 31-52.

aa) the feminist criticism of International Humanitarian Law

The very fact that IHL seeks to protect women’s “honour” and grants special protection to expectant and nursing mothers has given rise to much criticism from feminist theorists.^[155] They argue that IHL is inherently discriminatory – and somewhat old-fashioned – in that it mostly considers women as victims and men as combatants. At the same time, they contend that the rules on women are low down in the hierarchy of IHL rules: for instance, provisions on women aim at ensuring protection rather than imposing strict prohibitions, and rape is not even included in the list of grave breaches.^[156]

However, as mentioned above, the notion of rape, and the broader category of sexual violence, has evolved in international criminal law and such acts are now often prosecuted as grave breaches. Moreover, the language used in IHL texts may be outdated, but the rules on the protection of women should be read and adapted in the light of their contemporary meaning. In our view, the main problem is not that the texts are insufficient, but that in this field, as in others, the rules are not sufficiently respected.

Quotation IHL in addressing humanitarian needs in armed conflict assumes a population in which there is no systemic gender inequality. The system fails to recognize the unequal situation of men and women in society generally.

[Source: GARDAM Judith & JARVIS Michelle J., *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, 2001, p. 97; quoted in DURHAM Helen “Women, Armed Conflict and International Law”, in *IRRC*, No. 847, September 2002, p. 657]

SUGGESTED READING: CHARLESWORTH Hilary, “Feminist Methods in International Law”, Symposium on Method in International Law”, in *AJIL*, Vol. 93, 1999, pp. 379-394. CHINKIN Christine, “A Gendered Perspective to the International Use of Force”, in *AYIL*, 1988-1989, pp. 279-293. GARDAM Judith, “Women, Human Rights and International Humanitarian Law”, in *IRRC*, No. 324, September 1998, pp. 421-432. GARDAM Judith, “Women and the Law of Armed Conflict: Why the Silence?”, in *ICLQ*, Vol. 46, 1997, pp. 55-80. GARDAM Judith & CHARLESWORTH Hilary, “Protection of Women in Armed Conflict”, in *Human Rights Quarterly*, Vol. 22/1, February 2000, pp. 148-166.

FURTHER READING: DURHAM Helen, “Women, Armed Conflict, and International Law”, in *IRRC*, No. 847, September 2002, pp. 655-659. GARDAM Judith & JARVIS Michelle J., *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, 2001, 283 pp.

155 In general, see Judith Gardam & Michelle J. Jarvis, *Women, Armed Conflict and International Law*, The Hague, Kluwer Law International, 2001, 283 pp.

156 GC I-IV, Arts 50/51/130/147 respectively; P I, Art. 85

bb) the principles of non-discrimination and special protection

Quotation Ever since its inception, international humanitarian law has accorded women general protection equal to that of men. [...] Women who have taken an active part in hostilities as combatants are entitled to the same protection as men when they have fallen into enemy hands. [...] Besides this general protection, women are also afforded special protection based on the principle outlined in Article 14, paragraph 2 [of Geneva Convention III], that “women shall be treated with all the regard due to their sex”. This principle is followed through in a number of provisions which expressly refer to the conditions of detention for women in POW camps [...]. Women (and men) who, as members of the civilian population, are taking no active part in hostilities are afforded protection under the Fourth Geneva Convention [...] and under Additional Protocol I. [...] In addition to this general protection, women are afforded special protection under the said Convention and Protocol I, which stipulate that “women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution or any form of indecent assault”. International humanitarian law also lays down special provisions for pregnant women and mothers of small children [...].

[Source: LINDSEY Charlotte, “Women and War”, in *IRRC*, No. 839, September 2000, p. 580]

cc) protection against rape and sexual violence

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 333-358]
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 16, 35-37]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 87-89]
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SUGGESTED READING: ANTONIONI Antonio, “Le viol et le droit de la guerre dans la doctrine”, in *Journal of the History of International Law*, Vol. 4/1, 2002, pp. 100-114. CHINKIN Christine, “Rape and Sexual Abuse of Women in International Law”, in *EJIL*, Vol. 5/3, 1994, pp. 326-341. COPELON Rhonda, “Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law”, in *McGill Law Journal*, Vol. 46/1, 2000, pp. 217-240. DIXON Rosalind, “Rape as a Crime in International Humanitarian Law: Where to From Here?”, in *EJIL*, Vol. 13/3, June 2002, pp. 697-719. GUENIVET Karima, *Violences sexuelles : la nouvelle arme de guerre*, Paris, Michalon, 2001, 206 pp. ISLAM Rafiqul, “The Culpability of Gender-Based Terrorism in International Humanitarian Law: the Rape of Women in Armed Conflicts”, in *ISIL Yearbook of International Humanitarian and Refugee Law*, Vol. 6, 2006, pp. 87-105. KENNEDY-PIPE Caroline & PENNY Stanley, “Rape in War: Lessons of the Balkan Conflicts in the 1990s”, in *International Journal of Human Rights*, Vol. 4/3-4, 2000, pp. 67-84. MERON Theodor, “Rape as a Crime under International Humanitarian Law”, in *AJIL*, Vol. 87/3 1993, pp. 424-428. MORRIS Madeline, “By Force of Arms: Rape, War and Military Culture”, in *Duke Law Journal*, Vol. 45/4, 1996, pp. 651-781. NIARCHOS Catherine N., “Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia”, in *Human Rights Quarterly*, Vol. 17/4, 1995, pp. 649-690. PAPACONSTANTINO Maria, “Rape as Crime under International Humanitarian Law”, in *Revue Hellénique de Droit International*, Vol. 51/2, 1998, pp. 477-499. PILCH Frances T., “The Crime of Rape in International Humanitarian Law”, in *Journal of Legal Studies*, Vol. 9, 1998-99, pp. 99-119. QUENIVET Noëlle N.R., *Sexual Offenses in Armed Conflict and International Law*, Ardsley, Transnational Publishers, 2005, 230 pp.

FURTHER READING: ASKIN Kelly Dawn, “Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunal: Current Status”, in *AJIL*, Vol. 93/1, 1999, pp. 97-123. DYANI Ntombizozuko, “Protocol on the Rights of Women in Africa: Protection of Women from Sexual Violence during Armed Conflict”, in *African Human Rights Law Journal*, Vol. 6, No. 1, 2006, pp. 166-187. FLORES ACUNA Tathiana, “The Rome Statute’s Sexual Related Crimes: an Appraisal under the Light of International Humanitarian Law”, in *Humanitäres Völkerrecht*, Vol. 19, No. 1, 2006, pp. 39-51. LAVIOLETTE Nicole, “Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the former Yugoslavia and Rwanda”, in *CYL*, Vol. 36, 1998, pp. 93-149. LEWIS Dustin A., “Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law”, *Wisconsin International Law Journal*, Vol. 27, No. 1, 2009, pp. 1-49. RICHEY Katie C., “Several Steps Sideways: International Legal Developments Concerning War Rape and the Human Rights of Women”, in *Texas Journal of Women and the Law*, Vol. 17, No. 1, 2007, pp. 109-129. SIVAKUMARAN Sandesh, “Sexual Violence against Men in Armed Conflict”, *EJIL*, Vol. 18, No. 2, April 2007, pp. 253-276. SIVAKUMARAN Sandesh, “Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict”, in *IRRC*, Vol. 92, No. 877, March 2010, pp. 259-277. VAN DER POLL Letetia, “The Emerging Jurisprudence on Sexual Violence Perpetrated against Women during Armed Conflict”, in *African Yearbook on International Humanitarian Law*, 2007, pp. 1-38. ZAWATI Hilmi M., “Impunity or Immunity: Wartime Male Rape and Sexual Torture as a Crime against Humanity”, in *Torture: Journal on Rehabilitation of Torture Victims and Prevention of Torture*, Vol. 17, No. 1, 2007, pp. 27-47.

dd) grounds for preferential treatment

- pregnant women or maternity cases
- mothers of children under seven years of age

c) special protection of children

GC IV, Arts 14, 17, 23, 24, 38, 50, 76, 82, 89, 94 and 132; P I, Arts 70 and 77-78; P II, Art. 4 [CIHL, Rules 135-137]

Like women, children are first protected by IHL if they are wounded, sick or shipwrecked, as civilians and as members of the civilian population. They also benefit from special protection because of their vulnerability. Every armed conflict leaves numerous children without resources or separated from their families, a situation that renders them even more vulnerable. This is why IHL contains specific rules aimed at protecting children from the effects of hostilities, from any form of indecent assault, or from any other danger arising from the general circumstances of a war situation.^[157]

But above all, IHL aims to prevent the participation of children in hostilities. Parties to conflicts may not recruit children under 15 into their armed forces and have to ensure that they do not take a direct part in hostilities.^[158] In Protocols I and II and in Art. 38 of the Convention on the Rights of the Child, the age threshold is 15; the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict^[159] raises it to 18, except that States may accept voluntary enrolment of persons under 18 into military schools, thus establishing an inequality between governmental forces and non-State armed groups. If children nevertheless participate in hostilities, they will still benefit, if captured, from preferential treatment.^[160] If they are, despite

157 See, for example, GC IV, Arts 14, 17, 23, 24, 38(5), 50, 51, 68, 76, 82, 89, 94 and 132; P I, Arts 70, 77 and 78; P II, Art. 4(3)(e)

158 P I, Art. 77(2); P II, Art. 4(3)(c)

159 See Document No. 24, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict

160 P I, Art. 77

the above-mentioned prohibitions, members of armed forces, they benefit from combatant and prisoner-of-war status.

The contents of the special protection afforded to children must nevertheless be construed with care. For instance, as the treaty rules prevent the direct involvement of children in hostilities, organizations working in the field of children's rights and some soft law instruments suggest that the prohibition (or even the notion of direct participation) be extended to the case of children associated with armed groups, in order to ensure that children are kept away from all sorts of involvement. This might not be realistic in the case of insurgent groups and might at the same time make it easier for the enemy to directly target participating children, thus putting such children in greater danger. At the same time, the mere fact that children could be targeted when involved in combat goes against the idea of preferential treatment afforded to children. A solution would be to exclude participating children from the category of legitimate targets, but it seems unrealistic to expect the parties to refrain from targeting such armed enemies. The principle of military necessity as a restriction to violence even against legitimate targets should at least in this case require them to arrest rather than kill such children whenever possible.

Quotation Article 38.

1. States Parties undertake to respect and to ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child.
2. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
3. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavor to give priority to those who are oldest.
4. In accordance with their obligations under International Humanitarian Law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

[Source: *Convention on the Rights of the Child*, November 20, 1989; available on <http://www.ohchr.org>]

Quotation 2 Convention (182) on the Worst Forms of Child Labour, 1999. [...]

Article 1

Each Member which ratifies this Convention shall take immediate and effective measures to secure the prohibition and elimination of the worst forms of child labour as a matter of urgency.

Article 2

For the purposes of this Convention, the term child shall apply to all persons under the age of 18.

Article 3

For the purposes of this Convention, the term the worst forms of child labour comprises:

- (a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; [...]

[Source: Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (C182), 17 June 1999; available on <http://www.ilo.ch>]

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- ⇒ Document No. 24, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict
 - ⇒ Document No. 34, ICRC, Tracing Service [2]
 - ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 418]
 - ⇒ Case No. 276, Sierra Leone, Special Court Ruling on the Recruitment of Children
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aa) respect for children

bb) prohibition of recruitment

- the age threshold
 - under Protocols I and II and the Convention on the Rights of the Child: 15 years of age
 - under the Optional Protocol to the Convention on the Rights of Child on the involvement of children in armed conflicts: 18 years of age for direct participation in hostilities and for compulsory recruitment
 - but States (unlike armed groups) may accept voluntary enrolment into military schools

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- ⇒ Document No. 24, Optional Protocol on the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 10-11]
 - ⇒ **Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo**
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Art. 50]
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 2., A.]
 - ⇒ Case No. 276, Sierra Leone, Special Court Ruling on the Recruitment of Children
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cc) status and treatment of child soldiers

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- ⇒ Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo
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d) special protection of journalists

GC I-III, Arts 13/13/4; P I, Art. 79 [CIHL, Rule 34]

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- ⇒ Case No. 37, Protection of Journalists
 - ⇒ Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict [Part A.]
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e) restoring family links

GC III, Arts. 70 and 122; GC IV, Arts 25-26 and 106; P I, Art. 32; P II, Art. 4(3)(b) [CIHL, Rule 125]

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- ⇒ **Document No. 34, ICRC, Tracing Service**
 - ⇒ **Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement [Art. 12]**
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, *Coard v. United States*
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SUGGESTED READING: DJUROVIC Gradimir, *The central tracing agency of the International Committee of the Red Cross: Activities of the ICRC for the alleviation of the mental suffering of war victims*, Geneva, ICRC, 1986, 259 pp. DRAPER Gerald I.A.D., “The Reunion of Families in Time of Armed Conflict”, in *IRRC*, No. 191, February 1977, pp. 57-65. EGGER Daniela & TOMAN Jiri, *Family Reunification: Collection of Documents*, Geneva, Henry-Dunant Institute, 1997, 184 pp. ICRC, *Restoring Family Links Strategy: Including Legal References*, Geneva, ICRC, February 2009, 64 pp. SASSÒLI Marco, “The National Information Bureau in Aid of the Victims of Armed Conflicts”, in *IRRC*, No. 256, January 1987, pp. 6-24.

f) fundamental guarantees (P I, Art. 75)

SUGGESTED READING: HERCZEGH Géza, “State of Emergency and Humanitarian Law: On Article 75 of Additional Protocol I”, in *IRRC*, No. 242, September 1984, pp. 263-273.

3. Rules on protected civilians

a) who is a protected civilian?

GC IV, Art. 4

(See *supra*, Part I, Chapter 2. III. 2. Personal scope of application)

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- ⇒ Case No. 104, Netherlands, *In re Pilz*
 - ⇒ Case No. 116, United States, Screening of Detainees in Vietnam
 - ⇒ Case No. 132, Israel, Cases Concerning Deportation Orders
 - ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, *Coard v. United States*
 - ⇒ Case No. 175, UN, Detention of Foreigners
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., paras 163-169]**
 - ⇒ Case No. 213, ICTY, Prosecutor v. Rajic [Part A., paras 34-37]
 - ⇒ **Case No. 216, ICTY, The Prosecutor v. Blaskic [Paras 127-146]**
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.3]
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SUGGESTED READING: SASSÒLI Marco & OLSON Laura M., “The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?”, in *IRRC*, No. 839, September 2000, pp. 733-769.

b) rules on protected civilians

aa) foreigners on a party's own territory: basically the rules protecting foreigners in peacetime remain applicable

GC IV, Art. 38 (initial sentence)

bb) right to leave?

GC IV, Arts 35-37 and 48

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- ⇒ Case No. 162, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property
 - ⇒ Case No. 175, UN, Detention of Foreigners
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cc) humane treatment

GC IV, Art. 27 [CIHL, Rule 87]

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- ⇒ Document No. 34, ICRC, Tracing Service [4]
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.

- ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al* v. Ministry of Security
 - ⇒ Case No. 135, Israel, The Rafah Case [Paras 21 and 52]
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 199, Canada, R. v. Brocklebank [Paras 24, 25, 49, 60, 62, and 64-66]
 - ⇒ Case No. 200, Canada, R. v. Boland
 - ⇒ Case No. 201, Canada, R. v. Seward
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [10]
 - ⇒ Case No. 216, ICTY, The Prosecutor v. Blaskic [Paras 154-155]
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 7-9]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 90-98]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 90-93]
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SUGGESTED READING: DROEGE Cordula, ““In Truth the Leitmotiv”: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law”, in *IRRC*, Vol. 89, No. 867, September 2007, pp. 515-541. SALINAS BURGOS Hernan, “The Taking of Hostages and International Humanitarian Law”, in *IRRC*, No. 270, May-June 1989, pp. 196-216.

dd) forced labour

GC IV, Arts 40, 51 and 95 [CIHL, Rule 95]

- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [9]
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 51-53]
-

ee) prohibition of collective punishment

GC IV, Art. 33 [CIHL, Rule 103]

- ⇒ Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory
 - ⇒ Case No. 137, Israel, Power Cuts in Gaza [Part A., para. 17]
 - ⇒ **Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 12-23, 37]**
 - ⇒ **Case No. 277, Sierra Leone, Special Court Ruling in AFRC Case [Part II., paras 672-681]**
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 101-109]
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“Collective Punishments under International Humanitarian Law: an Analysis of the 2006 War in Lebanon”, in *Pace Diritti Umani*, Vol. 5, No. 3, 2009, pp. 95-120.

ff) visits by the Protecting Power and by the ICRC

GC IV, Arts 9-10, 30 and 143 [CIHL, Rule 124 A]

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part II.]
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gg) if interned: civilian internees

GC IV, Arts 41-43, 68 and 78-135

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 138, Israel, Detention of Unlawful Combatants [Part A., para. 17]
 - ⇒ Case No. 162, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property
 - ⇒ **Case No. 170, ICRC, Iran/Iraq Memoranda**
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 52-56, 90-98]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 90-93]
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SUGGESTED READING: Case Western Reserve Journal of International Law, “Security Detention”, Vol. 40, No. 3, 2009, pp. 315-650. GOODMAN Ryan, “The Detention of Civilians in Armed Conflicts”, in *AJIL*, Vol. 103, No. 1, January 2009, pp. 48-74. Ministry of Foreign Affairs of Denmark, “The Copenhagen Process on the Handling of Detainees in International Military Operations”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 46, 2007, pp. 363-392. NAERT Frederik, “Detention in Peace Operations: the Legal Framework and Main Categories of Detainees”, in *Revue de droit militaire et de droit de la guerre*, Vol 1-2, No. 45, 2006, pp. 51-78. OLSON Laura, “Guantanamo Habeas Review: Are the D.C. District Court’s Decisions Consistent with IHL Internment Standards?”, in *Case Western Reserve Journal of International Law*, Vol. 42, No. 1 & 2, 2009, pp. 197-243. OSWALD Bruce, “The Detention of Civilians in Military Operations: Reasons for and Challenges to Developing a Special Law of Detention”, in *Melbourne University Law Review*, Vol. 32, 2008, pp. 524-553.

– decision of internment: individual administrative decision

GC IV, Art. 78

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- ⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States [Paras 52-59]
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– reasons for internment: imperative security reasons; not punishment

GC IV, Arts 41, 42 and 78

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States
 - ⇒ Case No. 162, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [12]
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SUGGESTED READING: SASSÒLI Marco, “The Concept of Security in International Law Relating to Armed Conflicts”, in BAILLIET Cécilia M., *Security: a Multidisciplinary Normative Approach*, Leiden, Boston, M. Nijhoff, 2009, pp. 7-23.

– treatment of civilian internees

GC IV, Arts 83-131, Annex III [CIHL, Rules 118-123 and 125-127]

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- ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
 - ⇒ Case No. 162, Eritrea/Ethiopia, Award on Civilian Internees and Civilian Property
 - ⇒ Case No. 184, United States, The Taguba Report
 - ⇒ Case No. 185, United States, The Schlesinger Report
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SUGGESTED READING: CRYER Robert, “The Fine Art of Friendship: *jus in bello* in Afghanistan”, in *Journal of Conflict and Security Law*, Vol. 7/1, 2002, pp. 37-83. DROEGE Cordula, “Transfer of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 669-701. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Oxford, OUP, 3rd ed., 2009, 697 pp. SASSÒLI Marco, “The National Information Bureau in Aid of the Victims of Armed Conflicts”, in *IRRC*, No. 256, January 1987, pp. 6-24.

– release of civilian internees

GC IV, Arts 132-135 [CIHL, Rule 128 B]

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- ⇒ Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement [Arts 3-11 and 13-15]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [18. and 21.]
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c) possible derogation

GC IV, Art. 5

- aa) from substantive rights on a party's own territory
- bb) from communication rights in occupied territory
- cc) in any case, humane treatment and judicial guarantees are non-derogable

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security [Para. 6]
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III. REFUGEES AND DISPLACED PERSONS IN INTERNATIONAL HUMANITARIAN LAW

Introductory text

If States consistently and fully observed the principles of IHL protecting civilians,^[161] most population movements brought about by armed conflicts would be prevented. The IHL of non-international armed conflicts contains a general prohibition of forced movements of civilians,^[162] while the IHL of international armed conflicts stipulates such a general prohibition only for occupied territories.^[163] Recognizing that such situations and population movements may occur for reasons other than an armed conflict, IHL provides protection to both displaced persons and refugees.

Displaced persons are civilians fleeing within their own country, e.g., from armed conflict. IHL protects those displaced because of an international armed conflict, e.g., grants them the right to receive items essential to survival.^[164] Civilians displaced by internal armed conflict enjoy similar but less detailed protection.^[165]

Refugees, in contrast, are those who fled their country. IHL protects such individuals, as civilians affected by hostilities,^[166] only if they have fled to a State taking part in an international armed conflict^[167] (or if that State is beset by internal armed conflict^[168]). IHL specifically protects refugees entering the territory of an enemy State against unfavourable treatment (based on their nationality).^[169] Those considered refugees prior to the outbreak of hostilities (including those from a neutral State) are always considered protected persons under the IHL of international armed conflicts,^[170] which also provides special guarantees for those who fled to territory which becomes occupied by the State of which they are nationals.^[171] Finally, regarding non-refoulement, the Conventions expressly state that protected persons may not be transferred to a State where they fear persecution on political or religious grounds.^[172]

SUGGESTED READING: BUGNION François, “Réfugiés, personnes déplacées et droit international humanitaire”, in *Revue suisse de droit international et de droit européen*, Vol. 3, 2001, pp. 277-288.

161 For example, prohibitions against direct or reprisal attacks on civilians, including those intended to spread terror among the population and against starvation of civilians. (See P I, Arts 51 and 54)

162 See P II, Art. 17

163 See GC IV, Art. 49

164 See GC IV, Art. 23; P I, Art. 70

165 See GC I-IV, common Art. 3; P II (repeating and expanding the rules in common Art. 3)

166 The 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol define a refugee in much narrower terms (generally, as one fleeing persecution). Only the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa includes people fleeing armed conflicts under the concept of refugee. Yet, civilians must rely upon these Conventions and the United Nations High Commissioner for Refugees for protection and benefits when fleeing to territory not involved in armed conflict, as IHL is inapplicable.

167 See GC IV, Arts 35 to 46

168 In this case GC I-IV, common Art. 3 and P II would apply.

169 See GC IV, Art. 44

170 See particularly P I, Art. 73

171 See GC IV, Art. 70(2)

172 See GC IV, Art. 45(4)

COLLINSON Sarah (ed.), *Realising Protection: the Uncertain Benefits of Civilian, Refugee and IDP Status*, London, Overseas Development Institute, September 2009, 62pp. LAVOYER Jean-Philippe, “Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC”, in *IRRC*, No. 305, March-April 1995, pp. 162-180. MAURICE Frédéric & COURTEN Jean de, “ICRC Activities for Refugees and Displaced Civilians”, in *IRRC*, No. 280, January-February 1991, pp. 9-21. Special Issue “50th Anniversary of the 1951 Refugee Convention. The Protection of Refugees in Armed Conflicts”, in *IRRC*, No. 843, September 2001, pp. 571 ff.

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⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict [Part A.]

1. Displaced persons fleeing within their own country because of an armed conflict

⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part II., A.]

⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 2., C.]

SUGGESTED READING: ABEBE Allehone Mulugeta, “Displacement of Civilians during Armed Conflict in the Light of the Case Law of the Eritrea-Ethiopia Claims Commission”, in *Leiden Journal of International Humanitarian Law*, Vol. 22, No. 4, 2009, pp. 823-851. ABEBE Allehone Mulugeta, “Legal and Institutional Dimensions of Protecting and Assisting Internally Displaced Persons in Africa”, in *Journal of Refugee Studies*, Vol. 22, No. 2, June 2009, pp. 155-176. CONTAT HICKEL Marguerite, “The Challenge Posed by Displaced Persons”, in *Refugee Survey Quarterly*, Vol. 20, February 2001, pp. 51-54. DAVIES Sara E. & GLANVILLE Luke, *Protecting the Displaced: Deepening the Responsibility to Protect*, Leiden, Boston, M. Nijhoff, 2010, 210 pp. ICRC, *Internally Displaced People: Humanitarian Response to Internally Displaced People in Armed Conflict*, Geneva, ICRC, June 2010, 12 pp. ISLAM Rafiqul, “The Sudanese Darfur Crisis and Internally Displaced Persons in International Law: the Least Protection for the Most Vulnerable”, in *International Journal of Refugee Law*, Vol. 18, No. 2, June 2006, pp. 354-385. KELLENBERGER Jakob, “The ICRC’s Response to Internal Displacement: Strengths, Challenges and Constraints”, in *IRRC*, Vol. 91, No. 875, September 2009, pp. 475-490. LAVOYER Jean-Philippe, “Guiding Principles on Internal Displacement”, in *IRRC*, No. 324, September 1998, pp. 467-480. LUOPAJÄRVI Katja, “Is There an Obligation on States to Accept International Humanitarian Assistance to Internally Displaced Persons under International Law?”, in *International Journal of Refugee Law*, Vol. 15/4, 2004, pp. 678-714. PHUONG Catherine, *The International Protection of Internally Displaced Persons*, Cambridge, CUP, 2004, 293 pp. PLATTNER Denise, “The Protection of Displaced Persons in Non-International Armed Conflicts”, in *IRRC*, No. 291, November-December 1992, pp. 567-580. “Internally Displaced Persons: The Mandate and

Role of the International Committee of the Red Cross”, in *IRRC*, No. 838, June 2000, pp. 491-500. ZAAT Kirsten, “The Protection of Internally Displaced Persons in the Sudan: Applying International Law at the Field Level, in *Journal of Humanitarian Assistance*, October 2006, 33 pp.

a) protection by IHL

aa) prohibition of population displacements

(See *infra*, Part I, Chapter 8. IV.8. a) Deportations, p.243, and Chapter 12. II. 3. b) more absolute prohibition of forced displacement)

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- ⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 199-208]
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 3-9]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 120-125]
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bb) same protection as other civilians

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- ⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 29-46]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 135-139]
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b) need for a specific instrument?

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- ⇒ **Document No. 26, African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa**
 - ⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 - ⇒ **Document No. 56, UN, Guiding Principles on Internal Displacement**
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SUGGESTED READING: COHEN Roberta, “Developing an International System for Internally Displaced Persons”, in *International Studies Perspectives* 7, 2006, pp. 87-101. COHEN Roberta, “Ten Years of the Guiding Principles on Internal Displacement”, in *Forced Migration Review* 10, 2008, 39 pp. GOLDMAN Robert, “Codification of International Rules on Internally Displaced Persons”, in *IRRC*, No. 324, September 1998, pp. 463-466. KAELIN Walter, The Brookings Institution-University of Bern Project on Internal Displacement, *Guiding Principles on Internal Displacement: Annotations*, Washington, The American Society of International Law, 2008, 171 pp. LAVOYER Jean-Philippe, “Guiding Principles on Internal Displacement”, in *IRRC*, No. 324, September 1998, pp. 467-480. The Brookings Institution-University of Bern Project on Internal Displacement, *Protecting Internally Displaced Persons: a Manual for Law and Policymakers*, Washington, Brookings Institution-University of Bern Project on internal displacement, October 2008, 280 pp.

2. Persons fleeing into a third country because of an armed conflict

a) protected by the OAU Convention, the 1984 Cartagena Declaration and UN General Assembly Resolutions

⇒ Document No. 25, Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa

The Cartagena Declaration on Refugees is available on <http://www1.umn.edu/humanrts/instree/cartagena1984.html>.
The UN General Assembly Resolutions are available on <http://www.un.org/documents/resga.htm>.

b) protected by IHL if

aa) the third country is the adverse party in an international armed conflict

GC IV, Art. 44

⇒ Case No. 170, ICRC, Iran/Iraq Memoranda

⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part 1., D.]

bb) the third country is affected by another armed conflict

⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part 1., D.]

3. Persons fleeing persecution: protected by IHL if the third country is subsequently affected by an armed conflict

GC IV, Art. 70(2); P I, Art. 73

a) on a party's own territory: protected persons on the grounds of their nationality (but GC IV, Art. 44)

b) on occupied territory:

aa) protected persons on the grounds of their nationality

bb) if nationals of the occupying power:

- protected by GC IV, Art. 70(2)
- protected persons under P I, Art. 73

⇒ Case No. 215, ICTY, The Prosecutor v. Kupreskic *et al.* [Paras 587-588]

⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part 1., D.]

SUGGESTED READING: LAVOYER Jean-Philippe, “Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC”, in *IRRC*, No. 305, March-April 1995, pp. 162-180.

c) loss of protection in refugee law and IHL

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- ⇒ Case No. 155, Canada, Ramirez v. Canada
 - ⇒ Case No. 195, Canada, Sivakumar v. Canada
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. D.]
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part A., consid. 10]
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SUGGESTED READING: PEJIC Jelena, “Article 1F(a): The Notion of International Crimes”, in *International Journal of Refugee Law*, Special supplementary issue, Vol. 12, 2000, pp. 11-45.

4. The principle of non-refoulement in IHL

GC IV, Art. 45(4)

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- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [16]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. D.]
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SUGGESTED READING: DROEGE Cordula, “Transfers of Detainees: Legal Framework, Non-Refoulement and Contemporary Challenges”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 669-701. GILLARD Emanuela-Chiara, “There’s No Place Like Home: States’ Obligations in Relation to Transfers of Persons”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 703-750.

5. The return of refugees and displaced persons at the end of the conflict

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- ⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part A., Art. 7 (1)]
 - ⇒ Document No. 56, UN, Guiding Principles on Internal Displacement [Principles 28-30]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. D.]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 131-134]
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– obligation to accept those willing to return?

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- ⇒ **Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement [Art. 12]**
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 85-86]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 131-134]
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SUGGESTED READING: Canadian International Development Agency, *The Long Road Home: Opportunities and Obstacles to the Reintegration of IDPs and Refugees Returning to Southern Sudan and the Three Areas: Report of Phase II: Conflict, Urbanisation and Land*, London, Overseas Development Institute, September 2008, 84 pp.

IV. SPECIAL RULES ON OCCUPIED TERRITORIES

Introductory text

From the point of view of IHL, civilians in occupied territories deserve and need particularly detailed protecting rules. Living on their own territory, they come into contact with the enemy independently of their will, merely because of the armed conflict in which the enemy obtains territorial control over the place where they live. The civilians have no obligation towards the occupying power other than the obligation inherent in their civilian status, i.e., not to participate in hostilities. Because of that obligation, IHL allows them neither to violently resist occupation of their territory by the enemy^[173] nor to try to liberate that territory by violent means.^[174]

Starting from this philosophy, the obligations of the occupying power can be logically summed up as permitting life in the occupied territory to continue as normally as possible. IHL is therefore strong in protecting the *status quo ante*, but weak in responding to any new needs experienced by the population in the occupied territory. The longer the occupation lasts, the more shortcomings IHL tends to reveal.

In practice, this has the following consequences: except concerning the protection of the occupying power's security, local laws remain in force^[175] and local courts remain competent.^[176] Except when rendered absolutely necessary by military operations, private property may not be destroyed^[177] and may only be confiscated under local legislation.^[178] Public property (other than that of the municipalities^[179]) can obviously no longer be administered by the State previously controlling the territory (normally the sovereign). It may therefore be administered by the occupying power, but only under the rules of usufruct.^[180] The local population may not be deported;^[181] the occupying power may not transfer its own population into the occupied territory.^[182]

The occupying power's only protected interest is the security of the occupying armed forces; it may take the necessary measures to protect that security, but it is also responsible for law and order in the occupied territory,^[183] as well as for ensuring hygiene and public health^[184] and food and medical supplies.^[185] Its legitimate interest is to control the territory for the duration of the occupation, i.e., until the territory is

173 Except in the framework of a *levée en masse* against the approaching enemy, in which case they become combatants. (See GC III, Art. 4(A)(6))

174 If they commit hostile acts, they may be punished under legislation introduced by the occupying power, but do not lose their status of protected civilians. (They may however lose their communication rights under GC IV, Art. 5(2).) Except if and for as long as they directly participate in hostilities, they benefit from the protection of civilians against effects of hostilities. (See P I, Art. 51(3); and Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities)

175 See HR, Art. 43; GC IV, Art. 64

176 See GC IV, Art. 66

177 See GC IV, Art. 53

178 See HR, Art. 46

179 See HR, Art. 56

180 See HR, Art. 55

181 See GC IV, Art. 49(1)

182 See GC IV, Art. 49(6)

183 See HR, Art. 43

184 See GC IV, Art. 56

185 See GC IV, Art. 55

liberated by the former sovereign or transferred to the sovereignty of the occupying power under a peace treaty. IHL is neutral on *jus ad bellum* issues and shows no preference for either solution, but international law tries to ensure that no measures are taken during the occupation which would compromise a return to the former sovereign.

The IHL of military occupation protects all civilians, except nationals of the occupying power^[186] other than refugees.^[187] Unilateral annexation of the occupied territory by the occupying power, whether lawful or unlawful under *jus ad bellum*, or agreements concluded by the occupying power with the local authorities of the occupied territory, cannot deprive protected persons from the protection afforded by IHL.^[188] The rules of IHL on occupied territories apply whenever, during an armed conflict, a territory comes under the control of the enemy of the power previously controlling that territory,^[189] as well as in every case of belligerent occupation, even when it does not encounter armed resistance and there is therefore no armed conflict.^[190] It is a matter of controversy whether the rules of IHL of military occupation only start to apply once the enemy exercises full authority over a (part of a) territory, or, according to a functional approach, already during the invasion, as soon as a protected person falls into the power of the enemy. The answer may differ according to the individual rule concerned. Similar controversies exist regarding the end of military occupation and therefore the end of the application of the IHL of military occupation: is a troop withdrawal decisive, even when the (former) occupying power still controls many aspects of life in a territory, e.g., entry and exit of persons and objects?^[191] Does the IHL of military occupation cease to apply when troops of the (former) occupying power, acting at the invitation of a new national government or on the basis of a UN Security Council authorization, remain present and keep overall control over a (former) occupied territory?

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- ⇒ Case No. 49, ICRC, *The Challenges of Contemporary Armed Conflicts* [Part A.]
 - ⇒ Document No. 122, ICRC *Appeals on the Near East* [Part C.]
 - ⇒ Case No. 137, Israel, *Power Cuts in Gaza*
 - ⇒ **Case No. 161, Eritrea/Ethiopia, Awards on Occupation**
 - ⇒ **Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Judgement, paras 80-81, 172-179; Separate opinion, paras 34-49]**
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186 See GC IV, Art. 4(1)

187 See P I, Art. 73; GC IV, Art. 70(2)

188 See GC IV, Art. 47

189 See HR, Art. 42; GC IV, Art. 2(1)

190 See GC IV, Art. 2(2)

191 See **Case No. 137, Israel, Power Cuts in Gaza**

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internationales”, in *IRRC*, No. 853, March 2004, pp. 9-36. WEDGEWOOD Ruth & JACOBSON Harold K., “Symposium: State Reconstruction after Civil Conflict, Foreword”, in *AJIL*, Vol. 95, 2001, pp. 1-6. WILDE Ralph, “From Danzig to East Timor and Beyond: The Role of International Territorial Administration”, in *AJIL*, Vol. 95, 2001, pp. 583-606. WILDE Ralph, “From Trusteeship to Self-Determination and Back Again: the Role of the Hague Regulations in the Evolution of International Trusteeship, and the Framework of Rights and Duties of Occupying Powers”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 333-370. ZIMMERMANN Andreas & STAHN Carsten, “Yugoslav Territory, United Nations Trusteeship or Sovereign State? Reflections on the Current and Future Legal Status of Kosovo”, in *Nordic Journal of International Law*, Vol. 70, 2001, pp. 438-441.

1. The place of rules on military occupation in contemporary IHL

a) **inter-State rules, which apply to situations arising between two States, but which also govern relations between individuals and a State and between individuals**

b) **sources**

aa) HR, Arts 42-56

⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 124]

bb) GC IV, Sections I, III and IV

cc) The contributions of P I: Arts 44(3), 63, 69, 73 and 85(4)(a)

2. The applicability of the rules of IHL concerning occupied territories

⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part A.]

⇒ **Document No. 122, ICRC Appeals on the Near East [Part C., para. 2]**

⇒ Case No. 124, Israel/Gaza, Operation Cast Lead

⇒ **Case No. 125, Israel, Applicability of the Fourth Convention to Occupied Territories**

⇒ Case No. 127, Israel, Ayub v. Minister of Defence

⇒ Case No. 129, Israel, Al Nawar v. Minister of Defence

⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 18-24]

⇒ **Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Parts A., E. II. 2, and G.]**

⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 10-14]

⇒ **Case No. 141, United Kingdom, Position on Applicability of Fourth Convention**

⇒ **Document No. 142, Switzerland, Prohibition of Deportation from Israeli Occupied Territories**

⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila

⇒ Case No. 151, ECHR, Cyprus v. Turkey

⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia

- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [2, 6, 15 and 33]
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part B., paras 580-58]
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Judgement, paras 80-81, 172-179; Separate opinion, paras 34-49]
 - ⇒ Case No. 286, The Conflict in Western Sahara [Part A.]
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a) independently of *jus ad bellum*

b) in the case of armed conflict

GC IV, Art. 2(1)

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- ⇒ **Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 90-101 and B., para. 23]**
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 1, 3-4, 16-17, 76]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 19-28]
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c) in the case of belligerent occupation encountering no resistance

GC IV, Art. 2(2)

d) absence of sovereignty of the occupying power

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- ⇒ Case No. 161, Eritrea/Ethiopia, Awards on Occupation [Part A.]
-

e) beginning of the occupation

HR, Art. 42 – also applicable to GC IV?

aa) the standard of the HR

bb) same standard for GC IV? Or does GC IV contain a functional (= flexible) concept of occupation, depending on the rule concerned?

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- ⇒ Case No. 129, Israel, *Al Nawar v. Minister of Defence*
 - ⇒ Case No. 161, Eritrea/Ethiopia, *Awards on Occupation* [Part A.]
 - ⇒ Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* [Judgement, paras 80-81, 172-179; Separate opinion, paras 34-49]
 - ⇒ Case No. 291, Georgia/Russia, *Independent International Fact-Finding Mission on the Conflict in South Ossetia* [Paras 19-28]
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f) annexation does not make the IHL of military occupation inapplicable

GC IV, Art. 47

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- ⇒ Case No. 94, *United States Military Tribunal at Nuremberg, United States v. Alfred Krupp et al.* [Para. 4.(iv).]
 - ⇒ Case No. 110, *India, Rev. Mons. Monteiro v. State of Goa*
-

3. Protected persons

⇒ Case No. 175, UN, Detention of Foreigners

GC IV, Art. 4

a) nationals of the occupied power

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- ⇒ Case No. 161, Eritrea/Ethiopia, *Awards on Occupation* [Part A.]
-

b) nationals of third States (except of co-belligerent States)**c) refugees, even if they are nationals of the occupying power**

PI, Art. 73

4. Philosophy of the rules on occupied territories

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- ⇒ **Document No. 122, ICRC Appeals on the Near East [Parts B. and C.]**
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part E. II. 2.]
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey
-

a) protected interests of the territory's population: its life must continue as normally as possible

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- ⇒ Case No. 103, Burma, Ko Maung Tin v. U Gon Man
 - ⇒ **Document No. 122, ICRC Appeals on the Near East [Part C., para. 3]**
-

b) protected interests of the occupying power: security of the occupying forces

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part B., paras 27-31]
-

SUGGESTED READING: SASSÒLI Marco, "The Concept of Security in International Law Relating to Armed Conflicts", in BAILLIET Cécilia M., *Security: a Multidisciplinary Normative Approach*, Leiden, Boston, M. Nijhoff, 2009, pp. 7-23.

c) protected interests of the occupied power: no change in status?

5. Legal order of an occupied territory

SUGGESTED READING: Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative, *Occupation and Peacebuilding*, online: <http://www.hpcrresearch.org> (with references to doctrine, news, and presentations of issues from an IHL perspective, including: SASSÒLI Marco, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century", 2004, online: <http://www.hpcrresearch.org/sites/default/files/publications/sassoli.pdf>). KAIKOBAD Kaiyan Homi, "Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003 June 2004", in *ICLQ*, Vol. 54/1, January 2005, pp. 253-264. MURPHY Sean D., "Coalition Laws and Transitional Arrangements During Occupation of Iraq", in *AJIL*, Vol. 98, 2004, pp. 601-606. SCHWENK Edmund H., "Legislative Powers of the Military Occupant under Article 43, Hague Regulations", in *Yale Law Journal*, Vol. 54, 1945, pp. 393 ff. SCHEFFER David J., "Beyond Occupation Law", in *AJIL*, Vol. 97, 2003, pp. 842-860.

a) the principle concerning legislation: occupying powers must leave local legislation in force

⇒ Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfred Krupp *et al.*

⇒ Case No. 103, Burma, Ko Maung Tin v. U Gon Man

⇒ **Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory**

- aa) the relationship between Art. 43 of HR and Art. 64 of Convention IV
 - Art. 64 of Convention IV further defines (and softens) the exceptions in Art. 43 of HR
 - Art. 64(2) of Convention IV clarifies para. 1
- bb) applicability of Art. 43 to legislation enacted by local authorities under the effective control of an occupying power

b) exceptions to the prohibition to legislate

⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B.]

SUGGESTED READING: SASSÒLI Marco, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, in *EJIL*, Vol. 16, No. 4, September 2005, pp. 661-694.

- aa) the occupying power may legislate to ensure its security.
- bb) the occupying power may adopt legislation essential for the implementation of IHL.

⇒ Case No. 189, Iraq, The Trial of Saddam Hussein

- cc) the occupying power may adopt legislation essential for the implementation of International Human Rights Law.
 - special problem concerning economic, social and cultural rights

⇒ **Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 112]**

- dd) the occupying power may legislate where necessary to maintain public order.

⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B. 1bis]

- ee) may the occupying power legislate to maintain civil life in an occupied territory?

ff) may an occupying power legislate to enhance civil life in an occupied territory?

⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B. 5., 5bis., 5ter; Part C.]

gg) Security Council authorization?

⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part A.]

c) special rules on criminal law

GC IV, Arts 64, 65, 67 and 70

aa) penal laws in force are applied by existing local tribunals

⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B. 3 and 4]

⇒ Case No. 189, Iraq, The Trial of Saddam Hussein

bb) legislation introduced by the occupying power (for the reasons mentioned under b) above)

⇒ Case No. 189, Iraq, The Trial of Saddam Hussein

– non-retroactive

GC IV, Art. 67

– prosecution of offences committed before the occupation

GC IV, Art. 70

– competent military tribunals

GC IV, Art. 66

– detailed judicial guarantees

GC IV, Arts. 68-75

6. Protection of persons deprived of liberty

⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp

a) **the principle: unlike combatants, civilians may not be deprived of their liberty**

⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States

⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [12]

b) indicted or convicted persons

aa) judicial guarantees

GC IV, Arts 71-75

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- ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B. 1ter]
 - ⇒ Case No. 189, Iraq, The Trial of Saddam Hussein
-

SUGGESTED READING: FARRELL Norman, “International Humanitarian Law and Fundamental Judicial Guarantees”, in *Annual Conference/The African Society of International and Comparative Law*, Vol. 10, 1998, pp. 130-141. GASSER Hans-Peter, “Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: The Part Played by ICRC Delegates”, in *IRRC*, No. 287, March-April 1992, pp. 121-142. SASSÒLI Marco, “La peine de mort en droit international humanitaire et dans l’action du Comité international de la Croix-Rouge”, in *Revue internationale de droit pénal*, Vol. 58, 1987, pp. 583-592.

bb) detention in the occupied territory

GC IV, Art. 76

cc) humane treatment

GC IV, Art. 76

-
- ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
 - ⇒ Case No. 188, Iraq, Occupation and Peacebuilding [Part B. 2.]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 90-98]
-

dd) handing over to local authorities at the end of the occupation

GC IV, Art. 77

c) civilian internees

aa) decision on internment or assignment to residence

GC IV, Art. 78

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- ⇒ Case No. 133, Israel, Ajuri v. IDF Commander
 - ⇒ Case No. 185, United States, The Schlesinger Report
-

- for imperative reasons of security
- individual administrative decision
- possibility of appeal
- if possible, review every six months

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- ⇒ **Case No. 138, Israel, Detention of Unlawful Combatants [Part A.]**
 - ⇒ Case No. 184, United States, The Taguba Report
-

bb) detailed rules on their treatment

GC IV, Arts 79-135

d) re-interred prisoners of war

GC III, Art. 4(B)(1)

7. Protection of private property

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- ⇒ Case No. 94, United States Military Tribunal at Nuremberg, *United States v. Alfried Krupp et al.*
 - ⇒ Case No. 105, Singapore, *Bataafsche Petroleum v. The War Damage Commission*
 - ⇒ **Case No. 127, Israel, Ayub v. Minister of Defence**
 - ⇒ **Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory**
 - ⇒ **Case No. 129, Israel, Al Nawar v. Minister of Defence**
 - ⇒ Case No. 134, Israel, *Evacuation of Bodies in Jenin*
 - ⇒ Case No. 151, ECHR, *Cyprus v. Turkey* [Paras 183-189 and 165-270]
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council *Assessing Violations of International Humanitarian Law* [Part A., Annex, paras 32, 34, 50, 55 and 56]
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SUGGESTED READING: ABUALI Gamal, “Natural Resources under Occupation: The Status of Palestinian Water under International Law”, in *Pace International Law Review*, Vol. 10/2, 1998, pp. 411-574. ANDO Nisuke, *Surrender, Occupation and Private Property in International Law*, Oxford, Clarendon Press, 1991, 208 pp. DINSTEIN Yoram, “The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses”, in *IYHR*, Vol. 29, 1999, pp. 285-304. LANGENKAMP R. Dobie & ZEDALIS Rex J., “What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined International Legal Questions Regarding Occupation of Oil Fields”, in *EJIL*, Vol. 14, No. 3, 2003, pp. 417-435. VERHOVEN Sten, “A Missed Opportunity to Clarify the Modern *Ius ad Bellum*: Case Concerning Armed Activity on the Territory of the Congo”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No 45, 2006, pp. 355-368. WATSON Geoffrey R. *et al.*, “Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory”, in *AJIL*, Vol. 99/1, January 2005, pp. 1-141.

a) rights covered by the concept of property: broader in common law than in civil law traditions

b) prohibition of pillage

GC IV, Art. 33(2); HR, Arts 28 and 47 [CIHL, Rule 52]

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- ⇒ **Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al.**
 - ⇒ Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* [Paras 240-245, 250]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 75, 79, 82-83, 87-89]

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- ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 94-100]
-

SUGGESTED READING: STEWART James G., *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York, The Open Society Institute, 2010, 157 pp.

c) prohibition of confiscation of private property

HR, Art. 46(2) [CIHL, Rule 51(c)]

- except for war material

HR, Art. 53(2)

- ⇒ Case No. 105, Singapore, Bataafsche Petroleum v. The War Damage Commission
-

d) limited admissibility of requisitions

HR, Art. 52

- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 132 and Part B., paras 8 and 32]
- ⇒ Case No. 127, Israel, Ayub v. Minister of Defence
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8. Specific prohibitions

a) deportations

GC IV, Art. 49(1) [CIHL, Rule 129 A.]

- ⇒ Case No. 110, India, Rev. Mons. Monteiro v. State of Goa
- ⇒ Case No. 132, Israel, Cases Concerning Deportation Orders
- ⇒ Case No. 133, Israel, Ajuri v. IDF Commander [Paras 20-22]
- ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part A.]
- ⇒ **Document No. 142, Switzerland, Prohibition of Deportation from Israeli Occupied Territories**
- ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
- ⇒ Case No. 161, Eritrea/Ethiopia, Awards on Occupation [Part A., para. 54]
- ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
- ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 120-125]
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SUGGESTED READING: DINSTEIN Yoram, “The Israel Supreme Court and the Law of Belligerent Occupation: Deportations”, in *IYHR*, Vol. 23, 1993, pp. 1-26. LAPIDOTH Ruth, “The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues”, in *EJIL*, Vol. 1, 1991, pp. 97-109.

SHERRY Virginia N., *Persona Non Grata: The Expulsion of Lebanese Civilians from Israeli-Occupied Lebanon*, New York, Human Rights Watch, 1999, 83 pp., <http://www.hrw.org/reports/1999/lebanon>.

b) transfer of the occupying power's own population

GC IV, Art. 49(6) [CIHL, Rule 130]

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- ⇒ **Document No. 122, ICRC Appeals on the Near East [Parts B. and C., para. 5]**
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 120 and 135]
 - ⇒ **Case No. 127, Israel, Ayub v. Minister of Defence**
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Parts B. and F.]
 - ⇒ Case No. 286, The Conflict in Western Sahara [Part A.]
-

aa) status and protection of settlers

-
- ⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 5]
 - ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
-

SUGGESTED READING: AL-RAYYES Nasser, *The Israeli Settlements from the Perspective of International Humanitarian Law*, Ramallah, Al-Haq Institute, 2000, 139 pp. MALLISON William T., "A Juridical Analysis of the Israeli Settlements in the Occupied Territories", in *The Palestine Yearbook of International Law*, Vol. 10, 1998-99, pp. 1-26.

c) destruction of property

GC IV, Art. 53

aa) except when rendered absolutely necessary by military operations

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 132 and 135]
 - ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part II, paras 913-989]
 - ⇒ Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory
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SUGGESTED READING: DINSTEIN Yoram, "The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses", in *IYHR*, Vol. 29, 1999, pp. 285-304.

9. The administration of an occupied territory

a) responsibility for public order and safety ("la vie et l'ordre publics")

HR, Art. 43

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- ⇒ Case No. 94, United States Military Tribunal at Nuremberg, *United States v. Alfred Krupp et al.*
 - ⇒ Case No. 102, United States, *In re Yamashita*
 - ⇒ Case No. 144, ICRC/Lebanon, *Sabra and Chatila*
 - ⇒ Case No. 151, ECHR, *Cyprus v. Turkey* [Paras 69 and 77]
 - ⇒ Case No. 188, Iraq, *Occupation and Peacebuilding* [Part B. 1 bis]
 - ⇒ Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* [Paras 177-179]
 - ⇒ Case No. 290, Georgia/Russia, *Human Rights Watch's Report on the Conflict in South Ossetia* [Paras 76-78, 84]
 - ⇒ Case No. 291, Georgia/Russia, *Independent International Fact-Finding Mission on the Conflict in South Ossetia* [Paras 110-119]
-

- aa) field of application: not only security, but also welfare (according to the authentic French version of Art. 43 of HR)
- bb) an obligation of means and not of result
- cc) an obligation subject to the limitations human rights law sets for any State action

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- ⇒ Case No. 183, Iraq, *Use of Force by United States Forces in Occupied Iraq*
-

b) taxation

HR, Arts 48, 49 and 51

c) administration of public property

HR, Art. 55 [CIHL, Rule 51(a) and (b)]

SUGGESTED READING: ABOUALI Gamal, “Natural Resources under Occupation: The Status of Palestinian Water under International Law”, in *Pace International Law Review*, Vol. 10/2, 1998, pp. 411-574. BENVENISTI Eyal, “Water Conflicts During the Occupation in Iraq”, in *AJIL*, Vol. 97, 2003, pp. 860-872. STEWART James G., *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York, The Open Society Institute, 2010, 157 pp.

- aa) but no confiscation, except of property which may be used for military operations

HR, Art. 53

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- ⇒ Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* [Paras 240-245, 250]
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d) respect for the status of civil servants

GC IV, Art. 54

10. Protection of economic, social and cultural rights

SUGGESTED READING: DE FALCO Randle C., “The Right to Food in Gaza: Israel’s Obligations under International Law”, in *Rutgers Law Record*, Vol. 35, 2009, pp. 11-22. VITE Sylvain, “The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights: the Examples of Food, Health and Property”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 629-651.

a) food and medical supplies

GC IV, Arts 55 and 59-62; P I, Art. 69

⇒ Case No. 135, Israel, The Rafah Case [Paras 27-28]

aa) obligation not to interfere with local supply system

bb) obligation to furnish supplies

⇒ Case No. 137, Israel, Power Cuts in Gaza [Part A., paras 15-17]

cc) obligation to allow free passage of aid

⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Para. 20]

b) public health and hygiene

GC IV, Arts 56, 57 and 63

⇒ Case No. 135, Israel, The Rafah Case [Paras 40-44], p. 1131

⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 20 and 31]

aa) obligation to guarantee them

bb) respect for medical personnel

cc) respect for hospitals

dd) respect for the National Red Cross or Red Crescent Society

c) children and their education

GC IV, Art. 50

SUGGESTED READING: HOROWITZ Jonathan T., “The Right to Education in Occupied Territories: Making More Room for Human Rights in Occupation Law”, in *YIHL*, Vol. 7 (2004), 2006, pp. 233-281.

d) protection of workers

aa) limits on working obligations

GC IV, Art. 51

bb) prohibition to cause unemployment

GC IV, Art. 52

e) cultural property

[See **Document No. 10**, Conventions on the Protection of Cultural Property [See Second Hague Protocol for the Protection of Cultural Property, Art. 9]]

11. The end of the applicability of the rules on occupied territories

⇒ **Case No. 190, Iraq, The End of Occupation**

SUGGESTED READING: ALONZO-MAIZLISH David, “When Does it End? Problems in the Law of Occupation”, in ARNOLD Roberta & HILDBRAND Pierre-Antoine (eds), *International Humanitarian Law and the 21st Century’s Conflicts*, Lausanne, Edis, 2005, pp. 97-116. BENVENISTI Eyal, “The Law on the Unilateral Termination of Occupation”, in GIEGERICH, Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 371-382. ROBERTS Adam, “The End of Occupation in Iraq (2004)”, in *ICLQ*, Vol. 54, 2005, pp. 27 (also online: <http://journals.cambridge.org/action/displayAbstract?fromPage=online&aid=1524012>). KOUTROULIS Vaios, *Le début et la fin du droit de l’occupation*, Paris, Pedone, 2010, 334 pp.

a) during an occupation according to Convention IV (Art. 6 (3)), but not to Protocol I (Art. 3(b))

⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Para. 125]

b) in the case of self-government?

- aa) if the new government invites the former occupying forces to remain?
- bb) at least on issues administered by the new government?
- cc) can the occupying power (which cannot deprive protected persons of the protection afforded by Convention IV, according to Art. 47 of Convention IV) introduce free elections?

c) in the case of a peace treaty

d) should the occupying power retreat,

- aa) how much *de facto* control need the retreating occupying power retain for the IHL of military occupation (or some of its rules) to be applicable even after troops retreat?

⇒ **Case No. 124, Israel, Operation Cast Lead [Part II, paras 273-283]**

- ⇒ **Case No. 137, Israel, Power Cuts in Gaza [Part A., paras 12-18]**
 - ⇒ Case No. 138, Israel, Detention of Unlawful Combatants [Part A., para. 11]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun
-

e) by UN Security Council determination?

