LEBANESE UNIVERSITY
Faculty of Law,
Political and Administrative Sciences
Master I - Political and Administrative Sciences

COURSE

OF

INTERNATIONAL HUMANITARIAN LAW

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LIST OF ABBREVIATIONS

AFDI: Annuaire Français de Droit International
AJIL: American Journal of International Law
ASDI: Annuaire Suisse de Droit International
AYIL: Australian Yearbook of International Law
BYIL: British Year Book of International Law
CIHL: Customary International Humanitarian Law
CUP: Cambridge University Press
CYIL: Canadian Yearbook of International Law
ECHR: European Court of Human Rights / European Convention for the Protection of Human Rights and Fundamental Freedoms, of 4 November 1950
EJIL: European Journal of International Law
ENMOD: Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, of 10 December 1976
GC I (or Convention I): Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, of 12 August 1