- ⇒ Case No. 190, Iraq, The End of Occupation
-

f) protection of persons who remain detained or are not yet re-established

GC IV, Art. 6(4)

V. TRANSMISSION OF INFORMATION

- ⇒ Document No. 34, ICRC, Tracing Service
-

a) internment cards (to be sent to the family and to the Central Tracing Agency)

GC IV, Art. 106

b) notification (to the power of origin through the Central Tracing Agency)

GC IV, Arts 136-138, 140

c) correspondence

GC IV, Art. 107

Chapter 9

Conduct of Hostilities

SUGGESTED READING: ARRASSEN Mohamed, *Conduite des hostilités, droit des conflits armés et désarmement*, Brussels, Bruylant, 1986, 605 pp. BAXTER Richard R., “The Duties of Combatants and the Conduct of Hostilities (The Law of the Hague)”, in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1986, pp. 93-133. DINSTEIN Yoram, “Jus in Bello Issues Arising in the Hostilities in Iraq in 2003”, in *IYHR*, Vol. 34, 2004, pp. 1-14. DINSTEIN Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, CUP, 2010, 320 pp. EPSTEIN Melissa & BUTLER Richard, “The Customary Origins and Elements of Select Conduct of Hostilities Charges before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions”, in *Military Law Review*, Vol. 179, 2004, pp. 68-127. KALSHOVEN Frits & ZEGVELD Liesbeth, *Constraints on the Waging of War*, Geneva, ICRC, 2001, 223 pp.

I. THE DISTINCTION BETWEEN THE LAW OF THE HAGUE AND THE LAW OF GENEVA

(See *Supra* Part I, Chapter 3, Historical Development of International Humanitarian Law)

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- ⇒ Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 75]
 - ⇒ Document No. 73, France, Accession to Protocol I [Part A.]
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 6]**
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II. THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES

1. Basic rule: Art. 48 of Protocol I

[CIHL, Rule 7]

Quotation 1 Article 48: Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

[Source: Protocol I]

Quotation 2 Considering: [...]

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men. [...]

[Source: *Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles under 400 Grammes Weight*, Saint Petersburg, November 29/December 11, 1868, paras 2-3 of the Preamble; original text in French; English translation in *Parliamentary Papers*, vol. LXIV, 1869, p. 659; reprinted from Schindler, D. & Toman, J. (eds), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Leiden, Boston, M. Nijhoff, 2004, p. 91; also available on <http://www.icrc.org/ihl>]

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- ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ Document No. 122, ICRC Appeals on the Near East
 - ⇒ **Case No. 124, Israel/Gaza, Operation Cast Lead**
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 13]
 - ⇒ Case No. 226, Federal Republic of Yugoslavia, NATO Intervention
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SUGGESTED READING: SOLF Waldemar A., "Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I", in *American University Journal of International Law and Policy*, Vol. 1, 1986, pp. 107-135.

FURTHER READING: DOSWALD-BECK Louise, "The Value of the Geneva Protocols for the Protection of Civilians", in MEYER Michael (ed.), *Armed conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Conventions*, London, 1989, pp. 137-172. GEHRING Robert W., "Protection of Civilian Infrastructures", in *Law and Contemporary Problems*, Vol. 42/2, 1978, pp. 86-139. OBRADOVIC Konstantin, "La protection de la population civile dans les conflits armés internationaux", in CASSESE

Antonio (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, Editoriale Scientifica, Vol. I, 1979, pp. 128-160. SALAHI Reem, “Israel’s War Crimes: a First Hand Account of Israel’s Attacks on Palestinian Civilians and Civilian Infrastructure”, in *Rutgers Law Record*, Vol. 36, 2009, pp. 201-223. SAUSSURE Hamilton de, “Belligerent Air Operations and the 1977 Geneva Protocol I”, in *Annals of Air and Space Law*, Vol. 1, 1976, pp. 33-47. SPAIGHT James M., *Air Power and War Rights*, London, Longmans, 1947, 523 pp. URBINA Julio Jorge, *Protección de las víctimas de los conflictos armados, Naciones Unidas y derecho internacional humanitario: desarrollo y aplicación del principio de distinción entre objetivos militares y bienes de carácter civil*, Valencia, Tirant Monografias, 2000, 439 pp.

2. Field of application

P I, Art. 49

SUGGESTED READING: SOLF Waldemar A., “Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I”, in *The American University Journal of International Law and Policy*, Vol. 1, 1986, pp. 107-135. MEYROWITZ Henri, “Une révolution inaperçue : l’article 49(2) du Protocole additionnel I aux Conventions de Genève de 1949”, in *Oesterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 32, 1981, pp. 29-57.

a) acts of violence in defence and offence

⇒ Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War

SUGGESTED READING: KRETZMER David, “Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?”, in *EJIL*, Vol. 16/2, 2005, pp. 171-212. MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp.

b) no matter where, including attacks on the party’s own territory under enemy control

c) attacks from land, air or sea affecting the civilian population on land

(See also Part I, Chapter 11, The Law of Air Warfare, p. 313)

⇒ Case No. 226, Federal Republic of Yugoslavia, NATO Intervention

SUGGESTED READING: BOURBONNIERE Michel, “Law of Armed Conflict (LOAC) and the Neutralization of Satellites or *Ius in bello Satellitis*”, in *Journal of Conflict and Security Law*, Vol. 9, 2004, pp. 43 ff. CANESTARO Nathan, “Legal and Policy Constraints on the Conduct of Aerial Precision Warfare”, in *Vanderbilt Journal of Transnational Law*, Vol. 37/2, 2004, 431-484. ROSCINI Marco, “Targeting and Contemporary Aerial Bombardment”, in *ICLQ*, Vol. 54/2, 2005, p. 411-444.

3. Principles

- a) only military objectives may be attacked
- b) even attacks directed at military objectives are prohibited if the expected incidental effects on the civilian population are excessive
- c) even when an attack directed at a military objective is not expected to have excessive effects on the civilian population, all feasible precautionary measures must be taken to minimize those effects

4. Definition of military objectives

P I, Art. 52(2) and (3) [CIHL, Rule 8]

Introductory text

When the focus of the law on the conduct of hostilities shifted from the prohibition to attack undefended towns and villages^[192] to the rule that only military objectives may be attacked, the definition of military objectives became crucial. The principle of distinction is practically worthless unless at least one of the categories between which the attacker has to distinguish is defined. From the point of view of the philosophy of International Humanitarian Law (IHL), it would have been more satisfactory to define civilian objects. However, because objects become military objectives according to their use by the enemy or potential use by the attacker rather than because of their intrinsic character, it was military objectives that were defined. Indeed, all objects other than those benefiting from special protection^[193] can become military objectives. By the same token, it has not been possible to draw up an exhaustive list of military objectives, although such a list would have greatly simplified practical implementation. Most definitions are therefore abstract but provide a list of examples. Protocol I chooses to illustrate its definition with an open-ended list of examples of civilian objects which are presumed not to be military objectives.^[194]

Under the definition provided in Article 52(2) of Protocol I, an object^[195] must cumulatively^[196] meet two criteria to be a military objective.

First, the object, by its “nature, location, purpose or use”, has to contribute effectively to the military action of the enemy.^[197] “Nature” refers to the object’s intrinsic character.

¹⁹² See HR, Art. 25

¹⁹³ Those specially protected objects, e.g., dams, dikes, and hospitals, may not be used by those who control them for military action and should therefore never become military objectives. If they are however used for military purposes, even they can under restricted circumstances become military objectives. (See, e.g., P I, Art. 56(2); GC IV, Art. 19)

¹⁹⁴ See P I, Art. 52(3)

¹⁹⁵ Indeed, only a material object can be a military objective under IHL, as immaterial objectives can only be achieved, not attacked. It is the basic idea of IHL that political objectives may be achieved by a belligerent with military force only by directing the latter against material military objectives. As for computer network attacks, they can only be considered as “attacks” if they have material consequences.

¹⁹⁶ In practice, however, one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy.

¹⁹⁷ One cannot imagine how it could do this other than by its “nature, location, purpose or use.” Those elements foreseen in Art. 52(2) only clarify that not only objects of a military nature are military objectives.

“Location” admits that an object may be a military objective simply because it is situated in an area that is a legitimate target. Some States have clearly stated that their understanding of the word is that a specific area of land may be a military objective if its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage. “Purpose” refers to the enemy’s intended future use, based on reasonable belief. “Use” refers to the current function of the object. For example, it is generally agreed that weapons factories and even extraction industries providing raw materials for such factories are military objectives, because they serve the military, albeit indirectly.

Second, the object’s destruction, capture or neutralization has to offer a definite military advantage for the attacking side.^[198] According to declarations of understanding made by some States, the military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole, not just from isolated or particular parts of the attack. A direct connection with specific combat operations is not considered to be necessary. An attack as a whole must, however, be a finite event, not to be confused with the entire war.

What counts is that the action and the advantage have to be “military”; the political aim of victory may be achieved through violence only by using violence against military objectives, i.e., by weakening the military potential of the enemy.^[199] By characterizing the contribution as “effective” and the advantage as “definite”, the drafters tried to avoid too broad an interpretation of what constitutes a military objective. However, the exact practical implications of those terms are subject to controversy. Both criteria must be fulfilled “in the circumstances ruling at the time”. Without this limitation to the actual situation, the principle of distinction would be void, as every object could in *abstracto*, in the wake of possible future developments, e.g., if used by enemy troops, become a military objective.

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part A]
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Document No. 73, France, Accession to Protocol I
 - ⇒ **Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 101-111, Part II, paras 365-392]**
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 40-42]
 - ⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Para. 47]
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 116-117, 140-148]
 - ⇒ **Case No. 163, Eritrea/Ethiopia, Awards on Military Objectives**
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Part A.]

198 Characterizing the contribution as “effective” and the advantage as “definite” – as Art. 52(2) does – avoids that everything can be considered as a military objective, taking into account indirect contributions and possible advantages; thus, the limitation to “military” objectives could be too easily undermined.

199 If force could be used to achieve the political aim by directing it at any advantage, not just military objectives, even the civilian population as such would be attacked, as they might well influence the enemy government. Then, however, there would be no more IHL, merely considerations of effectiveness.

- ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 179, United States, Surrendering in the Persian Gulf War
 - ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 19 and 27]
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., para. 54]
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others
 - ⇒ **Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part A., paras 1018; Part B., paras 55 and 71-79]**
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ Case No. 265, United States, Military Commissions [Para. 5. D.]
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 20-22, 39-40, 58-64]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 31-51]
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SUGGESTED READING: BOIVIN Alexandra, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare", in *University Centre for International Humanitarian Law*, Research Paper Series, No. 2, 2006, 100 pp. DÖRMANN Knut, "The Definition of Military Objectives", in BERUTO Gian Luca (ed.), *The Conduct of Hostilities: Revisiting the Law of Armed Conflict: 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007: Proceedings*, Milano, Nagard, 2008, pp. 85-93. DOUGHERTY Bernard & QUENIVET Noëlle, "Has the Armed Conflict in Iraq Shown once more the Growing Dissension Regarding the Definition of a Legitimate Target?: What and Who can be Lawfully Targeted?", in *Humanitäres Völkerrecht*, Vol. 4, 2003, pp. 188-196. HENDERSON Ian, *The Contemporary Law of Targeting: [Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I]*, Leiden, Boston, M. Nijhoff, 2009, 266 pp. HOLLAND Joseph, "Military Objective and Collateral Damage: their Relationship and Dynamics", in *YIHL*, Vol. 7(2004), 2007, pp. 35-78. MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp. ROBERTSON Horace B., "The Principle of the Military Objective in the Law of Armed Conflict", in *International Law Studies*, US Naval War College, Vol. 72, 1998, pp. 197-223. SASSÒLI Marco, "Targeting: The Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts", in WIPPMAN David & EVANGELISTA Matthew (eds), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 181-210. SCHMITT Michael, "Targeting and Humanitarian Law: Current Issues", in *IYHR*, Vol. 34, 2004, pp. 59-104. SPEROTTO FEDERICO, "Targeted Killings in response to Security Threats: Warfare and Humanitarian Issues", in *Global Jurist*, Vol. 8, Issue 3, 2008, pp. 1-32. WARD Christopher, "Distinction: The Application of the Additional Protocols in the Theatre of War", in *Asia-Pacific Yearbook of International Humanitarian Law*, vol. 2, 2006, pp. 36-45.

5. Definition of the civilian population

P I, Art. 50

Introductory text

The principle of distinction can only be respected if not only the permissible objectives but also the persons who may be attacked are defined. As combatants are characterized by a certain uniformity and civilians by their great variety,^[200] Art. 50(1) of Protocol I logically defines civilians by excluding them from the corollary category of combatants: everyone who is not a combatant is a civilian benefiting from the protection provided for by the law on the conduct of hostilities.^[201] As will be seen below, civilians only lose their protection from attack and the effects of the hostilities if and for such time as they directly participate in hostilities.^[202] The complementarity of the two categories, civilians and combatants, is very important in rendering IHL complete and effective, and thereby ensuring no one may fight but not be fought, or be attacked but not defend himself/herself – a privilege and a sanction which would never be respected and would undermine the whole fabric of IHL in a given conflict.

Recently, some scholars and governments have argued that persons belonging to an armed group failing to fulfil the collective requirements for combatant status (e.g., by not distinguishing themselves from the civilian population or because they do not belong to a party to the international armed conflict) may nevertheless be attacked like combatants and not only, like civilians, when and for such time as they directly participate in hostilities. This argument, which could be invoked to justify acts that would otherwise qualify as extra-judicial executions, is, at a minimum, incompatible with the wording of Art. 50(1) of Protocol I. Because of the difficulties in identifying such persons in the conduct of hostilities, it also puts other civilians at risk.

Thus, under this definition there is no category of “quasi-combatants”, i.e. civilians contributing so fundamentally to the war effort (e.g. workers in ammunition factories) that they lose their civilian status although not directly participating in hostilities. Indeed, in IHL there can logically be no such category. If the civilian population is to be protected, only one distinction is practicable: the distinction between those who (may) directly participate in hostilities, on the one hand, and all others, who do not, may not and cannot militarily hinder the enemy from obtaining control over their country by means of a complete military occupation, no matter what their contribution to the war effort may be otherwise, on the other.

To allow attacks on persons other than combatants would also violate the principle of necessity, because victory can be achieved by overcoming only the combatants of a country – however efficient its armament industry and however genial its politicians may be. All this obviously does not preclude military objectives, such as armament factories, from being attacked; subject to the principle of proportionality – the attack

200 This variety justifies the presumption of civilian status provided for in P I, Art. 50(1).

201 The definition of civilians benefiting from protected civilian status under the Convention IV is more restrictive in that it excludes those in the power of their own side, but it is also complementary to that of the combatant. (See GC IV, Art. 4)

202 See P I, Art. 51(3) and *infra*, Part I, Chapter 9, II., 7., Loss of protection: The concept of direct participation in hostilities and its consequences

on a military objective does not become unlawful because of the risk that a civilian who works or is otherwise present in it may come to harm during the course of the attack.

If one person so defined is a civilian, any number of such persons constitute the civilian population.^[203] According to proportionality as a general principle of law, the presence of individual non-civilians among a great number of civilians does not deprive the latter of the character of a civilian population,^[204] nor does it mean that the non-civilians may not be individually attacked provided that the necessary precautions are taken.

⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 237-248, Part II, paras 393-437]

SUGGESTED READING: GEHRING Robert W., “Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I”, in *RDMDG*, Vol. 19, 1980, pp. 9-48. TURNER Lisa & NORTON Lynn G., “Civilians at the Tip of the Spear”, in *Air Force Law Review*, Vol. 51, 2001, pp. 21 ff. GUILLORY Michael E., “Civilianizing the Force: Is the United States Crossing the Rubicon?”, in *Air Force Law Review*, Vol. 51, 2001, pp. 111 ff.

a) definition of a civilian

[See also *infra*, Part I, Chapter 9, II.7, Loss of Protection: The concept of direct participation in hostilities and its consequences]

P I, Art. 50(1) [CIHL, Rule 5]

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- ⇒ Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
 - ⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 7]
 - ⇒ **Case No. 126, Israel, Military Prosecutor v. Kassem and Others [Part II. E. 4]**
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 291, 292 and 422]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [27]
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part B., paras 639 and 640]
 - ⇒ Case No. 216, ICTY, The Prosecutor v. Blaskic [Paras 211-214]
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.2. and 3.3.2.1., Para. E.1]
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 4 and 8]
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b) the presence of a combatant or a military objective among the civilian population

P I, Art. 50(3)

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- ⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin

203 See P I, Art. 50(2)

204 See P I, Art. 50(3)

- ⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 34 and 47]
 - ⇒ **Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 263-267]**
 - ⇒ **Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 12-16]**
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., para. 282]
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6. Prohibited attacks

(See also *infra*, Part I, Chapter 9. III. Means and Methods of Warfare, p. 280)

Introductory text

Under IHL, lawful methods of warfare are not unlimited. In particular, IHL prohibits certain kinds of attacks. The civilian population may never be attacked; this prohibition includes attacks the purpose of which is to terrorize the population.^[205] IHL also proscribes attacks directed at civilian objects.^[206] Even those attacks directed at a legitimate military objective^[207] are regulated by IHL; such attacks must not be indiscriminate, i.e. the weapons utilized must be capable of being directed at the specific military objective and the means used must be in proportion to the military necessity.^[208] The principle of proportionality prohibits attacks, even when directed at a military objective, if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”.^[209] This principle is the inescapable link between the principles of military necessity and humanity, where they pull in opposite directions. Although military advantage, which may be taken into account, is qualified, the principle of proportionality remains very difficult to apply, and any attempt to weigh the expected military advantage against the anticipated civilian losses or damage to civilian objects is inevitably dependent on subjective value judgements, especially when both probabilities, i.e. gaining the advantage and affecting civilians, can be gauged with less than 100% accuracy.

In addition, if a military objective is targeted and the principle of proportionality is respected, but civilians or civilian objects may nevertheless be affected by the attack, precautionary measures must be taken.^[210] Finally, reprisals against civilians or civilian objects are prohibited under IHL.^[211]

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- ⇒ Document No. 73, France, Accession to Protocol I [Part A.]
 - ⇒ Case No. 77, United States, President Rejects Protocol I

205 See P I, Arts 48, 51(2) and 85(3); P II, Art. 13

206 See P I, Arts 52-56 and 85(3)

207 See P I, Art. 52(2)

208 See HR, Art. 22; P I, Art. 51(4) and (5)

209 PI, Art. 51(5)(b)

210 See HR, Arts 26 and 27; GC IV, Art. 19 (concerning hospitals); P I, Art. 57(2)

211 See P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)

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- ⇒ Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others
 - ⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 7]
 - ⇒ Case No. 163, Eritrea/Ethiopia, Awards on Military Objectives
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
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SUGGESTED READING: DOWNES Alexander B., *Targeting Civilians in War*, Ithaca, London, Cornell University Press, 2008, 315 pp. OLASOLO Héctor, *Unlawful Attacks in Combat Situations: from the ICTY's Case Law to the Rome Statute*, Leiden, M. Nijhoff, 2008, 288 pp. ROSEN Richard D., "Targeting Enemy Forces in the War on Terror: Preserving Civilian Immunity", in *Vanderbilt Journal of Transnational Law*, Vol. 42, No. 3, May 2009, pp. 683-777.

a) attacks against the civilian population as such (including those intended to spread terror)

(See also *supra*, Part I, Chapter 2. III. 1. d) acts of terrorism?, p. 128)

P I, Art. 51(2) [CIHL, Rule 2]

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- ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 114, Malaysia, Osman v. Prosecutor
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 7]
 - ⇒ **Case No. 143, Amnesty International, Breach of the Principle of Distinction**
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 212, ICTY, The Prosecutor v. Martić [Part A., paras 8, 10-14; Part B, paras 66-71, 472]
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajić [Part A., paras 51-56.]
 - ⇒ **Case No. 218, ICTY, The Prosecutor v. Galić [Part A., paras 16-137 and 561-593; Part B, paras 69-104]**
 - ⇒ **Case No. 219, ICTY, The Prosecutor v. Strugar [Part A.; Part B., paras 220-222 and 280-288; Part C, paras 270-272]**
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulović and Others
 - ⇒ **Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 12-23, 27, 30-34]**
 - ⇒ Case No. 277, Sierra Leone, Special Court Ruling in the AFRC Case [Part II., paras 660-670]
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SUGGESTED READING: SAYAPIN Sergey V., "The Spread of Terror among the Civilian Population: A War Crime?", in *Asia-Pacific Yearbook of International Humanitarian Law*, Vol. 2, 2006, pp. 196-225.

b) attacks against civilian objects

P I, Art. 52(1) [CIHL, Rule 10]

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- ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ **Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., paras 223-228 and 282]**
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SUGGESTED READING: BART Gregory Raymond, “The Ambiguous Protection of Schools under the Law of War: Time for Parity with Hospitals and Religious Buildings”, in *Georgetown Journal of International Law*, Vol. 40, No. 2, 2009, pp. 405-446.

c) indiscriminate attacks

[CIHL, Rule 11]

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- ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 183, Iraq, Use of Force by United States Forces in Occupied Iraq
 - ⇒ **Case No. 218, ICTY, The Prosecutor v. Galic [Part A, paras 57-61 and 372-387]**
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 21-22]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 71-73]
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SUGGESTED READING: BLIX Hans, “Area Bombardment: Rules and Reasons”, in *BYIL*, Vol. 49, 1978, pp. 31-69. CASSESE Antonio, “The Prohibition of Indiscriminate Means of Warfare”, in AKKERMAN Robert J. (ed.), *Declarations on Principles, A Quest for Universal Peace, Liber Amicorum Discipulorumque Prof. Dr Bert V.A. Röling*, Leiden, 1977, pp. 171-194. DOWNES Alexander B., *Targeting Civilians in War*, Ithaca, London, Cornell University Press, 2008, 315 pp. MEYROWITZ Henri, “Le bombardement stratégique d’après le Protocol I aux Conventions de Genève”, in *ZaöRV*, Vol. 41, 1981, pp. 1-68.

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aa) attacks not directed at a specific military objective

P I, Art. 51(4)(a) [CIHL, Rule 12(a)]

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- ⇒ Case No. 124, Israel, Operation Cast Lead [Part II, paras 365-392]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Para. 34]
 - ⇒ **Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 116-117, 140-148]**
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bb) use of weapons which cannot be directed at a specific military objective

P I, Art. 51(4)(b) [CIHL, Rule 12(b)]

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- ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ **Case No. 212, ICTY, The Prosecutor v. Martić [Part B, paras 303-313, 461-463, 470 and 472; Part C, 248]**
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 65-74]
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cc) treating different military objectives as a single military objective

P I, Art. 51(5)(a) [CIHL, Rule 13]

dd) principle of proportionality

(See *also supra*, Part I, Chapter 4. III. 2. c) proportionality, p. 162)

P I, Art. 51(5)(b) [CIHL, Rule 14]

- also covers reasonably foreseeable incidental effects

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts
 - ⇒ **Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 43]**
 - ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 120-126, 230-232]
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Paras 40-46]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 38-42]
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Para. 526]**
 - ⇒ **Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part A., paras 4, 18-19 and Part B., paras 75-78]**
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ **Case No. 257, Afghanistan, Goatherd Saved from Attack**
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 28-30, 41-47]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 66-67]
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d) attacks against the civilian population (or civilian objects) by way of reprisals

P I, Art. 51(6) and 52(1)

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- ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part C]
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ **Case No. 212, ICTY, The Prosecutor v. Martić [Part A, paras 15-17; Part B, 464-468; Part C., para. 268]**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 527-536]**
 - ⇒ **Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 12-23, 37]**
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SUGGESTED READING: See *infra* Part I, Chapter 13. IX. 2. c) ee) Admissibility of reprisals, p. 394

7. Loss of protection: The concept of direct participation in hostilities and its consequences

P I, Art. 51(3); P I, Art. 13(3) [CIHL, Rule 6]

Introductory text

The concept of “direct participation in hostilities” is a cornerstone of the IHL on the conduct of hostilities, and its practical importance has grown as armed conflicts have become “civilianized”.^[212] Both in international and non-international armed conflicts, civilians lose their protection against attacks (and their protection against the incidental effects of attacks, afforded to the civilian population as a whole) if and for such time as they participate directly in hostilities.^[213] Neither treaty nor customary law defines this concept. After a broad consultation of experts revealed an absence of agreement on certain crucial points, the ICRC tried to clarify several concepts in an “Interpretive Guidance”:^[214] who is covered as a “civilian” by the rule prohibiting attacks except in case of direct participation; what conduct amounts to direct participation; the duration of the loss of protection; the precautions to be taken and the types of protection afforded in case of doubt; the rules governing attacks against persons who take direct part in hostilities; and the consequences of regaining protection. The first issue is probably the most controversial.

In international armed conflicts, treaty law is clear that everyone who is not a combatant is a civilian benefiting from protection against attacks except if he or she takes a direct part in hostilities. Members of the armed forces of a party to the international armed conflict who lost their combatant status (e.g., because they did not distinguish themselves from the civilian population) may also reasonably be excluded. Some scholars also exclude

212 See *supra* Part I, Chapter 5. VII. 6. “Civilianization” of armed conflicts

213 P I, Art. 51(3); P II, Art. 13(3)

214 See **Document No. 51**, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities

members of armed groups that do not belong to a party to the international armed conflict. In our view, such “fighters” are either civilians or covered by the rule applicable to a parallel non-international armed conflict, discussed below.

In non-international armed conflicts, the absence of any mention of “combatants” might lead one to deduce that everyone is a civilian and that no one may be attacked unless they directly participate in hostilities. However, this would render the principle of distinction meaningless and impossible to apply. In addition, common Article 3 confers protection on “persons taking no active part in hostilities, including members of armed forces who have laid down their arms or are otherwise *hors de combat*”. The latter part of the phrase suggests that for members of armed forces and groups, it is not sufficient to no longer take active part in hostilities to be immune from attack. They must take additional steps and actively disengage. On a more practical level, to prohibit government forces from attacking clearly identified fighters unless (and only while!) the latter engage in combat against government forces is militarily unrealistic, as it would oblige them to react rather than to prevent, while facilitating hit-and-run operations by the rebel group. These arguments may explain why the Commentary on Protocol II considers that “[t]hose belonging to armed forces or armed groups may be attacked at any time.”^[215]

There are two ways of conceptualizing this conclusion. First, “direct participation in hostilities” can be understood to encompass the simple fact of remaining a member of the group or of keeping a fighting function in such a group. Second, members of armed groups, or, as the ICRC Interpretive Guidance suggests, those members of an armed group whose specific function is continuously to commit acts that constitute direct participation in hostilities, may not be considered “civilians” (and therefore do not benefit from the rules that protect them against attacks unless and for such time as they directly participate in hostilities). The latter suggestion ensures that membership of the armed group is distinguished from simple affiliation with a party to the conflict for which the group is fighting – in other words, membership of the political, educational or humanitarian wing of a rebel movement. In every case, however, in practice the difficult question arises as to how government forces are to determine (fighting) membership in an armed group while the individual in question does not commit hostile acts.

As for the question about **what conduct amounts to “direct participation”**, the ICRC Interpretive Guidance concludes, based on a broad agreement among experts, that the following criteria must be cumulatively met in order to classify a specific act as direct participation in hostilities:

1. the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);

215 Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4789

3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)."

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts
 - ⇒ **Document No. 51, ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities**
 - ⇒ Case No. 109, ECHR, Korbely v. Hungary
 - ⇒ **Case No. 136, Israel, The Targeted Killings Case [Paras 24-40]**
 - ⇒ Case No. 138, Israel, Detention of Unlawful Combatants [Part A., paras 13 and 21; Part B.],
 - ⇒ Case No. 192, Inter-American Commission on Human Right, Tablada [Paras 178 and 189]
 - ⇒ Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo [Paras 259-267]
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D. 3.3.1.-5.4.3., Para. E.1]
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 7-9, 20-21]
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ Case No. 267, United States, The Obama Administration's Internment Standards
 - ⇒ Case No. 272, Civil War in Nepal [Part II]
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 132-138]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 48-51]
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8. The civilian population is not to be used to shield military objectives

P I, Art. 51(7) [CIHL, Rule 97]

Introductory text

IHL prohibits attacks against the civilian population and civilian objects.^[216] IHL also prohibits abuse of this prohibition: civilians, the civilian population and certain specially protected objects may not be used to shield a military objective from attack.^[217] The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions^[218] is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender’s specific intention to obtain “protection” for its military forces and objectives, or simply of a lack of care for the civilian population.

If the defender violates the prohibition to use human shields, the “shielded” military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects.^[219] It is generally agreed that involuntary human shields nevertheless remain civilians. Care must therefore be taken to spare them when attacking a legitimate objective.^[220] In an extreme case, if the anticipated incidental loss of life or injury among involuntary human shields is excessive in relation to the concrete and direct military advantage expected from attacking the military objective or combatants, an attack directed against the latter may become unlawful.^[221] The status of voluntary human shields is more controversial. Some consider that acting as voluntary human shields constitutes direct participation in hostilities, which would cause the persons concerned to lose protection against the effects of hostilities while they act as human shields. Others object, first, that in order to classify an act as direct participation, the act must provoke, through a physical

216 See P I, Art. 51(2), 52-56, Art. 85(3); P II, Art. 13

217 See GC IV, Art. 28; P I, Art. 51(7)

218 See P I, Art. 58 and *infra* Part I, Chapter 9. II. 11. Precautionary measures against the effects of attacks

219 See P I, Art. 52

220 See P I, Arts 51(8) and 57

221 P I, Art. 51(5)(b)

chain of causality, harm to the enemy or its military operations. Human shields are a moral and legal rather than physical means to an end: to hinder the enemy from attacking. Second, the theory considering voluntary human shields as civilians directly participating in hostilities is self-defeating. If it were correct, the presence of human shields would not have any legal impact on the ability of the enemy to attack the shielded objective – but an act which cannot have any impact whatsoever upon the enemy cannot possibly be classified as direct participation in hostilities. Third, the distinction between voluntary and involuntary human shields refers to a factor, i.e. the voluntary involvement of the target, which is very important in criminal law and, to a lesser extent, in law enforcement operations, but is completely irrelevant in IHL. A soldier of a country with universal compulsory military service is just as much (and for just as long) a legitimate target as a soldier who is a member of an all-volunteer army. Fourth, the distinction is not practicable. How can a pilot or soldier launching a missile know whether the civilians he observes around a military objective are there voluntarily or involuntarily? What counts as a voluntary presence? Fifth, in a self-applied system like that of IHL during armed conflict, the suggested loss of protection against attacks may prompt an attacker to invoke the prohibition to use human shields abusively, as an alibi, as a mitigating circumstance or “to ease his conscience”.

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- ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part I, paras 151-169; Part II, paras 439-498]
 - ⇒ Case No. 136, Israel, The Targeted Killings case
 - ⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Para. 34]
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part II, paras 6-11]
 - ⇒ **Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Parts C. and D.]**
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 3-9]
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 24-26]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 15, 23, 25-26, 69-70]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 79-82]
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Hague Conventions and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007: Proceedings, Milano, Nagard, 2008, pp. 93-102. SCHMITT Michael N., “Human Shields in International Humanitarian Law”, *IYHR*, Vol. 38, 2008, pp. 17-58.

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9. Protected objects

Introductory text

In order to further safeguard the civilian population during armed conflicts, IHL protects specific objects from attack. It prohibits attacks against civilian objects, which are all objects not defined as military objectives;^[222] thus, a civilian object is one failing to contribute to military action because of, for example, its location or function, and because its destruction would provide no military advantage.

In addition, IHL grants some objects, most of which are civilian objects anyway, special protection. In addition to the general protection afforded to them as civilian objects, special protection means that these objects may not be used for military purposes by those who control them and should therefore never become military objectives under the two-pronged test of the definition of military objectives. Second, even if they meet the test and are effectively used for military purposes, specially protected objects may only be attacked under restricted circumstances and following additional precautionary measures. For each category, the specific rules on these issues are different.

Specially protected objects include: cultural objects;^[223] objects indispensable for the survival of the civilian population, such as water;^[224] works and installations containing dangerous forces (e.g., dams, dykes and nuclear electrical power generating stations). Attacks against military objectives located in the vicinity of such installations are also prohibited when they would cause sufficient damage to endanger the civilian

222 See HR, Arts 25 and 27; P I, Arts 48, 52, and 85(3)

223 See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14 1954 [See Document No. 10, Conventions on the Protection of Cultural Property [Part A.]]; P I, Arts 53 and 85(4); P II, Art. 16; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999 [See Document No. 10, Conventions on the Protection of Cultural Property [Part C.]]. See also *infra* Part I, Chapter 9, II. 9. b. aa. Cultural objects

224 See P I, Art. 54; P II, Art. 14

population.^[225] The special protection of these works and installations ceases only under limited circumstances.^[226] The environment (made up of civilian objects) also benefits from special protection. Means or methods of warfare with the potential to cause widespread, long-term, and severe damage to the environment are prohibited.^[227] Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited.^[228]

a) civilian objects

P I, Art. 52(1) [CIHL, Rule 9]

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- ⇒ Case No. 128, Israel, House Demolitions in the Occupied Palestinian Territory [Parts D and E.]
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., paras 39 and 42]
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., para. 282]
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others
 - ⇒ Case No. 253, Afghanistan, Operation “Enduring Freedom” [Part B.]
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 19-21, 23-25, 52-53-58]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 37-47, 94-109]
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b) specially protected objects

aa) cultural objects

P I, Art. 53 [CIHL, Rules 38-40]

“Total wars”, inter-religious strife and inter-ethnic conflicts are increasingly marked by the destruction of civilian objects, in particular cultural objects. Experience unfortunately shows that, far from being accidental or mere collateral damage, such destruction is very often clearly deliberate and part of the war effort.

The first attempts to protect cultural objects against the effects of war date back to the adoption of Hague Convention IV of 1907. This protection has been considerably developed in the Hague Convention for the Protection of Cultural Property in the event

225 See P I, Art. 56; P II, Art. 15

226 See P I, Art. 56(2)

227 See P I, Art. 55; see also Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)

228 See GC I, Arts 19(1) and 36(1); GC II, Arts 22, 24-27, and 39(1); GC IV, Arts 18-19 and 21-22, P I, Arts 20 and 21-31; P II, Art. 11

of Armed Conflict and its 1954 and 1999 Protocols, in the 1949 Geneva Conventions and in Additional Protocols I and II of 1977.

Cultural objects are defined as “movable or immovable property of great importance to the cultural heritage of every people” (which include in particular monuments of architecture, archaeological sites, works of art, scientific collections and collections of books or archives) and as “buildings whose main and effective purpose is to preserve or exhibit movable cultural property” (such as museums, libraries or refuges intended to shelter cultural property).

On the basis of provisions applicable in both international and non-international armed conflicts, States parties are required to safeguard and respect cultural objects. *Safeguarding* comprises all the preventive measures to be taken in peacetime (which include the obligations to list, signal and mark the cultural objects with a distinctive emblem). *Respect* for cultural objects implies refraining from attacking them and prohibiting any form of pillage or destruction.

Considered as civilian objects under special protection, cultural objects must not be attacked and may not be used for military purposes. Even if they are, they do not automatically become legitimate military objectives. Their immunity may only be waived in cases of “imperative military necessity”.

In spite of the many detailed provisions designed to guarantee their protection, cultural objects are still often collateral victims of modern conflicts. In most cases, their irreparable destruction often constitutes a serious obstacle to the restoration of normal relations between former belligerents.

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- ⇒ Document No. 10, Conventions on the Protection of Cultural Property
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 13]
 - ⇒ Case No. 148, Israel, Taking Shelter in Ancient Ruins
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 188-192]
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Part A., Annex, para. 50]
 - ⇒ Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War
 - ⇒ **Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., paras 229-233 and 298-329]**
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras 3, and E.3]
 - ⇒ Case No. 252, Afghanistan, Destruction of the Bamiyan Buddhas
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 52-55]
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bb) objects indispensable to the survival of the civilian population

P I, Art. 54 [CIHL, Rules 53 and 54]

- water

⇒ **Case No. 42, Water and Armed Conflicts**

⇒ Case No.124, Israel, Operation Cast Lead [Part II, paras 913-989]

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cc) works and installations containing dangerous forces

P I, Art. 56 [CIHL, Rule 42]

⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others

⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras 2, and E.3]

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dd) medical equipment

⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 172-177]

c) the natural environment

P I, Arts 35(3) and 55 [CIHL, Rules 44 and 45]

⇒ **Case No. 38, The Environment and International Humanitarian Law**

⇒ **Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Paras 30 and 33]**

⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 209-220]

⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law

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10. Precautionary measures in attack

Introductory text

Under IHL only military objectives may be attacked.^[229] Even such attacks, however, are not without restrictions. An attack must be cancelled if it becomes apparent that it is of a type that is prohibited.^[230] If circumstances permit, an advance warning must be given for those attacks which may affect the civilian population.^[231] In determining the objective of an attack, and when a choice is possible, the one causing least danger to the civilian population must be selected.^[232] Furthermore, IHL requires those planning and deciding on an attack to take precautionary measures,^[233] including refraining from attacking when incidental loss of civilian life or destruction of civilian objects outweighs the military advantage of the attack.^[234] The meaning of these obligations in practice remains controversial in many cases, mainly with regard to which precautions are “feasible”. Military and humanitarian considerations may influence the

229 See P I, Art. 52(2)

230 See P I, Art. 57(2)(b)

231 See HR, Art. 26; GC IV, Art. 19 (concerning hospitals); P I, Art. 57(2)(c)

232 See P I, Art. 57(3)

233 See P I, Art. 57(2)(a)

234 See P I, Art. 57(2)(a)(iii)

feasibility of such precautions: the importance and the urgency of destroying a target; the range, accuracy and effects radius of available weapons; the conditions affecting the accuracy of targeting; the proximity of civilians and civilian objects; the possible release of hazardous substances; the protection of the party's own forces (and the proportionality between the additional protection for those forces and the additional risks for civilians and civilian objects when a certain means or method is chosen); the availability and feasibility of alternatives; the necessity to keep certain weapons available for future attacks on targets which are militarily more important or more risky for the civilian population.

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- ⇒ Case No. 49, ICRC, *The Challenges of Contemporary Armed Conflicts*
 - ⇒ Case No. 124, Israel, *Operation Cast Lead* [Part I, paras 132-133, Part II, para. 529]
 - ⇒ Case No. 140, Israel, *Human Rights Committee's Report on Beit Hanoun* [Paras 26 and 38-42]
 - ⇒ Case No. 150, Israel, *Report of the Winograd Commission* [Para. 26]
 - ⇒ Case No. 203, *Case Study, Armed Conflicts in the former Yugoslavia* [27]
 - ⇒ Case No. 245, *Human Rights Committee, Guerrero v. Colombia*
 - ⇒ Case No. 257, *Afghanistan, Goatherd Saved from Attack*
 - ⇒ Case No. 282, *ECHR, Isayeva v. Russia*
 - ⇒ Case No. 283, *ECHR, Khatsiyeva v. Russia* [Paras 21 and 139]
 - ⇒ Case No. 290, *Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia* [Paras 18-25]
 - ⇒ Case No. 291, *Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia* [Paras 66-67, 74-82]
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SUGGESTED READING: HENDERSON Ian, *The Contemporary Law of Targeting: [Military Objectives, Proportionality and Precautions in Attack under Additional Protocol I]*, Leiden, Boston, M. Nijhoff, 2009, 266 pp.

a) an attack must be cancelled if it becomes apparent that it is a prohibited one

P I, Art. 57(2)(b) [CIHL, Rule 19]

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- ⇒ Document No. 73, *France, Accession to Protocol I* [Part B., para. 16]
 - ⇒ Case No. 140, Israel, *Human Rights Committee's Report on Beit Hanoun* [Para. 26]
 - ⇒ **Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part A., para. 6]**
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b) advance warning must be given, unless circumstances do not permit

P I, Art. 57(2)(c) [CIHL, Rule 20]

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- ⇒ Document No. 73, *France, Accession to Protocol I* [Part B., para. 16]
 - ⇒ **Case No. 124, Israel, Operation Cast Lead [Part I, paras 262-265, Part II, paras 499-536]**
 - ⇒ Case No. 149, *Israel/Lebanon/Hezbollah, Conflict in 2006* [Part I, paras 149-158]

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- ⇒ **Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part A., paras 18, 20, 22-25 and B., para. 77]**
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 15, 25, 72, 164, 171, 187, 192-193]
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 21 and 139]
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c) when a choice is possible, the objective causing the least danger to the civilian population must be selected

P I, Art. 57(3) [CIHL, Rule 21]

d) additional obligations of those who plan or decide on an attack

P I, Art. 57(2)(a) [CIHL, Rules 16 and 17]

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- ⇒ Case No. 135, Israel, The Rafah Case [Paras 54-58]
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ **Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq**
 - ⇒ Case No. 183, Iraq, Use of Force by United States Forces in Occupied Iraq
 - ⇒ Case No. 226, Federal Republic of Yugoslavia, NATO Intervention
 - ⇒ Case No. 253, Afghanistan, Operation "Enduring Freedom" [Part B.]
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aa) verify that objectives are not illicit

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- ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 135-138]
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bb) choose means and methods avoiding or minimizing civilian losses

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- ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 257, Afghanistan, Goatherd Saved from Attack
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 260, Afghanistan, Code of Conduct of the Mujahideen, [Arts 41(C.) and 46]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 74-82]
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cc) refrain from attacks causing disproportionate civilian losses

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- ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Military Targets
 - ⇒ Case No. 257, Afghanistan, Goatherd Saved from Attack
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
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11. Precautionary measures against the effects of attacks

GC IV, Arts 18(5); P I, Art. 58 [CIHL, Rules 22-24]

Introductory text

Contrary to Art. 57 of Protocol I,^[235] which lays down rules for the conduct to be observed in attacks on the territory under the control of the enemy, Art. 58 of Protocol I relates to specific measures which every Power must take in its own territory in favour of its nationals, or in territory under its control. These precautionary measures against the effects of attacks (which are often referred to as “Conduct of Defence”^[236]) include three specific obligations that Parties to a conflict shall discharge “to the maximum extent feasible”:^[237]

- 1) They must “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”.^[238] In most cases, only specific categories of the population (i.e. children, the sick or women) are evacuated; sometimes the entire population is evacuated. It should be underlined that, when carrying out such measures, occupying powers remain bound by the strict limitations spelled out in Art. 49 of Convention IV.
- 2) They must “avoid locating military objectives within or near densely populated areas”.^[239] This obligation, which covers “both permanent and mobile objectives [...] should already be taken into consideration in peacetime”.^[240]
- 3) They must “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”.^[241] Practically speaking, the “other measures” are chiefly building shelters to provide adequate protection against the effect of hostilities for the civilian population and the training of efficient civil defence services.

The wording, however, clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only “to the maximum extent possible,” and the defender only has to “endeavour to remove” the civilian population and “avoid” locating military objectives nearby. While responsibility for the protection of the civilian population against the effects of hostilities is shouldered by both the attacker and the defender, its weight is not equally distributed.

⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict

²³⁵ See *supra*, Part I, Chapter 9. II. 10. Precautionary measures in attack

²³⁶ See Mulinen, F de, *Handbook on the Law of War for Armed Forces*, ICRC, 1987, p. 104

²³⁷ See P I, Art. 58(1)

²³⁸ See P I, Art. 58(a)

²³⁹ See P I, Art. 58(b)

²⁴⁰ See Sandoz, Y, Swinarski, C., & Zimmermann, B. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, M. Nijhoff, 1987, Art. 58, para. 2251

²⁴¹ See P I, Art. 58(c)

- ⇒ Case No. 124, Israel, Operation Cast Lead [Part I, paras 151-169, Part II, paras 439-498]
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Parts C. and D.]
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 15, 23, 25-26, 69-70]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 18-25]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 79-82]
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SUGGESTED READING: QUEGUINER Jean-François, “Precautions under the Law Governing the Conduct of Hostilities”, in *IRRC*, Vol. 88, No. 864, December 2006, pp. 798-821.

12. Presumptions

P I, Arts 50(1) and 52(3)

- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 9]
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ **Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
 - ⇒ Case No. 245, Human Rights Committee, Guerrero v. Colombia
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 21, 132-139]
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13. Zones created to protect war victims against the effects of hostilities

GC I, Art. 23; GC IV, Arts 14 and 15; P I, Arts 59 and 60 [CIHL, Rules 35-37]

See also *infra* Table, p. 279

Introductory text

While IHL mainly tries to protect civilians and other categories of protected persons by obliging combatants to identify positively military objectives and to only attack them, respecting civilians wherever they happen to be, it also foresees different types of zones aimed at separating civilians from military objectives. The following table summarizes the different types of protected zones. They have in common the purpose of protecting war victims from the effects of hostilities (but not from falling under the control of the enemy) by assuring enemy forces that no military objectives exist in a defined area where war victims are concentrated. Thus, if the enemy respects IHL, the war victims run no risk of being harmed by the effects of hostilities. The risk with such zones is that they presuppose the willingness of the enemy to respect IHL. Hence,

they are pointless against an enemy determined to violate IHL. On the contrary, such zones may then lead to the displacement of civilians and help the enemy target and abuse civilians by concentrating them in a confined location. Established under *jus in bello*, such zones have to be distinguished from the safe areas, humanitarian corridors or safe havens recently created under Chapter VII of the UN Charter, i.e. under *jus ad bellum*, and meant to prevent certain areas and the war victims in them from falling into enemy hands.

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- ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 12-16]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [14]
 - ⇒ **Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993**
 - ⇒ Case No. 225, Netherlands, Responsibility of International Organizations [Paras 2.4 and 2.6]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 16 and 186]
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SUGGESTED READING: BOUVIER Antoine, “Zones protégées, zones de sécurité et protection de la population civile”, in BOUSTANY Katia & DORMOY Daniel, *Perspectives humanitaires entre conflits, droit(s) et action*, Brussels, Bruylant, 2002, pp. 251-269. LAVOYER Jean-Philippe, “International Humanitarian Law, Protected Zones and the Use of Force”, in BIERMANN Wolfgang & VADSET Martin (eds), *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia*, Ashgate, Aldershot, 1998, pp. 262-279. OSWALD Bruce M., “The Creation and Control of Places of Protection During United Nations Peace Operations”, in *IRRC*, No. 844, December 2001, pp. 1013-1036. SANDOZ Yves, “Localités et zones sous protection spéciale”, in *Quatre études du droit international humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 35-47. TORELLI Maurice, “Les zones de sécurité”, in *RGDIP*, Vol. 99/4, 1995, pp. 787-848.

FURTHER READING: LANDGREN Karen, “Safety Zones and International Protection: A Dark Grey Area”, in *International Journal of Refugee Law*, Vol. 7/3, 1995, pp. 436-458. “Zones sanitaires et zones de sécurité”, in *IRRC*, Nos 390 & 392, 1951, 80 pp. PATEL Bimal N., “Protection zones in international humanitarian law”, in *The Indian Journal of International Law*, Vol. 39/4, 1999, pp. 689-702.

a) open cities

SUGGESTED READING: ELKIN G., “Application of the ‘Open City’ Concept to Rome 1942/1944”, in *Air Force Law Review*, 1980-1981, pp. 188-200.

Protected Zones According to International Humanitarian Law

		International						Non International
Armed Conflict								
Legal Basis	GC I, Article 23 GC I, Annex I	GC IV, Article 14 GC IV, Annex I	GC IV, Article 15	P I, Article 59	P I, Article 60		GC IV, common Article 3(3)	
Terminology	Hospital zones and localities	Hospital and safety zones and localities	Neutralized zones	Non-defended localities	Demilitarized zones		"Neutralized zones"	
Categories of Protected Persons	Sick, wounded, and related personnel	Specific categories of civilians: wounded, sick, aged persons, children under 15, expectant mothers and mothers of children under 7	All civilians who do not take part in the hostilities and wounded and sick combatants	Civilian population (in its place of residence)	Civilian population (in its place of residence)		Civilian population	
Modality of Creation	Written agreement between the Parties or unilateral declaration with recognition of the opposing party	Written agreement between the Parties or unilateral declaration with recognition of the opposing party	Written agreement between the Parties	Notification to the opposing Party (or <i>ad hoc</i> agreement, if not all conditions satisfied)	Express agreement		Agreement between the Parties Practice of the ICRC	
Characteristics: - location - time-frame	Distant from the front Durable	Distant from the front Durable	Inside the combat zone Provisional	Near or inside the combat zone: Open to occupation; Military personnel and equipment evacuated	Prohibition to extend military operations to such zones		By analogy with the principles of GC IV, Article 15	
Markings	Red cross/crescent	Oblique red bands on white ground	To be defined	To be agreed upon by the Parties	To be agreed upon by the Parties		Red cross emblem (if under authority of the ICRC)	

14. Civil defence

P I, Arts 61-67

SUGGESTED READING: JAKOVLJEVIC Bosko, *New International Status of Civil Defence*, Geneva/The Hague, Henry-Dunant Institute/M. Nijhoff, 1982, 142 pp. JEANNET Stéphane, “Civil Defence 1977-1997: From Law to Practice”, in *IRRC*, No. 325, December 1998, pp. 715-723. SCHULTZ E., *Civil Defence in International Law*, Copenhagen, Danish National Civil Defence and Emergency Planning Directorate, 1977, 59 pp.

III. MEANS AND METHODS OF WARFARE

(See also *supra* Part I, Chapter 9, II.6. Prohibited attacks, p.257, and 10. Precautionary measures in attack, p.273)
HR, Arts 22-34

Introductory text

[We are deeply grateful to Dr. Théo Boutruche, IHL consultant, who wrote his PhD thesis (*L'interdiction des maux superflus : contribution à l'étude des principes et règles relatifs aux moyens et méthodes de guerre en droit international humanitaire*, Graduate Institute of International and Development Studies, Geneva, 2008) on the concept of superfluous injury or unnecessary suffering, for this contribution.]

Under IHL the term “rules on means and methods of warfare” refers to a complex and large set of norms that are relatively fragmented and not systematically identified as such. While the term “means of warfare” commonly relates to the regulation of weapons, the term “methods” covers a broader array of rules depending on the definition considered. Traditionally, with regard to weapons, “means” encompasses weapons, weapons systems or platforms employed for the purposes of attack, whereas “methods” designates the way or manner in which the weapons are used. However, the concept of method of warfare also comprises any specific, tactical or strategic, ways of conducting hostilities that are not particularly related to weapons and that are intended to overwhelm and weaken the adversary, such as bombing, as well as the specific tactics used for attack, such as high altitude bombing. The term “methods” is rather new in treaty law.^[242]

State practice offers examples of these two understandings of “methods”. The IHL governing means and methods of warfare contains two types of norms: general principles banning certain effects, and specific rules addressing particular weapons or methods. The distinction between “means” and “methods” is also related to the way IHL regulates the use of weapons. This branch of law either prohibits the use of certain weapons in any circumstances due to their inherent characteristics or it merely restricts and limits certain ways of using all weapons or certain specific weapons. For example, the prohibition of indiscriminate effects may be relevant in relation to the

242 See P I, Part III, Section I

very nature of the effects of a weapon and at the same time for any type of weapon that can potentially be used indiscriminately.

Historically, prohibitions and limitations on means and methods of warfare were prompted by the concern to protect combatants, which saw the emergence of the principle prohibiting weapons causing superfluous injury or unnecessary suffering^[243] and the ban on specific weapons, such as explosive projectiles weighing less than 400 grams^[244] or dum-dum bullets^[245], as well as particular methods like killing or wounding treacherously.^[246] Protocol I laid down elaborate principles and rules governing means and methods of warfare aimed at protecting the civilian population and objects, such as the prohibition of indiscriminate attacks, including those which employ a method or means of combat which cannot be directed at a specific military objective,^[247] or those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol.^[248] While most of the treaty norms pertaining to means and methods of warfare apply only in times of international armed conflict, international customary law applicable to non-international armed conflicts progressively evolved to contain the same rules in this regard.^[249]

The overarching principle of IHL governing means and methods of warfare stipulates that the right of the parties to a conflict to choose means and methods of warfare is not unlimited.^[250] The principles prohibiting the means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering^[251] and the principle prohibiting means and methods of warfare causing indiscriminate effects^[252] are derived from this. Protocol I does not list the latter principle among the basic rules under the section on means and methods of warfare, but in the section on the protection of the civilian population against effects of hostilities. Indeed, this principle protects only civilians. Protocol I further prohibits means or methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.^[253]

The relationship between the general principles and the specific rules on weapons remains a delicate issue, notably concerning the extent to which the latter merely crystallize the former. For example, the prohibition to cause superfluous injury or unnecessary suffering is considered by some to outlaw in and of itself certain weapons in the absence of a particular rule, while others assert that it must be translated by States into specific prohibitions before it can produce proper legal effects. The latter approach is questionable, however, as it appears to confuse the normative value of the principle *per se* with the issue of its interpretation and application to specific

243 See St Petersburg Declaration of 1868, Preamble; HR, Art. 23(e)

244 See St Petersburg Declaration of 1868

245 See Declaration Concerning Expanding Bullets (adopted by the First Hague Peace Conference of 1899)

246 See HR, Art 23(b)

247 See P I, Art. 51(4)(b)

248 See P I, Art. 51(4)(c)

249 See Case No. 43, ICRC, Customary International Humanitarian Law and Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 125],

250 See HR, Art. 22; P I, Art. 35(1)

251 See P I, Art. 35(2)

252 See P I, Art. 51(4)

253 See P I, Arts 35(3) and 55(1)

weapons. First, it is well recognized that a weapon not covered by a specific norm remains regulated by the general principles. Second, States do rely on the principles themselves, including to prohibit methods of warfare. Furthermore, the States parties to Protocol I are under an obligation to assess the legality of new weapons, means or methods of warfare, including in the light of the general principles.^[254] General principles hence are legal rules with a normative value of their own.

Outside the Geneva Conventions and Protocols, IHL contains a series of prohibitions and limitations of use for specific weapons. Certain weapons are forbidden in all circumstances because of their characteristics,^[255] while others are only governed by restrictions in use.^[256] As several treaty regimes are in place, a weapon can be both prohibited and its use limited.^[257]

Specific prohibited methods of warfare not particularly related to weapons primarily comprise the denial of quarter^[258] and perfidy.^[259] There is nevertheless no agreed list of specific prohibited methods, which may vary in State practice and according to scholars. Some include as specific prohibited methods of warfare those aimed at spreading terror, reprisals, the use of human shields, and the manipulation of the environment. Conversely, others treat those methods as distinct prohibitions, separate from the issue of methods.

Besides norms on means and methods of warfare *per se*, IHL also contains additional obligations with regard to the choice of means and methods when planning and deciding on an attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.^[260] Those precautionary measures in attack, while being designed with reference to the protection of civilians and civilian objects, might be considered relevant for other types of means and methods of warfare to ensure respect for all relevant norms of IHL.

The exact content and scope of the term “method of warfare” within the principles and rules of IHL that refer to it remain unclear. Indeed, although the prohibition of superfluous injury or unnecessary suffering traditionally concerns the nature of means of warfare, it also covers the way to use weapons as well as specific methods with particular features. Contemporary challenges in the field of the regulation of means and methods of warfare include the issue of the interaction between the general principles in the case of a means of warfare that allows for better compliance with IHL rules protecting civilians but conversely may cause superfluous injury or unnecessary suffering to combatants.

254 See P I, Art. 36

255 See Document No. 15, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)

256 See Document No. 14, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)

257 See, for example, the antipersonnel mines regime set out in the 1997 Ottawa Convention [Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction], and Art. 3(3) of the Protocol on Mines, Booby-Traps and Other Devices [Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)].

258 See HR, Art. 23(d); P I, Art. 40

259 See P I, Art. 37

260 See P I, Art. 57(2)(a)(ii)

SUGGESTED READING: BOOTHBY William H., *Weapons and the Law of Armed Conflict*, New York, OUP, 2009, 412 pp. BOUTRUCHE Théo, *L'Interdiction des Maux Superflus : Contribution à l'Étude des Principes et Règles Relatifs aux Moyens et Méthodes de Guerre en Droit International Humanitaire*, Geneva, Thesis, Graduate Institute of International and Development Studies, Université de Genève, 2008, 559 pp. CASSESE Antonio, "Means of Warfare: The Traditional and the New Law", in CASSESE Antonio (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, Editoriale Scientifica, 1976, pp. 161-198. ICRC, WASZINK, Camilla & COUPLAND Robin Michael, COLLEGE D'EUROPE, *Current Perspectives on Regulating Means of Warfare: Proceedings of the Bruges Colloquium, 18-19 October 2007*, Collegium, Nouvelles du Collège d'Europe No. 37, 2008, 168 pp. MYJER Eric P., "Means and Methods of Warfare and the Coincidence of Norms between the Humanitarian Law of Armed Conflict and the Law of Arms Control", in HEERE Wybo P. (ed.), *International law and The Hague's 750th anniversary*, Cambridge, CUP, 1999, pp. 371-383. TURNS David, "At the 'Vanishing Point' of International Humanitarian Law: Methods and Means of Warfare in Non-International Armed Conflicts", *German Yearbook of International Law = Jahrbuch für Internationales Recht*, Vol. 45, 2002, pp. 115-148.

1. The basic rule: Art. 35 of Protocol I

[CIHL, Rule 70]

Quotation

Part III: Methods and means of warfare [...]

Section I: Methods and means of warfare

Article 35 – Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. [...]

[Source: Protocol I]

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- ⇒ **Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 78], p. 776**
 - ⇒ Case No. 80, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Paras 4 and 8], p. 846
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 249-263], p. 1245
 - ⇒ Case No. 179, United States, Surrendering in the Persian Gulf War, p. 1534
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy, p. 2313
 - ⇒ Case No. 260, Afghanistan, Code of Conduct of the Mujahideen [Art.41], p. 2325
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 19, 33, 165-167, 191-191], p. 2472
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 8, 20-22, 28], p. 2523
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 58-63], p. 2546
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SUGGESTED READING: BOUTRUCHE Théo, *L'Interdiction des Maux Superflus : Contribution à l'Étude des Principes et Règles Relatifs aux Moyens et Méthodes de Guerre en Droit International Humanitaire*, Geneva, Thesis, Graduate Institute of International and Development Studies, Université de Genève, 2008, 559 pp. COUPLAND Robin M., “The SIRUS Project: Towards a Determination of Which Weapons Cause ‘Superfluous Injury or Unnecessary Suffering’”, Geneva, ICRC, 1997, 43 pp. ICRC, Special Issue on Means of Warfare, *IRRC*, Vol. 87, No. 859, 2005, 604 pp. MACLEOD Iain J. & ROGERS Anthony P.V., “The Use of White Phosphorus and the Law of War”, in *YIHL*, Vol. 10 (2007), 2009, pp. 75-97. MEYROWITZ Henri, “The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977”, in *IRRC*, No. 299, October 1994, pp. 98-122.

2. Prohibited or restricted use of weapons

Introductory text

Lowering the level of cruelty between combatants and protecting those *hors de combat* and the civilian population in a more effective manner requires the regulation and, ultimately, the prohibition of certain means of warfare. To this end, several provisions of IHL applicable to international armed conflicts limit the means of warfare, i.e. weapons.^[261] These provisions aim, in particular, to prohibit weapons causing “superfluous injury or unnecessary suffering”. In practice, the application of this basic rule is always a compromise between military necessity and humanity, as the principle of “superfluous injury or unnecessary suffering” has been interpreted as referring to harm that would not be justified by military utility, either because of the lack of even the slightest utility or because utility is considerably outweighed by the suffering caused. Although this standard may seem too vague to be effective, it has nevertheless led to efforts to prohibit and restrict certain conventional weapons^[262] and weapons of mass destruction.^[263] Although the Geneva Conventions and Additional Protocols limit means and methods of warfare (including those severely damaging the environment),^[264] they neither prohibit nor restrict the use of any specific weapon; however, various other conventions do.^[265] Recognizing that it is much easier to prohibit a weapon’s use prior to its incorporation into a State’s arsenal, Protocol I also places constraints on the development of new weapons.^[266]

261 See HR, Arts 22 and 23(e); PI, Art. 35

262 For example, dum-dum bullets, mines, incendiary weapons, non-detectable fragments, and cluster munitions.

263 For example, chemical weapons, use of poison, bacteriological and biological weapons, and – without success – nuclear weapons.

264 See PI, Arts 35(3) and 55; see also Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Geneva, May 18, 1977

265 For example, the Declaration Concerning Expanding Bullets (adopted by the First Hague Peace Conference of 1899); the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [Document No. 9, The Geneva Chemical Weapons Protocol] (extending the Hague Regulation of 1899 prohibiting use of “poison or poisoned weapons”); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [See Document No. 48, ICRC, Biotechnology, Weapons and Humanity [Part A.]], and the 1980 UN Convention on the Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects and subsequent Protocols [See Documents No. 11-16 and 18].

266 See PI, Art. 36

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- ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [28]
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a) explosive bullets

[CIHL, Rule 78]

b) dum-dum bullets

[CIHL, Rule 77]

c) certain conventional weapons

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- ⇒ Document No. 11, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons
 - ⇒ Document No. 12, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts
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SUGGESTED READING: KALSHOVEN Frits, “The Conventional Weapons Convention: Underlying Legal Principles”, in *IRRC*, No. 279, 1990, pp. 510-520. MATHEWS Robert J., “The 1980 Convention on Certain Conventional Weapons: A Useful Framework Despite Earlier Disappointments”, in *IRRC*, No. 844, December 2001, pp. 991-1012. PARKS William H., “Conventional Weapons and Weapons Review”, in *YIHL*, Vol. 8 (2005), 2007, pp. 55-142. SANDOZ Yves, “A New Step Forward in International Law: Prohibitions or Restriction on the Use of Certain Conventional Weapons. United Nations Conference on Prohibition or Restrictions of Use of Certain Conventional Weapons”, in *IRRC*, No. 220, January 1981, pp. 3-18. “Report of the ICRC for the Review Conference of the 1980 UN Conventions on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects”, in *IRRC*, No. 299, March-April 1994, pp. 123-182.

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aa) mines

[CIHL, Rules 80-83]

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- ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)
 - ⇒ Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
 - ⇒ Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines
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bb) incendiary weapons

[CIHL, Rules 84 and 85]

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- ⇒ Document No. 14, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)
 - ⇒ Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 186]
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cc) non-detectable fragments

[CIHL, Rule 79]

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- ⇒ Document No. 13, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)
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dd) blinding weapons

[CIHL, Rule 86]

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- ⇒ Document No. 15, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
 - ⇒ Case No. 80, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons
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ee) explosive remnants of war

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- ⇒ Document No. 18, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [28]
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in *Frieden in Freiheit = Peace in Liberty = Paix en liberté, Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos, 2008, pp. 193-205.

ff) cluster munitions

⇒ **Document No. 19, Convention on Cluster Munitions**

- ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Paras 249-256]
 - ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 253, Afghanistan, Operation "Enduring Freedom" [Part A.]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 48-51, 65-74]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 64-70]
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gg) other weapons for which limitations are under discussion

- light weapons
- anti-vehicle mines
- fragmentation weapons

d) chemical weapons

[CIHL, Rules 74-76]

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- ⇒ Document No. 9, The Geneva Chemical Weapons Protocol,
 - ⇒ Document No. 21, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
 - ⇒ Document No. 79, Switzerland, Prohibition of the Use of Chemical Weapons
 - ⇒ Case No. 173, UN/ICRC, The Use of Chemical Weapons
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e) poison

HR, Art. 23(a) [CIHL, Rule 72]

f) bacteriological and biological weapons

[CIHL, Rule 73]

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- ⇒ Document No. 9, The Geneva Chemical Weapons Protocol
 - ⇒ Document No. 21, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction
 - ⇒ Document No. 48, ICRC, Biotechnology, Weapons and Humanity
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g) nuclear weapons

Quotation 3. Mr. PAOLINI (France) made the following statement:

[...]

[A]lready in 1973, the French Government noted that the ICRC did not include any regulations on nuclear weapons in its drafts. In participating in the preparation of the additional Protocols, therefore, the French Government has taken into consideration only conflicts using conventional weapons. It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons.

[Source: Official Records of the Diplomatic Conference on the reaffirmation and development of International Humanitarian Law applicable in armed conflicts, Geneva (1974-1977), Federal Political Department, Bern, Vol. II, 1978, p. 193]

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- ⇒ **Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Paras 84-86, 95, and 105]**
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 2]
 - ⇒ Case No. 81, United Kingdom, Interpreting the Act of Implementation
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h) “new means and methods”

PI, Art. 36

As a measure of precaution, Art. 36 of Protocol I requires the States Parties to assess whether the use of any new weapon or of any new method of warfare that they develop or plan to acquire or deploy in operations is allowed by, and compatible with, international law.

The rapid evolution of new military technologies and the development of potentially devastating means and methods of warfare lends added resonance to this legal review.

The parties to Protocol I are obliged to conduct such reviews, but it would also be appropriate for States that are not parties to Protocol I to do so. This would allow them to verify that their armed forces act in conformity with international rules regulating the use of means and methods of warfare.

Art. 36 does not specify the practical modalities of such reviews, which are left to the parties to decide. It is understood that the legal review should cover the weapons themselves and the ways in which they might be used. Particular attention should be paid to the potential effect of the weapon concerned on both civilians (prohibition of indiscriminate effects) and combatants (prohibition of unnecessary suffering).

⇒ **Document No. 47, ICRC, New Weapons**

⇒ **Case No. 80, United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Para. 2]**

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3. Prohibited methods of warfare

Introductory text

The concept of method of warfare encompasses any tactical or strategic procedure meant to outweigh or weaken the adversary.

The limitations or prohibitions to resort to specific methods of warfare stipulated in IHL are predicated on three premises:

- the choice of the methods of warfare is not unlimited;^[267]
- the use of methods of a nature to cause unnecessary suffering or superfluous injury is forbidden;^[268]

267 See HR, Art. 22; P I, Art. 35(1)

268 See HR, Art. 23(e); P I, Art. 35(2)

- the only legitimate object of war is to weaken the military forces of the enemy.^[269]

Contemporary IHL forbids, for instance, methods of warfare involving terror,^[270] starvation,^[271] reprisals against protected persons and objects,^[272] pillage,^[273] the taking of hostages,^[274] enforced enrolment of protected persons^[275] and deportations.^[276]

Under the specific heading “prohibited methods of warfare”, two methods of warfare are usually discussed, namely perfidy and denial of quarter.

Unlike ruses of war,^[277] which are lawful, perfidy^[278] is outlawed in IHL. Ruses of war are intended to mislead an adversary or to induce him to act recklessly. Perfidy, on the contrary, invites the confidence of an adversary and leads him to believe that he is entitled to or is obliged to provide protection under the rules of IHL.

The main aim of the prohibition of the denial of quarter^[279] is to protect combatants when they fall into enemy hands by ensuring that they will not be killed. The objective is to prevent the following acts: to order that there shall be no survivors, to threaten the adversary therewith, or to conduct hostilities on this basis.

Most cases of perfidy and denial of quarter are grave breaches of IHL and hence war crimes.

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- ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras 4, D.5.4.4, E.2 and Dissenting opinion]
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 7-9, 23-25, 54]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 75, 79, 82-83, 87-89]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 94-100]
-

a) giving or ordering no quarter

P I, Art. 40 [CIHL, Rule 46]

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- ⇒ Document No. 89, British Policy Towards German Shipwrecked
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ Case No. 147, Israel, Navy Sinks Dinghy off Lebanon
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ **Case No. 179, United States, Surrendering in the Persian Gulf War, p. 1534**

269 See 1868 St Petersburg Declaration, Preamble

270 See P I, Art. 51(2); P II, Art. 13

271 See P I, Art. 54; P II, Art. 14

272 See GC I-IV, Arts 46/47/13(3)/33 respectively; P I, Arts 20 and 41-56

273 See HR, Arts 28 and 47; GC I, Art. 15; GC II, Art. 18; GC IV, Arts 16 and 33; P II, Art. 4

274 See GC I-IV, common Art. 3; GC IV, Art. 34; P I, Art. 75

275 See GC III, Art. 130; GC IV, Art. 51

276 See GC IV, Art. 49; P II, Art. 17; see also *supra*, Part I, Chapter 8. IV. Special Rules on Occupied Territories, p. 231

277 See HR, Art. 24; P I, Art. 37(2)

278 See HR, Art. 23; P I, Art. 40

279 See HR, Art. 23(b); P I, Art. 37(1)

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- ⇒ **Case No. 192, Inter-American Commission on Human Rights, Tablada [Paras 182-185]**
 - ⇒ Case No. 272, Civil War in Nepal
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b) perfidy: the distinction between perfidy and permissible ruses of war

P I, Art. 37 [CIHL, Rules 57-65]

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- ⇒ **Case No. 92, United States Military Court in Germany, Trial of Skorzeny and Others**
 - ⇒ Case No. 207, Bosnia and Herzegovina, Using Uniforms of Peacekeepers
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– wearing of enemy uniforms

P I, Art. 39(2) [CIHL, Rule 62]

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- ⇒ **Case No. 92, United States Military Court in Germany, Trial of Skorzeny and Others**
 - ⇒ Case No. 207, Bosnia and Herzegovina, Using Uniforms of Peacekeepers
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c) starvation of civilians

(See *infra*, Part I, Chapter 9.IV. International Humanitarian Law and Humanitarian Assistance, p. 294)

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- ⇒ Case No. 278, Angola, Famine as a Weapon
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IV. INTERNATIONAL HUMANITARIAN LAW AND HUMANITARIAN ASSISTANCE

Introductory text

IHL recognizes that the civilian population of a State affected by an armed conflict is entitled to receive humanitarian assistance. It regulates in particular the conditions for providing humanitarian assistance, in the form of food, medicines, medical equipment or other vital supplies, to civilians in need.

During an **international armed conflict**, belligerents are thus under the obligation to permit relief operations for the benefit of civilians, including enemy civilians.

Art. 23 of Convention IV outlines the basic principles applicable to relief assistance for particularly vulnerable groups among the civilian population: children under fifteen and pregnant and nursing mothers. It also grants the States concerned the right to inspect the contents and verify the destination of relief supplies, as well as to refuse the passage of relief goods if they have well-founded reasons to believe that they will not be distributed to the victims but rather used in the military effort.

Art. 70 of Protocol I has considerably developed the right to humanitarian assistance. Under this provision, relief operations must be carried out for the benefit of the entire civilian population if there is a general shortage of indispensable supplies. However, Art. 70 contains a severe limitation: it stipulates that the consent of all the parties concerned – including that of the State receiving the aid – is necessary for such assistance.

In occupied territories, the occupying power has to make sure that the population receives adequate medical and food supplies.^[280] If this proves impossible, the occupying power is obliged to permit relief operations by third States or by an impartial organization, and to facilitate such operations.^[281]

The rules regulating humanitarian assistance during **non-international armed conflicts** are far less developed. However, Art. 18(2) of Protocol II stipulates that: “If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned.”

Although Art. 18 undoubtedly enhances the protection of the civilian population, it has been strongly criticized because it also makes relief actions contingent on government consent. Art. 18 can, however, also be construed as implying that the government has to give this consent when the stipulated conditions are fulfilled.

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280 See GC IV, Arts 55 and 56

281 See GC IV, Art. 59; P I, Art. 69

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1. Principles

a) starvation of civilians: a prohibited method of warfare

P I, 54(1); P II, 14 [CIHL, Rule 53]

⇒ Case No. 278, Angola, Famine as a Weapon

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b) the right of the civilian population to be assisted

[CIHL, Rules 55 and 56]

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- ⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 17]
 - ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part II, paras 311-326, 1305-1331], p. 1035
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
 - ⇒ **Case No. 177, UN, Security Council Resolution 688 on Northern Iraq [Para. 3]**
 - ⇒ Case No. 197, UN, UN Forces in Somalia
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [3 and 13]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
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c) the belligerents bear primary responsibility

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- ⇒ Case No. 41, ICRC, Assistance Policy
 - ⇒ Case No. 137, Israel, Power Cuts in Gaza
-

d) medical assistance may benefit civilians or combatants

2. Definition and characteristics of humanitarian assistance

[CIHL, Rule 55]

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- ⇒ Case No. 41, ICRC, Assistance Policy
 - ⇒ Document No. 56, UN, Guiding Principles on Internal Displacement [Principle 24(1)]
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 242 and 243]**
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq [Part B.]
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a) the starting point: Art. 23 of Convention IV

- aa) addressed to all “High Contracting Parties”, not only the parties to the conflict
- bb) but limitations
 - with regard to the beneficiaries
 - with regard to the kind of assistance
 - conditions

b) in occupied territories: Art. 59 of Convention IV: the occupying power has an obligation to accept relief

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- ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part II, paras 311-326, 1305-1331]
 - ⇒ Case No. 137, Israel, Power Cuts in Gaza [Part A., paras 15-17]
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c) a broad right to assistance: Art. 70 of Protocol I and Art. 18(2) of Protocol II

- aa) but subject to the consent of the State concerned

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- ⇒ Case No. 177, UN, Security Council Resolution 688 on Northern Iraq
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 24-26]
-

- bb) the conditions on which a belligerent may make its agreement to humanitarian assistance contingent

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- ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 242 and 243]**
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed upon Iraq
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [13 and 36]
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- cc) is the State concerned obliged to give its consent if the conditions are fulfilled?

4. Protection of those providing humanitarian assistance

[CIHL, Rules 31 and 32]

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8(2)(b)(iii)]
 - ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.3.]
 - ⇒ Case No. 46, ICRC’s Approach to Contemporary Security Challenges
 - ⇒ **Document No. 52, First Periodical Meeting, Chairman’s Report [Part II. 1]**
 - ⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict [Part B., paras 58-60]
 - ⇒ Case No. 197, UN, UN Forces in Somalia
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5. The protection of water supplies and water engineers

⇒ Case No. 42, Water and Armed Conflicts

SUGGESTED READING: *See supra*, Part I, Chapter 9. II. 9. b) bb) – Water

Chapter 10

The Law of Naval Warfare

(For attacks from the sea on objectives on land, see *supra*, Part I, Chapter 9. Conduct of Hostilities)

Introductory text

“Naval warfare” is the term used to denote “the tactics of military operations conducted on, under, or over the sea”.^[282] The general principles of International Humanitarian Law (IHL) applicable to conflicts on land (which have to do primarily with sparing non-combatants and civilian property) apply to this type of military operation. Naval warfare nevertheless has certain singular features that necessitate a specific set of rules.

Most of the international instruments governing the law of war at sea were adopted in the early twentieth century.^[283] However, it became clear during the various conflicts that subsequently occurred that the rules governing war at sea had become obsolete. It was not until the early 1990s that experts and government officials drew up the San Remo Manual, which clarifies the law of war at sea and brings it up to date, taking account of the developments that had occurred over the previous hundred years.

Though incomplete, most of the work codifying the law of war at sea was done in 1907, the year in which the Hague Conventions were adopted.^[284] Eight of the Conventions tackle different aspects of naval warfare. Their provisions deal both with the conduct of hostilities (the laying of underwater mines: Convention VIII; bombardment by naval forces: Convention IX; protection of the sick, wounded and shipwrecked: Convention X) and the protection of certain ships (the status of merchant ships and their conversion into warships: Conventions VI and VII; the right of capture: Conventions XI and XII, which never came into force; the rights and duties of neutral powers: Convention XIII).

The inability of the rules adopted in those Conventions to limit the number of victims of naval hostilities became evident during the two world wars. The rules also proved outdated in the light of the technological progress made during that time. Indeed, a treaty was adopted in London in 1936 stipulating that submarines were bound by

282 Encyclopedia Britannica, online: <http://www.britannica.com>

283 To consult all these texts, see SCHINDLER Dietrich & TOMAN Jiri, *The Laws of Armed Conflicts*, 4th ed., Leiden/Boston, M. Nijhoff, 2004, pp. 1055-1178 and 1409-1430.

284 These texts are available at <http://www.icrc.org/ihl>

the same rules as surface ships, but it proved insufficient: the Second World War was ridden with torpedo attacks on neutral vessels, merchant ships and hospital ships, the indiscriminate laying of underwater mines, etc.

In 1949 the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea (Convention II) replaced the Hague Convention X of 1907. In addition, Protocol I of 1977 states that all its provisions concerning protection against the effects of hostilities also apply to naval operations “which may affect the civilian population, individual civilians or civilian objects on land”.^[285] However, these two fundamental instruments still failed to clarify matters concerning the conduct of hostilities at sea.

During the Falklands/Malvinas War (1982), for example, problems arose with the use of exclusion zones by the warring parties and Convention II’s prohibition of the use of secret codes by hospital ships.^[286] Moreover, the armed conflict between the Islamic Republic of Iran and Iraq (1980-1988) saw frequent attacks on neutral civilian ships and the use of underwater mines.

Between 1987 and 1994, experts and high-ranking government officials from 24 countries convened several times at the International Institute of Humanitarian Law in San Remo to draft the San Remo Manual.^[287] The Manual is a non-binding document modelled on its ancestor, the Oxford Manual,^[288] and containing laudable clarifications of the rules currently applicable to naval warfare. Its main virtue is that it allows post-war developments in international law, in particular IHL (1949 Geneva Conventions and Protocol I of 1977) to be explicitly combined.

The San Remo Manual recalls that the key principles of the law of war on land are applicable to war at sea. For example, the principle of distinction and the requirement to take precautionary measures when launching an attack are clearly formulated. The concept of “military objective” was included and adapted to war at sea.

The Manual also clears up certain problems specific to maritime hostilities: it contains detailed provisions on the use of certain weapons (mines and torpedoes) and addresses interaction between ships and aircraft; distinctions between different kinds of maritime zone reflect developments in the law of the sea, etc.

The fact that the text is non-binding and wars at sea are not common in no way robs the San Remo Manual of its usefulness today. It provides States with a coherent document enabling them to take account of the law of war at sea in their actions and legislation.^[289] It is today the main reference document for the law of naval warfare.

285 Art. 49(3)

286 GC II, Art. 34(2); see also **Case No. 191**, Argentina/United Kingdom, The Red Cross Box,

287 *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Prepared by International Jurists and Naval Experts Brought Together by the San Remo International Institute of Humanitarian Law.* Adopted in June 1994. Reproduced in *IRRC*, No. 816, 1995, pp. 583-637. See **Document No. 83**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea

288 *Manual of the Laws of Naval War*, Oxford, 1913; available at <http://www.icrc.org/ihl>

289 The German military manual, for example, was based on the work carried out at San Remo: *Humanitarian law in armed conflicts Manual*, Federal Ministry of Defence, Germany, VR II 3, DSK WV207320067, Zdv 15/2, August 1992, pp. 97-112. The recent military manuals of the United States and the United Kingdom equally follow, as far as the law of sea warfare is concerned, largely the San Remo Manual.

SUGGESTED READING: DOSWALD-BECK Louise (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge, CUP, 1995, 257 pp. HEINTSCHEL VON HEINEGG Wolff, *Regions of Operations of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea*, Canadian Ministry of Defence, Canadian Red Cross, Ottawa 25-28 September 1992, Bochum, N. Brockmeyer, Vol. III, 1995, 150 pp. HEINTSCHEL VON HEINEGG Wolff, “How to Update the San Remo Manual on International Law Applicable to Armed Conflicts at Sea”, in *IYHR*, Vol. 36, 2006, pp. 119-148. MEYROWITZ Henri, “Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime”, in *RGDIP*, Vol. 89/2, 1985, pp. 243-298. POLITAKIS George P., *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, London, New York, Kegan Paul International, 1998, 678 pp. RAUCH Elmar, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of Sea: Repercussions on the Law of Naval Warfare*, Berlin, Duncker & Humblot, 1984, 165 pp. ROACH J. Ashley, “The law of naval warfare at the turn of two centuries”, in *AJIL*, Vol. 94/1, 2000, pp. 64-77. SHEARER I. A., “International Humanitarian Law and Naval Operations”, in *Quatre Études du Droit International Humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 17-34. VEGO Milan, *Operational Warfare at Sea: Theory and Practice*, London, New York, Routledge, 2009, 272 pp.

FURTHER READING: BIERZANEK Remigiusz, *The Laws of Naval Warfare, A Collection of Agreements and Documents with Commentaries*, Dordrecht, Boston, London, 1988, pp. 161-171. BRING Ove, “The Falkland Crisis and International Law”, in *Nordisk Tidsskrift for International Ret*, Vol. 51, 1982, pp. 129-163. COLOMBOS Constantine John, *The International Law of the Sea*, London, Longmans, 6th ed., 1967, 886 pp. DINSTEIN Yoram, “The Laws of War at Sea”, in *IYHR*, Vol. 10, 1980, pp. 38-69. RONZITTI Natalino (ed.), *The Law of Naval Warfare, A Collection of Agreements and Documents with Commentaries*, Dordrecht/Boston, M. Nijhoff, 1988, 888 pp. HEINTSCHEL VON HEINEGG Wolff, “Manoeuvring in Rough Waters: the UK Manual of the Law of Armed Conflict and the Law of Naval Warfare”, in *Frieden in Freiheit = Peace in Liberty = Paix en liberté: Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos; Zürich, Dike, 2008, pp. 427-444. TUCKER Robert W., “The Law of War and Neutrality at Sea”, in *International Law Studies*, US Naval War College, Vol. 50, 1955, 448 pp. WOLFRUM Rüdiger, “Military Activities on the High Seas: What are the Impacts of the U.N. Convention on the Law of the Sea?”, in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 501-513.

I. SCOPE OF APPLICATION: THE DIFFERENT ZONES

SUGGESTED READING: HEINTSCHEL VON HEINEGG Wolff, *Regions of Operations of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea*, Canadian Ministry of Defence, Canadian Red Cross, Ottawa 25-28 September 1992, Bochum, N. Brockmeyer, Vol. III, 1995, 150 pp.

FURTHER READING: HEINTSCHEL VON HEINEGG Wolff, “The Law of Naval Warfare and International Straits”, in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 263-292. LECKOW Ross, “The Iran-Iraq Conflict in the Gulf: The Law of War Zones”, in *ICLQ*, Vol. 37, 1988, pp. 629-644.

1. Zones

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 10, 11, and 12]

a) internal waters, territorial sea and archipelagic waters

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 14-22]

b) international straits and archipelagic sea lanes

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 23-33]

c) exclusive economic zone and continental shelf

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 34-35]

d) high seas and seabed beyond national jurisdiction

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 36-37]

2. Sea areas for protected vessels

a) stay in neutral ports – limit 24 hours

b) by agreement between parties: create a neutral zone

⇒ Case No. 191, Argentina/United Kingdom, The Red Cross Box

c) passage of protected vessels through restricted areas: exclusion zones

II. PRINCIPLES OF NAVAL WARFARE

⇒ Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A., para. 100]

SUGGESTED READING: BOELAERT-SUOMINEN Sonja, *International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions during International Armed Conflict*, Newport, Naval War College, 2000, 364 pp. HEINTSCHEL VON HEINEGG Wolff, *Visit, Search, Diversion and Capture: The Effect of the United Nations Charter on the Law of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Norwegian Navy School of Tactics, Norwegian Red Cross, Bergen, 20-24 September 1991*, Bochum, N. Brockmeyer, Vol. IV, 1995, 210 pp. MEYROWITZ Henri, “Le Protocole additionnel I aux Conventions de Genève et le droit de la guerre maritime”, in *RGDIP*, Vol. 89, 1989, pp. 243-298. MOINEVILLE Hubert, *La guerre navale*, Paris, PUF, 1982, 152 pp. VEGO Milan, *Operational Warfare at Sea: Theory and Practice*, London, New York, Routledge, 2009, 272 pp.

FURTHER READING: HEINTSCHEL VON HEINEGG Wolff, “Visit, Search, Diversion, and Capture in Naval Warfare. Part II, Developments Since 1945”, in *CYL*, 1992, pp. 89-126. MACCLAIN Ronald S., “The Coastal Fishing Vessel Exemption from Capture and Targeting: An Example and Analysis of the Origin and Evolution of Customary International Law”, in *Naval Law Review*, Vol. 45, 1998, pp. 77-125. ROBERTSON Horace B., “The Obligation to Accept Surrender”, in *International Law Studies*, US Naval War College, Vol. 68, 1995, pp. 541-552. ROBERTSON Horace B., “The Principle of the Military Objective in the Law of Armed Conflict”, in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 501-513.

1. Traditional principles of naval warfare

2. The law of neutrality in naval warfare: *jus ad bellum* or *jus in bello*?

SUGGESTED READING: SERSIC Maja, “Neutrality in International Armed Conflicts at Sea”, in VUKAS Budislav & SOSIC Trpimir M. (eds), *International Law: New Actors, New Concepts, Continuing Dilemmas: Liber Amicorum Bozidar Bakotic*, Leiden, Boston, M. Nijhoff, 2010, pp. 583-593.

3. Additional principles

a) basic rules

- distinction between civilian objects and military objectives

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 38-41]

b) precautions in attack

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Para. 46]
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c) military objectives

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Para. 40]
- ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
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SUGGESTED READING: MELSON David A., “Targeting War-Sustaining Capabilities at Sea: Compatibility with Additional Protocol I”, in *The Army Lawyer*, July 2009, pp. 44-54.

III. MEANS AND METHODS OF WARFARE AT SEA

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea
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1. Mine warfare

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 80-92]
- ⇒ Case No. 153, ICJ, Nicaragua v. United States [Paras 80, 215, and 254]
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SUGGESTED READING: DINSTEIN Yoram, “The Laws of War at Sea”, in *IYHR*, Vol. 10, 1980, pp. 38-69. HEINTSCHEL VON HEINEGG Wolff, “The International Law of Mine Warfare at Sea”, in *IYHR*, Vol. 23, 1993, pp. 53-76. REED J., “‘Damm the Torpedoes’: International Standards Regarding the Use of Automatic Submarine Mines”, in *Fordham International Law Journal*, Vol. (2), 1984-1985, pp. 286-322. STEPHEN D. J. & FITZPATRICK M. D., “Legal aspects of contemporary naval mine warfare”, in *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 21/4, 1999, pp. 553-590.

FURTHER READING: LIENANT J.-C., “La guerre des mines au Viet-Nam”, in *Revue Maritime*, No. 299, 1974, pp. 696-703.

2. Submarine warfare

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- ⇒ Document No. 89, British Policy Towards German Shipwrecked
 - ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
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SUGGESTED READING: MIDDLETON Drew, *Submarine, The Ultimate Naval Weapon*, Chicago, Playboy Press, 1976, 256 pp. PARKS William H., “Making Law of War Treaties: Lessons for Submarine Warfare Regulation”, in SCHMITT Michael N. (ed.), *International Law across the Spectrum of Conflict*, Newport, R.I., 2000, pp. 339-385. WEISS C.J., “Problems of Submarine Warfare under International Law”, in *Intramural Law Review*, Vol. 22, 1967, pp. 136-151.

FURTHER READING: GILLILAND Jane, “Submarines and Targets: Suggestions for New Codified Rules of Submarine Warfare”, in *Georgetown Law Journal*, No. 3, 1985, pp. 975-1005. KERR Alex A., “International Law and the Future of Submarine Warfare”, in *United States Naval Institute Proceedings*, Vol. 81, 1955, pp. 1105-1110.

3. Blockade

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- ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 17]
 - ⇒ **Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 93-104]**
 - ⇒ Case No. 85, United States, The Prize Cases
 - ⇒ Case No. 124, Israel, Operation Cast Lead [Part II, paras 311-326, 1305-1331]
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I, paras 268-275]
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq [Part B.]
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SUGGESTED READING: MEYROWITZ Henri, “Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime”, in *RGDIP*, Vol. 89/2, 1985, pp. 243-298. SWAYZE Frank B., “Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam”, in *JAG Journal*, Vol. 29/2, 1977, pp. 143-173. WHITEMAN Marjorie M., “Blockade”, in *Digest of International Law*, Vol. 10, Chapter XXXI: *Belligerent Interference with Neutral Commerce*, US Department of State Publication 8367, Washington DC, Government Print. Off., 1968, pp. 861-879.

FURTHER READING: ROWSON S.W.D., “Modern Blockade: Some Legal Aspects”, in *BYIL*, Vol. 23, 1946, pp. 346-353.

IV. PROTECTED OBJECTS

1. Hospital ships

(See *infra*, VI. Hospital Ships)

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 47-51]
 - ⇒ Case No. 191, Argentina/United Kingdom, The Red Cross Box
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2. Other protected vessels

a) vessels guaranteed safe conduct by prior agreement between belligerents

aa) cartel ships

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 47 and 48]
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bb) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 47 and 48]
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b) passenger vessels

c) vessels charged with religious, non-military scientific, or philanthropic missions

d) vessels transporting cultural property under special protection

e) small coastal fishing vessels and small boats engaged in local trade

f) vessels engaged in the protection of the marine environment

g) ships which have surrendered

h) life boats and rafts

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- ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
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SUGGESTED READING: CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. DOSWALD-BECK Louise, “Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea”, *The British Year Book of International Law*, 1994, 211-261 pp. EBERLIN Philippe, “The Protection of Rescue Craft in Period of Armed Conflict”, in *IRRC*, No. 246, June 1985, 16 pp. PREUX Jean de, “Protection du sauvetage maritime côtier”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 103-111.

3. Protection of enemy merchant vessels

- a) **except if they are military objectives**
- b) **activities which may render them military objectives**

4. Protection of neutral merchant vessels

- a) **circumstances which make them subject to attack**

⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Para. 67]

SUGGESTED READING: JENKINS M., “Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals”, in *Boston College International and Comparative Law Review*, Vol. 8/2, 1985, pp. 517-549. NAVIAS Martin S. & HOOTON E.R., *Tanker Wars: The Assault on Merchant Shipping During the Iran-Iraq Conflict, 1980-88*, London, Tauris Academic Studies, 1996, 244 pp. WALKER George K., *The Tanker War, 1980-88: Law and Policy*, Newport, Naval War College, 2000, 627 pp.

5. Protection of the maritime environment

V. MARITIME EXCLUSION ZONES

SUGGESTED READING: POCAR Fausto, “Missile Warfare and Exclusion Zones in Naval Warfare”, in *IYHR*, Vol. 27, 1997-1998, pp. 215-224.

FURTHER READING: JENKINS M., “Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals”, in *Boston College International and Comparative Law Review*, Vol. 8/2, 1985, pp. 517-549.

VI. HOSPITAL SHIPS

GCII, Arts 22-35; PI, Art. 22

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 47 and 49-51]
 - ⇒ Document No. 90, United Kingdom/Germany, Sinking of the Tübingen in the Adriatic
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SUGGESTED READING: GRIMORD D. L. & RIGGS G. W., “The Unique and Protected Status of Hospital Ships under the Law of Armed Conflict”, in JACQUES Richard B. (ed.), “Issues in International Law and Military Operations”, in *International Law Studies*, Vol. 80, 2006, pp. 263-273. JUNOD Sylvie S., *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, Geneva, ICRC, 1985, 45 pp.

FURTHER READING: CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. DOSWALD-BECK Louise, “Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea”, *The British Year Book of International Law*, 1994, 211-238 pp. EBERLIN Philippe, “The Identification of Medical Aircraft in Periods of Armed Conflict. Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949”, in *IRRC*, No. 229 & 231, November-December 1982, 31 pp. EBERLIN Philippe, “The Protection of Rescue Craft in Period of Armed Conflict”, in *IRRC*, No. 246, June 1985, 16 pp. PREUX Jean de, “Protection du sauvetage maritime côtier”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 103-111.

1. Specific protection

- a) **small craft used for coastal rescue operations**
- b) **medical transports**
- c) **neutral vessels**

2. Loss of protection

- a) **using codes**

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- ⇒ Case No. 191, Argentina/United Kingdom, The Red Cross Box
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VII. THE STATUS AND TREATMENT OF WAR VICTIMS AT SEA

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 161-168]
 - ⇒ Case No. 147, Israel, Navy Sinks Dinghy off Lebanon
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SUGGESTED READING: DOSWALD-BECK Louise, “Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea”, *The British Year Book of International Law*, 1994, 279-294 pp. JUNOD Sylvie S., *Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action*, Geneva, ICRC, 1985, 45 pp. SHEARER I. A., “International Humanitarian Law and Naval Operations”, in *Quatre Études du Droit International Humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 17-34.

Chapter 11

The Law of Air Warfare

Introductory text

The continuous and rapid technological progress being made in the area of aviation, the key role played by air forces in present-day warfare and the economic importance of this sector of the armaments industry^[290] explain the difficulties encountered in perfecting treaty provisions specifically governing air warfare.

Air warfare has evolved considerably in line with technological advances. Initially used for reconnaissance (airships at the end of the nineteenth century), then gradually as a powerful strike force during the twentieth century, air power has more recently been a vital instrument in the “zero-casualty” wars conducted by the United States and its allies, a doctrine aimed at eliminating war on land or subordinating it to air strikes (the main examples being the Gulf War in 1991, strikes against the Federal Republic of Yugoslavia in 1999, and, to a certain extent, air strikes in Afghanistan in 2001/02 and in Iraq in 2003). Technological developments such as electronic means of target recognition and evaluation, “intelligent” munitions or unmanned aerial vehicles may promote respect for traditional principles, but they can also give the individuals who have to apply the rules an illusion of diminished responsibility with regard to respecting IHL. Nonetheless, the problems posed by air warfare have far more to do with traditional concepts of the laws of war on land (target selection, principles of proportionality and discrimination, etc.) than with the specificities of air combat in the strict sense of the term.

The legal instruments specifically dealing with the subject of air warfare are thus few in number and limited in effect. The Hague Declaration of 1907^[291] prohibited the discharge of projectiles and explosives from balloons or other similar new methods at a time when air technology was not sufficiently advanced to permit the precise targeting of objectives to be destroyed. After the First World War another specific instrument was drafted. The Rules concerning the Control of Wireless Telegraphy

290 Air weapons are said to represent 90% of the total trade in war materials; see GUIÑÁNDEZ GÓMEZ Javier, “The Law of Air Warfare,” *IRRC*, No. 323, June 1998, pp. 347-362. <http://www.icrc.org/eng/review>

291 Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, available at <http://www.icrc.org/ihl>

in Time of War and Air Warfare (commonly referred to as the Hague Rules)^[292] were drafted in 1922 and 1923. Although those rules were never ratified by States, large parts are considered to be customary law binding on the whole of the international community. Certain rules defined in that instrument – such as the distinction between military aircraft and other aircraft, and the prohibition of bombing targets other than military objectives – remain crucial. The latter point was recalled by the Assembly of the League of Nations, which adopted a resolution^[293] to that effect 15 years later. As for civil aviation, it is protected in time of peace by conventions banning the capture or destruction of civilian aircraft and defining a number of offences against civilian aircraft that may occur on board or in airports.^[294] However, the extent to which these conventions apply in times of war is a point of debate. A group of experts tried to restate the law applicable to air warfare in the Manual on International Law Applicable to Air and Missile Warfare,^[295] along the lines of what the San Remo Manual^[296] did for naval warfare, taking new technological developments and the practice of major air forces into account. The important role played by representatives of major air forces was more problematic than that of representatives of major navies in drawing up the San Remo Manual, because air warfare affects civilians in countries without major air forces much more than naval warfare affects civilians in countries without navies. The Manual nevertheless reflects a consensus between military and humanitarian experts, even though it was in many cases possible to write down only the least common denominator, in particular in the crucial area of protection of the civilian population on land against air attacks.

Firstly, air attacks on targets on land are governed by the rules regarding war on land. Secondly, when an aircraft flies over the open sea or is engaged in combat with naval forces, the law of naval warfare applies and it is largely restated in the San Remo Manual.^[297] What remains is air-to-air warfare, a situation of limited humanitarian importance in respect of which the Manual on Air and Missile Warfare has led to genuine progress in clarifying the law.

As for the first aspect, i.e. air attacks on targets on land, the Hague Regulations already prohibit “bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”.^[298] Cultural property and places of worship are protected against any form of attack by the Hague Convention of 1954^[299] and Article 53 of Protocol I.

Most importantly, Article 49(3) stipulates that the rules of Protocol I for the protection of the civilian population are applicable to air operations which may affect the civilian

292 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at the Hague, December 1922 – February 1923, available at <http://www.icrc.org/ihl>

293 Protection of civilian populations against bombing from the air in case of war, Resolution adopted on 30 September 1938, in SCHINDLER Dietrich & TOMAN Jiri, *The Laws of Armed Conflicts*, 4th ed., Leiden/Boston, M. Nijhoff, 2004, pp. 329-330

294 For details of these conventions, see the website of the International Civil Aviation Organization, <http://www.icao.int> and the United Nations website devoted to terrorism, <http://www.un.org/terrorism>

295 See Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare

296 See *supra*, Part I, Chapter 10. The Law of Naval Warfare, p. 301; and Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea

297 See *supra*, Part I, Chapter 10. The Law of Naval Warfare

298 See Document No. 1, The Hague Regulations [Art. 25.]

299 See Document No. 10, Conventions on the Protection of Cultural Property [Part A.]

population on land, including attacks from the air against objectives on land. The rules of the Manual on Air and Missile Warfare mainly restate Protocol I, with some regrettable omissions^[300] and some useful clarifications.^[301]

As important air powers are not party to Protocol I, the question arises whether the same rules apply under customary law to all attacks on targets on land, including if directed from the air, even though the latter were traditionally discussed under the heading of the law of air warfare. The implicit answer of the Manual on Air and Missile Warfare is affirmative, and this is correct for several reasons. Foremost, modern technology makes attacks on a given target by the air force, missiles or artillery interchangeable. Secondly, most discussions on the law of the conduct of hostilities in recent years, by States, NGOs, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY)^[302] and authors refer mainly to aerial attacks, but no one claims that the law applicable to land attacks would be different. The United States Department of Defense Report on the Conduct of the 1991 Gulf War,^[303] for instance, discusses targeting mainly in relation to cases which actually consisted of aerial bombardments, but makes no distinction between those attacks coming from the air or by missiles or artillery. As for the standards it applies, it refers exclusively to the law of land warfare, including Article 23(g) of the Hague Regulations, and applies or criticizes (indifferently for air and land warfare) certain provisions of Protocol I. At the Diplomatic Conference which adopted Protocol I, Article 49(3) gave rise to considerable controversy, in particular as to whether the rules of the Protocol should only apply to attacks against objectives “on land”, but no State questioned the idea that such attacks should at least be covered.^[304]

Protocol I therefore prohibits attacks on the civilian population and civilian property regardless of whether the attack is on land, from the air or from the sea. In addition, International Humanitarian Law (IHL) prohibits indiscriminate attacks, attacks on installations and works containing dangerous forces and the use of methods and means of warfare which are intended or may be expected to cause damage to the natural environment and thereby to prejudice the health or survival of the population. All these specific rules in Protocol I also apply to air warfare, as long as there is a connection with protecting the civilian population on land.

As for the second aspect, i.e. naval warfare, the Manual on Air and Missile Warfare restates and develops important rules, some of which are set out in the San Remo Manual, on the protection of civilian aircraft^[305] and in particular civilian airliners,^[306]

300 Compare, e.g., Arts 35(3) and 55 on the natural environment with **Document No. 84**, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 88 and 89]

301 See, for example, *ibid.*, Rules 22-24 on military objectives

302 See **Case No. 226**, Federal Republic of Yugoslavia, NATO Intervention

303 See **Case No. 178**, United States/United Kingdom, Report on the Conduct of the Persian Gulf War

304 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts*, Geneva (1974-1977), Bern, 1978, vol. XIV, pp. 13-25, 85, and in particular, *ibid.*, vol. XV, p. 255, a working group reporting to the competent committee of the conference that it was unanimously of the view that the rules should at least cover military operations from the air against persons and objects on land.

305 See **Document No. 84**, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 47-57]

306 *ibid.*, Rules 58-63

the meaning of exclusion and no-fly zones^[307] and the possibility for aircraft (and their crews) to surrender.^[308]

For the third aspect, i.e. air-to-air warfare, no one disputes, as formulated by Oppenheim/Lauterpacht, that the same “humanitarian principles of unchallenged applicability [apply as in land warfare, including] the fundamental prohibition of direct attack upon non-combatants [and therefore, we would add, also the principle of distinction and the prohibition of indiscriminate attacks]. Whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of air warfare.”^[309]

Examples of express agreement that does not depart from, but rather applies, the general principles can be found in the Geneva Conventions’ rules protecting medical aircraft, which were greatly improved and developed in Protocol I.^[310] Such rules are now restated in the Manual of Air and Missile Warfare as customary law equally binding upon States not party to Protocol I.^[311] Another specific treaty provision is Article 57(4) of Protocol I, which states that in air warfare “each Party to the conflict shall take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects”. The standard of “reasonable” is undoubtedly slightly different from, and a little less far-reaching than, the expression “take all feasible precautions” used in paragraph 2 of the same article. The provision is in any case much vaguer than the detailed obligations prescribed in paragraphs 2 and 3. These, however, may be considered as a more detailed and precise formulation of the principle stated in paragraph 4, as they concern the principle of precaution codified in paragraph 1. Third, the provision is explicitly qualified by a reference to the existing rules (“in conformity with its rights and duties under rules of international law applicable to armed conflict”). This must probably be understood as a simple saving clause in respect of those rules applicable to air warfare. It nevertheless indicates an authoritative understanding of the States drafting Protocol I that “reasonable precautions” have to be taken according to those other rules which are not yet codified in a treaty.^[312]

For the rest, as mentioned above, any modification of the fundamental principles, and we would add of the rules for attacks on targets on land which specify them, must be “proved by reference to the peculiar conditions of air warfare”. In this respect, the Manual on Air and Missile Warfare helps identify in what respect the details must be adapted to the physical realities of the air environment. One of the realities of that environment, mentioned by Oppenheim/Lauterpacht, is that “the danger of surprise on the part of apparently inoffensive civil aircraft will probably impose upon the latter

307 *Ibid.*, Rules 105-110

308 *Ibid.*, Rules 128-131

309 Oppenheim, *International Law – A Treatise*, 7th edition, edited by Hersch Lauterpacht, Vol. II, Disputes, *War and Neutrality*, London, 1952, p. 520. A US Air Force Pamphlet stipulates that “[t]he law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land and sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources” (US Air Force Pamphlet 110-31, 19 November 1976, para. 1-3 (c), pp. 1-7).

310 See GC I, Arts 36-37; GC II, Arts 39-40; GC IV, Art. 22; P I, Arts 24-31

311 See Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 71-87]

312 See in this sense the report of the competent committee of the Diplomatic Conference, Official Records, *supra* note 304, vol. XV, p. 261, para. 99

special restraints as the price of immunity.”^[313] Following the terrorist attacks of 11 September 2001, this fear has become even more important.

The Hague Rules defined circumstances in which aircraft lose their protection (for the aforementioned reason) very broadly, due to the more rudimentary means of verification and communication existing at the time. They stated in particular that enemy civilian aircraft “are exposed to being fired at” when flying: within the jurisdiction of the enemy; in the immediate vicinity of such jurisdiction and outside that of their own country; in the immediate vicinity of the military land and sea operations of the enemy; or even within the jurisdiction of their State, but there only if they do not land at the nearest suitable point when an enemy military aircraft is approaching.^[314] The conditions for neutral civilian aircraft losing protection were also formulated very broadly.^[315] From the wording of the rules, it is not clear whether the terms “are exposed to being fired at” refer to a factual risk of aircraft engaged in such behaviour or to a loss of immunity in law. Here too, “the fundamental prohibition of direct attack upon non-combatants”, which was “unchallenged” even at that time, leads us to the understanding that the terms could only refer to the factual risk such aircraft take, but not to a license to deliberately attack civilian aircraft identified as such and known not to be engaged in hostile activities. Today, the circumstances that make enemy and neutral civil aircraft lose protection are listed in the most detailed manner, confirmed by several military manuals and several rules of the San Remo Manual, in the Manual on Air and Missile Warfare.^[316]

The danger of surprise and the difficulties of identifying civil aircraft furthermore lead the Manual to prescribe several passive precautions against attacks that must be taken by civil aircraft and corresponding active precautions, i.e. measures of verification and warning which must be taken before attacking aircraft.^[317]

The peculiarities of the air environment have also resulted in special rules on the interception, visit and search of civil aircraft, which are based on those applicable on the sea, but take into account that an aircraft, unlike a ship, cannot be boarded while flying.^[318]

Lastly, air-to-air operations may endanger civilians and civilian objects on land. Military objectives in the air above land perforce fall on land if they are successfully hit. The wording of Article 49(3) of Protocol I makes the provisions of that Protocol applicable to “air or sea warfare which may affect the civilian population, individual civilians and civilian objects on land”. In any case, the principles of immunity, distinction, necessity and proportionality are of general application, and precautionary measures resulting

313 Oppenheim/Lauterpacht, *supra* note 309

314 See Arts 33 and 34 of the Hague Rules, *supra* note 292

315 *Ibid.*, Arts 30, 35, 50, and 51

316 See Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare, Rules 27 (on enemy civilian aircraft), 63 and 68 (on civilian airliners), and 174 (on neutral civilian aircraft); and Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Rules 53-58, for medical aircraft, civilian airliners and aircraft granted safe conduct, Rules 62 and 63 for civil aircraft, and Rule 70, for neutral civil aircraft.

317 See Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare, Rules 37, 38, 40, 41, 55, 57 and 70; and Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Rules 72-77.

318 See Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare, Rules 134-146; and Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea, Rules 125-158

from those principles must certainly also be taken in this respect by States not parties to Protocol I. The obligations to choose appropriate methods and the appropriate target when a choice exists and to verify whether the proportionality principle is respected are particularly relevant. Those planning and deciding an attack on enemy military aircraft are simply most often unable to foresee where such a moving target will actually be hit and the crew operating an aircraft or a missile has no time to evaluate alternatives and only rarely sufficient certainty that an alternative attack will actually be successful. This is at least the case in generalized international armed conflicts.

⇒ **Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare**

- ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 100]
 - ⇒ Case No. 226, Federal Republic of Yugoslavia, NATO Intervention
 - ⇒ Case No. 253, Afghanistan, Operation "Enduring Freedom"
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I. THE SPECIFICITIES OF THE AIR ENVIRONMENT

1. The danger of surprise and the difficulty to identify

2. The laws of gravity mean that all damaged aircraft fall to earth or into the sea

II. APPLICABILITY OF THE GENERAL PRINCIPLES

III. APPLICABILITY OF THE GENERAL RULES ON THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES TO AERIAL BOMBARDMENTS OF TARGETS ON LAND

P I, Art. 49(3)

(See *supra*, Part I, Chapter 9. II. The protection of the civilian population against the effects of hostilities, p. 250)

IV. APPLICABILITY OF THE GENERAL RULES ON THE PROTECTION OF THE CIVILIAN POPULATION AGAINST THE EFFECTS OF HOSTILITIES TO AIR OPERATIONS WHICH MAY AFFECT THE CIVILIAN POPULATION ON LAND

P I, Art. 49(3)

(See *supra*, Part I, Chapter 9. II. The protection of the civilian population against the effects of hostilities, p. 250)

V. AIRCRAFT OVER SEA ARE GOVERNED BY THE LAW OF NAVAL WARFARE

VI. SPECIFIC RULES FOR WARFARE AGAINST OBJECTIVES IN THE AIR

1. Aircraft which may not be attacked

a) The protection of medical aircraft and their identification

GC I, Arts 36 and 37; P I, Arts 24-31 [CIHL, Rules 29 and 30]

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 53 and 54]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 75-87]
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aa) Circumstances precluding protection

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 53-58]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 74 and 83]
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b) The protection of civil and neutral aircraft

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 55 and 56]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 47-70]
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SUGGESTED READING: DOSWALD-BECK Louise, “Vessels, Aircraft and Persons Entitled to Protection During Armed Conflicts at Sea”, in *BYIL*, 1994, 268-277 pp. ROBERTSON Horace B., “The Status of Civil Aircraft in Armed Conflict”, in *IYHR*, Vol. 27, 1997-1998, pp. 113-150.

aa) Circumstances precluding protection

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 62, 63 and 70]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 47,50,52,174]
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2. Surrender of military aircraft?

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- ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 125-131]
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3. Ruses of war and perfidy

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- ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 111-117]
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4. The status of parachutists

PI, Art. 42

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- ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 132-133]
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5. Precautionary measures

a) In attacks

PI, Art. 57(4)

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 74 and 75]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 20, 30-41]
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b) Against the effects of attacks

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- ⇒ Document No. 83, San Remo Manual on International Law Applicable to Armed Conflicts at Sea [Paras 72, 73, 76 and 77]
 - ⇒ Document No. 84, HPCR, Manual on International Law Applicable to Air and Missile Warfare [Rules 42-46]
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VII. THE STATUS AND TREATMENT OF VICTIMS ON BOARD AIRCRAFT

Analogous to the status and treatment of war victims at sea, *see supra*, Part I, Chapter 10. VII. The status and treatment of war victims at sea

Chapter 12

The Law of Non-International Armed Conflicts

Introductory text

From a humanitarian point of view, the victims of non-international armed conflicts should be protected by the same rules as the victims of international armed conflicts. They face similar problems and need similar protection. Indeed, in both situations, fighters and civilians are arrested and detained by “the enemy”; civilians are forcibly displaced; they have to flee, or the places where they live fall under enemy control. Attacks are launched against towns and villages, food supplies need to transit through front lines, and the same weapons are used. Furthermore, the application of different rules for protection in international and in non-international armed conflicts obliges humanitarian players and victims to classify the conflict before those rules can be invoked. This can be theoretically difficult and is always politically delicate. To classify a conflict may imply assessing questions of *jus ad bellum*. For instance, in a war of secession, for a humanitarian actor to invoke the law of non-international armed conflicts implies that the secession is not (yet) successful, which is not acceptable for the secessionist authorities fighting for independence. On the other hand, to invoke the law of international armed conflicts implies that the secessionists are a separate State, which is not acceptable for the central authorities.

However, States, in the international law they have made, have never agreed to treat international and non-international armed conflicts equally. Indeed, wars between States have until recently been considered a legitimate form of international relations and the use of force between States is still not totally prohibited today. Conversely, the monopoly on the legitimate use of force within its boundaries is inherent in the concept of the modern State, which precludes groups within that State from waging war against other factions or the government.

On the one hand, the protection of victims of international armed conflicts must necessarily be guaranteed through rules of international law. Such rules have long been accepted by States, even by those which have the most absolutist concept

of their sovereignty. States have traditionally accepted that soldiers killing enemy soldiers on the battlefield may not be punished for their mere participation: in other words, they have a “right to participate” in the hostilities.^[319]

On the other hand, the law of non-international armed conflicts is more recent. States have for a long time considered such conflicts as internal affairs governed by domestic law, and no State is ready to accept that its citizens would wage war against their own government. In other words, no government would renounce the right in advance to punish its own citizens for their participation in a rebellion. Such renunciation, however, is the essence of combatant status as defined in the law of international armed conflicts. To apply all the rules of the contemporary International Humanitarian Law (IHL) of international armed conflicts to non-international armed conflicts would be incompatible with the very concept of the contemporary international society being made up of sovereign States. Conversely, if ever the international community is organized as a world State, all armed conflicts would be “non-international” in nature and it would thus be inconceivable for combatants to have the right to participate in hostilities independently of the cause for which they fight, as foreseen in the law of international armed conflicts.

In recent years, however, the IHL of non-international armed conflicts has drawn closer to the IHL of international armed conflicts: through the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda based on their assessment of customary international law;^[320] in the crimes defined in the ICC Statute;^[321] because States have accepted that recent treaties on weapons and on the protection of cultural objects are applicable to both categories of conflicts;^[322] under the growing influence of International Human Rights Law; and according to the outcome of the ICRC Study on Customary International Humanitarian Law.^[323] This study comes to the conclusion that 136 (and arguably even 141) out of 161 rules of customary humanitarian law, many of which run parallel to rules of Protocol I applicable as a treaty to international armed conflicts, apply equally to non-international armed conflicts.

Theoretically, the IHL of international armed conflicts and the IHL of non-international armed conflicts should be studied, interpreted and applied as two separate branches of law – the latter being codified mainly in Art. 3 common to the Conventions and in Protocol II. Furthermore, non-international armed conflicts occur much more frequently today and entail more suffering than international armed conflicts. Thus, it would be normal to study first the law of non-international armed conflicts, as being the most important.

However, because the IHL of non-international armed conflicts must provide solutions to problems similar to those arising in international armed conflicts, because it was

319 As recalled in P I, Art. 43(2)

320 See in particular **Case No. 211**, ICTY, *The Prosecutor v. Tadic* [Part A., paras 96-136]

321 Compare Art. 8 (2) (a) and (b) with Art. 8. (2) (c) and (e), **Case No. 23**, The International Criminal Court [Part A.]

322 See **Document No. 12**, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts; **Document No. 16**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 1.2]; **Document No. 17**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction; and **Document No. 10**, Conventions on the Protection of Cultural Property [Part C., Art. 22]

323 See **Case No. 43**, ICRC, Customary International Humanitarian Law

developed after the law applicable to international armed conflicts, and because it involves the same principles, although elaborated in the applicable rules in less detail, it is best to start by studying the full regime of the law applicable to international armed conflicts in order to understand the similarities and differences between it and the law of non-international armed conflicts. The two branches of law share the same basic principles, and analogies have to be drawn between them to flesh out certain provisions or to fill logical gaps. Similarly, only by taking the law of international armed conflicts as a starting point can one identify which changes must result, for the protective regime in non-international armed conflicts, from the fundamental legal differences between international and non-international armed conflicts. Finally, from the perspective of the law of international armed conflicts, there is a grey area not affected by those fundamental differences but in which States have refused to provide the same answer in the treaties of IHL. The practitioner in a non-international armed conflict confronted with a question to which the treaty rules applicable to such situations fail to provide an answer will either look for a rule of customary IHL applicable to non-international armed conflicts or search for the answer applicable in international armed conflicts and then analyse whether the nature of non-international armed conflicts allows for the application of the same answers in such conflicts. In any event, soldiers are instructed and trained to comply with one set of rules and not with two different sets.

The ICRC Study on customary international humanitarian law^[324] has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflicts (Art. 3 common to the Conventions and Protocol II in particular). Additionally, the study demonstrates that many rules initially designed to apply only in international conflicts also apply – as customary rules – in non-international armed conflicts. They include the rules relating to the use of certain means of warfare, relief assistance, the principle of distinction between civilian objects and military objectives and the prohibition of certain methods of warfare.

The fact that the IHL of non-international armed conflicts continues to be developed is certainly a good thing for the victims of such conflicts, which are the most frequent in today's world, but it should never be forgotten that these rules are equally binding on government forces and non-State armed groups.^[325] Therefore, for all existing, claimed and newly suggested rules of the IHL of non-international armed conflicts, or whenever we interpret any of these rules, we should check whether an armed group willing to comply with the rule in question is able to do so without necessarily losing the conflict.

In addition, it should be borne in mind that if a given situation or issue is not regulated by the IHL of non-international armed conflicts applying as the *lex specialis*, international human rights law applies, although possibly limited by derogations.

To conclude, it should be stressed that even in cases in which the IHL of international armed conflicts contains no detailed provisions or to which no analogies with that

324 See Case No. 43, ICRC, Customary International Humanitarian Law

325 See *infra*, Part I, Chapter 12, VIII. Who is bound by the IHL of non-international armed conflicts?

law apply, and even without falling back on customary law, the plight of the victims of contemporary non-international armed conflicts would be incomparably improved if only the basic black-letter provisions of Art. 3 common to the Conventions and of Protocol II were respected.

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- ⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part E., paras 37-100]
 - ⇒ Case No. 220, ICTY, The Prosecutor v. Boskoski
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II
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I. INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

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- ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 71-76 and 96-98]
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 2-27]
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Quotation The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.

[Source: Commission of Experts appointed to investigate violations of International Humanitarian Law in the Former Yugoslavia. UN Doc. S/1994/674, para. 52]

II. COMPARISON OF THE LEGAL REGIMES FOR INTERNATIONAL AND FOR NON-INTERNATIONAL ARMED CONFLICTS

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8]
 - ⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part B., paras 74-77]
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 8-12]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(c)]
 - ⇒ Case No. 197, UN, UN Forces in Somalia [Part I. 3.1]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [para. 18]
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SUGGESTED READING: BARTELS Rogier, “Timelines, Borderlines and Conflicts: the Historical Evolution of the Legal Divide between International and Non-International Armed Conflicts”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 35-67. CRAWFORD Emily, “Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-International Armed Conflicts”, in *Leiden Journal of International Law*, No. 20, 2007, pp. 441-465. CRAWFORD Emily, “Blurring the Lines between International and Non-International Armed Conflicts: the Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15 (2008), 2009, pp. 29-54. OBRADOVIC Konstantin, “Les règles du droit international humanitaire relatives à la conduite des hostilités en période de conflits armés non internationaux”, in *Yearbook of the International Institute of Humanitarian Law* (San Remo), Milano, Giuffrè, 1992, pp.95-116. SASSÒLI Marco, “Le droit international humanitaire applicable aux conflits armés non internationaux : Quelques problèmes fondamentaux et le rôle du CICR”, in *Revue burkinabè de droit*, No. 17, 1990, pp. 115-143.

1. Traditional difference: protection not based on status (e.g. prisoner-of-war or protected civilian status) but on actual conduct (direct participation in hostilities)

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- ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., paras 68, 171]
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras D.3.3.1.-5.4.3., Para. E.1]
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 132-138]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 7-15, 42, 84 and 92]
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SUGGESTED READING: KLEFFNER Jann K., “From “Belligerents” to “Fighters” and Civilians Directly Participating in Hostilities: on the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference”, in *Netherlands International Law Review*, Vol. 54, No. 2, 2007, pp. 315-336. KLEFFNER Jann K., “The Notions of Civilians and Fighters in Non-International Armed Conflicts”, in BERUTO Gian Luca (ed.), *The Conduct of Hostilities: Revisiting the Law of Armed Conflict: 100 Years After the 1907 Hague Conventions and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law, Sanremo, 6-8 September 2007: Proceedings*, Milano, Nagard, 2008, pp. 69-78. SOLF Waldemar A., “The Status of Combatants in Non international Armed Conflicts Under Domestic Law and Transnational Practice”, in *American University Law Review*, Vol. 33/1, 1983, pp. 53-65.

2. However, the regime is closer to that of international armed conflicts if fighters (members of an armed group with a continuous fighting function) are not considered to be civilians:

- a) and may therefore be targeted not only while directly participating in hostilities through specific acts but also – like combatants in international

armed conflicts – as long as they do not fall into the power of the enemy or are otherwise *hors de combat*;

⇒ **Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities**

b) and may, in the view of some States and specialists, also be detained for the mere fact that they belong to the enemy (like prisoners of war in international armed conflicts).

⇒ Document No. 50, ICRC, Sixtieth Anniversary of the Geneva Conventions
 ⇒ Case No. 262, United States, President's Military Order
 ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 ⇒ **Case No. 267, United States, The Obama Administration's Internment Standards**
 ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities

SUGGESTED READING: SASSÒLI Marco, "The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?", *IYHR*, Vol. 39, 2009, pp. 177-212.

3. Uncontroversial similarities and differences

a) protection of all those who do not or no longer directly participate in hostilities

⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena
 ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Para. 255]**
 ⇒ Case No. 177, UN, Security Council Resolution 688 on Northern Iraq
 ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part B., paras 572-575 and 615]**
 ⇒ Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.
 ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part II.]
 ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part A., consid. 9a.; Part B., III. ch. 3.D.1]
 ⇒ Case No. 270, India, Press release, Violence in Kashmir
 ⇒ Case No. 271, India, People's Union for Civil Liberties v. Union of India
 ⇒ Case No. 272, Civil War in Nepal
 ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki

aa) who is protected?

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 292]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 629]**
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B., III., ch. 3.D.1]
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bb) the wounded and sick

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- ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
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SUGGESTED READING: SOLF Waldemar A, “Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 237-248.

cc) prohibition of rape and other forms of sexual violence

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 166 and 333-358]
-

dd) treatment of detainees

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- ⇒ Document No. 34, ICRC, Tracing Service
 - ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 298 and 422]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. F.2]
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Document No. 269, United States, Treatment and Interrogation in Detention
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki [Para. 14]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 90-93]
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SUGGESTED READING: CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp. GOODMAN Ryan, “The Detention of Civilians in Armed Conflicts”, in *AJIL*, Vol. 103, No. 1, January 2009, pp. 48-74. Ministry of Foreign Affairs of Denmark, “The Copenhagen Process on the Handling of Detainees in International Military Operations”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 46, 2007, pp. 363-392. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Oxford, OUP, 3rd ed., 2009, 697 pp. OSWALD Bruce, “The Detention of Civilians in Military Operations: Reasons for and Challenges to Developing a Special Law of Detention”, in *Melbourne University Law Review*, Vol. 32, 2008, pp. 524-553.

ee) judicial guarantees

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- ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. F.]
 - ⇒ Case No. 262, United States, President’s Military Order
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ **Case No. 266, United States, Habeas Corpus for Guantanamo Detainees**
 - ⇒ Document No. 268, United States, Closure of Guantanamo Detention Facilities
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SUGGESTED READING: Case Western Reserve Journal of International Law, “Security Detention”, Vol. 40, No. 3, 2009, pp. 315-650. ICRC, Chatam House, “Expert Meeting on Procedural Safeguards for Security Detention in Non-International Armed Conflict”, in *IRRC*, Vol. 91, No. 876, December 2009, pp. 859-881. OSWALD Bruce, “The Detention of Civilians in Military Operations: Reasons for and Challenges to Developing a Special Law of Detention”, in *Melbourne University Law Review*, Vol. 32, 2008, pp. 524-553.

b) more absolute prohibition of forced displacements

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 226 and 328]
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [9, 30 and 36]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part II. A.]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 120-125]
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SUGGESTED READING: MANGALA Jack M., “Préventions des déplacements forcés de population – possibilités et limites”, in *IRRC*, No. 844, December 2001, pp. 1067-1095. PLATTNER Denise, “The Protection of Displaced Persons in Non-International Armed Conflicts”, in *IRRC*, No. 291, November-December 1992, 13 pp. WILMS Jan, “Without Order, Anything Goes?: The Prohibition of Forced Displacement in Non-International Armed Conflict”, in *IRRC*, Vol. 91, No. 875, September 2009, pp. 547-575.

III. DIFFERENT TYPES OF NON-INTERNATIONAL ARMED CONFLICTS

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8(2)(d) and (f)]
 - ⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 74-76],
 - ⇒ Case No. 220, ICTY, The Prosecutor v. Boskoski [Para.197]

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- ⇒ **Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus**
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., paras 601-610 and 622-627]**
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SUGGESTED READING: ANGSTROM Jan, “Towards a Typology of Internal Armed Conflict: Synthesising a Decade of Conceptual Turmoil”, in *Civil Wars*, Vol. 4/3, 2001, pp. 93-116. BOTHE Michael, “Article 3 and Protocol II: Case Studies of Nigeria and El Salvador”, in *American University Law Review*, Vol. 31/4, 1982, pp. 899-909. DAHL Arne Willy & SANDBU Magnus, “The Threshold of Armed Conflict”, in *Revue de droit militaire et de droit de la guerre*, Vol. 3-4, No. 45, 2006, pp. 369-388. SCHINDLER Dietrich, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 163, 1979, pp. 153-156.

1. Conflicts to which common Art. 3 is applicable

- ⇒ Case No. 108, Hungary, War Crimes Resolution
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Para. 219]**
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni, p. 1660
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 23]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., paras 619-621]**
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B., III., ch. 3.C.]
 - ⇒ **Case No. 263, United States, Hamdan v. Rumsfeld**
 - ⇒ Case No. 272, Civil War in Nepal [Part I.]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 84 and 92]
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– lower threshold

- ⇒ Document No. 32, The Seville Agreement [Part Art. 5.2]
 - ⇒ Case No. 45, ICRC, Disintegration of State Structures
 - ⇒ Document No. 55, UN, Minimum Humanitarian Standards
 - ⇒ Case No. 109, ECHR, Korbely v. Hungary
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena
 - ⇒ Case No. 192, Inter-American Commission on Human Right, Tablada [Paras 154-56]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 23]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part B., paras 562-568, Part E.]**
 - ⇒ **Case No. 220, ICTY, The Prosecutor v. Boskoski**
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., paras 619-621]**
 - ⇒ Case No. 271, India, People’s Union for Civil Liberties v. Union of India
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
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2. Conflicts covered by common Art. 3 and Art. 8(2)(e) of the ICC Statute

3. Conflicts to which, in addition, Protocol II is applicable

[See Part I, Chapter 2, International Humanitarian Law as a Branch of Public International Law, III, 1., c) Non international armed conflicts]

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 10 and Commentary, para.9]
 - ⇒ Document No.55, UN, Minimum Humanitarian Standards [Part B., paras 78-81]
 - ⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II
 - ⇒ **Case No. 156, Switzerland, Qualification of the Conflict in El Salvador**
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 16, 24 and 34-37]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., paras 622-627]**
 - ⇒ **Case No. 241, Switzerland, The Niyonteze Case [Part A., 9 a. and Part B., III., ch. 3, Parts C and D. 2]**
 - ⇒ Case No. 245, Human Rights Committee, Guerrero v. Colombia
 - ⇒ Case No. 279, Germany, Government Reply on Chechnya
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
 - ⇒ Case No. 281, Russia, Constitutionality of Decrees on Chechnya
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 11-12]
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SUGGESTED READING: JUNOD Sylvie S., “Additional Protocol II: History and Scope”, in *American University Law Review*, Vol. 33/1, 1983, pp. 29-40. LYSAGHT Charles, “The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments”, in *American University Law Review*, Vol. 33/1, 1983, pp. 9-27.

4. Material field of application of the customary IHL of non-international armed conflicts

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- ⇒ Case No. 220, ICTY, The Prosecutor v. Boskoski
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5. Conflicts to which IHL as a whole is applicable

a) recognition of belligerency by the government

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- ⇒ Case No. 85, United States, The Prize Cases
 - ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 14 and 15]
 - ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
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b) special agreements between the parties

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 168]
 - ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [4]
 - ⇒ **Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts**
 - ⇒ Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 73]**
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galic [Part A., para. 22]
 - ⇒ Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part B., para. 69]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III.B.]
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict
 - ⇒ Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland
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SUGGESTED READING: JAKOVLJEVIC Bosko, “Memorandum of Understanding of 27 November 1991: International Humanitarian Law in the Armed Conflict in Yugoslavia in 1991”, in *Yugoslav Review of International Law*, No. 3, 1991, pp. 301-312. JAKOVLJEVIC Bosko, “The Agreement of May 22, 1992, on the Implementation of International Humanitarian Law in the Armed Conflict in Bosnia-Herzegovina”, in *Yugoslavenska Revija za Medunarodno Pravo*, No. 2-3, 1992, pp. 212-221. SANDOZ Yves, “Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie”, in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490. SMITH Colin, “Special Agreements to Apply the Geneva Conventions in Internal Armed Conflicts: the Lessons of Darfur”, in *Irish Yearbook of International Law*, 2009, pp. 91-101. TENEFRANCIA Roselle C., “A Breed of its Own: Characterizing the CARHRIHL as a Legal Document”, in *Ateneo Law Journal*, Vol. 54, 2009, pp. 149-163.

c) meaning of declarations of intention

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- ⇒ **Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines**
 - ⇒ Case No. 249, Germany, Government Reply on the Kurdistan Conflict
 - ⇒ **Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines**
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SUGGESTED READING: PLATTNER Denise, “La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvement en lutte dans un conflit armé”, in *RBDI*, Vol. 18/1, 1984-1985, pp. 298-320. See documents on <http://www.genevacall.org>.

6. Problems of qualification

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- ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
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SUGGESTED READING: BYRON Christine, “Armed Conflicts: International or Non-International?”, in *Journal of Conflict and Security Law*, Vol. 6, No. 1, June 2011, pp. 63-90. CARSWELL Andrew J., “Classifying the Conflict: a Soldier’s Dilemma”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 143-161. CRAWFORD Emily, “Blurring the Lines Between International and Non-International Armed Conflicts: The Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15, 2008, pp. 29-54. GRAY Christine, “Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences”, in *BYIL*, Vol. 67, 1996, pp. 155-197. MERON Theodor, “Classification of Armed Conflict in the Former Yugoslavia, Nicaragua’s Fallout”, in *AJIL*, Vol. 92/2, 1998, pp. 236-242. SANDOZ Yves, “Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie”, in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490. SASSÒLI Marco, “The Legal Qualification of the Conflicts in the former Yugoslavia: Double Standards or New Horizons in International Humanitarian Law?”, in WANG Tieya & SIENHO Yee (eds), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, pp. 307-333. SIVAKUMARAN Sandesh, “Identifying an Armed Conflict not of an International Character”, in STAHN Carsten & SLUITER Göran (eds), *The Emerging Practice of the International Criminal Court*, Leiden, Boston, M. Nijhoff, 2009, pp. 363-380. STEWART James G., “Towards a Single Definition of Armed Conflict in International Humanitarian Law: a Critique of Internationalized Armed Conflict”, in *IRRC*, No. 850, June 2003, pp. 313-349. VITE Sylvain, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, in *IRRC*, Vol. 91, No. 873, March 2009, pp. 69-94.

a) traditional internationalized internal conflicts

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- ⇒ **Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 8]**
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 219 and 254]**
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 9 and 26]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 72 and Part C., paras 87-162]**
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., paras 11 and 13-31]
 - ⇒ Case No. 222, United States, Kadic *et al.* v. Karadzic
 - ⇒ Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. A.]
 - ⇒ Case No. 270, India, Press release, Violence in Kashmir
 - ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
 - ⇒ **Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 7-15]**
 - ⇒ **Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 2-27]**
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SUGGESTED READING: GASSER Hans-Peter, “Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon”, in *American University Review*, Vol. 33/1, 1983, pp. 145-161. SCHINDLER Dietrich, “The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols”, in *Collected Courses*, Vol. 163/2, 1979, pp. 119-163. SCHINDLER Dietrich, *International Humanitarian Law and the Internationalization of Internal Armed Conflict*, San Remo, International Institute of Humanitarian Law, 1981, 15 pp.

b) conflicts of secession

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- ⇒ Case No. 85, United States, The Prize Cases
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 2 and 34]
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A.]
 - ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
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c) foreign intervention not directed against governmental forces

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- ⇒ Case No. 124, Israel, Operation Cast Lead [Part I, paras 29-30]
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ **Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006**
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. A.]
 - ⇒ **Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Parts I, II, and III, paras 1-12]**
 - ⇒ Case No. 256, Afghanistan, Drug Dealers as Legitimate Targets
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 1. B.4]
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d) non-international armed conflicts that spread into a neighbouring country

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- ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea
-

e) UN peacekeeping and peace-enforcement operations in a non-international armed conflict

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel
 - ⇒ Case No. 197, UN, UN Forces in Somalia
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. D.]

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- ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Part 1. B. 3.]
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SUGGESTED READING: CHO Sihyun, “International Humanitarian Law and United Nations Operations in an Internal Armed Conflict”, in *Korean Journal of International and Comparative Law*, Vol. 26, 1998, pp. 85-111. SHRAGA Daphna, “The United Nations as an Actor Bound by International Humanitarian Law”, in *International Peacekeeping*, Vol. 5/2, 1998, pp. 64-81.

f) UN operations to restore or maintain law and order

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- ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part II, paras 10-11; Part III, paras 61-70]
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g) the “global war on terror”

[See *supra* Part I, Chapter 2. III. 1. e. The global war on terror, p. 130]

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- ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts
 ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 ⇒ Case No. 263, United States, Hamdan v. Rumsfeld [Parts I and III]
 ⇒ Case No. 267, United States, The Obama Administration’s Internment Standards
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IV. THE EXPLICIT RULES OF COMMON ARTICLE 3 AND OF PROTOCOL II

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- ⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part B., para. 76.]
 ⇒ Case No. 109, ECHR, Korbely v. Hungary
 ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part II. B., Part III. C. 1 and 2]
 ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II
 ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
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1. Who is covered by common Art. 3?

2. Principles under common Art. 3

a) non discrimination

b) humane treatment

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- ⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*,
 - ⇒ Case No. 155, Canada, *Ramirez v. Canada*
 - ⇒ Case No. 219, ICTY, *The Prosecutor v. Strugar* [Part B., paras 219 and 234-250]
 - ⇒ **Case No. 245, Human Rights Committee, Guerrero v. Colombia**
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 3, 8, 12-13, 18, 21]
 - ⇒ Document No. 269, United States, *Treatment and Interrogation in Detention*
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SUGGESTED READING: DROEGE Cordula, ““In Truth the Leitmotiv”: The Prohibition of Torture and Other Forms of Ill-Treatment in International Humanitarian Law”, in *IRRC*, Vol. 89, No. 867, September 2007, pp. 515-541.

- does the prohibition of murder cover attacks in the conduct of hostilities?

c) judicial guarantees

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- ⇒ Case No. 262, United States, *President’s Military Orde*
 - ⇒ **Case No. 263, United States, Hamdan v. Rumsfeld**
 - ⇒ Case No. 265, United States, *Military Commissions*
 - ⇒ Case No. 266, United States, *Habeas Corpus for Guantanamo Detainees*
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SUGGESTED READING: CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp. PEJIC Jelena, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, in *IRRC*, No. 858, June 2005, pp. 375-391. SAYAPIN Sergey, “The Application of the Fair Trial Guarantees to Alleged Terrorists in Non-International Armed Conflicts”, in *Humanitäres Völkerrecht*, Vol. 3, 2004, pp. 152-159.

d) obligation to collect and care for the wounded and sick

3. Additional rules under Protocol II

a) more precise rules on:

aa) fundamental guarantees of humane treatment

P II, Arts 4 and 5 [CIHL, Rules 87-96, 103, 118, 119, 121, 125, 128]

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- ⇒ Case No. 196, Sri Lanka, *Conflict in the Vanni* [Paras 29-46]
 - ⇒ Case No. 229, Democratic Republic of the Congo, *Conflict in the Kivus* [Part III, paras 16, 35-41]
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Art. 51]
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SUGGESTED READING: BELLAMY Alex J., “No Pain, No Gain? Torture and Ethics in the War on Terror”, in *International Affairs*, Vol. 82, No. 1, January 2006, pp. 121-146. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Oxford, OUP, 3rd ed., 2009, 697 pp.

bb) judicial guarantees

P II, Art. 6 [CIHL, Rules 100-102]

⇒ Case No. 262, United States, President’s Military Order

cc) wounded, sick and shipwrecked

P II, Arts 7-8 [CIHL, Rules 109-111]

dd) use of the emblem

P II, Art. 12 [CIHL, Rules 30 and 59]

⇒ Case No. 247, Colombia, Misuse of the Emblem

b) specific rules on:

aa) protection of children

P II, Art. 4(3) [CIHL, Rules 136 and 137]

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- ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 10-11]
 - ⇒ Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Art. 50]
 - ⇒ Case No. 272, Civil War in Nepal
 - ⇒ Case No. 276, Sierra Leone, Special Court Ruling on the Recruitment of Children
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bb) protection of medical personnel and units, duties of medical personnel

P II, Arts 9-12 [CIHL, Rules 25, 26 and 28-30]

⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 17-22]

c) rules on the conduct of hostilities

aa) protection of the civilian population against attacks

P II, Art. 13 [CIHL, Rules 1 and 6]

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- ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 12-16]
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 12-23]
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 272, Civil War in Nepal
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia
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bb) protection of objects indispensable for the survival of the civilian population

P II, Art. 14 [CIHL, Rules 53 and 54]

cc) protection of works and installations containing dangerous forces

P II, Art. 15 [CIHL, Rule 42]

⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras 2, and E.3]

dd) protection of cultural objects

P II, Art. 16 [CIHL, Rules 38-40]

⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation [Paras 3, and E.3]

d) prohibition of forced movements of civilians

P II, Art. 17 [CIHL, Rule 129 B]

⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 3-9]
 ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 24, 30, 33 and 36]
 ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 38-40]

e) relief operations

P II, Art. 18 [CIHL, Rules 55 and 56]

⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 23-28]

V. CUSTOMARY LAW OF NON-INTERNATIONAL ARMED CONFLICTS

⇒ **Case No. 43, ICRC, Customary International Humanitarian Law**
 ⇒ **Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 154-167]**
 ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 96-126]**

SUGGESTED READING: COWLING Michael, “International Lawmaking in Action: the 2005 Customary International Humanitarian Law Study and Non-International Armed Conflicts”, in *African Yearbook on International Humanitarian Law*, 2006, pp. 65-87. CRAWFORD Emily, “Blurring the Lines between International and Non-International Armed Conflicts: the Evolution of Customary International Law Applicable in Internal Armed Conflicts”, in *Australian International Law Journal*, Vol. 15 (2008), 2009, pp. 29-54. KALSHOVEN Frits, “Applicability of Customary International Law in Non-International Armed Conflicts”, in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 267-285. TAVERNIER Paul & HENCKAERTS Jean-Marie (Dir.), *Droit international humanitaire coutumier : enjeux et défis contemporains*, Brussels, Bruylant, 2008, 289 pp. WILMSHURST Elizabeth & BREAU Susan (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law*, Cambridge, CUP, 2007, 433 pp.

VI. APPLICABILITY OF THE GENERAL PRINCIPLES ON THE CONDUCT OF HOSTILITIES

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8(2)(e)]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 166]
 - ⇒ **Case No. 192, Inter-American Commission on Human Rights, Tablada [Paras 182-189]**
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., para. 48]
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 22-24]
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SUGGESTED READING: CASSESE Antonio, “The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts”, in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318. HOFFMANN Michael H., *The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War*, Geneva, ICRC, October 1990, 23 pp. “Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts”, in *IRRC*, No. 278, September-October 1990, 5 pp. “Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts”, in *IRRC*, No. 278, September-October 1990, pp. 383-403.

1. Principle of distinction

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- ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(c)]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 166 and 240-268]
 - ⇒ **Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 177]**
 - ⇒ Case No. 212, ICTY, The Prosecutor v. Martić [Part A., paras 11-14]
 - ⇒ **Case No. 219, ICTY, The Prosecutor v. Strugar [Part A.; Part B., paras 116 and 228]**

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- ⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 31 and 39]
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 28-34]
 - ⇒ Case No. 279, Germany, Government Reply on Chechnya
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
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2. Principle of military necessity

3. Principle of proportionality

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 166 and 260]
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4. Right to relief

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- ⇒ Document No. 56, UN, Guiding Principles on Internal Displacement [Principle 25]
 - ⇒ Case No. 177, UN, Security Council Resolution 688 on Northern Iraq
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 23-28]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 36]
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SUGGESTED READING: BINDSCHEDLER-ROBERT Denise, “Actions of Assistance in Non-international Conflicts – Art. 18 of Protocol II”, in *European Seminar on Humanitarian Law* (Jagellonean University, Krakow, 1979), Warsaw/Geneva, Polish Red Cross, ICRC, Geneva, 1979, pp. 71-85.

FURTHER READING: KWAKWA Edward, “Internal Conflicts in Africa: Is There a Right of Humanitarian Action?”, in *African Yearbook of International Law*, 1994, pp. 9-46.

5. Need to look into the law of international armed conflicts – and sometimes International Human Rights Law – for the precise meaning of principles

VII. NECESSITY AND LIMITS OF ANALOGIES WITH THE LAW OF INTERNATIONAL ARMED CONFLICTS

Introductory text

First, in some cases the precise rule resulting from a common principle or from combining principles with a provision of the law of non-international armed conflicts or with simple legal logic can be found by analogy in rules which have been laid down in the much more detailed texts of the Conventions and Protocol I for international armed conflicts.^[326]

Second, certain rules and regimes of the law of international armed conflicts have to be applied in non-international armed conflicts to fill gaps in the applicable provisions, to make the application of explicit provisions possible, or to give the latter a real chance of being applied.

For example, the law of non-international armed conflicts contains no definition of military objectives or of the civilian population. Such definitions are required, however, to apply the principle of distinction applicable in both types of conflict and the explicit prohibitions to attack the civilian population, individual civilians and certain civilian objects.^[327] No fundamental difference between the regimes applicable to the two types of conflict precludes the application of one and the same definition.

Prohibitions or limitations on the use of certain weapons are a more difficult case. None of the relevant differences between the two categories of conflict could justify not applying in non-international armed conflicts prohibitions or restrictions on the use of certain weapons set out in the law of international armed conflicts. Yet States have traditionally refused to accept proposals explicitly extending such prohibitions to non-international armed conflicts. Fortunately, this trend has been reversed in recent codification efforts.^[328]

A striking feature of the law of non-international armed conflicts is that it foresees no combatant status, does not define combatants and does not prescribe specific rights and obligations for them; its provisions do not even use the term “combatant”. This is a consequence of the fact that no one has the “right to participate in hostilities” in a non-international armed conflict (a right which is an essential feature of combatant status). Some authors conclude that the law of non-international armed conflicts does not protect people according to their status but according to their actual activities. If this is correct, on the crucial question of when a fighter (i.e. a member of an armed group

326 Thus, one may claim that the prohibition of indiscriminate attacks as codified in Art. 51(5) and the precautionary measure laid down in Art. 57(2)(b) of Protocol I are necessary consequences of the principle of distinction, and the rules of Conventions I and IV as well as Protocol I concerning who may use, and in which circumstances, the distinctive emblem have to be taken into account when applying Art. 12 of Protocol II on the distinctive emblem.

327 See P II, Arts 13 and 14

328 Thus the Protocol on Mines, Booby-Traps and other Devices also applies to non-international armed conflicts [See Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 1(2)]]

with a fighting function^[329] may be attacked and according to what procedures a captured fighter may be detained, no analogy could be made with the rules applicable in international armed conflicts to combatants and prisoners of war. Fighters could only be attacked if and for such time as they directly participate in hostilities and the admissibility of their detention would be governed, in the absence of specific rules of the IHL of non-international armed conflicts, by domestic law and International Human Rights Law.

Other authors and States consider that fighters may be attacked in non-international armed conflicts like combatants may be attacked in international armed conflicts, i.e. at any time until they surrender or are otherwise *hors de combat*. Some of those who promote this analogy also consider that captured fighters may be detained, like prisoners of war in international armed conflicts, without any individual judicial determination until the end of the conflict.

This controversy, which has important humanitarian consequences in non-international armed conflicts and armed conflicts which have both international and non-international components, shows that an analogy between international and non-international armed conflicts does not always lead to better protection for those affected by the conflict. It also raises the question of whether International Human Rights Law should not have a greater impact in non-international armed conflicts than in international armed conflicts, *inter alia* because the applicable IHL treaty rules are incomplete.

In any case, if civilians are to be respected in non-international armed conflicts as prescribed by the applicable provisions of IHL, those conducting military operations must be able to distinguish those who fight from those who do not fight, and this is only possible if those who fight distinguish themselves from those who do not fight. Detailed solutions on how this can and must be done are found, *mutatis mutandis*, in the law of international armed conflicts. In addition, it might be reasonable not to consider fighters as civilians (who may be attacked only if and for such time as they directly participate in hostilities), but this presupposes clear criteria and a real possibility to determine who is a fighter. On the other hand, in our view, captured fighters should not be detained by analogy to prisoners of war. On arrest, it is more difficult to identify fighters than soldiers of armed forces of another State. The correct classification can be made by a tribunal, which will only have its say if the arrested person is not classified as a POW.

⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., para. 126]**

⇒ Case No. 267, United States, The Obama Administration's Internment Standards

SUGGESTED READING: CARILLO-SUÀREZ Arturo, “*Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*”, in *American University International Law Review*, Vol. 15/1, 1999, pp. 1-150.

329 For a discussion of this concept, see *supra*, Part I, Chapter 9, II. 7. Loss of protection: The concept of direct participation in hostilities and its consequences

1. “Combatants” must distinguish themselves from the civilian population

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- ⇒ Case No. 114, Malaysia, Osman v. Prosecutor
 - ⇒ Case No. 120, Nigeria, Pius Nwaoga v. The State
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 35]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part II. B.]
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
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2. Respect for IHL must be rewarded

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- ⇒ Case No. 85, United States, The Prize Cases
 - ⇒ Case No. 167, South Africa, Sagarius and Others
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 16]
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a) internment, not imprisonment for those captured bearing arms

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- ⇒ Case No. 154, Inter-American Court of Human Rights, Bámaca-Velasquez v. Guatemala,
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SUGGESTED READING: Case Western Reserve Journal of International Law, “Security Detention”, Vol. 40, No. 3, 2009, pp. 315-650. OLSON Laura, “Guantanamo Habeas Review: Are the D.C. District Court’s Decisions Consistent with IHL Internment Standards?”, in *Case Western Reserve Journal of International Law*, Vol. 42, No. 1 & 2, 2009, pp. 197-243.

b) encouragement of amnesty at the end of the conflict

P II, Art. 6(5)

SUGGESTED READING: DUGARD John, “Dealing with Crimes of Past Regime. Is Amnesty still an Option?”, in *Leiden Journal of International Law*, Vol. 12/4, 1999, pp. 1001-1015. MACDONALD Avril, “Sierra Leone’s Uneasy Peace: The Amnesties Granted in the Lomé Peace Agreement and the United Nations’ Dilemma”, in *Humanitäres Völkerrecht*, Vol. 13/1, 2000, pp. 11-26.

- aa) for the mere fact of having taken part in hostilities
- bb) but not for war crimes or other violations

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- ⇒ Case No. 169, South Africa, AZAPO v. Republic of South Africa
 - ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 243, Columbia, Constitutional Conformity of Protocol II [Paras 41-43]
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 3. D.]
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3. Rules on the use of the emblem

P II, Art. 12

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- ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 247, Colombia, Misuse of the Emblem
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4. Prohibition of the use of certain weapons

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- ⇒ Document No. 12, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts
 - ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 1]
 - ⇒ Case No. 43, ICRC, Customary International Humanitarian Law
 - ⇒ Document No. 55, Minimum Humanitarian Standards [Art. 5(3)]
 - ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 173, UN/ICRC, The Use of Chemical Weapons
 - ⇒ Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 187]
 - ⇒ Case No. 202, Geneva Call, Puntland State of Somalia Adhering to a Total Ban on Anti-Personnel Mines
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 119-124]**
 - ⇒ Case No. 212, ICTY, The Prosecutor v. Martić [Part A., para. 18; Part B., 303-313, 461-463, 470 and 472]
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SUGGESTED READING: FISCHER Horst, “Limitation and Prohibition of the Use of Certain Weapons in Non-International Armed Conflicts”, in *Yearbook of the International Institute of Humanitarian Law* (San Remo), 1989, pp. 117-180. PLATTNER Denise, “The 1980 Convention on Conventional Weapons and the Applicability of Rules Governing Means of Combat in a Non-International Armed Conflict”, in *IRRC*, No. 279, November-December 1990, pp. 551-564. SALINAS BURGOS Hernan, “The Taking of Hostages and International Humanitarian Law”, in *IRRC*, No. 270, May-June 1989, pp. 196-216.

5. Limits to analogies

SUGGESTED READING: CRAWFORD Emily, *The Treatment of Combatants and Insurgents under the Law of Armed Conflict*, Oxford, OUP, 2010, 213 pp. SOLF Waldemar A., “Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict”, in *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 323-326.

- no combatant status (but members of armed groups with a continuous fighting function are argued to have the same disadvantages – but not privileges – as combatants in international armed conflicts)

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- ⇒ Document No. 51, ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 267, United States, The Obama Administration's Internment Standards
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- no occupied territories

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- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 8]
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VIII. WHO IS BOUND BY THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS?

Introductory text

From the point of view of the law of treaties, Art. 3 common to the four Geneva Conventions and Protocol II are binding on the States party to those treaties. Even those rules of the IHL of non-international armed conflicts considered customary international law would normally be binding only on States. The obligations of the States parties include responsibility for all those who can be considered as their agents. IHL must, however, also be binding on non-State parties in a non-international armed conflict – which means not only those who fight against the government but also armed groups fighting each other – because victims must also be protected from rebel forces and because if IHL did not respect the principle of the equality of belligerents before it in non-international armed conflicts, it would have an even smaller chance of being respected by either the government forces, because they would not benefit from any protection under it, or by the opposing forces, because they could claim not to be bound by it.

A first possibility to explain why armed groups are bound by IHL is to consider that when the rules applicable to non-international armed conflicts, which include the provision that those rules be respected by “each Party to the conflict,”^[330] are created by agreement or custom, States implicitly confer on the non-governmental forces involved in such conflicts the international legal personality necessary to have rights and obligations under those rules. According to this construction, the States have conferred on rebels – through the law of non-international armed conflicts – the status of subjects of IHL; otherwise their legislative effort would not have the desired effect, the *effet utile*. At the same time, the States explicitly stated that the application

330 See GC I-IV, common Art. 3(1)

and applicability of IHL by and to rebels would not confer on the latter a legal status under rules of international law (other than those of IHL).^[331]

A second theory is to consider that armed groups are bound because a State incurring treaty obligations has legislative jurisdiction over everyone found on its territory, including armed groups. Those obligations then become binding on the armed group via the implementation or transformation of international rules into national legislation or by the direct applicability of self-executing international rules. Under this construction, IHL is indirectly binding on the rebels. Only if they became the effective government would they be directly bound.

Other possible explanations for the binding effect of IHL on rebel armed groups are: third, that armed groups may be bound under the general rules on the binding nature of treaties on third parties (this presupposes, however, that those rules are the same for States and non-State actors and, more importantly, that a given armed group has actually expressed its consent to be bound); fourth, that the principle of effectiveness is said to imply that any effective power in the territory of a State is bound by the State's obligations; fifth, armed groups often want to become the government of the State and such government is bound by the international obligations of that State.

The precise range of persons who are the addressees of the IHL of non-international armed conflicts has been discussed in the jurisprudence of the two *ad hoc* International Criminal Tribunals.^[332] Certainly, not only members of armed forces or groups, but also others mandated to support the war effort of a party to the conflict are bound by IHL. Beyond that, all those acting for such a party, including all public officials on the government side, must comply with IHL in the performance of their functions. Otherwise judicial guarantees, which are essentially of concern to judges, rules on medical treatment, which are equally addressed to ordinary hospital staff, and rules on the treatment of detainees, which also apply to ordinary prison guards, could not have their desired effect because those groups could not be considered as "supporting the war effort". On the other hand, acts and crimes unconnected to the armed conflict are not covered by IHL, even if they are committed during the conflict. As for individuals who cannot be considered as connected to one party but who nevertheless commit acts of violence contributing to the armed conflict for reasons connected with it, those perpetrating such acts are bound by the criminalized rules of IHL. If such individuals were not considered addressees of IHL, most acts committed in anarchic conflicts would be neither covered by IHL nor consequently punishable as violations of IHL. What is unclear is whether the many rules of IHL that are not equally criminalized cover all individual acts having a link to the conflict.

331 See GC I-IV, common Art. 3(4) (See *infra* Part I, Chapter 12.IX. Consequences of the Existence of a Non-International Armed Conflict for the Legal Status of the Parties)

332 See in particular Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 432-445]

1. Both parties

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- ⇒ **Case No. 53, International Law Commission, Articles on State Responsibility [Part A., para. 16 of the Commentary to Art. 10]**
 - ⇒ Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 172-174]
 - ⇒ Case No. 202, Geneva Call, Puntland State of Somalia Adhering to a Total Ban on Anti-Personnel Mines
 - ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 430-446]
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 8]**
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SUGGESTED READING: HENCKAERTS Jean-Marie, “Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law”, in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors*, 25th-26th October 2002, in *Collegium* No. 27, Spring 2003, pp. 123-138. SASSÒLI Marco, “Taking Armed Groups Seriously: Ways to Improve Their Compliance with International Humanitarian Law”, in *Journal of International Humanitarian Legal Studies*, Vol. 1, 2010, pp. 5-51. SIVAKUMARAN Sandesh, “Binding Armed Opposition Groups”, in *ICLQ*, Vol. 55, Part 2, April 2006, pp. 369-394. SOMER Jonathan, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, in *IRRC*, Vol. 89, No. 867, September 2007, pp. 655-690. ZEGVELD Liesbeth, *Accountability of Armed Opposition Groups in International Law*, Cambridge, CUP, 2002, 260 pp.

2. All those belonging to one party

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- ⇒ **Case No. 222, United States, Kadic et al. v. Karadzic**
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Parts II. 2 and III.]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 425-446]**
 - ⇒ **Case No. 241, Switzerland, The Niyonteze Case [Part A., para. 9 and Part B., III. ch. 3.D]**
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3. All those affecting persons protected by IHL by an action linked to the armed conflict

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- ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B., paras 432-445]
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B., III. ch. 3.D.2]
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IX. CONSEQUENCES OF THE EXISTENCE OF A NON-INTERNATIONAL ARMED CONFLICT ON THE LEGAL STATUS OF THE PARTIES

Introductory text

Art. 3(4) common to the Conventions clearly states that application of Art. 3 “shall not affect the legal status of the Parties to the conflict”. As any reference to “parties” has been removed from Protocol II, a similar clause could not appear in it. However, Protocol II contains a provision clarifying that nothing it contains shall affect the sovereignty of the State or the responsibility of the government, by all legitimate means – legitimate in particular under the obligations foreseen by IHL – to maintain or re-establish law and order or defend national unity or territorial integrity. The same provision underlines that the Protocol cannot be invoked to justify intervention in an armed conflict.^[333]

The application of IHL to a non-international armed conflict therefore never internationalizes the conflict or confers any status – other than the international legal personality necessary to have rights and obligations under IHL – to a party to that conflict. Even when the parties agree, as encouraged by Art. 3(3) common to the Conventions, to apply all of the laws of international armed conflicts, the conflict does not become an international one. In no case does the government recognize, by applying IHL, that rebels have a separate international legal personality which would hinder the government’s ability or authority to overcome them and punish them – in a trial respecting the judicial guarantees provided for in IHL – for their rebellion. Nor do the rebels, by applying the IHL of non-international armed conflicts, affect their possibility to become the effective government of the State or to create a separate subject of international law – if they are successful. Never in history has a government or have rebels lost a non-international armed conflict because they applied IHL. The opposite is not necessarily true.

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- ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 1(6)]
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 10 and Commentary, paras 2 and 9]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 174]
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A., Art. 14(2) and Part B., Introduction]
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 14-16]**
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SUGGESTED READING: CASSESE Antonio, “The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts”, in *ICLQ*, Vol. 30/2, 1981, pp. 416-439. NIYUNGEKO Gérard, “The Implementation of International Humanitarian Law and the Principle of State Sovereignty”, in *IRRC*, No. 281, March-April 1991, pp. 105-133.

Chapter 13

Implementation of International Humanitarian Law

⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part G.II.3], p. 1203

SUGGESTED READING: DOSWALD-BECK Louise, “Implementation of International Humanitarian Law in Future Wars”, in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 39-75. DRAPER Gerald I.A.D., “The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977”, in *Collected Courses*, Vol. 164, 1979, pp. 5-54. *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Luxembourg, Office for Official Publications of the European Communities, 1995. ICRC, *Integrating the Law*, Geneva, ICRC, May 2007, 43 pp. PFANNER Toni, “Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims”, in *IRRC*, Vol. 91, No. 874, June 2009, pp. 279-328. SANDOZ Yves, *Implementing International Humanitarian Law*, Geneva, Henry-Dunant Institute, 1995, 28 pp. SANDOZ Yves, “Implementing International Humanitarian Law”, in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1986, pp. 259-282. SASSÒLI Marco, “The Implementation of International Humanitarian Law: Current and Inherent Challenges”, *YIHL*, Vol. 10 (2007), 2009, pp. 45-73.

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Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?, Luxembourg, Office for Official Publications of the European Communities, 1995, pp. 13-82.

I. PROBLEMS IN THE IMPLEMENTATION OF INTERNATIONAL LAW IN GENERAL AND INTERNATIONAL HUMANITARIAN LAW SPECIFICALLY

Introductory text

The general mechanisms of international law to ensure respect and to sanction violations are even less satisfactory and efficient regarding International Humanitarian Law (IHL) than they are for the implementation of other branches of international law. In armed conflicts, they are inherently insufficient and in some cases even counter-productive.

In a society made up of sovereign States, enforcement is traditionally decentralized, which therefore gives an essential role to the State that has been or may be the victim of a violation. Other States may choose to support the injured State, according to their interests – which should include the general interest of every member of that society to have its legal system respected.

This decentralized structure of implementation is particularly inappropriate for the IHL applicable to armed conflicts, for the following reasons.

First, it would be truly astonishing if disputes arising out of violations of IHL were to be settled peacefully, at least in international armed conflicts. Indeed, IHL applies between two States because they are engaged in an armed conflict, which proves that they are unable to settle their disputes peacefully.

Second, a State can be directly injured by a violation of IHL committed by another State only in international armed conflicts.^[334] In such conflicts the injured State has the most unfriendly relationship imaginable with the violating State: armed conflict. It therefore lacks the many means of preventing or reacting to a violation of international law that usually ensure that international law is respected. In traditional international law, the use of force was the most extreme reaction available to the injured State. Today it is basically outlawed except in reaction to a prohibited use of force. In addition, a State injured by a violation of IHL logically no longer has the option to react by using force because such a violation can occur only in an armed conflict, namely, where the two States are already using force. The only reaction still available to the injured State

³³⁴ Legally, however, for the purpose of triggering the rules of State responsibility and taking the counter-measures it foresees, every other State party to the treaties of International Humanitarian Law might be considered as injured by its violations. This may be seen as resulting from the specific provision in Art. 1 common to the Conventions and Protocol I. See however the much more limited concept of injured State adopted by the International Law Commission in Art. 42 of the Draft Articles on State Responsibility [See Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 42 and 48]].

within the traditional structure of law enforcement in international society would be an additional use of force consisting of a violation of IHL itself. While such reciprocity or fear of such reprisals may contribute to respect for IHL, reprisals have themselves been largely outlawed because they lead to a vicious circle, a “competition of barbarism”, and hurt the innocent, precisely those whom IHL wants to protect.

Third, in the face of an armed conflict between two States, third States may have two reactions. They can take sides for reasons which are either purely political or, if related to international law, derive from *jus ad bellum*. They will therefore help the victim of the aggression, independently of who violates the *jus in bello*. Other third States may choose not to take sides. As neutrals they can help ensure respect for IHL, but they will always take care to ensure that their engagement for respect for IHL will not affect their basic choice not to take sides.

This traditional decentralized method of implementing international law is today supplemented – and tends to be partially superseded – by the more centralized enforcement mechanisms provided for in the UN Charter. The UN enforcement mechanisms can be criticized as frail and politicized, but come closest to what one could wish to have as an international law enforcement system. However, besides being weak, driven by power more than by the rule of law and frequently applying double standards, this system is inherently inappropriate for the implementation of IHL. One of its supreme goals is to maintain or restore peace, that is, to stop armed conflicts, while IHL applies to armed conflicts. Hence, the UN has an obligation to give precedence to respect for *jus ad bellum* over respect for *jus in bello*. It cannot possibly respect the principle of equality of the belligerents before *jus in bello*. It cannot apply IHL impartially. Furthermore, the most extreme enforcement measure of the UN system, namely the use of force, is itself an armed conflict to which IHL must apply. Similarly, economic sanctions, which constitute the next strongest measure under the UN Charter, should be considered with care when used as a measure to ensure respect for IHL, as they often provoke indiscriminate human suffering.

Given the shortcomings of the general enforcement mechanisms, IHL had to provide many specific mechanisms of its own and adapt general mechanisms to the specific needs of victims of armed conflicts. Far earlier than other branches of international law, it had to overcome one of the axioms of the traditional international society and provide enforcement measures directed against the individuals violating it, and not only against the State responsible for those violations. For this reason, and also in order to take advantage of the relatively more efficient and organized national law enforcement systems, IHL had to make sure that its rules were known and integrated into national legislation. It recognized that the International Committee of the Red Cross, an external independent and impartial body that had already promoted its codification, had a particular role to play in its implementation. IHL also adapts the traditional mechanism of good offices through the codification of the Protecting Power system. Lastly, it specifies that the obligations it sets forth are obligations *erga omnes* by obliging every State Party to ensure respect by other States Parties – without specifying what that means.

The specific mechanisms established by IHL nevertheless remain embedded in the general mechanisms. They can only be understood within the general framework as developments or correctives of the general mechanisms. IHL is certainly not a self-contained system.^[335] General mechanisms remain available alongside specific ones, for instance the methods for the peaceful settlement of disputes and the measures provided by the law of State responsibility – except those specifically excluded by IHL,^[336] those incompatible with its purpose and aim and those general international law permits only as a reaction to certain kinds of violations.^[337]

However, even the general and the specific mechanisms taken together cannot guarantee a minimum of respect for the individual in a situation of armed conflict. This can only be achieved through education, when everyone understands that in armed conflicts, even one's worst enemy is a human being who deserves respect.

II. MEASURES TO BE TAKEN IN PEACETIME

Introductory text

Just as the preparations for the military and economic aspects of a possible armed conflict are made in peacetime, so must the groundwork for the humanitarian aspects, in particular respect for IHL, be laid before war breaks out. Soldiers – whatever their rank or responsibilities – need to be properly instructed in peacetime, i.e. not only by informing them of and explaining the rules but also by integrating the latter into routine training and manoeuvres in order to instil automatic reflexes. Without such training, the often very detailed rules of IHL regulating the various problems appearing in armed conflicts – and their delicate interplay with International Human Rights Law – will never be respected in armed conflicts. Similarly, the whole population must have a basic understanding of IHL in order to realize that even in armed conflicts, certain rules apply independently of who is right and who is wrong, protecting even the worst enemy. Once an armed conflict, with all the hatred it feeds on and stirs, has broken out, it is often too late to teach this message. Thus, police forces, civil servants, politicians, diplomats, judges, lawyers, journalists, students who will fulfil those tasks in the future, and the public at large must know the limits constraining everyone's actions in armed conflicts, the rights everyone may claim in armed conflicts, and how international and national news about armed conflicts has to be written, read and treated from a humanitarian perspective.^[338]

Preparatory measures also include translating IHL instruments into national languages. Furthermore, if a constitutional system requires rules of international treaties to be

335 As are, according to the International Court of Justice, the rules on diplomatic and consular relations (See Case on United States Diplomatic and Consular Staff in Tehran, Judgement of 24 May 1980, ICJ Reports 1980, pp. 4 ff., paras 83-87).

336 Thus, International Humanitarian Law prohibits reprisals against protected persons.

337 Thus the use of force is under the UN Charter a lawful reaction, in the form of individual or collective self-defence, only to an armed aggression and not to any other violation of international law.

338 The obligation to disseminate IHL is prescribed in GC I-IV, Arts 47/48/127/144; P I, Arts 83 and 87(2); P II, Art. 19

transformed by national legislation into the law of the land for those rules to be applicable, such legislation must obviously already be adopted in peacetime.

In every constitutional system, moreover, implementing legislation is necessary to enable the national law enforcement system to apply the many non-self-executing rules of IHL. Owing not only to the length of any legislative process and the other priorities pressing upon a parliament when a war breaks out but also because courts have to be able to sanction war crimes in foreign conflicts and the misuses of the emblem in peacetime, such legislation must be adopted as soon as the State becomes a party to the relevant instrument.^[339]

Finally, certain practical measures must be taken by States for them to be able to respect IHL. Qualified personnel and legal advisors have to be trained in peacetime so as to be operational in wartime.^[340] Combatants and certain other persons need identity cards or tags to be identifiable,^[341] and these can obviously not be produced only when a conflict breaks out. Military objectives have to be separated, as far as possible, from protected objects and persons.^[342] It is evident that a hospital, for example, cannot be whisked away from army barracks or a weapons factory when an armed conflict breaks out.

⇒ **Document No. 36, ICRC, Advisory Services on International Humanitarian Law**

⇒ **Document No. 39, ICRC, Protection of War Victims [Para. 2.2]**

⇒ Case No. 69, Ivory Coast, National Interministerial Commission

SUGGESTED READING: BOTHE Michael, MACALISTER-SMITH Peter & KURZIDEM Thomas (eds), *National Implementation of International Humanitarian Law*, Dordrecht/Boston/London, M. Nijhoff, 1990, 286 pp. DJIBRIL Ly, “La mise en œuvre du droit international humanitaire: les obligations étatiques”, in *Études internationales*, Vol. 72/3, 1999, pp. 113-130. KÜNTZIGER Isabelle, “Le droit international humanitaire au plan national : impact et rôle des Commissions nationales”, in *IRRC*, No. 846, June 2002, pp. 489-494. PELLANDINI Cristina (ed.), *Committees or other National Bodies for International Humanitarian Law: Report of the Meeting of Experts: Geneva, 23-25 October 1996*, Geneva, ICRC, March 1997, 130 pp.

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339 See *infra*, **Introductory Text**, Part I, Chapter 13. II. 4. Legislation for application

340 See P I, Arts 6 and 82

341 See GC I, Arts 16, 17(1), 27, 40, and 41; GC II, Arts 19, 20, and 42; GC III, Arts 4(A)(4) and 17(3); GC IV, Arts 20(3) and 24(3); P I, Arts 18 and 79(3)

342 See GC I, Art. 19(2); GC IV, Art. 18(5); P I, Arts 12(4), 56(5) and 58(a) and (b)

1. Dissemination

GC IV, Arts 47/48/127/144 respectively; P I, Arts 83, 87(2) and 89; P II, Art. 19

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 2.3]
 - ⇒ Case No. 45, ICRC, Disintegration of State Structures
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a) instruction to the armed forces

[CIHL, Rule 142]

- aa) military manuals
- bb) integration into rules of engagement
- cc) practice-oriented instruction: integration of IHL into manoeuvres
- dd) integration into regular training, by the military hierarchy
- ee) integration of International Human Rights Law (in particular on law enforcement, as armed forces are increasingly used in law enforcement operations and as it becomes increasingly difficult to distinguish law enforcement operations from the conduct of hostilities)

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- ⇒ Case No. 106, China, Military Writings of Mao Tse-Tung
 - ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Case No. 150, Israel, Report of the Winograd Commission [Paras 20, 21 and 52]
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Para. 10]
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 97 and 166]
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= *Paix en liberté: Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos; Zürich, Dike, 2008, pp. 375-390. HOFFMAN Michael H., “Can Military Manuals Improve the Law of War? The San Remo Manual on the Law of Non-International Armed Conflict Considered in Relation to Historical and Contemporary Trends”, in *IYHR*, Vol. 37, 2007, pp. 241-258. KLENNER Dietmar, “Training in International Humanitarian Law”, in *IRRC*, No. 839, September 2000, pp. 653-662. MULINEN Frédéric de, “Law of War Training within the Armed Forces: Twenty Years of Experience”, in *IRRC*, No. 257, March 1987, pp. 168-179. PRESCOTT Jody M., “Training in the Law of Armed Conflict: a NATO Perspective”, in *Journal of Military Ethics*, Vol. 7, No. 1, 2008, pp. 66-75. ROBERTS David L., “Training the Armed Forces to Respect International Humanitarian Law: The Perspective of the ICRC Delegate to the Armed and Security Forces in South Asia”, in *IRRC*, No. 319, July-August 1997, pp. 433-446. *The Manual of the Law of Armed Conflict*, United Kingdom, Ministry of Defence, Oxford, OUP, 2004, 611 pp.

b) training of police forces

SUGGESTED READING: ROVER Cees de, *To Serve and to Protect*, Geneva, ICRC, 1998, 455 pp.

c) university teaching

(See also Part III, Chapter 1. Some Remarks on Teaching International Humanitarian Law, CD)

SUGGESTED READING: BOUVIER Antoine A. & SAMS Katie, “Teaching International Humanitarian Law in Universities: the Contribution of the International Committee of the Red Cross”, in *YIHL*, Vol. 5, 2002, pp. 381-393. DAVID Éric, “Dissemination of International Humanitarian Law at University Level”, in *IRRC*, No. 257, March 1987, pp. 155-169. HAMPSON Françoise, “Teaching the Law of Armed Conflict”, in *Essex Human Rights Review*, Vol. 5, No. 1, July 2008. KRAFFT Mathias-Charles, “Le Concours Jean-Pictet 1999 – ou les pièges d’une ‘Conférence internationale pour la protection des victimes des conflits armés’”, in *IRRC*, No. 838, June 2000, pp. 501-506. LANORD Christophe & DEYRA Michel, “Dissemination in Academic Circles: The Jean Pictet Competition”, in *IRRC*, No. 306, May-June 1995, pp. 341-346.

d) dissemination in civil society

[CIHL, Rule 143]

SUGGESTED READING: FARELL Norman, “Dissemination in Bosnia-Herzegovina: Lessons Learned”, in *IRRC*, No. 319, July-August 1997, pp. 409-420.

FURTHER READING: BAERISWYL Edith, “Teaching Young People to Respect Human Dignity – Contribution of the International Red Cross and Red Crescent Movement”, in *IRRC*, No. 319, July-August 1997, pp. 357-371. CASTILLO Frida, TRIAL, Pro Juventute, *Playing by the Rules: Applying International Humanitarian Law to Video and Computer Games*, Geneva, TRIAL; Zürich, Pro Juventute, October 2009, 46 pp. ICRC, *Exploring Humanitarian Law: IHL Guide: A Legal Manual for EHL Teachers*, Geneva, ICRC, January 2009, 26 pp. TAWIL Sobhi, “International Humanitarian Law and Basic Education”, in *IRRC*, No. 839, September 2000, pp. 581-600.

2. Translation (if necessary)

3. Transformation (if necessary) into domestic legislation

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- ⇒ **Case No. 65, Canada, Crimes Against Humanity and War Crimes Act**
 - ⇒ **Case No. 81, United Kingdom, Interpreting the Act of Implementation**
 - ⇒ Case No. 110, India, Rev. Mons. Monteiro v. State of Goa
 - ⇒ **Case No. 132, Israel, Cases Concerning Deportation Orders**
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena [Paras 9 and 10]
 - ⇒ Case No. 169, South Africa, AZAPO v. Republic of South Africa [Paras 26 and 27]
 - ⇒ Case No. 281, Russia, Constitutionality of Decrees on Chechnya
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SUGGESTED READING: BERGSMO Morten, HARLEM Mads & HAYASHI Nobuo (eds), *Importing Core International Crimes into National Criminal Law*, Oslo, International Peace Research Institute, 2007, 84 pp. MEYER Michael A. & ROWE Peter, “The Geneva Conventions (Amendments) Act 1995: A Generally Minimalist Approach”, in *ICLQ*, Vol. 45/2, 1996, pp. 476-484.

FURTHER READING: HARLAND Christopher B., “Domestic Reception of International Humanitarian Law: UK and Canadian Implementing Legislation”, in WATERS Christopher P. M., *British and Canadian Perspectives on International Law*, Leiden, Boston, M. Nijhoff, 2006, pp. 29-51.

4. Legislation for application

Introductory text

In monist constitutional systems (most countries with the exception of those with an English constitutional tradition, Germany and Italy), IHL treaty rules are immediately applicable by judges and the administration. Specific national implementing legislation is thus not necessary. In all constitutional systems this is also the case for customary rules. However, this direct application is only possible for “self-executing” provisions of international treaties, i.e. rules that are sufficiently precise to provide a remedy in a given case. For all other IHL rules, and in dualist constitutional systems, national legislation must be adopted to make the rules operational.^[343]

Even in countries in which the description of grave breaches in IHL instruments is considered to be sufficiently precise, no one can be punished for such behaviour by national courts unless the penalties have been stipulated in national legislation – otherwise the principle *nulla poena sine lege* would be violated. Furthermore, only national legislation can integrate those rules into the very different traditions of penal

³⁴³ P I, Art. 80(1). GC I-IV, Arts 48/49/128/145 respectively and P I, Art. 84 prescribe that such legislation must be communicated to the other parties.

law concerning, for example, the elements of crime, defences, and inchoate or group criminality. Only national legislation determines which courts, military or civil, are competent to try violations and which national prosecutor and judge can effectively enforce the State's obligation to apply universal jurisdiction over war criminals, to extradite them or to provide mutual assistance in such criminal matters, including to international tribunals.^[344]

IHL prescribes who may use the emblem of the red cross, the red crescent or the red crystal in peacetime and in wartime, on which objects and in which circumstances, with the permission and under the control of the competent authority. Only national legislation can prescribe who this competent authority is and provide the necessary details.^[345]

More generally, where IHL prescribes an obligation for the State to act, only national legislation can clarify who in the State, in a federal State or within a central administration, has to act. Without such a clarification, the international obligation will remain a dead letter – and will therefore be violated when it becomes applicable. National legislation is therefore the cornerstone of implementation of IHL.

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- ⇒ Case No. 64, Germany, International Criminal Code
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act
 - ⇒ Case No. 81, United Kingdom, Interpreting the Act of Implementation
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SUGGESTED READING: BERMAN Paul, “The ICRC’s Advisory Service on International Humanitarian Law: The Challenge of National Implementation”, in *IRRC*, No. 312, May-June 1996, pp. 338-347. CASSESE Antonio & DELMAS-MARTY Mireille (eds), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002, 673 pp. DÖRMANN Knut & GEISS Robin, “The Implementation of Grave Breaches into Domestic Legal Orders”, in *Journal of International Criminal Justice*, Vol. 7, No. 4, September 2009, pp. 703-722. FLECK Dieter, “Implementing International Humanitarian Law: Problems and Priorities”, in *IRRC*, No. 281, March-April 1991, 13 pp.

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344 The adoption of national legislation to repress war crimes and to establish universal jurisdiction over them is prescribed by GC I, Art. 49; GC II, Art. 50; GC III, Art. 129; GC IV, Art. 146 and P I, Art. 85.

345 Such legislation [See Document No. 35, ICRC, Model Law Concerning the Emblem] is prescribed by GC I, Arts 42, 44, 53 and 54 and by GC II, Arts 44 and 45

Jurisdiction over Grave Breaches of the Geneva Conventions”, in *Leiden Journal of international Law*, Vol. 15, 2000, pp. 815-854. *National Implementation of International Humanitarian Law – 2002-2003 Biennial Report*, Geneva, ICRC, 2004, 40 pp.

a) self-executing and non-self-executing norms of IHL

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- ⇒ Case No. 81, United Kingdom, Interpreting the Act of Implementation
 - ⇒ Case No. 110, India, Rev. Mons. Monteiro v. State of Goa
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena
 - ⇒ **Case No. 158, United States, United States v. Noriega [Part B.II.C]**
 - ⇒ Case No. 238, France, Radio Mille Collines
 - ⇒ **Case No. 263, United States, Hamdan v. Rumsfeld**
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b) particular fields to be covered

aa) penal sanctions

GC IV, Arts 49/50/129/146 respectively

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- ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Arts 10-12]
 - ⇒ Case No. 63, Switzerland, Military Penal Code
 - ⇒ **Case No. 64, Germany, International Criminal Code**
 - ⇒ **Case No. 65, Canada, Crimes Against Humanity and War Crimes Act**
 - ⇒ **Case No. 68, Belgium, Law on Universal Jurisdiction**
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 101, United States, Trial of Lieutenant General Harukei Isayama and Others
 - ⇒ **Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation**
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bb) use of the emblem

GC I, Arts 44 and 54; P III, Art. 6(1) [CIHL, Rule 141]

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- ⇒ **Document No. 35, ICRC, Model Law Concerning the Emblem**
 - ⇒ Case No. 66, Cameroon, Law on the Protection of the Emblem and the Name “Red Cross”
 - ⇒ Case No. 67, Ghana, National Legislation Concerning the Emblem
 - ⇒ Case No. 209, United Kingdom, Misuse of the Emblem
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cc) composition of armed forces

5. Training of qualified personnel

P I, Arts 6 and 82 [CIHL, Rule 141]

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- ⇒ Case No. 150, Israel, Report of the Winograd Commission [Paras 26-33]
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
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SUGGESTED READING: CAYCI Sadi, “Legal Advisor in the Armed Forces: How to Practice as a Good Legal Advisor”, in *RDMDG*, Vol. 38/1-4, 1999, pp. 333-340. DUTLI Maria Teresa, “Implementation of International Humanitarian Law: Activities of Qualified Personnel in Peacetime”, in *IRRC*, No. 292, May 1996, 7 pp. FLECK Dieter, “The Employment of Legal Advisors and Teachers of Law in the Armed Forces”, in *IRRC*, No. 145, April 1973, pp. 173-180. YBEMA Seerp B., “Between Conscience and Obedience: The role of the Legal Adviser in the Political Decision-Making Process with Regard to Military Operations”, in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 711-718.

FURTHER READING: DRAPER Gerald I.A.D, “Role of Legal Advisers in Armed Forces”, in *IRRC*, No. 202, January 1978, pp. 6-17.

6. Practical measures

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- ⇒ Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
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SUGGESTED READING: DUTLI Maria Teresa, “Implementation of International Humanitarian Law: Activities of Qualified Personnel in Peacetime”, in *IRRC*, No. 292, May 1996, 7 pp. OFFERMANS Marc, “The Belgian Interdepartmental Commission for Humanitarian Law”, in *IRRC*, No. 281, March-April 1991, pp. 154-166. SASSÒLI Marco, “The National Information Bureau in Aid of the Victims of Armed Conflicts”, in *IRRC*, No. 256, January 1987, pp. 6-24.

III. RESPECT BY THE PARTIES TO THE CONFLICT

1. Respect

[CIHL, Rule 139]

2. Supervision of their agents

[CIHL, Rule 139]

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- ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 54-60]
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 246-250]
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3. Role of domestic courts

National courts largely contribute to defining IHL concepts. In order to apply IHL to a particular situation, they may indeed need to interpret its relevant concepts, insofar as the latter are not sufficiently self-explanatory. As the nature of armed conflicts and the situations that the courts have to handle evolve over time, it has become increasingly necessary to clarify or adapt IHL norms and rules. The clarifications developed in national case law also serve foreign courts confronted with similar situations. Likewise, however, they may lead to undesirable interpretations spreading around the world.

Nevertheless, domestic courts can, in interpreting IHL norms, ensure that the national authorities respect IHL: they may declare government legislation or policies to be in contradiction with IHL and hence repeal them or ask that they be repealed. In many constitutional systems this presupposes that the IHL rules are first integrated into domestic legislation.

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- ⇒ Case No. 127, Israel, Ayub v. Minister of Defence
 - ⇒ Case No. 129, Israel, Al Nawar v. Minister of Defence
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 132, Israel, Cases Concerning Deportation Orders
 - ⇒ Case No. 133, Israel, Ajuri v. IDF Commander
 - ⇒ Case No. 134, Israel, Evacuation of Bodies in Jenin
 - ⇒ Case No. 135, Israel, The Rafah Case,
 - ⇒ Case No. 136, Israel, The Targeted Killings Case
 - ⇒ Case No. 137, Israel, Power Cuts in Gaza
 - ⇒ Case No. 138, Israel, Detention of Unlawful Combatants
 - ⇒ Case No. 169, South Africa, AZAPO v. Republic of South Africa
 - ⇒ Case No. 225, The Netherlands, Responsibility of International Organizations
 - ⇒ Case No. 266, United States, Habeas Corpus for Guantanamo Detainees
 - ⇒ Case No. 289, United States, Public curiosity
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4. Enquiries (spontaneously or following complaints)

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- ⇒ Document No. 86, Switzerland Acting as Protecting Power in World War II
 - ⇒ Document No. 90, United Kingdom/Germany, Sinking of the Tübingen in the Adriatic
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Para. 40]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 67-75]
 - ⇒ Case No. 150, Israel, Report of the Winograd Commission [Para. 46]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia [Paras 30-98, 168, 182]
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 140-148]
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5. Appointment of Protecting Powers

GC I-IV, Arts 8/8/8/9 respectively; P I, Art. 5

IV. SCRUTINY BY PROTECTING POWERS AND THE ICRC

1. The Protecting Power

Introductory text

Under international law, foreigners enjoy diplomatic protection by their home country. When such diplomatic protection is not possible because there are no diplomatic relations between the country of residence and the home country, the latter may appoint another State – a protecting power – to protect its interests and those of its nationals in the third State. This appointment is only valid if the three States concerned agree. IHL has taken advantage of this traditional institution of the law of diplomatic relations,^[346] it has clarified and added to it for the purpose of implementing its rules, by prescribing that IHL “shall be applied with the co-operation and under the scrutiny of the Protecting Powers”.^[347] In an armed conflict such Protecting Powers must obviously be chosen from among neutral States or other States not parties to the conflict.

The Protecting Powers are mentioned in more than 80 provisions of the Conventions and Protocol I, in connection with the following tasks: visits to protected persons, consent for certain extraordinary measures concerning protected persons, the provision of information about certain other measures, supervision of relief missions and evacuations, reception of applications by protected persons, assistance in judicial proceedings against protected persons, transmission of information, documents and relief goods, and the offering of good offices. Most of these tasks are parallel to those

³⁴⁶ Now codified in Art. 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961.

³⁴⁷ See GC I-III, common Art. 8; GC IV, Art. 9. P I, Art. 5 has developed this system.

of the ICRC. This duplication is intended, as it should lead to increased supervision of respect for IHL.

IHL obliges parties to international armed conflicts to designate Protecting Powers.^[348] However, in practice, such designation is the main problem. Basically, all three States concerned must agree with the designation. According to the Conventions, if no Protecting Powers can thus be appointed, a detaining or occupying power can ask a third State bilaterally to act as a substitute Protecting Power. If even this does not work, the offer of a humanitarian organization such as the ICRC to act as a humanitarian substitute for a Protecting Power must be accepted. Protocol I has fleshed out the appointment procedure.^[349] Nevertheless, in conformity with the cooperation-oriented approach needed for the implementation of IHL, no Protecting Power can act efficiently – and a neutral State will in any case be unwilling to act – without the consent of both belligerents.

Although Protocol I clarifies that the designation and acceptance of Protecting Powers do not affect the legal status of the parties or of any territory^[350] and that the maintenance of diplomatic relations is no obstacle to the designation of Protecting Powers,^[351] Protecting Powers have been designated in only five of the numerous armed conflicts that have broken out since World War II.^[352] Even there, they played a limited role. In an international legal order marked by the idea – or at least the ideal – of collective security, where at least one side in an armed conflict is considered (or at least labelled) an outlaw, neutrality becomes an increasingly obsolete concept and neutral States willing and likely to be designated as Protecting Powers increasingly rare.

The ICRC, for its part, has no interest in acting as a substitute Protecting Power, as it can fulfil most of the latter's functions in its own right, without giving the impression that it represents only one State and not all the victims. For one of the rare functions which IHL confers only upon the Protecting Powers and not also upon the ICRC, that of being notified of and providing assistance in judicial proceedings against protected persons, the ICRC has managed to be recognized as a *de facto* substitute when there is no Protecting Power.

⇒ Document No. 86, Switzerland Acting as Protecting Power in World War II, CD

SUGGESTED READING: COULIBALY Hamidou, “Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye”, in KALSHOVEN Frits & SANDOZ Yves (eds), *Implementation of International Humanitarian Law*, Dordrecht, M. Nijhoff, 1989, pp. 69-78. DOMINICÉ Christian & PATRNOGIC Jovica, “Les Protocoles additionnels aux Conventions de Genève et le système des puissances protectrices”, in *Annales de Droit International Médical*, No. 28, 1979, pp. 24-50. JANNER

348 See P I, Art. 5(1)

349 See P I, Art. 5(2)-(4)

350 See P I, Art. 5(5)

351 See P I, Art. 5(6)

352 The Suez Crisis pitting Egypt against France and the United Kingdom in 1956; the conflict in Bizerte between France and Tunisia in 1961; the crisis in Goa between India and Portugal in 1961; the conflict between India and Pakistan in 1971; and the Falkland/Malvinas war between the United Kingdom and Argentina in 1982.

Antonino, *La Puissance protectrice en droit international, d'après les expériences faites par la Suisse pendant la Seconde Guerre Mondiale*, Basel, Helbing und Lichtenhahn, 1948, 2nd ed., 1972, 79 pp.

FURTHER READING: FRANKLIN William McHenry, *Protection of Foreign Interests: A Study in Diplomatic and Consular Practice*, Washington, United States Government Printing Office, Department of State Publication No. 2693, 1946, 328 pp. KUSSBACH Erich, “Le Protocole Additionnel I et les États neutres”, in *IRRC*, No. 725, September 1980, pp. 82-95. WYLIE Neville, “Protecting Powers in a Changing World”, in *Politorbis, revue de politique étrangère*, No. 40, 2006, pp. 6-14.

a) the concept of Protecting Powers

P I, Art. 2(c)

b) the system for appointing Protecting Powers

P I, Art. 5(1) and (2)

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- ⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
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c) the possible substitute for the Protecting Power

GC I-IV, Arts 10/10/10/11 respectively; P I, Art. 5(3)-(7)

d) the tasks of the Protecting Power

GC III, Arts 126(1); GC IV, Arts 76 and 143

GC III, Arts 71(1) and 72(3)

GC III, Arts 65(2) and 73(3); GC IV, Arts 23(3), 55(4), 59(4) and 61; P I, Arts 11(6) and 70(3)

P I, Art. 78

GC III, Arts 78(2); GC IV, Arts 30, 52 and 102

GC III, Arts 105(2); GC IV, Arts 42, 71, 72, 74; P I, Art. 45

GC IV, Arts 39 and 98

GC I, Arts 16 and 48; GC II, Arts 19 and 49; GC III, Arts 23(3), 62(1), 63(3), 66(1), 68(1), 69, 75(1), 77(1), 120(1), 122(3) and 128; GC IV, Arts 83 and 137; P I, Arts 33, 45 and 60

GC III, Arts 56(3), 60(4), 79(4), 81(6), 96(5), 100(1), 101, 104(1) and 107(1); GC IV, Arts 35, 42, 49(4), 71, 72, 74, 75, 96, 98, 105, 108, 111, 123(5), 129 and 145

GC I-III, common Art. 11; GC IV, Art. 12

GC I, Art. 23; GC IV, Art. 14

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- ⇒ Document No. 86, Switzerland Acting as Protecting Power in World War II
 - ⇒ Document No. 90, United Kingdom/Germany, Sinking of the Tübingen in the Adriatic
 - ⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
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aa) visits to protected persons

bb) reception of applications by protected persons

⇒ Document No. 89, British Policy Towards German Shipwrecked

- cc) transmission of information and objects
- dd) assistance in judicial proceedings

⇒ Case No. 114, Malaysia, Osman v. Prosecutor
 ⇒ Case No. 168, South Africa, S. v. Petane

2. The International Committee of the Red Cross (ICRC)

(See *infra*, Part I, Chapter 15. The International Committee of the Red Cross (ICRC), p. 465)

V. THE OBLIGATION TO ENSURE RESPECT (COMMON ARTICLE 1)

Introductory text

Under Article 1 common to the Conventions and Protocol I, States undertake not only to respect (this is the principle *pacta sunt servanda*), but also to ensure respect for IHL. The International Court of Justice has recognized that this principle is part of customary international law and applies also to the law of non-international armed conflicts.^[353] Under this principle, not only is the State directly affected by a violation concerned by and entitled to take measures to stop it, all other States not only may, but must take measures.^[354] The obligations under IHL are therefore certainly obligations *erga omnes*.

The question is, however, which measures each State thus entitled and obliged may take under the law of State responsibility. The rules adopted on this question by the International Law Commission (ILC) recall that in case of a breach of an obligation owed to the whole international community, all States have the right to demand its cessation and, if necessary, guarantees of non-repetition, as well as reparation in the interest of the beneficiaries of the obligation breached.^[355] As for counter-measures by these States, the ILC estimates that their lawfulness remains “uncertain”,^[356] and it simply allows for “lawful” measures against the responsible State, without concluding when these measures are lawful.^[357] Can each State take individually all the measures it would have the right to take as an injured State in the case of a “bilateral” violation? Can we even consider, under the special rule of Art. 1 common to the Conventions,^[358] each State as injured by each violation of IHL? Or is there a need for coordination among the

353 See Case No. 153, ICJ, Nicaragua v. United States [Paras 115, 216, 255, and 256]

354 Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 158 and 159]

355 See Art. 48 of the Articles on State Responsibility and its commentary: see Case No. 53 [Part A.]

356 *Ibid*, Commentary of Art. 54

357 *Ibid*, Art. 54

358 *Ibid*, Art. 55, “*lex specialis*”

States entitled to take measures by common Art. 1? Even Art. 89 of Protocol I provides no clear answer when it stipulates that in the face of violations States have “to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter”.

Arguably, under common Art. 1, a State injured by a violation^[359] can take all measures to ensure respect afforded under general international law, so long as they are compatible with general international law (which excludes the use of force based on IHL^[360] and not excluded by IHL (such as reprisals against protected persons).^[361] Even without admitting such counter-measures, it is clear that a State can – and therefore must – react to all breaches of IHL by retaliatory measures that do not violate its international obligations. No State is obliged to receive representations from another State, to conclude treaties with it, to support a State within an international organization or to purchase weapons from it. State practice is unfortunately not rich enough to determine the upper limits of how a State may or must “ensure respect”. As for the lower threshold, it is only certain that a State violates common Art. 1 if it encourages or promotes violations by another State^[362] or dissident forces. The rules on State responsibility for internationally wrongful acts provide that a State must not recognize as legal a situation created by a grave breach of an imperative norm such as IHL, nor provide aid or assistance to maintain the situation.^[363] Although absolute indifference also clearly violates the text of the provision, unfortunately it is common practice. Considering the number of States concerned by common Art. 1, and the number of cases to which it applies, we can say that it is the most frequently violated provision of IHL.

In conclusion, common Art. 1 indicates in legal terms the moral idea formulated by the *starets* in *Dostoyevsky’s Brothers Karamazov* that “every single one of us is [...] responsible for all without exception in this world”, that we are “responsible to all men, for all and everything, for all human transgressions – both of the world at large and of individuals”;^[364] in IHL, this means that it is the shared responsibility of all States and of all human beings to grant a minimum of humanity to victims of armed conflicts.

⇒ **Document No. 29, European Union Guidelines on Promoting Compliance with International Humanitarian Law**

⇒ Document No. 39, ICRC, Protection of War Victims

⇒ Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law

⇒ **Document No. 122, ICRC Appeals on the Near East [Part C., paras 10-11]**

⇒ **Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention**

⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila

⇒ Case No. 170, ICRC, Iran/Iraq Memoranda

⇒ Case No. 185, United States, The Schlesinger Report

359 *Ibid.*, Arts 28-41

360 *Ibid.*, Art. 50(1)(a)

361 *Ibid.*, Art. 50(1)(c)

362 See Case No. 153, ICJ, Nicaragua v. United States [Paras 115, 216, 255, and 256]

363 See Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 40 and 41]

364 See DOSTOYEVSKY Fyodor, *The Brothers Karamazov*, Translated by Julius Katzer, Progress Publishers, vol. 1, 1980, p. 250

⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 246-250]

SUGGESTED READING: BOISSON DE CHAZOURNES Laurence & CONDORELLI Luigi, “Common Article 1 of the Geneva Conventions Revisited: Protecting Collective Interests”, in *IRRC*, No. 837, March 2000, pp. 67-87. CONDORELLI Luigi & BOISSON DE CHAZOURNES Laurence, “Quelques remarques à propos de l’obligation des États de ‘respecter et faire respecter’ le droit international humanitaire en toutes circonstances”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 17-35. LEVRAT Nicolas, “Les conséquences de l’engagement pris par les Hautes Parties contractantes de ‘faire respecter’ les conventions humanitaires”, in KALSHOVEN Frits & SANDOZ Yves (eds), *Implementation of International Humanitarian Law*, Dordrecht, M. Nijhoff, 1989, pp. 263-296. McCORMACK Timothy, “The Importance of Effective Multilateral Enforcement of International Humanitarian Law”, in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (eds), *Making the Voice of Humanity Heard*, Leiden/Boston, M. Nijhoff, 2004, pp. 319-338. PALWANKAR Umesh, “Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law”, in *IRRC*, No. 298, January-February 1994, pp. 9-25. SACHARIEW Kamen, “State’s Entitlement to Take Action to Enforce International Humanitarian Law”, in *IRRC*, No. 270, May-June 1989, pp. 177-195.

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1. Scope

⇒ **Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 158]**

2. Aim

3. Obligations of non-belligerents

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- ⇒ **Document No. 29, European Union Guidelines on Promoting Compliance with International Humanitarian Law**
 - ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part A.]
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 16, 40, 41, 48 and 55]
 - ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 116, 255 and 256]**
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4. Means to be employed

[CIHL, Rule 144]

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- ⇒ Document No. 29, European Union Guidelines on Promoting Compliance with International Humanitarian Law
 - ⇒ **Document No. 39, ICRC, Protection of War Victims [Para. 3.1.3]**
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 41(2), 50(1) and commentaries of Arts 50 and 54]
 - ⇒ **Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 159]**
 - ⇒ **Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part I., paras 4 and 11, Part J.]**
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia, [25]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I., B. and C. and Part III. D.]
 - ⇒ Case No. 232, Germany, Law on Cooperation with the ICTR [Para. 1.B.]
 - ⇒ Case No. 279, Germany, Government Reply on Chechnya
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SUGGESTED READING: GREEN Leslie C., “Enforcement of International Humanitarian Law and Threats to National Sovereignty”, in *Journal of Conflict and Security Law*, Vol. 8/1, April 2003, pp. 101-131. PALWANKAR Umesh, “Measures Available to States for Fulfilling their Obligation to Ensure Respect for International Humanitarian Law”, in *IRRC*, No. 298, January-February 1994, pp. 9-25.

5. Meetings of the States Parties

a) on general problems

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- ⇒ Document No. 39, ICRC, Protection of War Victims
 - ⇒ **Document No. 52, First Periodical Meeting, Chairman’s Report**
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b) on specific contexts of violations

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- ⇒ Document No. 122, ICRC Appeals on the Near East [Part C.]
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention
-

SUGGESTED READING: FUX Pierre-Yves & ZAMBELLI Mirko, “Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés : historique d’un processus multilatéral (1997-2001)”, in *IRRC*, No. 847, September 2002, pp. 661-695.

VI. ROLE OF NATIONAL RED CROSS OR RED CRESCENT SOCIETIES

Introductory text

The implementation of IHL is one of the key objectives of the International Red Cross and Red Crescent Movement. National Societies are particularly well placed to promote implementation within their own countries. The Movement’s Statutes recognize their role in cooperating with their governments to ensure respect for IHL and to protect the red cross, red crescent and red crystal emblems. National Societies’ contacts with national authorities and other interested bodies, and, in many cases, their own expertise on national and international law give them a key part to play in this field.

Action by National Societies

National Societies can take a range of measures contributing to the implementation of IHL. These include:

1. Adherence to IHL instruments

Discussing adherence to IHL treaties with national authorities.

2. National legislation

Making national authorities aware of the need for IHL implementing legislation.

Drafting national legislation and/or commenting on the national authorities’ draft legislation.

3. Protection of the emblem

Promoting legislation to protect the emblem.

Monitoring use of the emblem.

4. Dissemination of IHL

The Society's own dissemination activities.

Reminding national authorities of their obligation to spread knowledge of IHL.

Providing national authorities with advice and materials on dissemination.

5. Armed forces legal advisors and qualified personnel

Contributing to the training of advisors and personnel.

6. Medical assistance for conflict victims

In times of armed conflict, whether international or non-international, National Societies can play an important role in the implementation of IHL. As auxiliaries to the military medical services,^[365] National Societies contribute significantly to the care of the wounded and sick.

National Societies of neutral countries^[366] also play a role in this field, either when they render assistance to a party to the conflict or when they serve under the auspices of the ICRC.

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- ⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Arts 4 and 5]
 - ⇒ Document No. 35, ICRC, Model Law Concerning the Emblem [Art. 3]
 - ⇒ Case No. 69, Ivory Coast, National Interministerial Commission [Arts 3 and 4]
 - ⇒ Case No. 82, United Kingdom, Labour Party Campaign – Misuse of the Emblem
 - ⇒ Case No. 111, Cuba, Status of Captured “Guerrillas”
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 159, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
 - ⇒ Case No. 209, United Kingdom, Misuse of the Emblem
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SUGGESTED READING: MEYER Michael A., “Public Advocacy – Why the Red Cross and Red Crescent Should Look before it Leaps”, in *IRRC*, No. 315, November-December 1996, pp. 614-626. SASSÒLI Marco, “The National Information Bureau in Aid of the Victims of Armed Conflicts”, in *IRRC*, No. 256, January 1987, pp. 6-24.

VII. ROLE OF NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

SUGGESTED READING: BONARD Paul, *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, Geneva, ICRC, September 1998, 65 pp. BRETT Rachel, “Non-Governmental

³⁶⁵ See GC I, Art. 26; See also Part I, Chapter 7, Protection of the Wounded, Sick and Shipwrecked

³⁶⁶ See GC I, Art. 27

Human Rights Organizations and International Humanitarian Law”, in *IRRC*, No. 324, September 1998, pp. 531-536. RUBIO François & RYFMAN Philippe, “Les ONG, nouvelles gardiennes des Conventions de Genève ?”, in *Humanitaire : enjeux, pratiques, débats* 23, November 2009, pp. 12-59. RYFMAN Philippe, “Non-Governmental Organizations: an Indispensable Player of Humanitarian Aid”, in *IRRC*, Vol. 89, No. 865, March 2007, pp. 21-45. WEISSBRODT David & HICKS Peggy, “Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflicts”, in *IRRC*, No. 293, March-April 1993, pp. 120-138.

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1. Humanitarian assistance for conflict victims

⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict [Part A., paras 53-56]

a) rights and obligations of NGOs under IHL

⇒ Document No. 52, First Periodical Meeting, Chairman’s Report [Part II.1]

aa) impartiality of humanitarian action

bb) access to victims in need

(See *supra*, Part I, Chapter 9.IV. International Humanitarian Law and Humanitarian Assistance, p. 294)

cc) dilemmas involved

⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [10-12, 18 and 20]

⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women

b) use of the emblem by NGOs

⇒ Case No. 209, United Kingdom, Misuse of the Emblem

SUGGESTED READING: BOUVIER Antoine, “Special Aspects of the Use of the Red Cross or Red Crescent Emblem”, in *IRRC*, No. 272, September-October 1989, pp. 438-458. MEYER Michael, “Protecting the Emblems in Peacetime: The Experiences of the British Red Cross”, in *IRRC*, No. 272, September-October 1989, pp. 459-464.

2. Monitoring, reporting and mobilization of public opinion

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- ⇒ Case No. 143, Amnesty International, Breach of the Principle of Distinction
 - ⇒ Case No. 181, United States/United Kingdom, Conduct of the 2003 War in Iraq
 - ⇒ Case No. 183, Iraq, Use of Force by United States Forces in Occupied Iraq
 - ⇒ Case No. 226, Federal Republic of Yugoslavia, NATO Intervention [Part A.]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.F.1 and 2.B.]
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part I.]
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 2.A. and D.]
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki
 - ⇒ Case No. 286, The Conflict in Western Sahara [Parts A. and B.]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia
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3. Advocacy for the development of IHL

VIII. THE UNITED NATIONS

Introductory text

The primary objective of the United Nations (UN) being to prevent war, not to regulate the conduct of hostilities, IHL would appear to be of little relevance. To fulfil this objective, however, the UN Charter allows the Security Council, for instance, to authorize the use of force;^[367] in such situations IHL applies. The establishment of the *ad hoc* tribunals for the former Yugoslavia and Rwanda demonstrates that the UN Security Council in fact regards violations of IHL as breaches of or threats to international peace and security.

Under the Charter, the main aim of the UN in the face of an armed conflict should be to stop it and to resolve the underlying dispute. To do this, it has to take sides, for example against the aggressor; this seriously hampers its ability to contribute to the enforcement of IHL and, at least theoretically, to provide humanitarian assistance, as the former has to be enforced independently of any consideration of *jus ad bellum* and the latter has to be provided according to the needs of the victims and independently of the causes of the conflict.

Moreover, the UN's principal judicial organ, the International Court of Justice (ICJ), can be called on to interpret IHL. Indeed, the ICJ has dealt with some contentious or advisory cases raising IHL issues. IHL issues have been assessed in the ICJ's Advisory

Opinions on the legality of the threat or use of nuclear weapons and on the legal consequences of the construction of a wall in the occupied Palestinian Territory. The famous *Nicaragua* and *Congo v. Uganda* cases also consider questions of IHL in depth. Another example is the judgement in the *Arrest Warrant* case between the Democratic Republic of the Congo and Belgium, which considers the scope of universal jurisdiction in the prosecution of war criminals.

The Conventions do not refer to the UN.^[368] Likewise, the UN Charter makes no mention of IHL: UN purposes and principles^[369] are expressed in human rights terms.^[370] By tradition, the UN referred to IHL as “human rights in armed conflict”.^[371]

Conceptually, the UN cannot be considered a “party” to a conflict or a “Power” as understood by the Conventions.^[372] In practice, however, peacekeeping and peace-enforcement operations can be involved, with or against the will of the UN, in hostilities with the same characteristics and humanitarian problems to be solved by IHL as traditional armed conflicts. Still, many issues remain controversial: does IHL apply to such operations and, if so, what degree of intensity of hostilities triggers its applicability? When is it the law of international and when the law of non-international armed conflicts that applies? Is IHL binding on the UN or on the contributing States?

In keeping with the right to humanitarian assistance during periods of armed conflict enshrined in the Conventions,^[373] many UN organizations engaged in humanitarian work, such as UNHCR, UNICEF and WHO, try to distance themselves from the UN’s political undertaking to maintain international peace and security. These organizations are nevertheless ruled by their Member States, which are not and should not be neutral and impartial in armed conflicts.

Despite those limitations, the unique structure of the UN system provides it with the opportunity to play a significant role in implementing IHL – as codifier, executor and subject. Today, the UN Security Council, the UN General Assembly, and the UN Human Rights Council increasingly refer in detail to IHL in their discussions and resolutions. The UN Secretary-General publishes regular reports on the protection of civilians in armed conflicts and his Special Representative on Children and Armed Conflict reports on violations falling within his/her mandate.

⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.1.3]

⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict

368 But see P I, Art. 89 (concerning cooperation of States Parties with the UN); GC I-IV, Arts 64/63/143/159 respectively; P I, Art. 101; P II, Art. 27 (regarding ratification, accession, denunciation, and registration of the Conventions and Protocols)

369 UN Charter, Art. 24(2)

370 UN Charter, Arts 1(3) and 55(c)

371 UNGA Res. 2444 (XXIII) of 19 Dec. 1968

372 Certain provisions of the Conventions could literally not even apply to or be applied by the UN, e.g., GC IV, Art. 49(6) (prohibiting an occupying power to transfer “its own population” into an occupied territory), or GC I-IV, Arts 49/50/129/146 respectively and P I, Art. 85(1) (relating to the repression of grave breaches).

373 See GC IV, Art. 142; P I, Art. 81

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1. IHL applicable in situations threatening international peace and security

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- ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
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2. Violations of IHL as a threat to international peace and security

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- ⇒ **Document No. 39, ICRC, Protection of War Victims [Para. 3.1.2]**
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 160]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur
 - ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 17]
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 - ⇒ Case No. 230, UN, Statute of the ICTR [Part A.]
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- including in non-international armed conflicts

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- ⇒ Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir [Part A.]
 - ⇒ Case No. 177, UN, Security Council Resolution 688 on Northern Iraq
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. B., C.1 and Part III. D.]
 - ⇒ Case No. 231, UN, A Multinational Force to Facilitate Humanitarian Aid
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3. IHL as human rights in armed conflicts

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- ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006

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- ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part III. A.2, C.1 and D.]
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4. The activities of humanitarian organizations of the UN system

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.2]
 ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq [Part C.]
 ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. D.]
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5. UN military forces and IHL

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a) UN forces as addressees of and protected by IHL

Introductory text

Since the inception of UN peace-keeping operations, whether, when and which part of IHL applies to such operations has been a point of debate. Classic peace-keeping operations were based on the consent of the parties and were independent and impartial. As from the early 1990s, some peace-keeping operations were given the power to use force beyond self-defence, for example in defence of their mandate. Many recent peace operations have been authorized under Chapter VII of the UN Charter and have a broad mandate to use force. The applicability of IHL to such operations has therefore gained increasing importance.

The UN may be bound by IHL either because its internal law says so, because it has undertaken to be so bound, or because customary law applies equally to States and international organizations. Respect for human rights is one of the UN's purposes, and IHL can be seen as guaranteeing these rights in armed conflicts. The question is whether the rules of the UN Charter on respect for human rights are equally addressed to the organization itself. In addition, the relevant provisions in the Charter are vague. As for IHL, the UN Secretary-General's Bulletin on Observance by United Nations Forces of IHL includes and summarizes many – but not all – rules of IHL and requests that UN forces comply with them when engaged as combatants in armed conflicts.^[374] Are the missing rules (*inter alia* those on combatant status and treatment of protected persons in occupied territories) never binding on UN forces? When are UN forces engaged in an armed conflict as combatants? These two questions remain subject to controversy.

The UN is not able to become a party to IHL treaties and there are a good number of rules which could not be respected by an international organization but only by a State having a territory, laws and tribunals. When it comes to customary law, the majority view is that the UN is a subject of international law and as such is bound by the same rules as States if it engages in the same activities as States. The real question is, however, whether it is bound by precisely the same customary obligations as States. The UN long insisted that it was bound only by the "principles and spirit" of IHL. This formulation has changed over time to become the "principles and rules" of IHL, but as the UN denies that it is bound by many of the detailed rules of IHL, doubt has been expressed whether it is bound by customary IHL, which flows from the behaviour and *opinio juris* of its subjects.

Even if and insofar as the UN is not bound by IHL, those who actually act for it may be bound as individuals (by criminalized rules of IHL) or because they are organs of (contributing) States which are bound. States contributing troops are parties to IHL

374 See Case No. 57, UN, Guidelines for UN Forces

treaties, but they would certainly not like to be parties to an armed conflict and it is doubtful whether and when an operation can also be attributed to them if the UN has command and control. If the operation cannot be attributed to contributing States, under IHL they are still bound to “ensure respect” for IHL obligations.^[375] UN member States have the same obligation and are in addition responsible for activities they entrusted their organization to perform, if such delegation circumvented their own obligations in respect of those activities.^[376] If the UN authorized an operation to use force, the additional question arises whether, in what circumstances and how far the mandate given by the UN Security Council prevails, under Article 103 of the UN Charter, over the IHL obligations of member States or contributing States.

Other challenges to the applicability of IHL to peace operations relate to the mandate and purpose of such operations. Peace is certainly a noble reason for conducting hostilities. However, according to the fundamental distinction and complete separation between *jus ad bellum* and *jus in bello*, this should not matter for the applicability of IHL. Nevertheless, in debates about when IHL fully applies to UN forces, some argue that this depends on the mandate of such forces. More generally, underlying the reluctance of the UN to be bound by the full corpus of IHL rules, there is also the idea that UN forces, which represent international legality and the international community, and which enforce international law, cannot be bound by the same rules as their enemies.

Even if IHL could as such fully apply to the UN (or to contributing States in respect of the conduct of their contingents), it would only do so if and when the UN (or the respective contingent) is engaged in an armed conflict. For this, it is not sufficient for UN forces to be deployed on a territory where others are fighting an armed conflict. This raises the general issue of the material field of application of IHL. In addition, can a peace operation conducted on the territory of a State with the consent of its government be classified as a non-international armed conflict directed at an armed group fighting against that government, or does the IHL of international armed conflicts apply?

One of the main practical reasons for the reluctance of contributing and member States to recognize that IHL applies to peace forces is that they correctly perceive that if IHL (of international armed conflicts) applied to hostilities between those forces and armed forces opposed to them, both would be combatants and therefore lawful targets of attacks. Contributing States obviously hope that their forces will not be attacked. Even when recognizing the applicability of IHL, those States therefore argue that members of their forces are not combatants, but civilians.^[377]

Finally, when a territory is placed under the authority of UN forces or a UN administration, the question arises whether the rules of IHL on occupied territories apply. They certainly do not when UN forces are present with the consent of the sovereign power of the territory in question. Beyond that, it is doubtful that a UN presence, if not consented to by the territorial State, can ever be classified as military occupation.

375 See GC I-IV, common Art. 1 and P.I. See also *supra*, Part I, Chapter 13, V. The obligation to ensure respect (common Article 1)

376 See Draft Article 28 on the Responsibility of International Organizations, ILC, *Report of the International Law Commission on the Work of its 58th Session*, 1 May-9 June, 3 July-11 August 2006, UN Doc A/61/10, ch. VII

377 See *Case No. 23*, The International Criminal Court [Part A., Art. 8(2)(b)(iii) and e (iii)]

Quotation “The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it.”

[Source: A/CN.4/507/Add.2, International Law Commission, 52nd session, Geneva, 1 May-9 June, 10 July 18 August 2000, Third report on State Responsibility. Presented by M. James Crawford, Special Rapporteur, para. 267, available on <http://www.un.org>]

(See also **Quotation**, Part I, Chapter 14. I. 1. b))

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- ⇒ Case No. 22, Convention on the Safety of UN Personnel [Arts 2(2) and 20(a)]
 - ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8(2)(b)(iii) and (e)(iii)]
 - ⇒ **Case No. 57, UN, Guidelines for UN Forces**
 - ⇒ Document No. 59, UN, Review of Peace Operations
 - ⇒ Case No. 149, Israel/Lebanon/Hezbollah, Conflict in 2006 [Part I., paras 233-246, Part II., paras 12-13]
 - ⇒ Case No. 197, UN, UN Forces in Somalia
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 199, Canada, R. v. Brocklebank [Paras 62 and 90]
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- aa) the irrelevance of *jus ad bellum* (legality of the involvement of UN forces, their mandate) for the applicability of *jus in bello* (based on the facts on the ground)
- bb) which rules are binding?
 - the UN, a Party to the Geneva Conventions?
 - the “principles and spirit” of IHL
 - the UN Secretary-General’s Guidelines

- the 1994 Convention on the Safety of United Nations and Associated Personnel and its relationship with IHL
- cc) existence of an armed conflict?
 - is the conflict international or non-international?
 - the necessary threshold of violence
 - different for IHL of international and of non-international armed conflicts
 - irrelevance of the legal basis and the mandate of the international forces
- dd) who are the parties to the conflict?
- ee) are the members of the international force combatants?
- ff) the distinction between hostilities and police operations
- gg) is Convention IV binding on peace forces controlling a territory and an international civil administration?

b) UN forces as an IHL implementing mechanism

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- ⇒ Case No. 45, ICRC, Disintegration of State Structures
 - ⇒ **Document No. 59, UN, Review of Peace Operations**
 - ⇒ Case No. 197, UN, UN Forces in Somalia
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.B. and Part III.D.]
 - ⇒ Case No. 231, UN, A Multinational Force to Facilitate Humanitarian Aid
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part I.B.3]
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6. Respect for IHL and economic sanctions

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- ⇒ **Case No. 53, International Law Case, Articles on State Responsibility [Part A., para. 7 of the commentary to Art. 50]**
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
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7. The necessary distinction between conflict resolution and humanitarian action

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.1.3]
 - ⇒ Case No. 45, ICRC, Disintegration of State Structures
 - ⇒ Document No. 59, UN, Review of Peace Operations
 - ⇒ Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated [Part A.]
 - ⇒ Case No. 174, UN Security Council, Sanctions Imposed Upon Iraq
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [13 and 14]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.B.]
 - ⇒ **Case No. 231, UN, A Multinational Force to Facilitate Humanitarian Aid**
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- a) **conflict resolution must address the causes of the conflict, humanitarian action must be neutral**
- b) **the need to ensure that humanitarian action does not serve as an alibi**
 - aa) for intervention
 - bb) for non-resolution of the conflict

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IX. THE INTERNATIONAL RESPONSIBILITY OF THE STATE FOR VIOLATIONS

Introductory text

In conformity with the traditional structure of international law, violations are considered to have been committed by States and measures to stop and repress them therefore must be directed against the State responsible for the violation. Such measures can be foreseen in IHL itself, in the general international law of State responsibility, or under the UN Charter, the “constitution” of organized international society.

Before violations can be repressed, they have, of course, to be ascertained. The Conventions provide that an enquiry must be instituted into alleged violations if requested by a party to the conflict.^[378] However, the procedure has to be agreed on between the parties. Experience shows that such an agreement is difficult to reach once the alleged violation has occurred – in particular between parties fighting an armed conflict against each other. Art. 90 of Protocol I therefore constitutes an important step forward, as it establishes the International Humanitarian Fact-Finding Commission^[379] and its procedure. The Commission is competent to enquire into alleged violations of one party at the request of another party if both parties agree on its competence, either on an *ad hoc* basis or by virtue of a general declaration.^[380] The Commission has declared its readiness to act in non-international armed conflicts as well, if the parties concerned agree. In conformity with the traditional approach of IHL, the enquiry is based on an agreement between the parties, and the result will only be made public with their consent. This may be one of the reasons why no request for an enquiry has ever been brought before the Commission, although some 70 States have made a general declaration accepting its competence. States have preferred to impose enquiries through the UN system, which produces a published report, or to establish *ad hoc* commissions of enquiry, but the results have not been much more convincing.

In the event of a dispute, all means afforded by international law for the peaceful settlement of disputes are available. A conciliation procedure involving the Protecting Powers is foreseen, but needs the agreement of the parties.^[381] The Protecting Power system itself is an institutionalization of good offices. The general problem, however, is that a peaceful settlement of disputes on points of IHL between parties who prove

378 See GC I-IV, Arts 52/53/132/149 respectively

379 See Commission’s web page: <http://www.ihffc.org>

380 As of December 2010, 71 States Parties have made such a declaration comparable to the optional clause of compulsory jurisdiction under Art. 36(2) of the Statute of the International Court of Justice.

381 See GC I-III, common Art. 11; GC IV, Art. 12

by their participation in an armed conflict that they have been unable to settle their disputes in respect of *jus ad bellum* peacefully would be an astonishing occurrence and only rarely succeeds. Therefore, the use of coercive measures which can only be taken through the UN system seems more promising, but risks mixing *jus ad bellum* and *jus in bello*. Such a mix-up is natural for the UN, as its main role is to ensure respect for *jus ad bellum*, but it jeopardizes the autonomy, neutrality and impartiality required for the application of IHL.

When a violation occurs, not just the injured State, which is the direct victim, but – under common Art. 1 and the general rules on State responsibility^[382] – every State may and indeed must take measures to restore respect. Those measures must themselves conform to IHL and to the UN Charter^[383] and must be taken in cooperation with the UN as the frail embryo of a centralized international law enforcement system.^[384] Cooperation between all States, however, does not mean that no reaction to violations is possible in the absence of a consensus.

In keeping with the rules of the law of State responsibility, IHL recalls the general obligation to pay compensation.^[385] According to a majority of writers and court decisions, this implies, in conformity with the traditional structure of international law, that the State responsible for the violation has to compensate the State injured by the violation; it does not confer a right to compensation on the individual victims of violations. This traditional implementation structure is at variance with internal armed conflicts, as in such cases victims of violations are often nationals of the State concerned. Thus, for a growing number of violations, International Human Rights Law requires that the State make reparation directly to the beneficiary of the rule.

For the rest, IHL prescribes some changes to the general rules on State responsibility (or makes clear that certain of its exceptions apply in this branch). It holds the State strictly responsible for all acts committed by members of its armed forces;^[386] it prohibits reprisals against protected persons and goods and the civilian population,^[387] reciprocity in the application of IHL treaties being excluded by the general rules; and it makes clear that, as the rules of IHL are mostly *jus cogens*, States may not agree to waive the rights of protected persons^[388] nor may the latter renounce their rights.^[389] Finally, as IHL is intended for application in armed conflicts, which are by definition emergency situations, and as many armed conflicts are fought in self-defence, while the same IHL must apply to both sides, necessity (except where explicitly stated otherwise in some of its rules^[390]) and self-defence are not circumstances precluding the wrongfulness of IHL violations.^[391]

382 See *supra* for nuances, Part I, Chapter 13. V. The Obligation to Ensure Respect (Common Article I, with references to the Articles on State Responsibility, adopted by the International Law Commission, see Case No. 53, International Law Commission, Articles on State Responsibility)

383 See notes 360 and 361 above

384 See P I, Art. 89, which is analogous to Art. 56 of the UN Charter

385 See Hague Convention IV, Art. 3; P I, Art. 91

386 See Hague Convention IV, Art. 3; P I, Art. 91

387 See GC I-IV, Arts 46/47/13(3)/33(3) respectively; P I, Arts 20, 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)

388 See GC I-III, Art. 6; GC IV, Art. 7

389 See GC I-III, Art. 7; GC IV, Art. 8

390 See, e.g., GC I, Art. 33(2); GC IV, Arts 49(2) and (5), 53, 55(3), and 108(2); P I, Art. 54(5)

391 See Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 21, 26 and para. 3 of the commentary of Art. 21; Art. 25(2)(a) and para. 19 of the commentary of Art. 25]

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 4]
 - ⇒ Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
 - ⇒ Case No. 225, The Netherlands, Responsibility of International Organizations
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III., paras 7, 29-60]
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1. Assessment of violations

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- ⇒ Case No. 171, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
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a) enquiry procedures

GC I-IV, Arts 52/53/132/149 respectively; P I, 90(2)(e)

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- ⇒ Case No. 124, Israel/Gaza, Operation Cast Lead [Part II.]
 - ⇒ Case No. 136, Israel, The Targeted Killings Case [Para. 40]
 - ⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 67-70]
 - ⇒ Case No. 150, Israel, Report of the Winograd Commission [Para. 46]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [25]
 - ⇒ Case No. 259, UN, Request for an Investigation on War Crimes
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 140-142]
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b) the International Humanitarian Fact-Finding Commission

(See <http://www.ihffc.org>)

P I, Art. 90

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- ⇒ Document No. 33, ICRC, The International Humanitarian Fact-Finding Commission
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part D.II.3]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [7]
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a) cooperation among the States Parties

P I, Art. 89

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 41(1), 48 and 54]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [17]
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b) compensation

Hague Convention IV, Art. 3; P I, Art. 91 [CIHL, Rule 150]

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 4.3]
 - ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 28-33]
 - ⇒ Document No. 58, UN, Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 152]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 67-78]
 - ⇒ **Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 593-600]**
 - ⇒ Case No. 180, UN Compensation Commission, Recommendations
 - ⇒ **Case No. 222, United States, Kadic et al. v. Karadzic**
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 271, India, People's Union for Civil Liberties v. Union of India
 - ⇒ Case No. 291, Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 143-148]
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c) applicability of the general rules on State responsibility

[CIHL, Rule 149]

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- ⇒ **Case No. 53, International Law Commission, Articles on State Responsibility**
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 149-153]
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A., Art. 14(1)]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., paras 98-162; Part D.]**
 - ⇒ Case No. 225, The Netherlands, Responsibility of International Organizations
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 213-214, 243, 245-250]
 - ⇒ Case No. 290, Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 76-78]
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aa) but strict responsibility for armed forces

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- ⇒ **Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 7 and commentary; and Part B.]**
 - ⇒ Case No. 229, Democratic Republic of the Congo, Conflict in the Kivus [Part III., paras 7, 29-60]
 - ⇒ Case No. 270, India, Press release, Violence in Kashmir
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bb) but necessity is not a circumstance precluding wrongfulness

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 25(2)(a), 26 and commentary of Art. 25]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)]
 - ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
 - ⇒ **Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfried Krupp et al. [Section 4. (iii)]**
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 140]
 - ⇒ **Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees**
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., paras 280 and 295]
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cc) but self-defence is not a circumstance precluding wrongfulness

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 21, 26 and para. 3 of the commentary of Art. 21]
 - ⇒ Document No. 73, France, Accession to Protocol I [Part B., para. 11]
 - ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 138-139]
 - ⇒ Case No. 212, ICTY, The Prosecutor v. Martić [Part C., para. 268]
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 511-520]**
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dd) but no reciprocity

[CIHL, Rule 140]

Quotation

Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

[...]

2. A material breach of a multilateral treaty by one of the parties entitles:
 - a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State; or
 - (ii) as between all the parties;
 - b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
 - c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.
3. A material breach of a treaty, for the purposes of this article, consists in:
 - a) a repudiation of the treaty not sanctioned by the present Convention; or
 - b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

[...]

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular to provisions prohibiting any form of reprisals against persons protected by such treaties.

[Source: *Vienna Convention on the Law of Treaties*, U.K.T.S. 58 (1980), Cmnd. 7964]

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 49-51]
 - ⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case
 - ⇒ Document No. 122, ICRC Appeals on the Near East [Part B.]
 - ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part B., paras 148-163]
 - ⇒ Case No. 212, ICTY, Prosecutor v. Martić [Part A., para. 9]
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 517-520]**
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 9]
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ee) admissibility of reprisals

[CIHL, Rules 145-147]

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Arts 49, 50 and 51 and para. 8 of the commentary of Art. 50]
 - ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part C.]
 - ⇒ Document No. 79, Switzerland, Prohibition of the Use of Chemical Weapons [Para. 2]
 - ⇒ **Case No. 212, ICTY, The Prosecutor v. Martić [Part B., paras 464-468]**
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 517-520]**
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- no reprisals against protected persons

GC IV, Arts 46/47/13(3)/33(3) respectively; P I, Art. 20 [CIHL, Rules 146 and 147]

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- ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 4(7)]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)]
 - ⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part C.]
 - ⇒ Case No. 77, United States, President Rejects Protocol I
 - ⇒ Document No. 88, Germany/United Kingdom, Shackling of Prisoners of War
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
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- no reprisals against the civilian population

(See *supra*, Part I, Chapter 9. II. 6. d) attacks against the civilian population (or civilian objects) by way of reprisals)
 P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)

- conditions for reprisals where they are admissible:

[CIHL, Rule 145]

⇒ Case No. 74, United Kingdom and Australia, Applicability of Protocol I [Part C.]

⇒ **Case No. 212, ICTY, The Prosecutor v. Martić [Part B., paras 464-468]**

- aimed at compelling the enemy to cease violations
- necessity – proportionality
- preceded by a formal warning
- decided at the highest level

ff) IHL obligations are *erga omnes* obligations

⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 155-157]

X. VIOLATIONS BY INDIVIDUALS

Introductory text

Under its traditional structure, international law prescribes certain rules of behaviour for States, and it is up to every State to decide on practical measures or penal or administrative legislation to ensure that individuals whose conduct is attributable to it, or under some primary rules even all individuals under its jurisdiction, comply with those rules – indeed, ultimately only human beings can violate or respect rules. There is, however, the growing branch of international criminal law, which consists of rules of international law specifically criminalizing certain individual behaviour and obliging States to criminally repress such behaviour. IHL was one of the first branches of international law to contain rules of international criminal law.

IHL obliges States to suppress all its violations. Certain violations, called war crimes, are criminalized by IHL. The concept of war crimes includes – but is not limited to – the violations listed and defined in the Conventions and Protocol I as grave breaches.^[392] IHL requires States to enact legislation to punish such grave breaches, to search for persons who have allegedly committed such crimes, and to bring them before their own courts or to extradite them to another State for prosecution.^[393] IHL moreover contains provisions on the legal qualification of an individual's failure to act and on group criminality, such as the responsibility of commanders.^[394] While normally a State has criminal jurisdiction only over acts committed on its territory or by its nationals, IHL confers universal jurisdiction over grave breaches on all States. Moreover, it not

392 See GC I-IV, Arts 50/51/130/147 respectively; P I, Arts 11(4), 85 and 86

393 See GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1)

394 See P I, Arts 86 and 87

only permits, it even requires all States to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was committed. For this reason, too, national legislation is necessary.

Unfortunately, a number of States have not adopted the necessary legislation and many belligerents allow – or even order – their subordinates to violate IHL, with complete impunity. The efforts to set up international criminal courts are therefore understandable. As we will see, they have met with success.

According to the text of the Conventions and of the Protocols, the concept of grave breaches does not apply in non-international armed conflicts. There is, however, a growing tendency in international instruments,^[395] judicial decisions,^[396] and doctrine to count serious violations of the IHL of non-international armed conflicts under the broader concept of war crimes, to which a regime would apply under customary international law that is similar to that applicable under the Conventions and Protocol I to grave breaches.

The regular prosecution of war crimes would have an important preventive effect, deterring violations and making it clear even to those who think in categories of national law that IHL is law. It would also have a stigmatizing effect, and would individualize guilt and repression, thus avoiding the vicious circle of collective responsibility and of atrocities and counter-atrocities against innocent people. Criminal prosecution places responsibility and punishment at the level of the individual. It shows that the abominable crimes of the twentieth century were not committed by nations but by individuals. By contrast, as long as the responsibility was attributed to States and nations, each violation carried within it the seed of the next war. That is the civilizing and peace-seeking mission of international criminal law favouring the implementation of IHL.

The spectacular rise of international criminal law in recent years, which has been given substance by the establishment of international criminal courts in particular, constitutes an invaluable contribution to the credibility of IHL and to its effective implementation. It would be wrong and dangerous, however, to see IHL solely from the perspective of criminal law. IHL must be applied above all during conflicts – by the belligerents, third States and humanitarian organizations – to protect the victims. As is the case for national law, *ex post* criminal prosecution of violations is crucial to implementation but is also an admission of failure. It should not discourage the fundamental work of endeavouring to prevent violations and protect the victims by means other than criminal law. As for national law, action under criminal law can be only one of the ways of upholding the social order and common interest. The increasing focus of public opinion on criminal prosecution of violations of IHL may also have reinforced the reluctance of States and their military to use existing mechanisms for fact-finding, such as the International Humanitarian Fact-Finding Commission. Although the ICRC stresses that it will not provide information for the purpose of prosecuting perpetrators and has obtained the corresponding immunities, States and

395 See, e.g., Case No. 210, UN, Statute of the ICTY; Art. 3 as interpreted by the Tribunal in Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A.]; and see also Case No. 230, UN, Statute of the ICTR [Art. 4], and Case No. 23, The International Criminal Court [Part A., Art. 8(2)(c) and (e)]

396 See *infra*, cases referred to under Part I, Chapter 13. XI. 6. Repression of individual breaches of IHL, in particular Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A.]

armed groups may also have become more reluctant to give the ICRC access to victims of IHL violations in places of detention and in conflict areas. Certain proposals to develop new mechanisms for the implementation of IHL or to clarify vague concepts of IHL may also meet resistance in military circles because they could facilitate criminal prosecution, although this is not their aim.

An exclusive focus on criminal prosecution may also give the impression that all behaviour in armed conflict is either a war crime or lawful. That impression heightens feelings of frustration and cynicism about IHL and its effectiveness, which in turn facilitate violations. More importantly, that impression is simply wrong. Indeed, an attack directed at a legitimate military objective that is not expected to cause excessive incidental harm to civilians is not a war crime, even if many civilians die. Except in cases of recklessness, targeting errors are not war crimes. For the protection of the civilian population, it is nevertheless crucial for all those launching attacks to take all feasible measures to minimize incidental civilian harm or mistakes, for instance by verifying targets, selecting tactics, timing and ammunition, and giving the civilian population an effective warning, although a violation of that obligation is not a war crime. Similarly, it is crucial for war victims that occupying powers do not legislate as if they were at home, that the ICRC be given access to protected persons, that detainees be allowed to exchange family news, that families separated by frontlines be allowed to reunite, that (former) parties to a conflict cooperate to clarify the fate of missing persons, that mortal remains be if possible identified, that humanitarian organizations be given access to persons in need, that children be provided with appropriate education and that civilians, both in occupied and on enemy territory, have the opportunity to find employment. All the aforementioned is prescribed by IHL, but violations of such prescriptions are not war crimes.

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 4]
 - ⇒ Case No. 95, United States Military Tribunal at Nuremberg, The Ministries Case
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 199, Canada, R. v. Brocklebank
 - ⇒ Case No. 200, Canada, R. v. Boland
 - ⇒ Case No. 201, Canada, R. v. Seward
 - ⇒ Case No. 222, United States, Kadic *et al.* v. Karadzic
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case
 - ⇒ Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium
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PUF, 2001, 2nd ed., 425 pp. KITTICHAISAREE Kriangsak, *International Criminal Law*, Oxford, OUP, 2001, 482 pp. LA ROSA Anne-Marie, *Dictionnaire de droit international pénal*, Paris, PUF, 1998. SADAT Leila Nadya & SCHARF Michael P. (eds), *The Theory and Practice of International Criminal Law: Essays in Honour of M. Cherif Bassiouni*, Leiden, M. Nijhoff, 2008, 448 pp. SLYE Ronald C. & VAN SPAACK Beth, *International Criminal Law*, New York, Aspen Publishers, 2009, 354 pp.

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1. Definition of crimes

a) the concept of grave breaches of IHL and the concept of war crimes

GC I-IV, Arts 50 /51/130/147 respectively; PI, Arts 11(4), 85 and 86 [CIHL, Rule 151 and 156]

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 8]
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 8-12]
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Section 4]
 - ⇒ Case No. 67, Ghana, National Legislation Concerning the Emblem
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfred Krupp *et al.*
 - ⇒ Case No. 104, Netherlands, *In re Pilz*
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 49, 68 and 75]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [17, 27 and 32]
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part B. and Part C., Arts 2 and 3]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 79-84]**
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., para. 8]
 - ⇒ **Case No. 216, ICTY, The Prosecutor v. Blaskic [Part A., paras 151-158]**
 - ⇒ Case No. 244, Colombia, Constitutionality of IHL Implementing Legislation
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ Case No. 270, India, Press Release, Violence in Kashmir
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b) the extension of the concept of grave breaches to non-international armed conflicts?

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- ⇒ Case No. 23, The International Criminal Court [Part A.]
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 8-12]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(c)]
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 108, Hungary, War Crimes Resolution [Part V.4.(b)]
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [32]
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 79-83]
 - ⇒ Case No. 239, France, Dupaquier, *et al.* v. Munyeshyaka
 - ⇒ Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women [Part B., para. 12]
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c) the repression of violations of IHL which are not grave breaches

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- ⇒ Case No. 63, Switzerland, Military Penal Code
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 8-12]
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Section 4(4)]
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part B. and Part C., Art. 3]
 - ⇒ **Case No. 216, ICTY, The Prosecutor v. Blaskic [Part A., paras 179-187]**
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galic [Part A., paras 16-31]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.F]
 - ⇒ Case No. 230, UN, Statute of the ICTR [Part A., Art. 4]
 - ⇒ Case No. 240, Switzerland, X. v. Federal Office of Police
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part A., consid. 3. B., III., ch. 1. B.]
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 265, United States, Military Commissions
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d) crimes against humanity

Introductory text

Compared with war crimes or common crimes, the specific feature of crimes against humanity is that they are committed systematically, in accordance with an agreed plan, by a State or an organized group. Perpetrators of crimes against humanity are aware that the acts they are committing are part of a general policy of attacking a civilian population. They are therefore particularly serious crimes, especially because they can claim a large number of victims.

The concept of crimes against humanity evolved over the course of the twentieth century. The Charter of the International Military Tribunal of 8 August 1945 enabled punishment of those who had committed particularly odious crimes during the Second World War, which it defined as “crimes against humanity”.

The concept of crimes against humanity was subsequently recognized as forming part of customary law and being universally applicable. Moreover, it is no longer necessarily associated with the existence of an armed conflict.^[397] Finally, the concept

397 See, in particular, Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., para. 249]

of crimes against humanity has also developed in terms of the acts which it makes criminal offences by including, in particular, apartheid^[398] and sexual violence.^[399]

The legal definition of crimes against humanity, as they are understood today, can be found in the ICC Statute. A crime against humanity is one of the acts listed below when committed “as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”:^[400] murder; extermination; enslavement; deportation; persecution on political, racial, national, ethnic, cultural, religious, gender or other grounds; apartheid; arbitrary imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence; enforced disappearance of persons; or other inhumane acts intentionally causing great suffering or serious injury to the body or to mental or physical health. Genocide, for its part, may be understood as a particularly serious crime against humanity (*see infra*, e) genocide, p. 403).

This definition allows us to understand the particular nature of crimes against humanity as opposed to war crimes: they may be committed at any time and target the civilian population, regardless of nationality or bonds of allegiance. The *mens rea* also contributes to the specific nature of those crimes: the perpetrator of the crime must be aware that it is linked to a widespread or systematic attack directed against the civilian population.

This is not the place to review all of the above-mentioned acts, which are defined in the ICC Statute. However, the crime of persecution deserves particular attention to the extent that it is, by definition, relatively close to the crime of genocide. Indeed, it is the only crime against humanity that requires a specifically discriminatory intention. As a crime against humanity, persecution must be committed “on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court”.^[401] It differs from genocide in that the latter requires an intention to eliminate the group and that group can only be racial, national, ethnic or religious.

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- ⇒ Case No. 64, Germany, International Criminal Code [Para. 7]
 - ⇒ Case No. 108, Hungary, War Crimes Resolution
 - ⇒ Case No. 109, ECHR, Korbely v. Hungary
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [30]
 - ⇒ **Case No. 215, ICTY, The Prosecutor v. Kupreskic et al. [Paras 567-636]**
 - ⇒ **Case No. 216, ICTY, The Prosecutor v. Blaskic [Part A., paras 66-72 and Part B., paras 94-128]**
 - ⇒ Case No. 217, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic
 - ⇒ Case No. 235, ICTR, The Media Case
 - ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 2]
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398 See International Convention on the Suppression and Punishment of Apartheid, 30 November 1973, Article 1; available at untreaty.un.org

399 See Article 7(1)(g) of the Statute of the International Criminal Court (ICC), *see Case No. 23, The International Criminal Court [Part A.]*

400 See Article 7(1) of the ICC Statute, *see Case No. 23, The International Criminal Court [Part A.]*

401 See Article 7(1)(h) of the ICC Statute, *see Case No. 23, The International Criminal Court [Part A.]*

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e) genocide

Introductory text

Coined by Raphaël Lemkin in the early 1940s, the term “genocide” is derived from the word *genos*, meaning “race” in Greek, and the Latin verb *caedere*, meaning “to kill”.

In the face of the barbarity of the first half of the twentieth century, a neologism was needed to describe situations in which one group of individuals decides to annihilate another.

For a legal definition of genocide, the best source is the Convention on the Prevention and Punishment of the Crime of Genocide,^[402] which entered into force in 1951 and is today part of customary international law. The definition given in Arts II and III of the Convention is repeated verbatim in the statutes of the international criminal tribunals.^[403] The explanations given below are broadly based on the case law of those courts.

The fact that international law was once again “one war late” may be lamented. However, can it be blamed for failing to foresee what remains the “ultimate crime”, the “gravest violation of human rights that it is possible to commit”?^[404]

By virtue of its scale, the crime of genocide goes beyond the strict framework of IHL, and it is not actually essential that an armed conflict exist for an act of genocide to be committed. It is nonetheless important to define genocide in a work such as this since most such acts are committed in conflict situations.

The definition of genocide includes a list of acts, i.e. “killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group”. However, committing one of these acts is not enough for it to be deemed genocide.

The specific nature of the crime of genocide lies in the specific intention (*dolus specialis*) underlying its perpetration. The acts committed may, in fact, be “straightforward” killings, acts of torture, rape or crimes against humanity, for example, but their distinctive feature is that the specific intention of the perpetrators is not to kill or ill-treat one or more individuals but to annihilate the group to which those individuals belong. It is thus that intention which distinguishes genocide from murder and crimes against humanity.

The specific character of the crime of genocide does not therefore lie in the nature of the act itself but in the thinking (*mens rea*) behind its perpetration. That thinking is the “intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such”. The different elements that go together to make up this definition deserve to be clarified in greater depth.

The intention cannot be easily identified. It may be deduced from the words or the general behaviour of the perpetrator (for example, insults directed at a particular group), the systematic and methodical manner in which the crimes were committed, the fact that the choice of victims excluded members of other groups, the premeditated nature of the crimes, etc. Thus, when killing someone (for example), the person

402 The text of the Convention is available on untreaty.un.org

403 See Case No. 210, UN, Statute of the ICTY [Part C., Art. 4], and Case No. 230, UN, Statute of the ICTR [Art. 2]. See also Case No. 23, The International Criminal Court [Part A., Arts 6 and 25]

404 United Nations, E/CN.4/Sub.2/1985/6, 2 July 1985, paragraph 14: “Revised and updated version of the Study on the question of the prevention and repression of the crime of genocide”, generally referred to as the “Whitaker Report”.

committing genocide does not desire the death of that individual in particular but rather the destruction of the group “as such” to which that person belongs.

Moreover, the perpetrator’s intention does not necessarily have to be to destroy the whole of the group – the intention to destroy it “in part” is sufficient for the act to be called genocide. Here again, it is not easy to determine what is meant by “intent to destroy in part”. As things stand with regard to case-law interpretations of the definition of genocide, the intent to destroy must be aimed at a substantial part of the targeted group, at a significant part of the group in terms of quantity or quality. It follows that the expression “in part” also implies that genocide may be carried out within a defined geographical area such as a city.

Finally, how the “group” targeted by those committing genocide is determined is also an essential element of the definition. In the current state of customary international law, the categories referred to in the definition must be considered to be exhaustive. Political, economic or other groups of people that may be considered to be “distinct” from the rest of the population cannot be the target of genocide from a legal viewpoint. This is because groups that are not “national, racial, ethnical or religious” are considered to be “unstable” or “fluctuating”. It is true that the composition of the groups referred to in the definition of genocide is not easily determined in every case and that adherence to a political or economic group is probably even more difficult to establish.

Objective and subjective criteria may be used to identify the four groups targeted in the definition. For example, adherence to a religious group may be ascertained through objective factors such as the holding of services. Membership of other groups can mostly be ascertained in a more subjective manner, by virtue of the stigmatization of those groups by “others”, in particular those committing genocide.

It is important to stress that certain types of conduct related to the direct perpetration of acts of genocide are also deemed to be criminal. These are: conspiracy to commit genocide; direct and public incitement to commit genocide; attempted genocide; and complicity in genocide. Thus, for example, an individual may be sentenced for “conspiracy to commit genocide” or for “direct and public incitement to commit genocide” even if no act of genocide has been committed by himself or others. These are distinctive crimes which do not require the incitement or conspiracy to be followed by an actual effect. The implication of these acts is that it is the specific intention of those involved in the incitement or the conspiracy to destroy in whole or in part a group as such. By contrast, complicity in genocide – which may be characterized by giving instructions or by providing the means, aid or assistance to commit genocide – may not be deemed criminal unless the main crime has been committed. The accomplice did not necessarily have to have been motivated by the specific intent to commit genocide. He had to be – or should have been – aware of it.

Those reading these lines will probably be shocked to note the extent to which, coldly and mechanically, the law manages to apply concepts and definitions that may appear to have little to do with the atrocity of genocide itself. This had to be done, however, to achieve the objectives targeted by the Convention on Genocide, i.e. to prevent the

crime and universally repress instances of it without making any concessions. The Convention, which is recognized as having customary force^[405] and whose obligations are *erga omnes* in nature, requires all States to punish the crime of genocide. It is indeed essential for the law to be an uncompromising – fair and differentiated – instrument for repressing ordinary crimes, war crimes, crimes against humanity and the crime of genocide. The seriousness of the crime of genocide is such that a precise definition and universal repression were required. That is why the legal concept takes the liberty of putting into words what nonetheless remains absolutely unspeakable.

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- ⇒ Case No. 64, Germany, International Criminal Code [Para. 7]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 640-642]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I. A]
 - ⇒ **Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part A., paras 492-523]**
 - ⇒ **Case No. 235, ICTR, The Media Case**
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B.III.B]
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405 See, in particular, Case No. 234, ICTY, The Prosecutor v. Jean-Paul Akayesu [Part A., para. 495]

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2. Participation in war crimes

a) participation, complicity and instigation

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 25]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(e) and (f)]
 - ⇒ Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Para. 4]
 - ⇒ **Case No. 155, Canada, Ramirez v. Canada [Para. 16]**
 - ⇒ **Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 538-551]**
 - ⇒ **Case No. 195, Canada, Sivakumar v. Canada**
 - ⇒ Case No. 199, Canada, R. v. Brocklebank [Paras 5, 8-10, 52, 53 and 56]

- ⇒ Case No. 200, Canada, R. v. Boland
 - ⇒ Case No. 201, Canada, R. v. Seward
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part C., Art. 7]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part C., paras 178-233]**
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galic [Part A., paras 168-169 and 609-749]
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., paras 334-346; Part C., 297-308]
 - ⇒ Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part B., para. 49]
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case
 - ⇒ Case No. 263, United States, Hamdan v. Rumsfeld
 - ⇒ Case No. 265, United States, Military Commissions
 - ⇒ **Case No. 277, Sierra Leone, Special Court Ruling in the AFRC Case [Part I., paras 57-70; Part II., paras 70-84]**
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b) command responsibility

P I, Arts 86(2) and 87(3) [CIHL, Rules 152 and 153]

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 28]
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 4 and 13]
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Section 5]
 - ⇒ Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Paras 3(x) and 4]
 - ⇒ **Document No. 98, The Tokyo War Crimes Trial**
 - ⇒ **Case No. 102, United States, In re Yamashita**
 - ⇒ Case No. 195, Canada, Sivakumar v. Canada
 - ⇒ Case No. 200, Canada, R. v. Boland
 - ⇒ Case No. 201, Canada, R. v. Seward

- ⇒ Case No. 210, UN, Statute of the ICTY [Part C., Art. 7]
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajic [Part A., paras 58-61]
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galic [Part A., paras 173-177 and 609-649]
 - ⇒ **Case No. 219, ICTY, The Prosecutor v. Strugar [Part B., paras 361-444; Part C., 297-308]**
 - ⇒ **Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 655-673; Part B., paras 55-103]**
 - ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu [Part B.]
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part B., II., ch. 5]
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3. Defences

Introductory text

International criminal law, as it has developed to date, allows an individual accused of a crime to draw on every legal and *de facto* means available to present a full and complete defence. However, as international criminal justice has evolved, certain defences have sometimes been completely ruled out and sometimes simply restricted.

For example, contrary to what is applied at the national level in most States, justifying an act on the grounds that it was prescribed by the law of the land is something that has no application in international criminal law. And it should be recalled that the Nuremberg Tribunal deemed criminal the programme of euthanasia legally established under the Nazi regime in the *Nacht und Nebel* decree. Nor does the official position of the accused – even if he acted as head of State or government – relieve him of responsibility or constitute grounds for reducing the punishment.^[406] By the same token, international criminal law holds that the fact that a crime has been committed by a subordinate does not exonerate his superiors if they knew or had reason to know that the subordinate was committing or was going to commit a crime and did not try to prevent him from doing so. This rule was not set out in the Charter of the Nuremberg Tribunal. However, it was subsequently reflected in various post-World War II decisions.^[407] We should note that a commander incurs criminal responsibility for failing to act only if there is actually a legal obligation to act. The duty of commanders vis-à-vis their subordinates is stipulated in Art. 87 of Protocol I, whereas Art. 86 stipulates the criminal responsibility of commanders who have failed to fulfil their duty.^[408]

406 Agreement for the prosecution and punishment of the major war criminals of the European Axis, Article 7, available at <http://www.icrc.org/ihl>; Charter of the International Military Tribunal for the Far East, reproduced at <http://avalon.law.yale.edu>; Statute of the ICTY [Case No. 210, UN, Statute of the ICTY, p. 1742], Art. 7(2); Statute of the ICTR [Case No. 230, UN, Statute of the ICTR, p. 2104], Art. 6(2); ICC Statute [Case No. 23, The International Criminal Court [Part A.]], Art. 27

407 See, in particular, Case No. 102, United States, *In re Yamashita*; Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List; Document No. 98, The Tokyo War Crimes Trial

408 See also ICTY Statute, Art. 7; ICTR Statute, Art. 6; ICC Statute, Art. 28, referred to *supra*, note 406

The acceptability of a defence based on superior orders seems less clear. This defence consists of arguing that the accused was obeying orders issued by a government or a superior. Historically, some have considered it a valid defence while others have considered it to be a mitigating circumstance, or both. The Charter of the Nuremberg Tribunal explicitly ruled it out as a valid defence but allowed it to be a mitigating circumstance.^[409] However, the Nuremberg Tribunal refused to enforce that rule and to take account of superior orders when deciding the sentence. More recently, the decisions regarding Eichmann^[410] and Barbie^[411] confirmed the rule. Until quite recently, the fact that orders were given by a hierarchical superior was therefore systematically ruled out as a defence. This was demonstrated by the *Allied Control Council Law No. 10* (Art. II.4[b]), the *Statute of the International Military Tribunal in Tokyo* (Art. 6), the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Art. 2[3]), the various versions of the *Draft Code of Crimes against Peace and the Security of Humanity* (Art. 5) and, more recently, the *Statutes of the International Criminal Tribunal for Rwanda* (ICTR, Art. 6(3)) and the *International Criminal Tribunal for the former Yugoslavia* (ICTY, Art. 7(4)). The adoption of the *Statute of the International Criminal Court* (ICC) has perhaps changed matters. The Statute allows a defendant to cite superior orders in his defence on three conditions: that the subordinate was under a legal obligation to obey the order, that he did not know that the order was unlawful and that the order was not obviously unlawful.^[412] *A priori* that restriction suggests that a defence of this kind will not easily pass the acceptability test. What is more, the ICC Statute limits the presentation of such a defence all the more since an order to commit genocide or a crime against humanity is obviously unlawful.^[413]

The ICC Statute allows other defences: mental defect, illness,^[414] a state of intoxication depriving the person of the ability to appreciate the criminal nature of his conduct,^[415] a state of distress,^[416] and irresistible duress.^[417]

A defence based on duress has frequently been associated with a defence citing superior orders. However, a defence based on duress has its own definition and consequently an independent application. In fact, the difference is to be found in particular at the level of whether or not a moral choice was available. A soldier who is ordered to set off a bomb in a hospital is not morally obliged to carry out the order and can decide whether to follow it or not. By contrast, if the soldier in question carries out the order to avoid being exposed to a direct threat to his life or other serious consequences, this is a case of duress. Although the ICTY decided by three votes to two that the duress-based defence was not grounds for exoneration in the case of

409 See Charter of the Nuremberg Tribunal, Art. 8 (available at <http://www.icrc.org/ihl>)

410 A.G. Israel v. Eichmann, in *ILR*, Vol. 36, 1968, p. 18

411 Barbie, 8 July 1983, *Journal du Droit International*, 1983, p. 791; that decision was confirmed by the Court of Appeal: Barbie, 6 October 1983, in *RGDIP*, 1984, p. 507

412 See Art. 33(1), *Case No. 23*, The International Criminal Court [Part A.]

413 See Art. 33(2), *Case No. 23*, The International Criminal Court [Part A.]

414 See Art. 31(1) (a), *Case No. 23*, The International Criminal Court [Part A.]

415 See Art. 31(1)(b), *Case No. 23*, The International Criminal Court [Part A.]

416 See Art. 31(1)(c), *Case No. 23*, The International Criminal Court [Part A.]. See also "Atelier sur l'article 31, par. 1c) du Statut de la Cour pénale internationale, coordonné par Éric David", in *RBDI*, 2000-02, pp. 335-488

417 See Art. 31(1)(d), *Case No. 23*, The International Criminal Court [Part A.],

crimes against humanity or war crimes,^[418] the ICC Statute stipulates that duress may justify relieving the individual of criminal responsibility.^[419] Thus, when the actual will of an individual is worn down or destroyed completely by a situation, this will be deemed a case of irresistible duress and thus grounds for lifting criminal responsibility.

Finally, it should be pointed out that the ICC Statute places self-defence among the valid grounds for release from criminal responsibility. That defence must obviously meet certain criteria: the person must have used force with the intention of defending himself or of defending another person against an imminent and unlawful use of force and that defending force must be proportionate to the degree of danger. As regards war crimes, the Statute indicates that this applies to defending not only persons but also items essential to survival or to the accomplishment of a military mission. The provision fortunately stipulates that, to use this defence, it is not sufficient for an operation to be carried out as self-defence in the sense of *jus ad bellum*. Even given this restriction, it is difficult to imagine the circumstances in which that defence could actually be advanced to justify a war crime (and even less how it could justify genocide or a crime against humanity). Indeed, using force against a person who illegally resorts to force is not even prohibited under IHL. If the person is a civilian, he or she will cease to enjoy protection against attacks,^[420] and if the person is a combatant violating IHL, even a civilian can resist that person in order to defend himself without it being deemed to constitute unlawful involvement in hostilities. In neither case is the act prohibited by IHL, and there is thus no need to invoke self-defence to justify it.

⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Sections 11-14]

⇒ Case No. 215, ICTY, The Prosecutor v. Kupreskic *et al.* [Paras 511-520]

SUGGESTED READING: ESER Albin, “Defences in War Crimes”, in *IYHR*, Vol. 24, 1994, pp. 201-234. GALAND Renaud & DELOOZ François, “L’article 31, par. 1 c) du Statut de la Cour pénale internationale : une remise en cause des acquis du droit international humanitaire ?”, in *IRRC*, No. 842, June 2001, pp. 533-538. KNOOPS Geert-Jan, *Defenses in Contemporary International Law*, Ardsley NY, Transnational Publishers, 2001, 287 pp. ROWE Peter, “Duress as a Defence to War Crimes after Erdemovic: A Laboratory for a Permanent Court?”, in *YIHL*, Vol. 1, 1998, pp. 210-228. SHAHABUDEEN Mohamed, “Duress in International Humanitarian Law”, in ARMAS BAREA Calixto A. (ed.), *Liber amicorum ‘in memoriam’ of Judge José Mariá Ruda*, The Hague, Kluwer Law International, 2000, pp. 563-574. “Atelier sur l’article 31, par. 1 c) du Statut de la Cour pénale internationale, coordonné par Éric DAVID”, in *RBDI*, 2000-2, pp. 355-488.

a) self-defence?

⇒ Case No. 23, The International Criminal Court [Part A., Art. 31(1)(c)]

418 See ICTY, Prosecutor v. Drazen Erdemovic, (IT-96-22-T), Judgement of the Appeals Chamber of 7 October 1997, para. 19, available on <http://www.icty.org>

419 See Art. 31(3), Case No. 23, The International Criminal Court [Part A.]

420 See P I, Art. 51(3)

- ⇒ **Case No. 53, International Law Commission, Articles on State Responsibility [Part A., para. 3 of the commentary of Art. 21]**
 - ⇒ **Case No. 212, ICTY, The Prosecutor v. Martić [Part C., para. 268]**
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SUGGESTED READING: CASSESE Antonio, “Under What Conditions May Belligerents Be Acquitted of the Crime of Attacking an Ambulance?”, in *Journal of International Criminal Justice*, Vol. 6, No. 2, 2008, pp. 385-397. GALAND Renaud & DELOOZ François, “L’article 31, par. 1 c) du Statut de la Cour pénale internationale: une remise en cause des acquis du droit international humanitaire?”, in *IRRC*, No. 842, June 2001, pp. 533-538.

b) superior orders?

[CIHL, Rules 154 and 155]

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 33]
 - ⇒ Case No. 64, Germany, International Criminal Code [Para. 3]
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Section 14]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)(2)]
 - ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
 - ⇒ Document No. 96, United States Military Tribunal at Nuremberg, United States v. Wilhelm List [Part 3.(ii)]
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ **Case No. 117, United States, United States v. William L. Calley, Jr.**
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 199, Canada, R. v. Brocklebank [Paras 5, 11 and 96-101]
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part C., Art. 7(4)]
 - ⇒ Case No. 221, ICTY, The Prosecutor v. Mrksic and Sljivancanin [Part A., paras 669 and 673; Part B., paras 64 and 74]
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 36-40]
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Relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 8 June 1977”, in *IRRC*, Vol. 28, No. 263, 1988, pp. 105-120. OSIEL Mark, *Obeying Orders: Atrocity, Military Discipline, and the Law of War*, London, Transaction Publishers, 1999, 398 pp.

c) defence of necessity?

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 31(1)(c) and (d)]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part A., Art. 136(g)(1)]
 - ⇒ Case No. 91, British Military Court at Hamburg, The Peleus Trial
 - ⇒ Case No. 94, United States Military Tribunal at Nuremberg, United States v. Alfred Krupp *et al.* [4 (vii)]
 - ⇒ Case No. 155, Canada, Ramirez v. Canada
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4. The prosecution of war crimes

a) the universal obligation to repress grave breaches

GC I-IV, Arts 49/50/129/146 respectively; P I, Art. 85(1) [CIHL, Rules 157 and 158]

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- ⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Case No. 63, Switzerland, Military Penal Code
 - ⇒ Case No. 64, Germany, International Criminal Code
 - ⇒ Case No. 65, Canada, Crimes Against Humanity and War Crimes Act [Sections 6-8]
 - ⇒ **Case No. 68, Belgium, Law on Universal Jurisdiction [Part B., Arts 10.1(a) and 12(a) and Part C.]**
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 155, Canada, Ramirez v. Canada [Para. 11]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 613-615]
 - ⇒ Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir [Part A.]
 - ⇒ Case No. 195, Canada, Sivakumar v. Canada
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [17]
 - ⇒ Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities
 - ⇒ Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.
 - ⇒ **Case No. 241, Switzerland, The Niyonteze Case**
 - ⇒ **Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium [individual and dissenting opinions]**
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aa) relation to amnesty

[CIHL, Rule 159]

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- ⇒ Case No. 121, Bangladesh/India/Pakistan, 1974 Agreement [Arts 13-15]
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena [Para. 12]
 - ⇒ **Case No. 169, South Africa, AZAPO v. Republic of South Africa**
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.F.1]
 - ⇒ **Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 41-43]**
 - ⇒ **Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 3., D.]**
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bb) no statutory limitations

[CIHL, Rule 160]

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- ⇒ Case No. 23, The International Criminal Court [Part A., Art. 29]
 - ⇒ Case No. 64, Germany, International Criminal Code [Para. 5]
 - ⇒ **Case No. 108, Hungary, War Crimes Resolution**
 - ⇒ **Case No. 152, Chile, Prosecution of Osvaldo Romo Mena [Para. 12]**
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cc) link with international immunities

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- ⇒ Case No. 23, The International Criminal Court [Part A., Arts 27 and 98]
 - ⇒ Case No. 68, Belgium, Law on Universal Jurisdiction [Part B., Art. 1(a) and Part C.]
 - ⇒ **Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir**
 - ⇒ **Case No. 242, ICJ, Democratic Republic of the Congo v. Belgium**
 - ⇒ **Case No. 275, Sierra Leone, Special Court Ruling on Immunity for Taylor**
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SUGGESTED READING: FRULLI Micaela, “The Question of Charles Taylor’s Immunity: Still in Search of a Balanced Application of Personal Immunities?”, in *Journal of International Criminal Justice*, Vol. 2, 2004, pp. 1118-1129. SASSÒLI Marco, “L’arrêt Yerodia: quelques remarques sur une affaire au point de collision entre les deux couches du droit international”, in *RGDIP*, No. 4, October-December 2002, pp. 789-818.

b) mutual assistance in criminal matters

P I, Art. 88 [CIHL, Rule 161]

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- ⇒ Case No. 233, Luxembourg, Law on Cooperation with the International Criminal Courts,
 - ⇒ Case No. 240, Switzerland, X. v. Federal Office of Police
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c) judicial guarantees for all those accused of war crimes

GC I-IV, Arts 49(4), 50(4), 129(4) and 146(4) respectively; GC III, Arts 105-108; P I, 75(7)

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- ⇒ Case No. 23, The International Criminal Court [Part A., Arts 20, 22-25, and 30-32]
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 188, Iraq, Occupation and Peacebuilding
 - ⇒ Case No. 210, UN, Statute of the ICTY [Part C., Art. 21]
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.F.]
 - ⇒ Case No. 240, Switzerland, X. v. Federal Office of Police
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5. The international criminal courts

Introductory text

IHL requires that war crimes be prosecuted, and this may be done independently of the existence of international criminal courts. In reality, however, IHL provisions on the prosecution of war crimes were largely ignored until 1990. The armed conflicts in the former Yugoslavia, with their range of systematic atrocities, brought about a radical change in that respect. The international community felt duty-bound to respond. It established the ICTY through the sole emergency procedure known to current international law: a Security Council resolution.^[421] Once the ICTY had been set up, the double standard would have been too obvious if a similar tribunal, the ICTR, had not been set up following the armed conflict and the genocide that took hundreds of thousands of lives in Rwanda.^[422] There is certainly room for doubt about the way in which those *ad hoc* international criminal tribunals were set up. However, if steps had been taken to establish them according to the traditional method of constituting new international institutions – by means of a convention – the world would still be waiting for them to come into existence. And without those *ad hoc* tribunals, which served as precursors, the ICC Statute would probably not yet have been adopted.

The ICTY has the authority to take cognizance of acts of genocide, crimes against humanity, grave breaches of the Geneva Conventions and violations of the laws and customs of war. The concept of grave breaches is set out in the Geneva Conventions and therefore applies only to international armed conflicts. Surprisingly, the ICTY Statute does not mention grave breaches of Protocol I, despite the fact that the former Yugoslavia and its successor States were parties thereto. It should be recalled that the Protocol expands the concept of grave breaches to many violations of the rules governing the conduct of hostilities, which it brought up to date. The ICTY, however, plugged the gaps as far as non-international armed conflicts and the conduct of

421 See Case No. 210, UN, Statute of the ICTY

422 See Case No. 230, UN, Statute of the ICTR

hostilities were concerned by applying a broad interpretation to the concept of “violations of the laws or customs of war”.^[423]

For its part, the ICTR has the authority to take cognizance of acts of genocide, crimes against humanity and serious violations of Art. 3 common to the Conventions and of Protocol II. The concept of “serious violations” is different from that of “grave breaches”. The latter applies only in international armed conflicts, whereas the conflict in Rwanda was not international. It was the first explicit reference, in an international document, to the fact that violations of IHL committed during non-international armed conflicts may constitute international crimes.

The ICTY has authority with regard to any person who has committed one of the crimes listed in its Statute on the territory of the former Yugoslavia since 1991. It therefore remains authorized to deal with the crimes that were committed and are still being committed in Kosovo. By contrast, the ICTR is authorized only to deal with crimes committed during 1994 in Rwanda or by Rwandan citizens in the territory of neighbouring States.

All tribunals develop and refine the law they apply. In so doing, they demonstrate the realism of that law and heighten its credibility. In that respect, the ICTY and the ICTR have exceeded all expectations. In a short space of time they have *inter alia*: considerably developed the law of non-international conflicts; modified the distinction between international and non-international armed conflicts; redefined the concept of protected persons; made more explicit the active and passive scope of application of IHL; built up and coordinated the foundations of general principles of international criminal law and clarified the concepts of genocide and crimes against humanity. ICTY and ICTR case law may well be criticized from many points of view, but it has given a remarkable boost to IHL, which is now referred to daily by defence lawyers and public prosecutors, discussed in learned articles and finally forms the basis for well-reasoned verdicts.

The ICC Statute – the successful outcome of more than 50 years of effort – was adopted in Rome on 17 July 1998 and entered into force on 1 July 2002, having been ratified by 60 States.^[424] As a treaty, it is binding only on the States party to it and persons under their jurisdiction. The Court is authorized to deal with genocide, crimes against humanity, war crimes and aggression.

In international armed conflicts, all grave breaches of the Geneva Conventions fall within the jurisdiction of the Court.^[425] Conversely, Protocol I is not mentioned and the other serious violations of the law of international armed conflicts listed by the ICC Statute do not cover all the grave breaches defined by Protocol I. For example, the Statute makes no reference to unjustified delays in repatriating prisoners of war and civilians. On the other hand, it stipulates that rape, sexual slavery, enforced prostitution, forced pregnancy and enforced sterilization are war crimes.^[426] Moreover, the Statute defines the enlistment of children under 15 years of age and forcing them to participate actively in the hostilities as war crimes.^[427] The rules concerning the use

423 See Case No. 211, ICTY, *The Prosecutor v. Tadic* [Part A., paras 86-136]

424 See Case No. 23, *The International Criminal Court* [Part A.]

425 *Ibid.*, Art. 8(2)(a)

of certain weapons are limited to uncontroversial cases, such as chemical weapons.^[428] States were opposed to referring to nuclear weapons, biological weapons and laser weapons and have relegated the definition of weapons likely to cause superfluous injury to a list which has yet to be drawn up by the States Parties.^[429] As far as non-international armed conflicts are concerned, the ICC Statute represents spectacular progress in terms of IHL. It is the first treaty to contain a detailed list of war crimes in those situations and confirms once and for all that the concept of war crimes also applies to internal conflicts. The list covers serious violations of Art. 3 common to the Conventions^[430] as well as a large number of other violations, including crimes committed on the battlefield.^[431]

The Court may exercise its authority vis-à-vis the States Parties without having to obtain consent for each case of application. If the State on whose territory the acts or omissions being prosecuted took place or the State of which the person accused of a crime is a national is bound by the Statute or recognizes the authority of the ICC, the ICC may exercise its jurisdiction.^[432] It is therefore not always necessary to obtain the consent of the State of which the accused is a national. That is also the case when the Security Council refers a situation to the ICC by means of a resolution adopted in application of Chapter VII of the UN Charter.^[433] Conversely, the Security Council may also ask, through such a resolution, that no inquiry be opened and proceedings be deferred for a renewable period of 12 months.^[434] In a final provision, which we consider regrettable, the Statute stipulates that a State which becomes party to it may declare that, for a period of seven years from the entry into force of the text, it does not accept the Court's jurisdiction with respect to war crimes when it is alleged that those crimes have been committed on its territory or by its nationals.^[435] Thus, even the international crimes most firmly established in current treaty law may evade the authority of the ICC for seven years.

Only the Prosecutor, who is elected by the States Parties, may refer a specific case to the Court. Situations may be referred to the Prosecutor by any State Party and by the Security Council, but the Prosecutor may also open enquiries on his or her own initiative.^[436] In the latter case, the Prosecutor must, however, present a request for authorization to the Pre-Trial Chamber. If the Chamber decides to authorize the opening of an enquiry, or if a State has referred a matter to the Prosecutor and he intends to conduct the enquiry, the Prosecutor must notify all the States Parties as well as the other States concerned. If one of those States informs the Prosecutor that proceedings concerning the matter in question are already under way at the national level, the Prosecutor must place the proceedings under the authority of the State

426 *Ibid.*, Art. 8(2)(b)(xxii)

427 *Ibid.*, Art. 8(2)(b)(xxvi)

428 *Ibid.*, Art. 8(2)(b)(xxii)-(xix)

429 *Ibid.*, Art. 8(2)(b)(xx)

430 *Ibid.*, Art. 8(2)(c)

431 *Ibid.*, Art. 8(2)(e)

432 *Ibid.*, Art. 12(2)

433 See the first case of application in *Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir* [Part A.]

434 See *Case No. 23, The International Criminal Court* [Part A., Art. 16, and Part D.]

435 *Ibid.*, A., Art. 124

436 *Ibid.*, Arts 13-15

concerned, unless the ICC Pre-Trial Chamber authorizes him to continue the enquiry himself. There may be serious doubts about whether, on the one hand, that procedure contributes to the efficacy of the prosecutions and, on the other, whether it means that the right of the accused to have his case heard within a reasonable time can be respected. However, it does reflect the States' fears of any jurisdiction which might judge the conduct of their agents independently of their wishes.

One of the outstanding features of the ICC Statute is that it codifies – for the first time in a treaty whose framers intended it to be universal – the general part of international criminal law.^[437] It succeeds in bringing together the general principles of criminal law existing in the world's various legal systems and those deriving from the instruments of International Human Rights Law.

In the traditional view of international law, even when certain individual acts had been declared international crimes, the obligation or the right to prosecute the perpetrators used to be the task of one, several or all the States. The State was thus a vital intermediary between the rule of international law and the individual who had violated that law. It was only with the establishment of international criminal courts that this veil was lifted and the responsibility of the individual before international law and the international community became visible. These courts are therefore the most obvious manifestations of that new layer of international law – which superimposes itself on traditional international law governing the coexistence of and cooperation between States, but without replacing it – namely, the internal law of the international community of more than six billion human beings. Compared with the typical response to violations from the traditional layer – sanctions – criminal trials have obvious advantages: they are governed by law and do not depend on the good intentions of States; they are set in train in a regular, formalized procedure which is the same for everyone; they are not subject to veto and are influenced far less by political considerations than Security Council resolutions, the only body of international society empowered to decree sanctions; they are directed against the guilty individuals and do not affect innocent individuals, as military or economic sanctions inevitably do.

Despite all this, internal jurisdictions will retain a key role in the prosecution of war crimes – even when the ICC functions effectively and is empowered to deal with every situation in which international crimes are committed. First, that role will be quantitative, as international justice will never be able to cope with the hundreds of thousands of crimes which, unfortunately, blemish every major conflict. It will be able only to select a few specific, symbolic cases in order to put a stop to impunity. All the rest must be dealt with by national systems. Moreover, a policy of international criminal law and defence of international society implemented by the international judicial bodies alone would run counter to the principle of subsidiarity and would require disproportionate funds. The role of national justice will also be qualitative, however. Just as in each country the rule of law and its credibility depend on the quality, the independence and the effectiveness of the courts of first instance, international justice will continue to depend on national courts. Without them, the international courts will at most function as a fig leaf when it comes to war criminals. For those reasons, the existence of international courts should

437 *Ibid.*, Arts 22-33

under no circumstances discourage the States, their prosecutors and their courts from fulfilling their obligations with regard to war crimes.

In conclusion, war crimes and the obligation to prosecute them already existed before international courts were set up. However, those courts constitute an institution for the implementation of the existing rules and have therefore ensured that those rules become reality. As in so many other areas, setting up an institution, and paying its staff for the sole purpose of dealing with a problem is an important step toward finding a solution, but not sufficient in itself. Until recently, international criminal courts existed for only two of the many situations requiring them. Those two *ad hoc* courts represented a vital initial step. Once the ICC Statute has been universally accepted, other steps will follow. The very credibility of international justice depends on this because justice which is not the same for everyone is not justice.

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a) the establishment of *ad hoc* tribunals

⇒ Case No. 233, Luxembourg, Law on Cooperation with the International Criminal Courts

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aa) the International Criminal Tribunal for the former Yugoslavia (ICTY)

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 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [17 and 32]
 - ⇒ Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities
 - ⇒ **Case No. 210, UN, Statute of the ICTY**
 - ⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 11-58 and Part B., paras 239-241, 540-553]
 - ⇒ Case No. 212, ICTY, The Prosecutor v. Martić [Part A., para. 3]
 - ⇒ Case No. 213, ICTY, The Prosecutor v. Rajić [Part A., paras 1-3 and 66-70]
 - ⇒ Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel [Part A.]
 - ⇒ Case No. 215, ICTY, The Prosecutor v. Kupreskić *et al.*
 - ⇒ Case No. 216, ICTY, The Prosecutor v. Blaskić
 - ⇒ Case No. 217, ICTY, The Prosecutor v. Kunarac, Kovac and Vuković
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galić
 - ⇒ Case No. 219, ICTY, The Prosecutor v. Strugar
 - ⇒ Case No. 220, ICTY, The Prosecutor v. Boskoski
 - ⇒ Case No. 221, ICTY, The Prosecutor v. Mrksić and Sljivancanin
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bb) the International Criminal Tribunal for Rwanda (ICTR)

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- ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.E.]
 - ⇒ **Case No. 230, UN, Statute of the ICTR**
 - ⇒ Case No. 233, Luxembourg, Law on Cooperation with the International Criminal Courts
 - ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu
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cc) hybrid tribunals

- the Special Court for Sierra Leone

[See online <http://www.sc-sl.org>]

This court was established by the UN, in agreement with the Government of Sierra Leone, in 2000. Its objective is to try the most important war criminals of the conflict that broke out in Sierra Leone on 30 November 1996. This concerns a dozen persons from all the warring parties. They are charged with war crimes, crimes against humanity and other serious violations of IHL.

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- ⇒ Case No. 274, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Part 3. A.]
 - ⇒ Case No. 275, Sierra Leone, Special Court Ruling on Immunity for Taylor
 - ⇒ Case No. 276, Sierra Leone, Special Court Ruling on the Recruitment of Children
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- the Extraordinary Chambers in the Courts of Cambodia

After almost a decade of negotiations between the United Nations and the Government of Cambodia in view of the establishment of a special court to try the ageing leaders of the Khmer Rouge, in April 2005 both a final agreement entered into effect and the financial means seem to have been secured. Two Extraordinary Chambers have been established under Cambodian laws: one court will conduct the trials of those accused of killing thousands of civilians during the 1970s while the other will hear appeals within the existing justice system. The two Chambers have jurisdiction to try former Khmer Rouge leaders, *inter alia* for war crimes they have committed in the conflict that took place between 1975 and 1979 in Cambodia. As at September 2010, five people had been indicted by the Chambers. Kaing Guek Eav, also known as Duch, was the first person to be convicted: on 26 July 2010, the Trial Chamber found him guilty of crimes against humanity and grave breaches of the Geneva Conventions, and sentenced him to 35 years of imprisonment. The remaining four cases (Ieng Sary, Ieng Thirith, Khieu Samphan and Nuon Chea) are still at the pre-trial stage.

[See also online <http://www.ridi.org/boyle> for further information.]

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- War Crimes Chamber in Bosnia and Herzegovina

[<http://www.sudbih.gov.ba/?jezik=e>]

The War Crimes Chamber was created in Bosnia and Herzegovina in order to allow the ICTY to concentrate on high-ranking criminals and pursuant to UN Security Council resolutions 1503 (August 2003) and 1534 (March 2004) requesting domestic courts to assist the ICTY. Its task is to bring to justice lower-ranking persons suspected of having committed war crimes on the territory of Bosnia and Herzegovina. Contrary to the above-mentioned hybrid courts, the War Crimes Chamber was not directly created by the UN and hence is not controlled by it. It is established under Bosnian law, and is integrated into the Criminal Division of the Court of Bosnia and Herzegovina.

- Special Panels for Serious Crimes in Timor-Leste

In March 2000, following the establishment of the United Nations Transitional Administration of East-Timor (UNTAET), Special Panels functioning within the framework of the Dili District Court were created in Timor-Leste. The Panels are composed of one national and two international judges and are tasked with prosecuting serious crimes committed in 1999, including genocide, war crimes, crimes against humanity and torture.

b) the International Criminal Court

⇒ **Case No. 23, The International Criminal Court**

⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 608, 609, 616 and 648]

⇒ **Case No. 165, Sudan, Arrest Warrant for Omar Al-Bashir**

⇒ Case No. 237, ICC, The Prosecutor v. Thomas Lubanga Dyilo

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XI. IMPLEMENTATION IN TIME OF NON-INTERNATIONAL ARMED CONFLICT

Introductory text

Only two specific implementing mechanisms are provided for by the treaty rules of IHL applicable in non-international armed conflicts: (i) the obligation to disseminate IHL “as widely as possible”^[438] and (ii) the right of the ICRC to offer its services.^[439] The first mechanism has the same meaning as in international armed conflicts. The second means that in such conflicts the ICRC has no *right* to undertake its usual activities in the fields of scrutiny, protection and assistance; it may only *offer these services* to each party to the conflict and then initiate them with each party that has accepted its offer. This right of initiative clearly implies that such an offer is never interference in the internal affairs of the State concerned, nor is the ICRC’s undertaking of activities in respect of a party accepting such an offer an unlawful intervention. Furthermore, such an offer – as any other measure of implementation of the IHL of non-international armed conflicts – cannot be construed to confer any legal status on any party to a conflict.^[440]

Even though they are not specifically prescribed by the IHL of non-international armed conflicts, if the *preparatory measures* that the IHL of international armed conflicts directs to be taken already in peacetime are actually taken, they will also have a beneficial influence on respect for the IHL of non-international armed conflicts. For instance, building hospitals away from possible military objectives, properly

438 See P II, Art. 19

439 See GC I-IV, common Art. 3(2)

440 See GC I-IV, common Art. 3(4)

restricting the use of the red cross, red crescent or red crystal emblem, and instructing combatants to wear identity tags will necessarily have the same effects in international and non-international armed conflicts. In practice, armed forces train their members in peacetime in view of international armed conflicts. If such training is properly accomplished, all soldiers will have the same reflexes in a non-international armed conflict. Indeed, at the lower levels of the military hierarchy, the rules of behaviour are exactly the same.

Within their national legislation, some States have explicitly laid down that the same rules of IHL apply in both kinds of conflicts. Other States prescribe specific rules for non-international armed conflicts. Where penal legislation on war crimes exists, it is often limited to violations of the IHL of international armed conflicts, while legislation on the use of the emblem usually covers both. As a minimum requirement, States with a legal system in which international treaties are not part of the law of the land have to adopt legislation to transform the rules of the IHL of non-international armed conflicts into national law in order to make them binding on individuals, including rebels. Furthermore, for the same purpose, all States must adopt implementing legislation for the presumably rather few rules of Art. 3 common to the Conventions and of Protocol II which they consider not to be self-executing. Indeed, States have the international responsibility to ensure that individuals under their jurisdiction respect the basic rules of behaviour laid down in those rules.

Since the ICJ has decided that the principle laid down in Art. 1 common to the Conventions and Protocol I also applies to non-international armed conflicts,^[441] third States have the right and the obligation to ensure that not only government forces in a State confronted with a non-international armed conflict, but also non-governmental and anti-governmental forces respect the IHL of non-international armed conflicts.

The repression of violations of the IHL of non-international armed conflicts is expressly prescribed in neither Art. 3 common to the Conventions nor Protocol II. It is, however, one of the traditional means available to a State for ensuring compliance with its corresponding international obligations. Punishment will often, but not always, be possible under the ordinary rules of penal law. However, the principle of universal jurisdiction will not necessarily operate without specific legislation.

The establishment of universal jurisdiction and the criminalization of serious violations not falling under ordinary penal law are, however, achieved when national legislation assimilates violations of both the law of international armed conflicts and the law of non-international armed conflicts. Otherwise, repression under a regime similar to that applicable to grave breaches of the law of international armed conflicts can be accomplished by several legal constructions. First, some authors and States claim that – contrary to their textual and systematic interpretation – the detailed provisions on grave breaches provided for by the Conventions also apply to violations of the law of non-international armed conflicts. Second, recent developments, such as the reactions of the international community to violations of the IHL of non-international armed conflicts in the former Yugoslavia and Rwanda and the ICC Statute, prompt most

441 See Case No. 153, ICJ, *Nicaragua v. United States* [Para. 255]

authors, judicial decisions and – implicitly – the statutes of both international *ad hoc* tribunals to consider that customary international law criminalizes serious violations of the IHL of non-international armed conflicts. Such an understanding signifies permission, if not an obligation, to apply the principle of universal jurisdiction. Third, a violation of the IHL of non-international armed conflicts may often simultaneously be an act criminalized by other rules of customary or treaty-based international law, such as crimes against humanity, genocide, torture or terrorism.

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1. Dissemination

P I, Art. 19 [CIHL, Rules 142 and 143]

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- ⇒ Case No. 45, ICRC, Disintegration of State Structures
 - ⇒ Case No. 106, China, Military Writings of Mao Tse-Tung
 - ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Document No. 166, South Africa, African National Congress Manual
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Para. 10]
 - ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen
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2. Other preventive measures

[CIHL, Rules 139, 140 and 141]

3. The obligation of third States to ensure respect

[CIHL, Rule 144]

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- ⇒ **Case No. 153, ICJ, Nicaragua v. United States [Paras 220 and 255]**
 - ⇒ Case No. 279, Germany, Government Reply on Chechnya
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4. The ICRC's right of initiative

GC I-IV, common Art. 3(2)

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 550]
 - ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 31-36]
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 18]
 - ⇒ Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland
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a) meaning

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- ⇒ Document No. 56, UN, Guiding Principles on Internal Displacement [Principle 25]
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b) addressees: both the government and insurgents

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- ⇒ Case No. 75, Belgium and Brazil, Explanations of Vote on Protocol II [Part A.]
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c) ICRC activities

(See *infra*, Part I, Chapter 15. II. 1. In armed conflicts, p. 481)

5. International responsibility of the State and of the insurgent movement

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- ⇒ Case No. 53, International Law Commission, Articles on State Responsibility [Part A., Art. 10 and its commentary]
 - ⇒ Case No. 155, Canada, Ramirez v. Canada
 - ⇒ Case No. 195, Canada, Sivakumar v. Canada
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 177-179, 246-250]
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case [Part A., consid. 3.B., III., ch. 1.B.]
 - ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
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6. Repression of individual breaches of IHL

(See also *supra*, Part I, Chapter, 13. X. 1. b) the extension of the concept of grave breaches to non-international armed conflicts)

[CIHL, Rules 151-155]

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- ⇒ Document No. 16, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention) [Art. 14(2)]
 - ⇒ **Case No. 23, The International Criminal Court [Part A., Art. 8(2)(c) and (e)]**
 - ⇒ Case No. 63, Switzerland, Military Penal Code [Art. 108]
 - ⇒ Case No. 64, Germany, International Criminal Code [Paras 8-12]
 - ⇒ Case No. 70, United States, War Crimes Act
 - ⇒ Case No. 108, Hungary, War Crimes Resolution
 - ⇒ Case No. 115, Belgium, Public Prosecutor v. G.W.
 - ⇒ Case No. 152, Chile, Prosecution of Osvaldo Romo Mena [Para. 12]
 - ⇒ Case No. 155, Canada, Ramirez v. Canada
 - ⇒ Case No. 169, South Africa, AZAPO v. Republic of South Africa [Paras 30 and 31]
 - ⇒ Case No. 195, Canada, Sivakumar v. Canada
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A., Art. 11(2) and Part B., Art. 5(2)]
 - ⇒ **Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 128-136 and Part B., paras 623-654]**
 - ⇒ **Case No. 216, ICTY, The Prosecutor v. Blaskic [Part A., paras 179-187]**
 - ⇒ Case No. 218, ICTY, The Prosecutor v. Galic [Part A., paras 16-31]
 - ⇒ Case No. 220, ICTY, The Prosecutor v. Boskoski [Para. 196]
 - ⇒ Case No. 222, United States, Kadic *et al.* v. Karadzic
 - ⇒ Case No. 223, Switzerland, Military Tribunal of Division 1, Acquittal of G.
 - ⇒ Case No. 224, Croatia, Prosecutor v. Rajko Radulovic and Others
 - ⇒ Case No. 228, Case Study, Armed Conflicts in the Great Lakes Region [Part I.F.]
 - ⇒ Case No. 230, UN, Statute of the ICTR [Art. 4]
 - ⇒ Case No. 234, ICTR, The Prosecutor v. Jean-Paul Akayesu
 - ⇒ Case No. 240, Switzerland, X. v. Federal Office of Police
 - ⇒ Case No. 241, Switzerland, The Niyonteze Case
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7. Other mechanisms foreseen for international armed conflicts

8. Necessity and ways to engage non-State armed groups

Introductory text

As mentioned above, the IHL of non-international armed conflicts is equally binding on non-State armed groups.^[442] The legal mechanisms for its implementation are, however, still mainly geared toward States. Ways might be explored as to how armed groups could be involved in the development, interpretation and operationalization of the law. While an explicit acceptance is not necessary for them to be bound, armed groups should be encouraged to accept IHL formally, *inter alia* to foster a sense of ownership. Getting a commitment from insurgents is an important step as it places the onus on the members and leaders who undertook the commitment to become advocates of IHL within the group. Common Art. 3 encourages parties to non-international armed conflicts, including armed groups, to conclude agreements putting all or parts of the IHL of international armed conflicts into force. Armed groups

442 See *supra*, Ch. 12, VIII. Who is bound by the law of non-international armed conflicts?, p. 347

also frequently make unilateral declarations in which they undertake to respect IHL. In this respect it may be sometimes more beneficial to negotiate a code of conduct than to obtain a declaration promising compliance with all of international law. Respect for the rules should then be rewarded, which is not yet the case in the present IHL of non-international armed conflicts. A citizen who is, for example, involved in an internal armed conflict against the government will be prosecuted for treason and murder once captured by government forces even if he kills only soldiers and complies with IHL. In addition, acts that are committed in an armed conflict and are not prohibited under IHL should never fall under any definition of terrorism.

Armed groups should equally be offered advisory services. It remains unclear, for instance, how and whether insurgents can legislate and establish tribunals, although they will have to do so to obtain compliance from their members, punish those who do not comply or require certain conduct from those who are under their *de facto* control.

Respect for IHL must also be monitored. Under common Art. 3 of the Conventions, the ICRC may offer its services to insurgents. If they accept, the ICRC can monitor their compliance in exactly the same way as it monitors States Parties involved in international or non-international armed conflicts.

As for punishing violations, international criminal law is as applicable to insurgents as to government armed forces. Insurgent groups are responsible for violations committed by their members. Their responsibility to the international community has already been demonstrated by sanctions imposed on them by the Security Council. Understanding how humanitarian organizations react and how they should react to violations of IHL by insurgents is another area deserving of exploration.

There are two main objections to attempting to engage all insurgents. First, some argue that it encourages them to continue fighting. While a world without insurgents would be a better world, they are as real as armed conflicts. They will not disappear if we ignore them. Others believe that some, but not all insurgents should be engaged. However, it is important to engage all armed groups that are parties to genuine armed conflicts, a concept that is admittedly not very clearly defined in IHL. Beyond the need to clarify this concept, it is difficult to articulate a universally acceptable distinction between “good” and “bad” insurgents. Their willingness to comply with legal restraints will be revealed by the outcome of the process and therefore cannot be a precondition to it. From a humanitarian point of view, any distinction between insurgents would mean that those in need of the greatest protection would be deprived of efforts aimed at their protection. In addition, once certain groups are excluded from efforts to be engaged, it becomes more difficult to convince governments fighting against the other groups to tolerate such engagement.

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- ⇒ Case No. 49, ICRC, *The Challenges of Contemporary Armed Conflicts* [Part B.]
 - ⇒ **Case No. 61, UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict [Part A., paras 19-21; Part B., paras 38-47]**
 - ⇒ Document No. 166, South Africa, *African National Congress Manual*
 - ⇒ **Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines**

- ⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 34-37, 46-47 and 67]
 - ⇒ Case No. 273, Philippines, Application of IHL by the National Democratic Front of the Philippines
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a) IHL applies to armed groups

- ⇒ Case No. 61, UN, Secretary-General’s Reports on the Protection of Civilians in Armed Conflict
 - ⇒ Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines
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b) Ways to enforce IHL against armed groups

- aa) indirectly, through States
- bb) indirectly, through individual criminal responsibility
- cc) directly, against the armed group

c) Promotion of IHL among armed groups

- aa) dissemination
- bb) increase their sense of ownership of IHL

cc) allow or encourage armed groups to commit themselves to IHL

⇒ Case No. 202, Geneva Call, Puntland State of Somalia adhering to a total ban on anti-personnel mines

dd) encourage and assist them to implement IHL?

ee) reward the respect of IHL

d) Monitor the respect for IHL by armed groups

e) Responsibility of armed groups for violations

aa) criminal responsibility

bb) private law liability

cc) international law responsibility

⇒ Case No. 260, Afghanistan, Code of Conduct for the Mujahideen [Arts 34-37, 46-47 and 67]

f) Dilemmas involved

aa) does engaging armed groups encourage their use of violence?

bb) should only some armed groups be engaged?

XII. FACTORS CONTRIBUTING TO VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

(See *also supra*, Part I, Chapter 2.1.4. Application of International Humanitarian Law by and in failed States)

Introductory text

First, it is a distinctive feature of social rules that – contrary to the laws of physics – they can be and are actually violated.

Second, violations of IHL mostly consist of violent acts committed in situations already marked by violence: armed conflicts. This is not the place to explain the reasons for violence, a field in which much would appear to be unexplained. Suffice it to mention that violence seems to be inherent in the human condition and results from various complex factors, both objective (historical, cultural, educational and economic) and subjective. However, violence is never inevitable, not even when all factors leading to violence exist. No one is immune from violating IHL, but no one is ever put in a situation where he or she has to violate IHL. In addition, violence is contagious and may render further violence banal. Armed conflicts are marked by plenty of instances

of legal and illegal violence which can and do contaminate those who have not yet resorted to violence.

Third, armed conflicts are situations where the primary international legal and social regime – peace – is overruled, in other words *jus ad bellum* has been violated. It is not astonishing that human beings, having experienced the failure of the primary international legal regime, will not necessarily respect the subsidiary regime applicable to such a situation of failure, namely IHL. Lack of respect for the international rules regulating *jus ad bellum*, and more so *jus in bello*, will be reflected in situations of armed conflict and in the behaviour of every human being. Another aspect of this is that an armed conflict is an exceptional experience for every human being, even the best-trained soldiers. Prohibited acts usually become commonplace. Human beings are killed, and property is destroyed, with society's approval. In such circumstances, it is also easy to violate other rules of human behaviour – committing acts which remain prohibited even in armed conflicts by IHL.

Fourth, many of those fighting in and suffering from armed conflicts are continuously exposed to death, injury, fear, hate, cries, cadavers, dirt, cold, heat, hunger, thirst, exhaustion, weariness, physical tension, uncertainty, arbitrariness and lack of love. In other words, they are deprived of nearly everything which makes human life civilized; they live continuously in a kind of folly in which traditional references no longer exist. Is it astonishing under these circumstances that they commit inhumane and uncivilized acts?

Fifth, modern weapons make it possible for human beings to be killed from a great distance, without singling them out as individuals or even seeing them. Moreover, those weapons are launched according to a "division of labour" that waters down responsibility. Those two factors end up damping certain ethical reflexes. To take but one example, it is unlikely that the pilots who bombed Coventry, Dresden or Hiroshima would have slit the throats of or poured petrol over tens of thousands of women and children. That being said, recent genocidal conflicts have shown that as soon as inter-ethnic hatred has been triggered, good fathers are capable of raping, slitting the throats of and hacking to pieces their neighbours while looking them straight in the eye.

Sixth, most of those fighting in contemporary armed conflicts lived, before the conflict, in an environment of injustice and denial of the most fundamental civil and political, social, economic and cultural rights. This environment often contributed to the outbreak of the conflict. Is it surprising that individuals raised without a proper education, in an atmosphere of street violence, organized crime, misery, racism, perhaps in one of the ever-growing megalopolises where all social structures have collapsed, violate IHL once they are given a weapon and told to fight an "enemy"?

Seventh, the public at large and those who are likely to be protagonists in armed conflicts are often not instructed and trained in IHL. It may be objected that the basic moral principles of IHL are self-evident, but the detailed rules are not always self-explanatory. In particular, it is not obvious that basic moral principles also apply precisely in an armed conflict, where most other rules of social behaviour are suspended, and where fighters are trained to do the opposite: to kill and destroy.

Eighth, knowledge of the rules of IHL is a necessary but not sufficient condition to ensure their respect. They also have to be accepted and implemented. It has to be understood that they are the law accepted by States. It has to be understood that the numerous justifications for violating IHL that may be put forward, for instance, "state of necessity", "self-defence", the "sense of having suffered an injustice", "strategic interests", the desire to spare friendly forces, or any aim, however noble, cannot be and are not accepted grounds for violating IHL.

Furthermore, it has to be stressed that the rules of IHL can be and often are respected. Scepticism is the first step towards the worst atrocities. Indeed, if we want the public at large to respect these rules, it must become as politically incorrect to be sceptical about IHL as it has fortunately become politically incorrect to be sceptical about gender and racial equality.

Ninth, while respect for IHL is impossible without a minimum of discipline and organization, it is also impossible in the climate of blind obedience that is so commonplace in regular armies and in armed groups who identify their cause with a leader. Indoctrination creates situations in which "the cause" becomes more important than any (other) human value.

Tenth, despite the explanations of sociologists and international lawyers, our societies are still profoundly impregnated with the idea that rules are only valid if their violations are punished. The widespread, nearly generalized impunity met by violations of IHL therefore has a terribly corrupting effect, including on those accepting the rules, who are left with the impression that they are the only ones who comply with them.

Eleventh, IHL will be violated as long as there are cultures, ideologies and ideas excluding others, characterizing them as less human because of their nationality, race, ethnic group, religion, culture or economic condition.

Twelfth, in today's increasingly asymmetric conflicts, both sides are convinced that they cannot win without violating or at least "reinterpreting" IHL. How can the necessary intelligence information about terrorist networks be obtained by humanely treating those who are supposed to have such information? Is not demoralization of the civilian population through terrorist acts the only chance for many groups labelled as "terrorist" to overcome their enemy, which is far superior in equipment, technology and often manpower? In our view, both these calculations are wrong. Inhumane treatment of suspected "terrorists" will only help recruit others and put democratic States on the same moral level as the terrorists. Terrorist attacks only strengthen the determination of the public in democracies to stand behind their governments and to favour military solutions rather than to eradicate the root causes of terrorism (but this may be precisely what the terrorists aim for, because it guarantees them continued support from their constituencies).

Furthermore, in asymmetric conflicts, most rules of IHL are in fact addressed to one side only. Only one side has prisoners, only one side has an air force and only one side could possibly use the civilian population as shields. Beyond that, the very philosophy of IHL – that the only legitimate aim is to weaken the military forces of the enemy – is challenged by such conflicts. That aim is beside the point in asymmetric wars. One side

often has no military forces and most of the military forces of the other side are outside the reach of their enemy. One of the strongest arguments used to convince belligerents to respect IHL is that they can achieve victory while respecting IHL and that IHL will even make victory easier, because it ensures that they concentrate on what is decisive, the military potential of the enemy. This argument is not fully true in asymmetric conflicts. Finally, the weaker side in an asymmetric conflict often lacks the necessary structures of authority, hierarchy, communication between superiors and subordinates and processes of accountability, all of which are needed to enforce IHL. Legally, one may obviously consider that such groups do not possess the minimum structure of organization required to be a party to an armed conflict, and that IHL therefore does not apply to such conflicts. In practice, this would, however, mean that IHL does not apply at all to asymmetric conflicts, not even to the more organized government side.

Taking all these factors into account, it is no small source of astonishment that, as the tens of thousands of prisoners visited every year by the ICRC prove, countless fighters respect their surrendering enemies even after their comrades, wives, and children have been killed by those belonging to the same side as those who surrendered. Equally surprising, countless fighters, police officials and investigators do not resort to torture although they assume that those in their hands must know when an attack will happen, countless oppressed citizens do not plant indiscriminate bombs even though their rulers deny them the most fundamental civil, political, social and economic rights, and countless leaders do not fight with no holds barred, even though they fear they may lose the war or their power and are convinced that they are fighting for a just cause.

Only those who experience armed conflicts through their television sets can think that war inevitably entails violations of the laws of war. Those who actually live through wars know that they are fought by human beings who have the inherent choice to be humane.

A major challenge for the implementation of IHL is nevertheless the widening gap between the law's increased promises of protection and the growing perception that it is not respected in actual conflicts.

This widening gap has negative effects on the implementation of IHL. The perceived gap concerning some rules has a contagious effect on other rules. Sometimes, promises have also served as an alibi for not acting. When they see the gap between promises and the reality they suffer, the victims are frustrated, they no longer believe in the law and, what is worse, those who fight for them are even less likely to comply with IHL. Placing their trust in the promises of the international community, victims may even take wrong decisions, which may be fatal for them. Finally, and most importantly, no fighter, combatant or commander wants to risk his life, freedom and health, and forego the easiest solution or even victory to be the only one who respects IHL if he is convinced (or suspects) that no one else respects IHL, or that IHL is not appropriate for the conflict being fought.

The main way of reducing the gap between promises and reality is to respect IHL as promised. Next, those who claim that IHL as it stands was developed at another time and is not adequate for the new challenges of contemporary conflicts should be

clear that they advocate a change in the law and are not suggesting that the existing rules are no longer valid. In some instances, it may also be wise to nuance promises. True, law always lays down, in Kantian categories, a “*sollen*” (what ought to be) and therefore a promise. When Henry Dunant came back from the battlefield of Solferino, he suggested a promise (by States) that the wounded and sick should be respected, protected and cared for, “to whatever nation they belong”. Even today, this promise has not been entirely fulfilled. If Henry Dunant had not advocated that promise because he was not sure that States would actually deliver on it, there would be no Geneva Conventions. Those promises, although never entirely fulfilled, nevertheless clearly influenced reality for the benefit of war victims. We should simply make sure the gap never becomes too wide, mainly by bringing reality closer to our promises, but also by avoiding promises we can never deliver on and which are, moreover, often made by those who cannot deliver.

Another way of reducing the credibility gap and the disadvantages it implies is to have the perceived reality of systematic violations cede precedence to the actual reality of frequent respect. Those who consult the media and NGO reports probably believe that IHL is almost never respected. This feeling that IHL is systematically violated is both inaccurate and extremely dangerous for the credibility of IHL and for war victims. Only a few individuals are ready to respect rules protecting those they perceive as enemies even if they are convinced that their enemies do not respect those rules. This vicious circle of non-respect has to be broken. First by an attitude of respect. Second, States accused – often falsely – of violations should make serious enquiries and make their results public in every instance, in order to convince those who consider them as the enemy of their general willingness to respect IHL and their honest endeavour to ensure its respect by their forces. Third, all involved, but in particular teachers and trainers, should, whenever possible and when it is true, show that IHL is most often respected. This is not an easy task. It is not easy to get the facts of real-life examples of respect. Too much hope cannot be pinned on the media. A world in which they would report even-handedly and proportionately about respect and violations would be an Orwellian world. The fact that public opinion perceives violations as a scandal to be reported and respect as normal is a sign that IHL is profoundly anchored in the public conscience.

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 2]
 - ⇒ Case No. 45, ICRC, Disintegration of State Structures [Part II.]
 - ⇒ Case No. 49, ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
 - ⇒ Document No. 52, First Periodical Meeting, Chairman’s Report [Part II.2]
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention [Part G.II.1]
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XIII. NON-LEGAL FACTORS CONTRIBUTING TO RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Introductory text

As with all law, if IHL is respected, it is not mainly because of the efficiency of the legal mechanisms set up to ensure respect but because of non-legal factors. In that regard, routine is an important factor contributing to respect. Indeed, once soldiers or civil servants are aware of a regulation and know that their superiors expect it to be followed, they will apply and respect it without further discussion, especially if they have understood that it is possible to do so. For this reason, appropriate and meaningful dissemination of the rules is very important. In all human societies there is a positive predisposition to respect the law. In most cases, if individuals understand that the rules of IHL are the law applicable in armed conflicts accepted by States and the international community, and not simply the philanthropic wishes of professional do-gooders, they will respect them.

Respect for IHL is also largely in the military's interest. Troops who respect IHL form a disciplined unit, whereas looting and raping lacks military value. In addition, respect for IHL is a question of military efficiency. Attacks on civilians constitute not only war crimes but also a waste of ammunition needed for attacking military objectives. Many rules of IHL on the conduct of hostilities simply implement the tactical principles of economy and proportionality of means.

In a global information society, international and national public opinion increasingly contribute to respect for – but unfortunately sometimes also to violations of – IHL. Belligerents need the sympathy of international and national public opinion as much as they need supplies of ammunition. In non-international armed conflicts the battle for the hearts of the people is even one of the main issues. There is no more effective way to lose public support than television images of atrocities that may, unfortunately, also have been manipulated. Free access to the truth by the media may be hindered or manipulated by belligerents: for instance, enemy atrocities may be sheer fabrications. Some belligerents have even bombed their own population to provoke outside intervention against the enemy. Humanitarian assistance increasingly becomes an excuse not to initiate political solutions. Suffering populations are held hostage to achieve political objectives. Manipulated or not, some media incite hatred and atrocities by dehumanizing members of specific ethnic groups, depriving them of humanitarian protection; fanatic populations demonstrate against humanitarian assistance being brought to "enemy" populations. Even a freely elected parliament

may enact legislation depriving “enemies” or “terrorists” of fundamental judicial guarantees or condone torture for reasons of national security.

Respect for many rules of IHL corresponds to the cultural, ethical and religious imperatives of most societies. All religions contain rules on respect for the earth’s or God’s creatures; many holy books contain specific prohibitions applicable in wartime.^[443] One does not have to study the Geneva Conventions and Protocols to know that it is prohibited to kill children and to rape women. When the ICRC studies local and regional traditions, including poetry and proverbs, in an effort to anchor its dissemination work in the culture of the people it targets, it always finds principles and detailed rules of behaviour which run parallel to those of IHL.

Whereas (negative) reciprocity is not a legal argument to discontinue respect for IHL, whatever violations the enemy commits, positive reciprocity certainly plays an important role as a non-legal factor in encouraging belligerents to respect IHL. A soldier, an armed group or a State will also respect IHL in order to incite the enemy to respect it. However, even when a State or a soldier doubts whether the enemy will obey IHL, the other reasons for respecting IHL will not disappear.

Finally, the only rational aim of most armed conflicts is peace.^[444] At the conclusion of an armed conflict, territorial, political and economic issues remain to be resolved. However, peace is much more readily restored if it is not also necessary to overcome the hatred between peoples invariably spawned and most certainly exacerbated by violations of IHL.

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- ⇒ Case No. 106, China, Military Writings of Mao Tse-Tung
 - ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Case No. 235, ICTR, The Media Case
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SUGGESTED READING: IGNATIEFF Michael, *Warrior’s Honour: Ethic War and the Modern Conscience*, New York, Metropolitan Books, 1997, 207 pp. MUNOZ ROJAS Daniel & FRESARD Jean-Jacques, “The Roots of Behaviour in War: Understanding and Preventing International Humanitarian Law Violations”, in *IRRC*, No. 853, March 2004, pp. 189-206.

1. Routine

2. Military interest

a) discipline

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- ⇒ Case No. 106, China, Military Writings of Mao Tse-Tung

⁴⁴³ See *supra*, Quotations 1-5, Part I, Chapter 3. Historical Development of International Humanitarian Law,

⁴⁴⁴ If the aim of some fighters is not to win the war, but to “earn” their life (through pillage) by perpetuating the war, this logic no longer works and the respect of IHL is therefore particularly difficult to achieve.

⇒ Case No. 119, Nigeria, Operational Code of Conduct

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b) military efficiency

⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy

c) tactical principles of economy and proportionality of means

3. Public opinion

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 2.3.3]
 - ⇒ Case No. 106, China, Military Writings of Mao Tse-Tung
 - ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Case No. 178, United States/United Kingdom, Report on the Conduct of the Persian Gulf War
 - ⇒ Case No. 235, ICTR, The Media Case
 - ⇒ Case No. 258, Afghanistan, Assessment of ISAF Strategy
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki [Part 7]
 - ⇒ Case No. 289, United States, Public curiosity
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4. Ethical and religious factors

(See *supra*, Part I, Chapter 1. III. International Humanitarian Law and Cultural Relativism)

5. Positive reciprocity**6. Return to peace**

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- ⇒ Case No. 119, Nigeria, Operational Code of Conduct
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention
 - ⇒ Case No. 170, ICRC, Iran/Iraq Memoranda
 - ⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Para. 21]
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Chapter 14

International Humanitarian Law and International Human Rights Law

Introductory text

International humanitarian law (IHL) developed as the law of international armed conflicts and was therefore necessarily international law in the traditional sense, an objective legal order governing inter-State relations. Its main objective was always to protect individuals, but that protection was not expressed in the form of subjective rights of the victims; rather, it was a consequence of the rules of behaviour for States and (through them) of individuals.

Human rights have only recently been protected by international law and are still seen today as being mainly governed by national law (though not of exclusively domestic concern). They were always seen and formulated as subjective rights of the individual (and, more recently, of groups) in respect of the State – mainly their own State.

Both branches of international law are today largely codified. IHL, however, is codified in a broadly coherent international system of binding universal instruments of which the more recent or specific clarify their relationship with the older or more general treaties. International Human Rights Law, conversely, is codified in an impressive number of instruments – universal or regional, binding or exhortatory, concerning the whole subject, its implementation only, specific rights or their implementation only – that emerge, develop, are implemented and die in a relatively natural, uncoordinated way.

Because of the philosophical axiom driving them, human rights apply to everyone everywhere, and as they are concerned with all aspects of human life, they have a much greater impact on public opinion and international politics than IHL, which is applicable only in armed conflicts that are themselves to be avoided. IHL is therefore increasingly influenced by human rights-like thinking.

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I. FIELDS OF APPLICATION

⇒ Case No. 151, ECHR, Cyprus v. Turkey

⇒ **Case No. 192, Inter-American Commission on Human Right, Tablada [Paras 158 and 159]**

⇒ Case No. 243, Colombia, Constitutional Conformity of Protocol II [Paras 11 and 12]

1. Material fields of application: complementarity

Introductory text

IHL is applicable in armed conflicts only. International Human Rights Law is applicable in all situations. All but the non-derogable provisions, the “hard core” of International Human Rights Law, however, may be suspended, under certain conditions, in situations threatening the life of the nation. As the latter do not only include armed conflicts, the complementarity remains imperfect; in particular, a gap exists in situations of internal disturbances and tension.

a) IHL is applicable in armed conflicts

b) Human rights apply at all times

Quotation General Comment No. 31 [80]

The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting)

[...]

10. States Parties are required by article 2, paragraph 1 [of the International Covenant on Civil and Political Rights], to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This

means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.

11. As implied in [...] General Comment No. 29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

[Source: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. Human Rights Committee. Eightieth session (CCPR/C/74/CRP4/Rev.6), online: www.unhchr.ch/tbs/doc.nsf]

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 101-106 and 127-130]
 - ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 50-80]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 143]
 - ⇒ Case No. 236, ICJ, Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo [Paras 206-221]
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aa) but derogations possible in situations threatening the life of the nation

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- ⇒ Document No. 55, UN, Minimum Humanitarian Standards [Part B., paras 50-57]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 149-153]
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bb) no derogations from the "hard core" – but controversy whether and to what extent judicial guarantees belong to the "hard core"

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- ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
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cc) police operations remain at all times governed by the specific International Human Rights standards applicable to police operations against civilians, which may never be conducted like hostilities against combatants

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- ⇒ Case No. 135, Israel, The Rafah Case [Paras 54-58]

- ⇒ Case No. 183, Iraq, Use of Force by United States Forces in Occupied Iraq
 - ⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia
 - ⇒ Case No. 271, India, People's Union for Civil Liberties v. Union of India
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SUGGESTED READING: FLECK Dieter, “Law Enforcement and the Conduct of Hostilities: Two Supplementing or Mutually Excluding Legal Paradigms?”, in *Frieden in Freiheit = Peace in Liberty = Paix en liberté : Festschrift für Michael Bothe zum 70 Geburtstag*, Baden-Baden, Nomos; Zürich, Dike, 2008, pp. 391-407.

c) gap in situations of internal disturbances and tensions

(For a definition of internal disturbances and tensions, see *supra* Part I, Chapter 2.III.1.C) Other situations, footnote 40)

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- ⇒ Case No. 45, ICRC, Disintegration of State Structures
 - ⇒ **Document No. 55, Minimum Humanitarian Standards**
 - ⇒ Case No. 271, India, People's Union for Civil Liberties v. Union of India
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SUGGESTED READING: EIDE Asbjorn, ROSAS Allan & MERON Theodor, “Combating Lawlessness in Gray Zones Through Minimum Humanitarian Standards”, in *AJIL*, Vol. 89/1, 1995, pp. 215-223. GASSER Hans-Peter, “A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct”, in *IRRC*, No. 262, January-February 1988, pp. 33-58. MERON Theodor, “Draft Model Declaration on Internal Strife”, in *IRRC*, No. 262, January-February 1988, pp. 59-104. MERON Theodor, *Human Rights in Internal Strife: Their International Protection*, Cambridge, Grotius, 1987, 349 pp. MERON Theodor, “Towards a Humanitarian Declaration on Internal Strife”, in *AJIL*, Vol. 78/4, 1984, pp. 859-868. MOMTAZ Djamchid, “The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife”, in *IRRC*, No. 324, September 1998, pp. 455-462. VIGNY Jean-Daniel, “Standards fondamentaux d’humanité : quel avenir ?”, in *IRRC*, No. 840, December 2000, pp. 917-939.

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2. Protected persons

Introductory text

While it is an important rule of International Human Rights Law that all human beings benefit equally from these rights, the traditional approach of IHL, consistent with its development as inter-State law, is essentially to protect enemies. IHL therefore defines

a category of “protected persons”, consisting basically of enemy nationals, who enjoy its full protection. Nevertheless, victims of armed conflicts who are not “protected persons” do not completely lack protection. In conformity with and under the influence of International Human Rights Law, they benefit from a growing number of protective rules, which, however, never offer the full protection foreseen for “protected persons”.

⇒ Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*

a) International Humanitarian Law: concept of protected persons

(See *supra*, Part I, Chapter 2. III. 2. a) passive personal scope of application: who is protected?)

b) International Human Rights Law: all human beings

⇒ Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*

aa) who are on the territory and/or under the jurisdiction of a State: controversy about the extraterritorial application of International Human Rights Law

⇒ **Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States***

3. Relations affected

Introductory text

International Human Rights Law stipulates (or recognizes) that individuals (or groups) have rights in respect of the State (or, arguably, other authorities). The provisions of IHL, too, protect individuals against the (traditionally enemy) State or other belligerent authorities. IHL, however, also corresponds to the traditional structure of international law in that it governs (often by the very same provisions) relations between States. In addition, it prescribes rules of behaviour for individuals (who must be punished if they violate them) for the benefit of other individuals.

⇒ Case No. 45, ICRC, *Disintegration of State Structures*

a) International Humanitarian Law

- individual – State
- State – State
- individual – individual

b) International Human Rights Law

- individual – State

⇒ Document No. 55, Minimum Humanitarian Standards [Part B., paras 59-64]

⇒ Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*

SUGGESTED READING: CLAPHAM Andrew, *Human Rights Obligations of Non-State Actors*, Oxford, OUP, 2006, 613 pp. SZABLEWSKA Natalia, “Non-State Actors and Human Rights in Non-International Armed Conflicts”, in *South African Yearbook of International Law*, Vol. 32, 2007, pp. 345-360.

4. The geographical scope of application: the extraterritorial application of International Human Rights Law

Introductory text

No one disputes that a State has to comply with IHL when it fights outside its territory. The IHL of military occupation has even been specifically made for such situations. Some rules of IHL (e.g., on the protection of prisoners of war and protected civilians) protect only those who are in the power of a State, while other rules (such as those on the conduct of hostilities) protect everyone, including, for example, the civilian population of the adverse party, against indiscriminate attacks or enemy soldiers against acts of perfidy or the use of prohibited weapons. The territorial field of application of International Human Rights Law raises many more controversies.

Most regional human rights conventions clearly state that the States Parties must secure the rights listed in those conventions for everyone within their jurisdiction. This includes occupied territory. On the universal level, under the International Covenant on Civil and Political Rights a Party undertakes ‘to respect and to ensure to all individuals within its territory *and* subject to its jurisdiction the rights recognized...’ (our emphasis). This wording and the negotiating history lean towards understanding territory and jurisdiction as cumulative conditions. Several States therefore deny that the Covenant is applicable extraterritorially. The International Court of Justice, the United Nations Human Rights Committee and other States are, however, of the opinion that the Covenant applies equally in occupied territory. From a teleological point of view, it would indeed be astonishing that persons whose rights can neither be violated nor protected by the territorial State lose all protection of their fundamental rights in respect of the State which can actually violate and protect their rights.

Even if International Human Rights Law applies extraterritorially, the next question that arises is when a person can be considered to be under the jurisdiction of a State. Doctrine and judicial decisions provide differing answers. One solution lies in the functional approach, which distinguishes the degree of control necessary according to the right to be protected. Such a “sliding scale” approach would reconcile the object and purpose of human rights – to protect everyone – with the need not to bind States

by guarantees they cannot deliver outside their territory and concern to protect the sovereignty of the territorial State (which may be encroached upon by international forces protecting human rights against anyone other than themselves).

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 107-112]
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey
 - ⇒ Case No. 227, ECHR, Bankovic and Others v. Belgium and 16 Other States
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SUGGESTED READING: BEN-NAFTALI Orna & SHANY Yuval, “Living in Denial: The Application of Human Rights in the Occupied Territories”, in *Israel Law Review*, Vol. 37, No. 1, 2003, pp. 17-118. CERONE John, “Jurisdiction and Power: the Intersection of Human Rights Law & the Law of Non-International Armed Conflict in an Extraterritorial Context”, in *Israel Law Review*, Vol. 40, No. 2, 2007, 58 pp. DENNIS Michael J., “Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation”, in *AJIL*, Vol. 99, No. 1, January 2005, pp. 119-142. DENNIS Michael J. & SURENA Andre M., “Application of the International Covenant on Civil and Political Rights in Times of Armed Conflict and Military Occupation: The Gap Between Legal Theory and State Practice”, in *European Human Rights Law Review*, Issue 6, 2008, pp. 714-731. HENDIN Stuart, “Extraterritorial Application of Human Rights: the Differing Decisions of Canadian and UK Courts”, in *Windsor Review of Legal and Social Issues*, January 2010, pp. 57-86. SASSÒLI Marco, “The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?”, in *IYHR*, Vol. 39, 2009, pp. 177-212. ZIMMERMANN Andreas, “Extraterritorial Application of Human Rights Treaties: The Case of Israel and the Palestinian Territories Revisited”, in BUFFARD Isabelle, CRAWFORD James, PELLET Alain & WITTICH Stephan, *International Law between Universalism and Fragmentation: Festschrift in Honour of Gerhard Hafner*, Leiden, M. Nijhoff, February 2009, pp. 747-766.

II. PROTECTED RIGHTS

Introductory text

If the protective rules of IHL are translated into rights and these rights compared with those provided by International Human Rights Law, it becomes apparent that IHL protects, in armed conflicts, only some human rights,^[445] namely those that:

- a) are particularly endangered by armed conflicts^[446] and
- b) are not, as such, incompatible with the very nature of armed conflicts.^[447]

445 Thus, for example, Art. 41 of Protocol I protects the right to life of enemies *hors de combat*, Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories, Art. 56 of Protocol I protects the right to a healthy environment.

446 Thus, e.g., since an armed conflict more strongly affects the war victims' physical integrity than their freedom of opinion, it is logical that IHL contains more rules on the former than on the latter.

447 The right of a people to peace, e.g., is by definition violated when that people is affected by an armed conflict. The right to self-determination is one of the (lawful) reasons for armed conflict. IHL, therefore, can not protect either of these rights.

These few rights are protected by much more detailed IHL regulations that are better adapted to the specific problems arising in armed conflicts than the comprehensive guarantees formulated in International Human Rights Law.^[448] In addition, IHL regulates problems of vital import for the protection of victims of armed conflicts, but which International Human Rights Law fails to address, even implicitly.^[449]

IHL protects civil and political rights,^[450] economic, social and cultural rights,^[451] and collective or group rights.^[452] Indeed, ever since it was first codified, IHL has never made the artificial distinction between civil and political rights and economic, social and cultural rights or between rights imposing a positive obligation on the State and those requiring the State to abstain from a certain type of behaviour.^[453] In both fields IHL foresees legal obligations. For instance, in armed conflicts there is no meaningful protection without the provision of humanitarian assistance to those in need. Conversely, there can be no humanitarian assistance without a simultaneous concern for protecting those assisted from abuse and against violence and danger, which may even stem from the assistance provided.

SUGGESTED READING: JUNOD Sylvie S., “Human Rights and Protocol II”, in *IRRC*, No. 236, September 1983, pp. 246-254.

1. Rights protected by both branches: the *lex specialis* principle

Introductory text

When a point is covered by both IHL and International Human Rights Law, when both branches apply and in addition (which is rarely the case) lead to different results, the question arises as to which prevails. This problem is generally resolved by applying the *lex specialis* principle. In most cases, the two applicable rules do not contradict each other, but one or the other simply provides more details and therefore constitutes the *lex specialis*. Where contradictions exist, the meaning of the *lex specialis* principle is controversial. Some argue that IHL always prevails, or at least that it prevails in every situation for which it has a rule. Others, applying the rule of interpretation used to decide between competing or contradictory human rights rules, argue that in any circumstance the rule providing the greatest level of protection must be applied. In our view, it is preferable to apply the more detailed rule, that is, that which is more precise vis-à-vis the situation and the problem to be addressed.

448 Thus, e.g., the very detailed precautionary measures to be taken in attack, according to Art. 57 of Protocol I, constitute a translation of the right to life and physical integrity of civilians into detailed rules of behaviour for those who conduct hostilities which could affect the civilians. Note, however, that International Human Rights Law provides conversely more details on, e.g., “the judicial guarantees which are recognized as indispensable by civilized peoples” foreseen in Art. 3 common to the Conventions.

449 Thus, Art. 44(1)-(3) of Protocol I on combatant status deals with the question who may use force, an issue not addressed by International Human Rights Law, but which is crucial for the protection of civilians.

450 Thus, e.g., Art. 41 of Protocol I protects the right to life of enemies *hors de combat*.

451 Thus, e.g., Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories.

452 Thus, e.g., Art. 56 of Protocol I protects the right to a healthy environment.

453 Thus, the very idea of Henry Dunant codified in the First Geneva Convention of 1864 is to prescribe an international obligation that the wounded and sick shall not only be respected but also, and in particular, be collected and cared for.

The *lex specialis* principle does not indicate the inherent quality of one branch of law or of one of its rules. Rather, it determines which rule prevails over another in a particular situation. Each case must be analysed individually. Specialty in the logical sense implies that the norm that applies to certain facts must give way to the norm that applies to those same facts as well as to an additional fact present in the given situation. Between two applicable rules, the one which has the larger common contact surface area with the situation applies. The norm with the scope of application that enters completely into that of the other norm must prevail, otherwise it would never apply. It is the norm with the more precise or narrower material and/or personal scope of application that prevails. Precision requires that the norm addressing a problem explicitly prevails over the one that treats it implicitly, the one providing more details over the one that is more general, and the more restrictive norm over the one covering the entire problem but in a less exacting manner.

A less formal – and also less objective – factor in determining which of two rules applies is the conformity of the solution to the systemic objectives of the law. Characterizing this solution as *lex specialis* perhaps constitutes a misuse of language. The systemic order of international law is a normative postulate founded on value judgements. In particular, when formal standards do not indicate a clear result, this teleological criterion must weigh in, even though it allows for personal preferences.

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- ⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*
 - ⇒ Case No. 236, ICJ, *Democratic Republic of the Congo/Uganda, Armed Activities on the Territory of the Congo* [Paras 206-211]
 - ⇒ Case No. 261, United States, *Status and Treatment of Detainees Held in Guantanamo Naval Base* [Parts III. and IV.]
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SUGGESTED READING: CHEVALIER-WATTS Juliet, “Has Human Rights Law Become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?”, in *The International Journal of Human Rights*, Vol. 14, No. 4, pp. 584-602. DROEGE Cordula, “The Interplay between International Humanitarian law and International Human Rights Law in Situation of Armed Conflict”, in *Israel Law Review*, Vol. 40, No. 2, pp. 310-355, 2007. DROEGE Cordula, “Elective Affinities?: Human Rights and Humanitarian Law”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 501-548. SASSÒLI Marco, “Le droit international humanitaire, une *lex specialis* par rapport aux droits humains ?”, in AUER Andreas, FLUECKIGER Alexandre & HOTTELIER Michel, *Les droits de l’homme et la constitution : études en l’honneur du Professeur Giorgio Malinverni*, Zürich, Schulthess, 2007, pp. 375-395. SASSÒLI Marco, “The International Legal Framework for Stability Operations: When May International Forces Attack or Detain Someone in Afghanistan?”, in *IYHR*, Vol. 39, 2009, pp. 177-212. SHANY Yuval, “Human Rights and Humanitarian Law as Competing Legal Paradigms for Fighting Terror”, in *Hebrew University International Law Research Paper*, No. 23-09, 2009, 27 pp.

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dans les nouveaux conflits armés”, in *RGDIP*, T. 111/2007/3, pp. 539-574. MARSH Jeremy J., “Rule 99 of the Customary International Humanitarian Law Study and the Relationship between the Law of Armed Conflict and International Human Rights Law”, in *The Army Lawyer*, May 2009, pp. 18-22. SOMER Jonathan, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, in *IRRC*, Vol. 89, No. 867, September 2007, pp. 655-690.

a) areas in which details provided by IHL are more adapted to armed conflicts

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- ⇒ Document No. 55, Minimum Humanitarian Standards [Part B., para. 66]
 - ⇒ Case No. 62, ICJ, Nuclear Weapons Advisory Opinion [Para. 25]
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States [Paras 38-44]
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Parts III. and IV.]
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aa) right to life in the conduct of hostilities

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- ⇒ Case No. 136, Israel, The Targeted Killings Case
 - ⇒ Case No. 140, Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 45-51]
 - ⇒ Case No. 192, Inter-American Commission on Human Rights, Tablada [Para. 161]
 - ⇒ Case No. 245, Human Rights Committee, Guerrero v. Colombia
 - ⇒ Case No. 271, India, People’s Union for Civil Liberties v. Union of India
 - ⇒ Case No. 272, Civil War in Nepal [Part II.]
 - ⇒ Case No. 282, ECHR, Isayeva v. Russia
 - ⇒ Case No. 283, ECHR, Khatsiyeva v. Russia [Paras 129, 132-138]
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SUGGESTED READING: DOSWALD-BECK Louise, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, in *IRRC*, Vol. 88, No. 864, December 2006, pp. 881-904. MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp. RATNER Steven R., “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad”, in *Journal of Political Philosophy*, September 2007, Vol. 15, Issue 3, pp. 251-275. SOLOMON Solon, “Targeted Killings and the Soldiers Right to Life”, in *ILSA Journal of International and Comparative Law*, Vol. 14, No. 1, 2007, pp. 99-120. SPEROTTO Federico, “Targeted Killings in response to Security Threats: Warfare and Humanitarian Issues”, in *Global Jurist*, Vol. 8, Issue 3, 2008, pp. 1-32.

bb) prohibition of inhumane and degrading treatment

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- ⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees
 - ⇒ Case No. 154, Inter-American Court of Human Rights, Bámaca-Velasquez v. Guatemala
 - ⇒ Case No. 186, Iraq, Medical Ethics in Detention
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cc) right to health

⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun [Paras 53-56]

dd) right to food

ee) right to individual freedom (in international armed conflicts)

⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States [Paras 42 and 52-59]

⇒ Case No. 185, United States, The Schlesinger Report

b) areas in which International Human Rights Law gives more details

aa) procedural guarantees in case of detention?

⇒ Case No. 154, Inter-American Court of Human Rights, Bámaca-Velasquez v. Guatemala

⇒ Case No. 196, Sri Lanka, Conflict in the Vanni [Paras 29-46]

⇒ Case No. 229, Democratic Republic of the Congo, Conflicts in the Kivus [Part III, paras 38-40]

⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Parts III and IV]

SUGGESTED READING: Case Western Reserve Journal of International Law, "Security Detention", Vol. 40, No. 3, 2009, pp. 315-650. HENDIN Stuart, "Detainees in Afghanistan: the Balance between Human Rights Law and International Humanitarian Law for Foreign Military Forces", in *Tilburg Law Review*, Vol. 14, No. 3, 2008, pp. 249-271. Ministry of Foreign Affairs of Denmark, "The Copenhagen Process on the Handling of Detainees in International Military Operations", in *RDMDG*, Vol. 3-4, No. 46, 2007, pp. 363-392. OLSON Laura, "Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law: Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict", in *Case Western Reserve Journal of International Law*, Vol. 40, No. 3, 2009, pp. 437-461. OSWALD Bruce, "The Detention of Civilians in Military Operations: Reasons for and Challenges to Developing a Special Law of Detention", in *Melbourne University Law Review*, Vol. 32, 2008, pp. 524-553.

bb) judicial guarantees in case of trial

⇒ Case No. 263, United States, Hamdan v. Rumsfeld

cc) use of firearms by law enforcement officials

⇒ Document No. 122, ICRC Appeals on the Near East [Part C., para. 8]

⇒ Case No. 198, Belgium, Belgian Soldiers in Somalia

⇒ Case No. 245, Human Rights Committee, Guerrero v. Colombia

dd) medical ethics

⇒ Case No. 186, Iraq, Medical Ethics in Detention

ee) definition of torture

⇒ Case No. 130, Israel, Methods of Interrogation Used Against Palestinian Detainees

c) the main controversies over whether IHL or International Human Rights Law prevails

aa) the right to life of fighters in non-international armed conflict

⇒ Case No. 136, Israel, The Targeted Killings Case

⇒ Case No. 245, Human Rights Committee, Guerrero v. Colombia

⇒ Case No. 272, Civil War in Nepal [Part II.]

⇒ Case No. 283, ECHR, Khatsiyeva v. Russia

SUGGESTED READING: CHEVALIER-WATTS Juliet, “Has Human Rights Law Become *Lex Specialis* for the European Court of Human Rights in Right to Life Cases Arising from Internal Armed Conflicts?”, in *The International Journal of Human Rights*, Vol. 14, No. 4, pp. DOSWALD-BECK Louise, “The Right to Life in Armed Conflict: Does International Humanitarian Law Provide all the Answers?”, in *IRRC*, Vol. 88, No. 864, December 2006, pp. 881-904. MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp. RATNER Steven R., “Predator and Prey: Seizing and Killing Suspected Terrorists Abroad”, in *Journal of Political Philosophy*, September 2007, Vol. 15, Issue 3, pp. 251-275. SASSÒLI Marco & OLSON Laura, “The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts”, in *IRRC*, Vol. 90, no. 871, September 2008, pp. 599-627. SPEROTTO Federico, “Counter-insurgency, Human Rights, and the Law of Armed Conflict”, in *Human Rights Brief*, Vol. 17, Issue 1, 2009, pp. 19-23.

bb) procedural requirements in case of arrest and detention of fighters in non-international armed conflict

⇒ Case No. 154, Inter-American Court of Human Rights, Bámaca-Velasquez v. Guatemala,

⇒ **Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Parts III and IV]**

⇒ **Case No. 267, United States, The Obama Administration’s Internment Standards**

⇒ **Document No. 268, United States, Closure of Guantanamo Detention Facilities**

SUGGESTED READING: HENDIN Stuart, “Detainees in Afghanistan: the Balance between Human Rights Law and International Humanitarian Law for Foreign Military Forces”, in *Tilburg Law Review*, Vol. 14, No. 3, 2008, pp. 249-271. PEJIC Jelena, “Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence”, in *IRRC*, Vol. 87,

No. 858, June 2005, pp. 375-391. SASSÒLI Marco & OLSON Laura, "The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible Killing and Internment of Fighters in Non-International Armed Conflicts", in *IRRC*, Vol. 90, no. 871, September 2008, pp. 599-627.

2. Rules of IHL not covered by International Human Rights Law

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- ⇒ **Case No. 267, United States, The Obama Administration's Internment Standards**
 - ⇒ **Document No. 268, United States, Closure of Guantanamo Detention Facilities**
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3. Human rights outside the scope of IHL

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., paras 128-134]
 - ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 403-413]
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
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III. IMPLEMENTATION

Introductory text

While the purpose of both IHL and International Human Rights Law is to obtain respect for the individual, each of these branches of law has its own implementation mechanisms tailored to the typical situations for which they were created. Violations of IHL typically occur on the battlefield. They can only be addressed by immediate reaction. International Human Rights Law is more often violated through judicial, administrative or legislative decisions or inaction against which appeal and review procedures are appropriate and meaningful remedies. In the implementation of IHL, *redress* to the victims is central, and therefore a confidential, cooperative and pragmatic approach is often more appropriate. In contrast, the victims of traditional violations of International Human Rights Law want their rights to be reaffirmed, and therefore seek public condemnation as soon as they spot violations. A more legalistic and dogmatic approach is therefore necessary in implementing International Human Rights Law; indeed, such an approach corresponds to the human rights logic, which historically represents a challenge to the "sovereign", while respect for IHL can be considered as a treatment conceded by the "sovereign".

It has been said in some quarters that implementation of IHL requires the mentality of a good Samaritan, implementation of International Human Rights Law the mentality of a judge. In practice, IHL has traditionally been implemented through permanent, preventive and corrective scrutiny in the field, whereas International Human Rights Law has traditionally been implemented through *a posteriori* control, on demand, in a quasi-judicial procedure.

Interestingly, today the different bodies implementing International Human Rights Law in situations of gross and widespread human rights violations in the field act in a way akin to that traditionally adopted by the International Committee of the Red Cross (ICRC) for the implementation of IHL. United Nations (UN) human rights monitors are deployed in critical regions and visit prisons similarly to ICRC delegates, and special rapporteurs of the UN Human Rights Council travel to critical areas. On the other hand, IHL is more and more often implemented by international tribunals, necessarily *a posteriori* and in a judicial procedure.

In international practice, discussions and resolutions of the UN Security Council, the UN General Assembly and the UN Human Rights Council concerning armed conflict situations generally mention IHL and human rights together. Certain convergences are also inherent in international human rights instruments. Most human rights, except the most fundamental ones belonging to “the hard core”, may be derogated from in states of emergency, to the extent required by the exigencies of the situation, and if this derogation is consistent with the other international obligations of the derogating State.^[454] IHL contains some of those other international obligations. Therefore, when confronted in times of armed conflict with derogations admissible as such under human rights instruments, the implementing bodies of International Human Rights Law must check whether those measures are compatible with IHL. If they are not, they also violate International Human Rights Law.

Similarly, International Human Rights Law considers the right to life as non-derogable, even in time of armed conflict. Some instruments, however, set out an explicit – and others an implicit – exception for “lawful acts of war”.^[455] IHL defines what is lawful in war. When confronted with State-sponsored killings in time of armed conflict, human rights courts, commissions or NGOs must therefore check whether such actions are consistent with IHL before they can know whether they violate International Human Rights Law.

Conversely, the main international body implementing IHL, the ICRC, has for a long time been engaged in activities in situations of internal violence similar to those it performs in international armed conflicts. During such situations, IHL does not apply. In the past implicitly and today more and more explicitly – but maintaining its pragmatic, cooperative, and victim-oriented approach – the ICRC must therefore refer to human rights instruments for applicable international standards, for example on procedural principles and safeguards for internment or administrative detention in non-international armed conflicts.

454 See 1966 Covenant on Civil and Political Rights, Art. 4(1); European Convention on Human Rights, Art. 15(1); American Convention on Human Rights, Art. 27(1)

455 See explicitly European Convention on Human Rights, Art. 15(2). Other instruments only prohibit “arbitrary” deprivation of life.

Finally, as far as the teaching, training and dissemination of the two branches are concerned, soldiers must know Human Rights Law. Indeed, more and more soldiers are deployed in peacetime for police operations to which Human Rights Law applies. Police forces have to be familiar with both branches and know the relationship between them. Students will not understand new developments in IHL, in particular the important “human rights-like” rules of the law of non-international armed conflicts, if they have not first understood the philosophy and interpretations of International Human Rights Law. Conversely, they would have an incomplete view of the protection international law can offer to the individual if they studied only Human Rights Law without understanding the principles and fundamentally different starting point of IHL, namely the rules providing for protection of the individual in the most dangerous situations: armed conflicts.

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1. Difference

⇒ Case No. 45, ICRC, Disintegration of State Structures

- a) due to the specificities of armed conflicts
- b) in the approach: charity vs. justice ?

Quotation [T]he ICRC abstains from making public pronouncements about specific acts committed in violation of law and humanity and attributed to belligerents. It is obvious that insofar as it set itself up as a judge, the ICRC would be abandoning the neutrality it has voluntarily assumed. Furthermore, in the quest for a result which would most of the time be illusory, demonstrations of this sort would compromise the charitable activity which the ICRC is in a position to carry out. One cannot be at one and the same time the champion of

justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.

[Source: Pictet, J., *The Fundamental Principles of the Red Cross. Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965*, Geneva, Henry Dunant Institute, 1979, pp. 59-60]

⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women

c) in action

aa) traditionally

- International Humanitarian Law: permanent, preventive and corrective control on the field
- International Human Rights Law: *a posteriori* control, on demand, in a quasi-judicial procedure

⇒ Case No. 271, India, People's Union for Civil Liberties v. Union of India

bb) contemporary tendency of human rights bodies to adopt an IHL-like approach

⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*,

⇒ Case No. 228, Case Study, *Armed Conflicts in the Great Lakes Region* [Part III., C.1 and D.1]

⇒ Case No. 261, United States, *Status and Treatment of Detainees Held in Guantanamo Naval Base* [Parts III. and IV.]

2. Convergence

⇒ Document No. 58, UN, *Guidelines on the Right to a Remedy and Reparation for Violations of International Humanitarian Law and Human Rights Law*

a) implementation of IHL by human rights mechanisms

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- ⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala*,
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, *Coard v. US*
 - ⇒ Case No. 192, Inter-American Commission on Human Rights, *Tablada* [Paras 158-171]
 - ⇒ Case No. 246, Inter-American Court of Human Rights, *The Las Palmeras Case*
 - ⇒ Case No. 261, United States, *Status and Treatment of Detainees Held in Guantanamo Naval Base* [Parts III. and IV.]
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SUGGESTED READING: BYRON Christine, “A Blurring of the Boundaries: the Application of International Humanitarian Law by Human Rights Bodies”, in *Virginia Journal of International Law*, Vol. 47, No. 4, 2007, pp. 839-896. HAMPSON Françoise, “Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts”, in *RDMDG*, Vol. 31, 1992, pp. 117-127. HAMPSON Françoise, “The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of a Human Rights Treaty Body”, in *IRRC*, Vol. 90, No. 871, September 2008, pp. 549-572. HENCKAERTS Jean-Marie, “Concurrent Application of International Human Rights Law and International Humanitarian Law: Victims in Search of a Forum”, in *Human Rights and International Legal Discourse*, Vol. 1, No. 1, 2007, pp. 95-124. MARTIN Fanny, “Le droit international humanitaire devant les organes de contrôle des droits de l’homme”, in *Droits Fondamentaux*, No. 1, July-December 2001, <http://www.droitsfondamentaux.org>. MARTIN Fanny, “Application du droit international humanitaire par la Cour interaméricaine des droits de l’homme”, in *IRRC*, No. 844, December 2001, pp. 1037-1066. REIDY Aisling, “The Approach of the European Commission and Court of Human Rights to International Humanitarian Law”, in *IRRC*, No. 324, September 1998, pp. 513-529. SASSÒLI Marco, “La Cour européenne des droits de l’homme et les conflits armés”, in BREITENMOSEER Stephan, EHRENZELLER Bernhard, SASSÒLI Marco, STOFFEL Walter & WAGNER PFEIFER Beatrice (eds), *Human Rights, Democracy and the Rule of Law: Liber Amicorum Luzius Wildhaber*, Zürich, Dike, February 2007, pp. 709-731

FURTHER READING: ALSTON Philip, MORGAN-FOSTER Jason & ABRESCH William, “The Competence of the UN Human Rights Council and its Special Procedures in Relation to Armed Conflicts: Extrajudicial Executions in the “War on Terror””, in *EJIL*, Vol. 19, No. 1, February 2008, pp. 183-209. D’AVIOLO Michele, “Regional Human Rights Courts and Internal Armed Conflicts”, *Intercultural Human Rights Law Review*, Vol. 2, 2007, pp. 249-328. MCCARTHY Conor, “Human Rights and the Laws of War under the American Convention on Human Rights”, in *European Human Rights Law Review*, No. 6, 2008, pp. 762-780. O’DONNELL Daniel, “Trends in the Application of International Humanitarian Law by United Nations Human Rights Mechanisms”, in *IRRC*, No. 324, September 1998, pp. 481-503. SÖFKER Carolin, “The Inter-American Commission and the Court of Human Rights: Enforcement Mechanisms of International Humanitarian Law?”, in *Humanitäres Völkerrecht*, 20. Jg., 1, 2007, pp. 33-36. ZEGVELD Liesbeth, “The Inter-American Commission on Human Rights and International Humanitarian Law: A Comment on the *Tablada Case*”, in *IRRC*, No. 324, September 1998, pp. 505-511.

aa) through clauses in human rights treaties

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- ⇒ Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*
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- exception to the right to life

SUGGESTED READING: GAGGIOLI Gloria & KOLB Robert, “A Right to Life in Armed Conflicts?: the Contribution of the European Court of Human Rights”, in *IYHR*, Vol. 37, 2007, pp. 115-163. MELZER Nils, *Targeted Killing in International Law*, Oxford, OUP, 2008, 468 pp.

- reference in derogation clauses

Quotation General Comment No. 29: States of Emergency (article 4), 31/08/2001.

[...]

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.
10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.

[Source: International Covenant on Civil and Political Rights, Document CCPR/C/21/Rev.1/Add.11, of 31 August 2001, General Comment no. 29, States of Emergency (article 4), online: www.unhcr.ch/tbs/doc.nsf]

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- ⇒ Case No. 192, Inter-American Commission on Human Rights, *Tablada* [Paras 168-170]
 - ⇒ Case No. 246, Inter-American Court of Human Rights, *The Las Palmeras Case*
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- the prohibition of “arbitrary” detention

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- ⇒ Case No. 157, Inter-American Commission on Human Rights, *Coard v. United States*,
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bb) indirectly, through the implementation of International Human Rights Law

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- ⇒ Case No. 140, Israel, Human Rights Committee's Report on Beit Hanoun
 - ⇒ Case No. 151, ECHR, Cyprus v. Turkey
 - ⇒ Case No. 154, Inter-American Court of Human Rights, *Bámaca-Velasquez v. Guatemala* [Paras 203-214]
 - ⇒ Case No. 245, Human Rights Committee, *Guerrero v. Colombia*
 - ⇒ Case No. 246, Inter-American Court of Human Rights, *The Las Palmeras Case*
 - ⇒ Case No. 282, ECHR, *Isayeva v. Russia*
 - ⇒ Case No. 283, ECHR, *Khatsiyeva v. Russia*
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b) implementation of human rights by the ICRC

SUGGESTED READING: FORSYTHE David P., "Choices More Ethical than Legal: The International Committee of the Red Cross and Human Rights", in *Ethics & International Affairs*, Vol. 7, 1993, pp. 131-151. SCHINDLER Dietrich, "The International Committee of the Red Cross and Human Rights", in *IRRC*, No. 208, January 1979, pp. 3-14.

FURTHER READING: GASSER Hans-Peter, "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct", in *IRRC*, No. 262, January-February 1988, pp. 33-58. SOMMARUGA Cornelio, "Humanitarian Law and Human Rights in the Legal Arsenal of the ICRC", in *Human Rights and Humanitarian Law*, The Hague, M. Nijhoff, 1997, pp. 125-133.

- in armed conflicts
- outside armed conflicts

3. Cooperation between the ICRC and human rights bodies

a) dissemination

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 2.3.1]
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b) thought

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- ⇒ Document No. 55, Minimum Humanitarian Standards [Part B., para. 99]
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c) operations

Chapter 15

The International Committee of the Red Cross (ICRC)

Quotation

The ICRC's mission

Since it was founded in 1863, the ICRC has been working to protect and assist the victims of armed conflict and other situations of violence. It initially focused on wounded soldiers but over time it extended its activities to cover all victims of these events.

In *A Memory of Solferino*, Henry Dunant suggested creating national relief societies,^[456] recognizable by their common emblem, and an international treaty to protect the wounded on the battlefield.^[457] A permanent committee was established in Geneva to further Dunant's ideas. A red cross on a white ground [reversing the colours of the Swiss flag and paying tribute to the country, as host of the Geneva International Conference of 1863] was chosen as the emblem and the committee went on to adopt the name of the International Committee of the Red Cross.

Initially, it was not the ICRC's intention to take action on the ground. However, the National Societies of countries in conflict – viewed as too close to the authorities – asked the ICRC to send its own relief workers, believing that humanitarian work in times of conflict needed to offer guarantees of neutrality and independence acceptable to all parties, which only the ICRC could do. The ICRC therefore had to build up operational activities very quickly within a framework of neutrality and independence, working on both sides of the battlefield. Formal recognition of this function came later, when the Geneva Conventions explicitly recognized the purely humanitarian and impartial nature of the ICRC's activities, and gave the organization a special role in ensuring the faithful application of international humanitarian law.

456 Dunant suggested that permanent relief societies be set up which would begin making preparations during peacetime so as to be ready to support the armed forces' medical services in wartime. These societies would coordinate their efforts and be recognized by the authorities. He also proposed that an international congress be held "to formulate some international principle, sanctioned by a Convention inviolate in character, which, once agreed upon and ratified, might constitute the basis for societies for the relief of the wounded," and would also protect the wounded and those coming to their aid [...].

457 In making Henry Dunant's ideas a reality, and in particular, promoting the adoption of a solemn commitment by States to help and care for wounded soldiers without distinction, the ICRC was at the forefront of the development of international humanitarian law. Its fieldwork was later given a legal basis through mandates contained in international humanitarian law and in resolutions adopted at meetings of the International Conference of the Red Cross and Red Crescent.

The ICRC defines its **mission** in the following terms:

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with assistance.

The ICRC also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles.

Established in 1863, the ICRC is at the origin of the Geneva Conventions and the International Red Cross and Red Crescent Movement. It directs and coordinates the international activities conducted by the Movement in armed conflicts and other situations of violence.

To be able to carry out its mission effectively, the ICRC needs to have the trust of all States, parties and people involved in a conflict or other situation of violence. This trust is based in particular on an awareness of the ICRC's policies and practices. The ICRC gains people's trust through continuity and predictability. Combining effectiveness and credibility irrespective of time, place or range of needs is a permanent challenge for the organization, because it must be able to prove it can be both pragmatic and creative. Within the framework of the ICRC's clear strategy and priorities, its delegations in the field are thus given considerable autonomy to decide how best to help victims of conflict and other situations of violence.

[...]

The ICRC's identity

The ICRC's purpose

The *raison d'être* of the ICRC is to ensure respect, through its neutral and independent humanitarian work, for the lives, dignity and physical and mental well-being of victims of armed conflict and other situations of violence. All of the ICRC's work is geared towards meeting this fundamental objective and strives to fulfil this ideal. The ICRC takes action to meet the needs of these people and in accordance with their rights and the obligations incumbent upon the authorities.

The dual nature of the ICRC's work

The ICRC's work developed along two lines. The first of these is operational, i.e. helping victims of armed conflict and other situations of violence. The second involves developing and promoting international humanitarian law and humanitarian principles.

These two lines are inextricably linked because the first operates within the framework provided by the second, and the second draws on the experience of the first and facilitates the ICRC's response to the needs identified. This dual nature thus reinforces the very identity of the ICRC and distinguishes it from other international humanitarian organizations, private or intergovernmental, which generally concentrate on just one of these two priorities.

An organization with a mandate

A key characteristic of the ICRC is that it was given a mandate (or rather mandates) by the States party to the Geneva Conventions to help victims of armed conflict. Its work is therefore firmly rooted in public international law. In other situations of violence, the ICRC derives its mandate from the Statutes of the Movement.^[458]

The main legal basis for the ICRC's work is to be found in international humanitarian law. The Statutes of the International Red Cross and Red Crescent Movement (the Movement) and resolutions of the International Conference of the Red Cross and Red Crescent and the Council of Delegates underscore the legitimacy of the ICRC's work. International humanitarian law, like the Statutes of the Movement, confirms a historical tradition of ICRC action which predates its successive codifications.

States gave the ICRC the responsibility of monitoring the faithful application of international humanitarian law. As the guardian of humanitarian law, the ICRC takes measures to ensure respect for, to promote, to reaffirm and even to clarify and develop this body of law. The organization is particularly concerned about possible erosion of international humanitarian law and takes bilateral, multilateral or public steps to promote respect for and development of the law.

The ICRC generally cites international humanitarian law in reference to its activities. It nevertheless reserves the right to cite other bodies of law and other international standards protecting people, in particular international human rights law, whenever it deems it necessary.

The ICRC has developed several policy documents that draw on its long experience. These texts serve as a guide for its actions and aim to give the organization long-term coherence, which in turn gives the ICRC added predictability and credibility when exercising its mandate.

Membership in a Movement

Another characteristic of the ICRC is its membership in a Movement – a Movement which it initiated. The ICRC is one component, and National Societies and the International Federation of Red Cross and Red Crescent Societies (the Federation) are the others. This link with the Movement is reinforced by the similarity of tasks of all Movement components and by the use of common emblems.

The Movement's mission is:

- to prevent and alleviate suffering wherever it may be found;
- to protect life and health and ensure respect for the human being, in particular in times of armed conflict and other emergencies;
- to work for the prevention of disease and for the promotion of health and social welfare;
- to encourage voluntary service and a constant readiness to give help by the members of the Movement, and a universal sense of solidarity towards all those in need of its protection and assistance (Preamble to the Statutes of the Movement).

458 See Document No. 31, Statutes of the International Red Cross and Red Crescent Movement (footnote added by the authors)

It may be added that by carrying out its activities throughout the world, the Movement contributes to the establishment of a lasting peace.

The mission of the National Societies is to carry out humanitarian activities within their own countries, particularly in the role of auxiliaries to the public authorities in the humanitarian field.^[459]

The ICRC undertakes procedures to recognize National Societies on the basis of criteria set out in the Statutes of the Movement. The recognition of National Societies makes them full members of the Movement and eligible to become members of the Federation. The ICRC cooperates with them in matters of common concern, such as their preparation for action in times of armed conflict, tracing and reuniting families and spreading knowledge of international humanitarian law and the Movement's Fundamental Principles. In armed conflict and other situations of violence, the ICRC is responsible for helping them boost their capacity to meet the increased need for humanitarian aid.

Often it is thanks to the National Societies' presence, resources, local knowledge and motivation that the ICRC can successfully carry out its work in the field. National Societies may also be involved in international operations via the ICRC, the Federation or the National Society of the country in question. The ICRC benefits from a unique worldwide network made up of all the National Societies. Cooperation and coordination within the Movement help make the best possible use of the capacity of all members.

In accordance with the Movement's agreements and rules, the ICRC directs and coordinates international relief activities in "**international and non-international armed conflicts**" and in **situations of "internal strife and their direct results."** It also directs and coordinates activities aiming to restore family links in any situation requiring an international emergency response. The ICRC thus has two levels of responsibility:

- doing the humanitarian work that derives from its own mandate and its specific areas of competence;
- coordinating the international operations of the Movement's components.

The Fundamental Principles of the International Red Cross and Red Crescent Movement

The ICRC's endeavour is guided by seven Fundamental Principles, which the organization shares with the other components of the Movement. The principles – **humanity, impartiality, neutrality, independence, voluntary service, unity and universality** – are set out in the Movement Statutes and constitute the common values that distinguish the Movement from other humanitarian organizations. The Movement has given the ICRC the task of upholding and disseminating these principles. The first four, which are set out below, are those most commonly cited by the ICRC and are specifically mentioned in its mission statement:

- Humanity is the supreme principle. It is based on respect for the human being and encapsulates the ideals and aims of the Movement. It is the main driving force behind the ICRC's work.
- Impartiality, a principle that rejects any form of discrimination, calls for equal treatment for people in distress, according to their needs. It enables the ICRC to prioritize its activities on the basis of the degree of urgency and the types of needs of those affected.

459 See *infra*, I.1.a) National Red Cross and Red Crescent Societies (footnote added by the authors)

- Neutrality enables the ICRC to keep everyone’s trust by not taking sides in hostilities or controversies of a political, racial, religious or ideological nature. Neutrality does not mean indifference to suffering, acceptance of war or quiescence in the face of inhumanity; rather, it means not engaging in controversies that divide peoples. The ICRC’s work benefits from this principle because it enables the organization to make more contacts and gain access to those affected.
- The ICRC’s independence is structural: the Committee’s members are all of the same nationality and they are recruited by co-optation. The ICRC is therefore independent of national and international politics, interest groups, and any other entity that may have some connection with a situation of violence. This gives the ICRC the autonomy it needs to accomplish the exclusively humanitarian task entrusted to it with complete impartiality and neutrality.

Scope of work and criteria for taking action

There are four different situations in which the ICRC takes action:

1. The ICRC’s endeavour to **help the victims of international armed conflict and non-international armed conflict** is at the heart of its mission. The ICRC offers its services on the basis of international humanitarian law, and after taking due account of the existing or foreseeable need for humanitarian aid.^[460]
2. **In other situations of violence, the ICRC offers its services** if the seriousness of unmet needs and the urgency of the situation warrant such a step. It also considers whether it can do more than others owing to its status as a specifically neutral and independent organization and to its experience. In these situations, its offer of services is based not on international humanitarian law but on the Statutes of the Movement.^[461]
3. If a **natural or technological disaster or a pandemic** occurs in an area where the ICRC has an operational presence, meaning it can deploy quickly and make a significant contribution, the organization steps in with its unique capabilities, to the extent it is able and in cooperation with the Movement. It generally takes action during the emergency phase only.
4. **In other situations**, it makes its own unique contribution to the efforts of all humanitarian agencies, especially within its fields of expertise such as tracing work and disseminating international humanitarian law and the Fundamental Principles. These are all fields in which it has an explicit mandate.

The ICRC sets priorities on the basis of the following criteria:

- the extent of victims’ suffering and the urgency of their needs: the principle of impartiality, mentioned in humanitarian law, remains the pillar of the ICRC’s work, which is non-discriminatory and proportionate to the needs of the people requiring protection and assistance;

460 See for instance GC I-IV, Art. 9/9/9/10 respectively; GC I, Art. 23; GC III, Arts 73, 123 and 125-126; GC IV, 14, 59, 61, 140 and 142-143; P I, Art. 33. (footnote added by the authors)

461 See Movement Statutes, Arts 5.2(d) and 5.3 [Document No. 31, Statutes of the International Red Cross and Red Crescent Movement] (footnote added by the authors)

- its unique capabilities deriving from its distinctiveness as a neutral and independent organization and intermediary and its experience in assisting the victims of armed conflict (local knowledge, human resources, logistics, tracing work, etc.). The particular merit of the ICRC, which results from its principles and its operational experience, is recognized by the international community. It fits into the scheme of an environment for humanitarian work that is characterized by numerous very different agencies;
- the legal basis for its work: the ICRC endeavours to take action in situations where international humanitarian law is applicable and carefully considers the advisability of taking action in the context of the direct results of these situations and in other situations of violence not covered by international humanitarian law (internal disturbances and tensions). In all cases, it tailors its action according to the criteria set out above.

Operational considerations and constraints (such as impact on other activities, whether the ICRC has been invited to take action, and security issues) can be added to these criteria.

Strategies for fulfilling the mission:

From comprehensive analysis to specific activities

A comprehensive analysis

For any action to be taken, a *comprehensive analysis* of the situation, the actors present, the stakes and the dynamics must be carried out. This enables the ICRC to identify the people adversely affected and their needs. It requires a clear understanding of the problems' causes and a good knowledge of local facilities, their capabilities and their potential. The ICRC endeavours to obtain an overall perspective of an issue of humanitarian concern by looking at all the aspects and at the different responses that would be suitable.

A number of factors should be considered: social, economic, political, cultural, security, religious and ethnic, among others. Analysis should also take account of the interdependence of local, regional and international factors affecting a situation of conflict or any other situation of violence.

Analysis provides a basis for deciding on an overall strategy, with specific *priorities* and *objectives*, and determines the types of problem and/or the categories of needs on which the ICRC is going to concentrate its efforts and its resources. It is then a matter of developing a strategy aimed not only at addressing the direct consequences of problems, but also – as far as possible within the framework of neutral and independent humanitarian activities – their origins and causes.

In so doing, the ICRC must first exploit its strong points and the opportunities offered by the local environment, and second try to minimize its weaknesses and neutralize or circumvent external difficulties. Because of the complementary role played by partners in and outside the Movement, the strong and weak points of these partners must also be taken into account in strategy discussions.

Depending on what needs to be done, the various activities either start simultaneously or consecutively.

Four approaches set out in the mission statement that allow the ICRC to fulfil its purpose

As described in the ICRC's mission statement, the organization combines four approaches in its overall strategy after analysing a situation in order to, directly or indirectly, in the short, medium or long term, ensure respect for the lives, dignity, and physical and mental well-being of victims of armed conflict and other situations of violence.

Protecting the lives and dignity of victims of armed conflict and other situations of violence

The protection approach

[See Document No. 40, ICRC, Protection Policy, CD]

- In order to preserve the lives, security, dignity, and physical and mental well-being of victims of armed conflict and other situations of violence, this approach aims to ensure that authorities and other actors fulfil their obligations and uphold the rights of individuals.
- It also tries to prevent or put an end to actual or probable violations of international humanitarian law or other bodies of law or fundamental rules protecting people in these situations.
- It focuses first on the causes or circumstances of violations, addressing those responsible and those who can influence them, and second on the consequences of violations.

Assisting victims of armed conflict and other situations of violence

The assistance approach

[See Case No. 41, ICRC, Assistance Policy, p. 623]

- The aim of assistance is to preserve life and/or restore the dignity of individuals or communities adversely affected by armed conflict or other situations of violence.
- Assistance activities principally address the consequences of violations of international humanitarian law and other relevant bodies of law. They may also tackle the causes and circumstances of these violations by reducing exposure to risk.
- Assistance covers the unmet essential needs of individuals and/or communities as determined by the social and cultural environment. These needs vary, but responses mainly address issues relating to health, water, sanitation, shelter and economic security by providing goods and services, supporting existing facilities and services and encouraging the authorities and others to assume their responsibilities.

Directing and coordinating the Movement's international relief efforts in armed conflict and other situations of violence

The cooperation approach

- The aim of cooperation is to increase the operational capacities of National Societies, above all in countries affected or likely to be affected by armed conflict or other situations of violence. A further aim is to increase the ICRC's capacity to interact with National Societies and work in partnership with them.

- The cooperation approach aims to optimize the humanitarian work of Movement components by making the best use of complementary mandates and skills in operational matters such as protection, assistance and prevention.
- It involves drawing up and implementing the policies of the Movement that are adopted during its statutory meetings and strengthening the capacities of the National Societies, helping them to adhere at all times to the Fundamental Principles.

Endeavouring to prevent suffering by promoting, reinforcing and developing international humanitarian law and universal humanitarian principles

The prevention approach

- The aim of prevention is to foster an environment that is conducive to respect for the lives and dignity of those who may be adversely affected by armed conflict and other situations of violence, and that favours the work of the ICRC.
- This approach aims to prevent suffering by influencing those who have a direct or indirect impact on the fate of people affected by these situations. This generally implies a medium or long-term perspective.
- In particular, the prevention approach involves communicating, developing, clarifying and promoting the implementation of international humanitarian law and other applicable bodies of law, and promoting acceptance of the ICRC's work.

Combining activities: Multidisciplinarity

Each activity responds, in humanitarian terms, to a specific problem or to common problems. Each approach uses its own implementation strategies. These strategies combine different **activities** from the four programmes detailed in the annual planning tool: protection, assistance, prevention and cooperation. Thus, a protection strategy could also include activities from the assistance, prevention or cooperation programmes. Digging wells in a camp for the displaced may be one aspect of an assistance programme and may be intended to tackle the lack of water. It would therefore form part of the assistance approach. However, this activity could equally be intended primarily to protect people exposed to violence while looking for water outside the camp. It therefore also forms part of the protection approach.

Combining activities is particularly important. The ICRC is duty bound to use all means at its disposal, according to each situation and to the priorities and objectives identified. Furthermore, the different approaches are of mutual assistance: for example, ICRC staff may receive information on violations of international humanitarian law while carrying out assistance work and this can then provide the grounds for making representations to the authorities, which is part of the protection approach. In conflict situations, assistance activities often take on a protection nature, and vice versa, to the point of being inextricably linked. It was after all to the ICRC that the Movement assigned the task of endeavouring at all times to *protect* and assist victims of these events.

Combining activities is often supported by what the ICRC calls its **humanitarian diplomacy**. The aim is to influence – and if necessary modify – the political choices of States, armed groups, and international and supranational organizations in order to enhance compliance with international humanitarian law and to promote the ICRC's major objectives. To that end, the ICRC encourages the various services and hierarchical levels at headquarters and its network of delegations to increase dialogue with these entities on general issues of concern

to it. The essential message of humanitarian diplomacy is the same for all delegations, whatever their operational priorities.

Coordination of humanitarian activities

Both from headquarters and in the field, the ICRC coordinates its activities with other humanitarian organizations in order to improve the lives, directly or indirectly, of victims of armed conflict and other situations of violence. Coordination is only possible as far as the strictly humanitarian approach of the ICRC, as an impartial, neutral and independent organization, allows. Authority cannot be ceded to any other entity or group of entities.

Modes of action

In keeping with the emphasis it places on complementary roles, the ICRC takes into account its partners' (in and outside the Movement) strong and weak points and their fields of expertise in its strategic discussions.

The ICRC's strategy is based on combining "modes of action" and on selecting the appropriate activities depending on the approach (or approaches) chosen. Modes of action are the methods or means used to persuade authorities to fulfil their obligations towards individuals or entire populations.

The ICRC's *modes of action* are: raising awareness of responsibility (persuasion, mobilization, denunciation), support, and substitution (direct provision of services). The ICRC does not limit itself to any one of them; on the contrary, it combines them, striking a balance between them either simultaneously or consecutively.

1. The aim of raising awareness of responsibility is to remind people of their obligations and, where necessary, to persuade them to change their behaviour. This translates into three methods:
 - a. **Persuasion** aims to convince someone to do something which falls within his area of responsibility or competence, through bilateral confidential dialogue. This is traditionally the ICRC's preferred mode of action.
 - b. The organization may also seek outside support, through **mobilization** of influential third parties (e.g. States, regional organizations, private companies, members of civil society or religious groups who have a good relationship with the authorities in question). The ICRC chooses such third parties with care, contacting only those who it thinks will be able to respect the confidential nature of the information that they receive.
 - c. Faced with an authority which has chosen to neglect or deliberately violate its obligations, persuasion (even with the mobilization of support from influential third parties) may not be effective. In certain circumstances, therefore, the ICRC may decide to break with its tradition of confidentiality and resort to **public denunciation**.^[462] This mode of action is used only as part of the protection approach, which focuses on the imminent or established violation of a rule protecting individuals.
2. If authorities are unable to take action, the ICRC provides support where necessary to enable them to assume their responsibilities.

⁴⁶² Public denunciation is subject to very strict conditions. See *infra*, Quotation, under V.1.1.3.3. *Public condemnation*

3. When the competent authorities do not take or are unable to take appropriate measures (owing to lack of means, or unwillingness, or when no such authorities exist), the ICRC takes direct action in their place (**substitution**) to meet the needs of the people or populations affected. If the situation is critical, the ICRC acts first and then speaks to the authorities to persuade them to take appropriate measures or to help them examine possible solutions.

Guidelines for action

The above-mentioned strategy is implemented with consideration for the following guidelines:

1. The ICRC's humanitarian work is **impartial, neutral and independent**. Experience has taught it that this approach offers the best chance of being accepted during an armed conflict or other situation of violence, in particular given the risk that actors at a local, regional or international level may become polarized or radicalized. The integration of political, military and humanitarian means as recommended by some States is therefore a major source of difficulty for the ICRC. The organization insists on the need to avoid a blurring of lines while still allowing for the possibility of complementary action.
2. Many of the ICRC's tasks are carried out **close to the people concerned** – in the field, in other words, where the organization has better access to them. The individuals and communities concerned must be consulted in order to better establish their needs and interests, and they should be associated with the action taken. Their value systems, their specific vulnerabilities and the way they perceive their needs must all be taken into consideration. The ICRC favours a participatory approach aimed at building local capacities.
3. The ICRC has a **universal vocation**. Its work is not limited to certain places, or to certain types of people (such as children or refugees). With a presence in numerous regions of the world, the ICRC has an overall vision that enables it to undertake comprehensive analysis. The organization must have a coherent approach everywhere it works if it is to appear transparent and predictable. However, this does not mean that ICRC activities are uniform. Taking the context into consideration is still a key aspect of analysis and strategy.
4. The ICRC gets involved during the emergency phase and stays for **as long as is necessary**. However, the organization is careful to ensure that its involvement does not dissuade the authorities from fully assuming their responsibilities or the communities affected from relying on their usual coping mechanisms. It also takes care not to get in the way of other organizations and actors who are building up civil society's resources. Measures are taken so that the ICRC is able to leave the scene in an appropriate manner when the time comes.
5. The ICRC engages in **dialogue** with all those involved in an armed conflict or other situation of violence who may have some influence on its course, whether they are recognized by the community of States or not. No one is excluded, not only because engaging in dialogue does not equate to formal recognition but also because multiple and varied contacts are essential for assessing a situation and for guaranteeing the safety of ICRC activities and personnel. The ICRC maintains a network of contacts locally, regionally and internationally. In the event of violations of international humanitarian law or other bodies of law or other fundamental rules protecting people in situations

of violence, the ICRC attempts to influence the perpetrators. In the first instance, it will take bilateral confidential action.^[463] When it comes to confidential action and to communication with the public, the ICRC wants to promote transparency and present itself as an organization acting in a credible and predictable manner. Moreover, reflecting the interest that States have in the unique status and role of the ICRC, the organization's right to abstain from giving evidence has been recognized by several sources of international law.

6. While doing what it can to help needy people, the ICRC also takes into consideration the efforts of others since there is a wide variety of agencies in the humanitarian world. The main objective of **interacting** with other providers of aid is to make the best use of complementary efforts in order to meet needs. Interacting should provide the basis for building on the skills of each and hence for obtaining the best possible results, then continue to respond to needs in the long term through programme handover. Interaction should therefore be based on transparency, equality, effective operational capacities and a complementary relationship between organizations. It starts with – but is not limited to – the Movement and its universal network. Indeed, the other components emerge as the ICRC's natural and preferred partners, with whom it would like to develop and strengthen a common identity and vision.^[464]
7. Through its work, the ICRC bears a certain responsibility for the individuals or entire populations it endeavours to protect and assist. Its fundamental concern is to have a genuinely positive **impact** on their lives. It has set up a framework of accountability and tools for planning, monitoring and assessing its actions; these help it examine its performance and results and hence constantly improve the quality of its work. The ICRC evaluates all of its activities using various criteria and indicators, including thresholds of success and failure, so that it can become more effective and find the most appropriate way of answering to beneficiaries and donors. Its work is regularly assessed, and reoriented if necessary.

[Source: ICRC, *The ICRC. Its Mission and Work*, March 2009; available at www.icrc.org; footnotes partially omitted]

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463 See *infra* V.1. Confidentiality, not publicity (footnote added by the authors)

464 See *supra* I.1. The ICRC within the International Red Cross and Red Crescent Movement, p. 476 (footnote added by the authors)

Today's Armed Conflicts”, in GIEGERICH Thomas (ed.), *A Wiser Century?: Judicial Dispute Settlement, Disarmament and the Laws of War 100 Years After the Second Hague Peace Conference*, Berlin, Duncker and Humblot, 2009, pp. 393-415. HUTCHINSON John F., *Champions of Charity: War and the Rise of the Red Cross*, Colorado and Oxford, Westview Press, 1996, 448 pp. PICTET Jean, *Une Institution unique en son genre : Le Comité international de la Croix-Rouge*, Geneva, Henry-Dunant Institute, Paris, Pedone, 1985, 111 pp.

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I. THE INSTITUTION

1. The ICRC within the International Red Cross and Red Crescent Movement

(See the Red Cross and Red Crescent Movement website: <http://www.redcross.int>)

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- ⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement
 - ⇒ Document No. 32, The Seville Agreement
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SUGGESTED READING: HAUG Hans, *Humanity for all: The International Red Cross and Red Crescent Movement*, Geneva/Bern/Stuttgart/Vienna, Henry-Dunant Institute/Paul Haupt Publishers, 1993, 682 pp.

FURTHER READING: PERRUCHOU Richard, “Resolutions of International Red Cross Conferences and their Implementation by the National Societies”, in *IRRC*, No. 227, 1982, pp. 88-96.

a) National Red Cross and Red Crescent Societies

(The list of the National Societies' websites is available on <http://www.ifrc.org>)

Introductory text

Originally created for service in time of armed conflicts, as auxiliaries to the military medical services, National Red Cross and Red Crescent Societies today carry out a wide range of activities in situations of both war and peace.^[465]

The activities carried out by the 186 National Societies are as diverse as the countries they serve. Their wartime role to support armed forces medical units remains essential but now represents just one of many aspects of their work.

Other National Society activities include: setting up and managing hospitals; training medical personnel; organizing blood donor clinics; assisting the handicapped, the elderly and the needy; providing ambulance services and road, sea and mountain rescue services. In addition, many National Societies are also responsible for emergency relief in the event of man-made or natural disasters (technological catastrophes, floods, earthquakes, tidal waves, etc.).

More recently, many National Societies have also considerably increased their involvement in new areas: relief to refugees and displaced persons; assistance to victims of epidemics (HIV/AIDS); and dissemination and implementation of International Humanitarian Law (IHL).

Each National Society must fulfil strict conditions in order to achieve recognition by the ICRC and thus become a member of the International Red Cross and Red Crescent Movement.^[466] In particular, it must be recognized by its own government as a voluntary aid society, be constituted on the territory of a State party to the Geneva Conventions, use one of the recognized emblems and respect the Fundamental Principles of the Red Cross and Red Crescent Movement.

⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Art. 4]

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b) the International Federation of Red Cross and Red Crescent Societies

(See the International Federation of the Red Cross and Red Crescent Societies website: <http://www.ifrc.org>)

⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Art. 6]

465 See Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Art. 3]

466 See *ibid.* Art. 4: Conditions for recognition of National Societies

SUGGESTED READING: GAUTIER Philippe, “ONG et personnalité internationale : à propos de l’accord conclu le 29 novembre 1996 entre la Suisse et la Fédération internationale des Sociétés de la Croix-Rouge et du Croissant-Rouge”, in *RBDI*, 1997, pp. 172-189.

c) the International Red Cross and Red Crescent Conference

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- ⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Arts 8-11]
 - ⇒ Case No. 44, ICRC, The Question of the Emblem
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2. Legal status of the ICRC

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- ⇒ Document No. 27, Agreement Between the ICRC and Switzerland
 - ⇒ Case No. 54, UN, ICRC Granted Observer Status
 - ⇒ Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel
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SUGGESTED READING: BUGNION François, *The International Committee of the Red Cross and the Protection of War Victims*, Geneva/Oxford, ICRC/Macmillan, 2003, 1161 pp. DOMINICÉ Christian, “La personnalité juridique internationale du CICR”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 663-673. KOENIG Christian, “Observer Status for the International Committee of the Red Cross at the United Nations: A Legal Viewpoint”, in *IRRC*, No. 280, January-February 1991, pp. 37-48. LORITE ESCORIHUELA Alejandro, “Le Comité international de la Croix-Rouge comme organisation *sui generis*? Remarques sur la personnalité juridique du CICR”, in *RGDIP*, Vol.3, 2001, pp. 581-616. REUTER Paul, “La personnalité juridique internationale du Comité international de la Croix-Rouge”, in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, M. Nijhoff, 1984, pp. 783-791.

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siège conclu par le Comité international de la Croix-Rouge avec la Suisse”, in *RGDIP*, Vol. 99/1, January-April 1995, pp. 5-36.

3. Independence

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- ⇒ Document No. 27, Agreement Between the ICRC and Switzerland
 - ⇒ Case No. 46, ICRC’s Approach to Contemporary Security Challenges
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SUGGESTED READING: SOMMARUGA Cornelio, “Swiss Neutrality, ICRC Neutrality: Are They Indissociable? An Independence Worth Protecting”, in *IRRC*, No. 288, May-June 1992, pp. 264-273.

4. Traditionally mono-national governing body and international action

5. Humanity

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- ⇒ Case No. 153, ICJ, Nicaragua v. United States [Para. 242]
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6. Neutrality and impartiality

Quotation On the general level, the idea of neutrality pre-supposes two elements: an attitude of abstention and the existence of persons or groups who oppose one another. Although neutrality defines the attitude of the Red Cross towards belligerents and ideologies, it never determines its behaviour towards the human beings who suffer because, in the first place, the wounded do not fight one another. And, above all, the essential characteristic of the Red Cross is to act and not to remain passive.

Neutrality and impartiality have often been confused with one another because both imply the existence of groups or theories in opposition and because both call for a certain degree of reserve. The two ideas are nevertheless very different, for the neutral man refuses to make a judgement whereas the one who is impartial judges a situation in accordance with pre-established rules.

Neutrality demands real self-control; it is indeed a form of discipline we impose upon ourselves, a brake applied to the impulsive urges of our feelings. A man who follows this arduous path will discover that it is rare in a controversy to find that one party is completely right and the other completely wrong. He will sense the futility of the reasons commonly invokes to launch one nation into war against another. In this respect, it is reasonable to say that neutrality constitutes a first step towards peace.

While neutrality, like impartiality, is often misunderstood and rejected, this happens because there are so many who want to be both judge and party, without recourse to any universally

valid criterion. Each side believes, rather naively, that his cause is the only just one; that refusal to join it is an offence against truth and justice.

[Source: Pictet, J.S., *Red Cross Principles*, Geneva, International Committee of the Red Cross, 1979, pp. 52-53]

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3. 3]
 - ⇒ Case No. 46, ICRC's Approach to Contemporary Security Challenges
 - ⇒ Case No. 82, United Kingdom, Labour Party Campaign – Misuse of the Emblem
 - ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
 - ⇒ Case No. 173, UN/ICRC, The Use of Chemical Weapons
 - ⇒ Case No. 203, Case Study, The Conflicts in the former Yugoslavia [Paras 14, 21 and 22]
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
 - ⇒ **Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel [Part A.]**
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SUGGESTED READING: FORSYTHE David P. & RIEFFER-FLANAGAN Ann J., *The International Committee of the Red Cross: a Neutral Humanitarian Actor*, Abingdon, New York, Routledge, 2007, 122 pp. HARROFF-TAVEL Marion, “Neutrality and Impartiality: The Importance of these Principles for the International Red Cross and Red Crescent Movement”, in *IRRC*, No. 273, November-December 1989, pp. 536-552. HENTSCH Thierry, *Face au blocus : La Croix-Rouge internationale dans le Nigéria en guerre (1967-1970)*, Geneva, Institut universitaire des hautes études internationales, 1973, 307 pp. HUBER Max, *Red Cross and Neutrality*, Geneva, ICRC, 1936, 11 pp. KALSHOVEN Frits, “Impartiality and Neutrality in Humanitarian Law and Practice”, in *IRRC*, No. 273, November-December 1989, pp. 516-535. KU Charlotte & CACERES BRUN Joaquin, “Neutrality and the ICRC Contribution to Humanitarian Action”, in *International Peacekeeping*, Vol. 10/1, Spring 2003, pp. 56-72. PICTET Jean, *The Fundamental Principles of the Red Cross: Commentary*, Geneva, Henry-Dunant Institute, 1979, 93 pp. SOMMARUGA Cornelio, “Swiss Neutrality, ICRC Neutrality: Are They Indissociable? An Independence Worth Protecting”, in *IRRC*, No. 288, May-June 1992, pp. 264-273.

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7. Funding

(See, e.g., the “Finance and Administration” section in ICRC Annual Reports, available on <http://www.icrc.org>)

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1. In armed conflicts

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- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts
 - ⇒ **Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel [Part A.]**
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a) visits to detained persons – interviews without witnesses

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- ⇒ Document No. 28, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal
 - ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
 - ⇒ Case No. 157, Inter-American Commission on Human Rights, Coard v. United States [Paras 30-32]
 - ⇒ Case No. 159, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict
 - ⇒ Case No. 160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 28, 29, 45, 55-62, 81 and 84; Part B., paras 100, 150-163.]
 - ⇒ **Case No. 170, ICRC, Iran/Iraq, Memoranda**
 - ⇒ Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated
 - ⇒ Case No. 185, United States, The Schlesinger Report
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 12. and 21.]
 - ⇒ **Document No. 248, ICRC, Visits to Detainees: Interviews Without Witnesses [Part B.]**
 - ⇒ Case No. 255, Afghanistan/Canada, Agreements on the Transfer of Detainees [Part A., paras 4, 7, 10; Part B., para. 10]

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- ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part II.]
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b) protection of the civilian population

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- ⇒ **Document No. 40, ICRC, Protection Policy**
- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 31]
- ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
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c) provision of relief supplies

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- ⇒ Document No. 32, The Seville Agreement [Art. 6.1.]
- ⇒ Case No. 41, ICRC, Assistance Policy
- ⇒ Case No. 174, UN, Security Council, Sanctions Imposed Upon Iraq [Part C., para. 6]
- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 12]
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d) medical assistance

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- ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
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SUGGESTED READING: ICRC, *Primary Health-Care Services: Primary Level*, Geneva, ICRC, May 2006, 26 pp. RUSSBACH Rémi, GRAY Robin C. & COUPLAND Robin M., “ICRC Surgical Activities”, in *IRRC*, No. 284, September-October 1991, pp. 483-490.

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e) tracing service

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- ⇒ **Document No. 34, ICRC, Tracing Service**
 - ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 151, ECHR, *Cyprus v. Turkey* [Opinion of Judge Fuad]
 - ⇒ Case No. 203, Case Study, *Armed Conflicts in the former Yugoslavia* [Para. 22]
 - ⇒ Case No. 206, *Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of the Hostilities*
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SUGGESTED READING: DJUROVIC Gradimir, *The Central Tracing Agency of the International Committee of the Red Cross: Activities of the ICRC for the Alleviation of Mental Suffering of War Victims*, Geneva, Henry-Dunant Institute, 1981, 259 pp. DOGNY Violaine, “Cooperation between the ICRC and the Tracing Services of the Newly Independent States of the Former-Soviet Union”, in *IRRC*, No. 323, June 1998, pp. 205-214. NOWAK Manfred, “Disappearances in Bosnia-Herzegovina”, in O’FLAHERTY Michael, *Post-war Protection of Human Rights in Bosnia and Herzegovina*, The Hague, M. Nijhoff, 1998, pp. 107-121. SASSÒLI Marco & TOUGAS Marie-Louise, “The ICRC and the Missing”, in *IRRC*, No. 848, December 2002, pp. 727-750. SCHREYER Thierry, “L’action de l’Agence centrale de recherches du CICR dans les Balkans durant la crise des réfugiés kosovars”, in *IRRC*, No. 837, March 2000, pp. 49-65. Special Issue “Missing Persons”, in *IRRC*, No. 848, December 2002, pp. 720-902.

f) the relevance of ICRC practice for the development of customary IHL

Quotation “[...] a number of Governments have suggested that the phrase “the international community as a whole” [...] should read “the international community of States as a whole”. [...] The Special Rapporteur does not agree that any change is necessary in what has become a well-accepted phrase. States remain central to the process of international lawmaking and law-applying, and it is axiomatic that every State is as such a member of the

international community. But the international community includes entities in addition to States: for example, the European Union, the International Committee of the Red Cross, the United Nations itself"

[Source: A/CN.4/517, United Nations General Assembly, 2 April 2001, International Law Commission, 53rd session, Geneva, 23 April – 1 June and 2 July – 10 August 2001, Fourth Report on State Responsibility, presented by M. James Crawford, Special Rapporteur, p. 15, available on <http://www.un.org>]

⇒ Case No. 211, ICTY, The Prosecutor v. Tadic [Part A., paras 99 and 109]

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a) visits (with interviews without witnesses) to detainees held in connection with the situation

⇒ Document No. 34, ICRC, Tracing Service [Para. 4]

⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 1]

⇒ **Document No. 248, ICRC, Visits to Detainees: Interviews without Witnesses [Part B.]**

3. Worldwide

a) Advisory Services on International Humanitarian Law

⇒ Document No. 36, ICRC, Advisory Services on International Humanitarian Law

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b) dissemination

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 2.3]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 1]
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SUGGESTED READING: BOUVIER Antoine A. & SAMS Katie, “Teaching International Humanitarian Law in Universities: the Contribution of the International Committee of the Red Cross”, in *Yearbook of International Humanitarian Law*, Vol. 5, 2002, pp. 381-393. CHOPARD Jean-Luc, “Dissemination of the Humanitarian Rules and Cooperation with National Red Cross and Red Crescent Societies for the Purpose of Prevention”, in *IRRC*, No. 305, May-June 1995, pp. 244-262.

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c) humanitarian diplomacy

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- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.2.]
 - ⇒ Case No. 46, ICRC’s Approach to Contemporary Security Challenges
 - ⇒ Case No. 139, UN, Resolutions and Conference on Respect for the Fourth Convention
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SUGGESTED READING: HARROFF-TAVEL Marion, “The Humanitarian Diplomacy of the International Committee of the Red Cross”, in *African Yearbook on International Humanitarian Law*, 2006, pp. 1-16.

4. The ICRC’s role in the *continuum* between pre-conflict and post-conflict situations

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- ⇒ Document No. 32, The Seville Agreement [Preamble, para. 3, Arts 5.3.1. and 5.5.]

⇒ Case No. 286, The Conflict in Western Sahara [Part C.]

a) ICRC residual responsibility towards persons it has assisted during a conflict

5. Cooperation between the ICRC and National Societies

⇒ Document No. 32, The Seville Agreement [Arts 5-9]

6. Cooperation with other humanitarian organizations

-
- ⇒ Document No. 39, ICRC, Protection of War Victims [Para. 3.2.]
 - ⇒ Case No. 41, ICRC, Assistance Policy
 - ⇒ Case No. 46, ICRC's Approach to Contemporary Security Challenges
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SUGGESTED READING: DENNE Sarah R., “Re-thinking Humanitarian Aid in the Post-Gulf War Era: the International Committee of the Red Cross Takes the Lead”, in *Case Western Reserve Journal of International Law*, Vol. 39, No. 3, 2007, pp. 867-895. MUNTARBHORN Vitit, “Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances: Reflections on the Mandates of the International Red Cross and Red Crescent Movement and the Office of the United Nations High Commissioner for Refugees”, in *IRRC*, No. 265, July-August 1988, pp. 351-366.

7. Cooperation with political organizations

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- ⇒ **Case No. 46, ICRC's Approach to Contemporary Security Challenges**
 - ⇒ Case No. 54, UN, ICRC Granted Observer Status
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SUGGESTED READING: CHURCHILL Ewumbue-Monono & VON FLUE Carlo, “Promotion of International Humanitarian Law through Cooperation between the ICRC and the African Union”, in *IRRC*, No. 852, December 2003, pp. 749-773. PFANNER Tony, “Cooperation between Truth Commissions and the International Committee of the Red Cross”, in *IRRC*, Vol. 88, No. 862, June 2006, pp. 363-373.

III. LEGAL BASIS OF ICRC ACTION

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- ⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Art. 5]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 31]
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SUGGESTED READING: BUGNION François, “Red Cross Law”, in *IRRC*, No. 308, September-October 1995, pp. 491-519. PFANNER Toni, “Le rôle du Comité international de la Croix-Rouge dans la mise en œuvre du droit international humanitaire”, in *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Luxembourg, Office for Official Publications of the European Communities, 1995, pp. 177-248. SANDOZ Yves, “Le droit d’initiative du Comité international de la Croix-Rouge”, in *German Yearbook of International Law*, Vol. 22, 1979, pp. 352-373.

1. In international armed conflicts

a) right to visit protected persons (prisoners of war and protected civilians)

GC III, Art. 126(5); GC IV, Art. 143(5)

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- ⇒ Case No. 131, Israel, Cheikh Obeid *et al.* v. Ministry of Security
-

b) right of initiative

GC I-IV, Arts 9/9/9/10 respectively; P I, Art. 81(1)

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- ⇒ Case No. 41, ICRC, Assistance Policy,
 - ⇒ Case No. 205, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
-

c) the Central Tracing Agency

GC I, Art. 16(2); GC III, Art. 123; GC IV, Art. 140; P I, Art. 33(3)

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- ⇒ Document No. 34, ICRC, Tracing Service
 - ⇒ Case No. 172, Iran/Iraq, 70,000 Prisoners of War Repatriated
 - ⇒ Case No. 206, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities
-

d) “substitute of the Protecting Power”

GC I-IV, Arts 10(3)/10(3)/10(3)/11(3) respectively; P I, Art. 5(4)

SUGGESTED READING: GASSER Hans-Peter, “Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: the Part Played by ICRC Delegates”, in *IRRC*, No. 287, March-April 1992, pp. 121-142.

2. In non-international armed conflicts: the right of initiative provided for in Art. 3 common to the Conventions

(See also *supra*, Part I, Chapter 13. XI. 4. The ICRC's right of initiative)

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- ⇒ Case No. 164, Sudan, Report of the UN Commission of Enquiry on Darfur [Para. 550]
 - ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 250, Afghanistan, Soviet Prisoners Transferred to Switzerland
 - ⇒ Case No. 280, Russian Federation, Chechnya, Operation Samashki [10]
-

a) meaning

b) possible addressees of such initiatives: both parties to the conflicts

3. In other situations calling for a neutral humanitarian intermediary: the right of initiative provided for in the Movement's Statutes

SUGGESTED READING: MINNIG Michel, "The Lima Hostage Crisis: Some Comments on the ICRC's Role as a 'Neutral Intermediary'", in *IRRC*, No. 323, June 1998, pp. 293-302. SANDOZ Yves, "Attitude du CICR en cas de prise d'otages – Commentaire", in *IRRC*, No. 846, June 2002, pp. 475-488. "ICRC Position on Hostage-Taking", in *IRRC*, No. 846, June 2002, pp. 467-470.

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- ⇒ Document No. 31, Statutes of the International Red Cross and Red Crescent Movement [Art. 5(3)]
 - ⇒ Document No. 193, ICRC, Request to Visit Gravesites in the Falklands/Malvinas
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IV. IMPORTANCE OF IHL IN ICRC OPERATIONS

SUGGESTED READING: BUGNION François, *The International Committee of the Red Cross and the Protection of War Victims*, Geneva/Oxford, ICRC/Macmillan, 2003, 1161 pp. HOLLEUFER Gilbert, "Image of Humanitarian Crisis: Ethical Implications", in *IRRC*, No. 315, November-December 1996, pp. 609-613. PICTET Jean, *Le droit international et l'activité du Comité international de la Croix-Rouge en temps de guerre*, Zürich, Orell Füssli, 1943, 34 pp. SANDOZ Yves, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, Geneva, ICRC, 1998, 32 pp. ZAMMIT BORDA Aldo (ed.), *International Humanitarian Law and the International Red Cross and Red Crescent Movement*, Abingdon, New York, Routledge, 2010, 202 pp.

FURTHER READING: ABI-SAAB Rosemary, "Human Rights and Humanitarian Law in Internal Conflicts", in *Human Rights and Humanitarian Law*, The Hague, M. Nijhoff, 1997, pp. 107-123. SAYAPIN Serguey, "The International Committee of the Red Cross and International Human Rights Law", in *Human Rights*

Law Review, Vol. 9, No. 1, 2009, pp. 95-126. SOMMARUGA Cornelio, “Humanitarian Law and Human Rights in the Legal Arsenal of the ICRC”, in *Human Rights and Humanitarian Law*, The Hague, M. Nijhoff, 1997, pp. 125-133.

1. The ICRC and the legal qualification of the situation

a) competence of the ICRC to qualify armed conflicts

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- ⇒ Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Part A., para. 97]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 2 and 9]
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b) practical importance of qualifying a conflict

c) difficulties for the ICRC to qualify a conflict

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- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 2 and 9]
-

aa) objective difficulties

- establishment of the facts
- constantly developing law

bb) political difficulties

- the ICRC seen as warmonger
- the ICRC taking position on facts relevant to *jus ad bellum* (the origin of the conflict)

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- ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A.]
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- divergence from the appreciation of the international community

cc) difficulties for its operational access

dd) advantages and shortcomings of a pragmatic approach

2. Reference to IHL in the ICRC’s various functions as the guardian of IHL

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- ⇒ Case No. 38, The Environment and International Humanitarian Law [Part D.]
 - ⇒ Document No. 122, ICRC’s Appeals on the Near East
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SUGGESTED READING: SANDOZ Yves, “L’appel du Comité international de la Croix-Rouge dans le cadre du conflit entre l’Irak et l’Iran”, in *AFDI*, Vol. 29, 1983, pp. 161-173. SANDOZ Yves, “Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie”, in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490. SANDOZ Yves, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, Geneva, ICRC, 1998, 32 pp. SASSÒLI Marco, “La contribution du Comité international de la Croix-Rouge à la formation et à l’application des normes internationales”, in BETTATI Mario & DUPUY Pierre-Marie (eds), *Les O.N.G. et le droit international*, Paris, Éditions Economica, 1986, pp. 93-102. “Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence”, in *IRRC*, No. 858, July 2005, pp. 393-400.

FURTHER READING: GASSER Hans-Peter, “Persuading States to Accept Humanitarian Treaties”, in *IRRC*, No. 320, September-October 1997, pp. 529-538. GASSER Hans-Peter, “Universal Acceptance of International Humanitarian Law – Promotional Activities of the ICRC”, in *IRRC*, No. 809, September-October 1994, pp. 491-505. “Conflict between Iraq and Iran: ICRC Appeal”, in *IRRC*, No. 235, July 1983, pp. 220-222. “Conflict between Iran and Iraq: Second Appeal”, in *IRRC*, No. 239, March 1984, pp. 113-115.

a) defending IHL

⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part II.]

b) developing IHL

⇒ Document No. 17, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction [Preamble para. 8]

c) promoting reflection on IHL

⇒ Document No. 50, Sixtieth Anniversary of the Geneva Conventions

d) promoting accession to IHL

e) disseminating IHL

f) implementing IHL

aa) monitoring respect by others

bb) implementing IHL through its own activities

g) mobilizing against violations of IHL

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- ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
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3. Reference to IHL in ICRC operations**a) dissemination****b) preventive appeal for respect for IHL**

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- ⇒ Document No. 122, ICRC's Appeals on the Near East
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c) argument for ICRC access to conflict victims**d) argument in negotiations on the behaviour of belligerents****e) request for enquiry into and repression of individual violations**

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- ⇒ Case No. 254, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners
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f) condemnation of violations

- aa) bilateral
- bb) public

g) reference in negotiations with third States and the international community

- aa) requests for ICRC support
- bb) appeals under Art. 1 common to the Conventions

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- ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda
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4. Importance of IHL in the absence of an explicit reference**a) reference to the contents of a rule without reference to its source**

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- ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
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- b) presentation of facts and questions
- c) IHL as political pressure in the background

V. ICRC'S APPROACH

SUGGESTED READING: BONARD Paul, *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, Geneva, ICRC, September 1998, 65 pp. HUBER Max, *La pensée et l'action de la Croix-Rouge*, Geneva, ICRC, 1954, 376 pp. MAURICE Frédéric, "Humanitarian Ambition", in *IRRC*, No. 289, July-August 1992, pp. 363-372. TAUXE Jean-Daniel, "Faire mieux accepter le Comité international de la Croix-Rouge sur le terrain", in *IRRC*, No. 833, March 1999, pp. 55-61.

1. Confidentiality, not publicity

(See also *infra* **Quotation 3**, under V.3. Access to victims, not investigation of violations, p. 494)

Quotation Action taken by the ICRC in the event of violations of International Humanitarian Law or of other fundamental rules protecting persons in situations of violence

[...]

Action taken by the ICRC on its own initiative

1 General rule

The ICRC takes all appropriate steps to put an end to violations of international humanitarian law or of other fundamental rules protecting the persons in situations of violence, or to prevent the occurrence of such violations. These steps are taken at various levels and through various modes of action, according to the nature and the extent of the violations.

[...]

3.3 Public condemnation

The ICRC reserves the right to issue a public condemnation of specific violations of international humanitarian law providing the following conditions are met:

- (1) the violations are major and repeated or likely to be repeated;**
- (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;**
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations;**
- (4) such publicity is in the interest of the persons or populations affected or threatened.**

Public condemnation means a public statement by the ICRC to the effect that acts which can be attributed to a party to a conflict – whether or not they are known to the public – constitute a violation of international humanitarian law.

The ICRC only takes recourse to this measure when it has exhausted every other reasonable means, including, where appropriate, through third parties, of influencing the party responsible for a violation, at the most relevant levels, and where these means have not produced the desired result or where it is clear that the violation is part of a deliberate policy adopted by the party concerned. It is also the case when the authorities concerned are inaccessible and when the ICRC is convinced that public pressure is the only means of improving the situation in humanitarian terms.

Such a measure is nevertheless exceptional and may be issued only if all of the four above-mentioned conditions have been met.

In considering “the interest of the persons or populations affected or threatened,” the ICRC must take account not only of their short-term interests but also of their long-term interests and of the fact that its responsibility is greater when it witnesses particularly serious events of which the public is unaware.

[Source: “Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of other Fundamental Rules Protecting Persons in Situations of Violence,” in *IRRC*, No. 858, June 2005, pp. 393-400, footnotes omitted; online: <http://www.icrc.org/eng/resources/international-review/>]

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- ⇒ Case No. 41, ICRC, Assistance Policy [Paras 2 and 4.3]
 - ⇒ Case No. 112, ICRC Report on Yemen, 1967
 - ⇒ Case No.160, Eritrea/Ethiopia, Partial Award on POWs [Part A., paras 45-48]
 - ⇒ **Case No. 214, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel**
 - ⇒ **Case No. 254, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners**
 - ⇒ Case No. 261, United States, Status and Treatment of Detainees Held in Guantanamo Naval Base [Part II.]
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SUGGESTED READING: COSTAS TRASCASAS Milena, “El Comité internacional de la Cruz Roja y la regla de la confidencialidad como garantía funcional de su actuación: reflexiones al hilo de la decisión del Tribunal internacional para la antigua Yugoslavia de 27 julio de 1999”, in *Revista Española de Derecho Militar*, Vol. 76, July-December 2000, pp. 31-68. JEANNET Stéphane, “Testimony of ICRC Delegates before the International Criminal Court”, in *IRRC*, No. 840, December 2000, pp. 993-1000. JEANNET Stéphane, “Recognition of the ICRC’s Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the former Yugoslavia”, in *IRRC*, No. 838, June 2000, pp. 403-425. RONA Gabor, “The ICRC Privilege not to Testify: Confidentiality in Action”, in *IRRC*, No.845, March 2002, pp.207-219. SANNA Silvia, “La testimonianza dei delegati del Comitato internazionale della Croce Rossa davanti ai tribunali penali internazionali”, in *Rivista di diritto internazionale*, Vol. 84/2, 2001, pp. 394-419. “Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law”, in *IRRC*, No. 222, March 1981, 8 pp.

a) reports on visits to the authorities

b) cases in which the ICRC goes public

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- ⇒ Case No. 144, ICRC/Lebanon, Sabra and Chatila
 - ⇒ Case No. 145, ICRC/South Lebanon, Closure of Insar Camp
 - ⇒ Case No. 146, Lebanon, Helicopters Attack on Ambulances
 - ⇒ Case No. 170, ICRC, Iran/Iraq, Memoranda [Part A., Appeal]
 - ⇒ Case No. 173, UN/ICRC, The Use of Chemical Weapons [Part B.]
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 21]
 - ⇒ Document No. 248, ICRC, Visits to Detainees: Interviews without Witnesses [Part A.]
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2. Cooperation, not confrontation

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- ⇒ Case No. 194, Sri Lanka, Jaffna Hospital Zone
 - ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Para. 21]
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part B., Art. 5]
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3. Access to victims, not investigation of violations

Quotation 1 Here again, measures contrary to the laws of warfare must, like war itself, be considered by the International Committee primarily in the sense of existing facts, just as the doctor to whom the sick and wounded are brought turns his attention first to the injury or disease, without going into the human guilt which may be its cause. The Red Cross, above all a work of aid, must first strive to bring relief to these victims of war, as to all others.

[Source: *Report of the International Committee of the Red Cross on its Activities During the Second World War (September 1, 1939 – June 30, 1947)*, Geneva, vol. 1, 1948, pp. 22-23]

Quotation 2 [...] [T]he International Red Cross Committee has no intention whatsoever of sitting in judgment. It is not a court of justice and, besides, it has not itself the means of ascertaining the facts, which alone would enable it to give a verdict. [...] It has a different part to play: it is a humanitarian institution.

[Source: HUBER Max, *The Red Cross: Principles and Problems*, Geneva, ICRC, Sine Data, pp. 73 and 74]

Quotation 3 [A]s a general rule, the ICRC abstains from making public pronouncements about specific acts committed in violation of law and humanity and attributed to belligerents. [...] [I]n the quest for a result which would most of the time be illusory, demonstrations of this sort would compromise the charitable activity which the ICRC is in a position to carry out. One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.

[Source: Pictet Jean S., *Red Cross Principles*, Geneva, International Committee of the Red Cross, 1979, pp. 59 and 60]

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- ⇒ Case No. 203, Case Study, Armed Conflicts in the former Yugoslavia [Paras 5 and 7]
 - ⇒ Case No. 204, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts [Part A., Arts 11 and 12; Part B., Arts 2.6 and 5.2]
 - ⇒ Case No. 251, Afghanistan, Separate Hospital Treatment for Men and Women
 - ⇒ Case No. 254, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners
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SUGGESTED READING: SASSÒLI Marco, “The Victim-Oriented Approach of International Humanitarian Law and of the International Committee of the Red Cross (ICRC)”, in BASSIOUNI M. Cherif, *International protection of victims* (Nouvelles Études Pénales 1988), Toulouse, Erès, 1988, pp. 147-180.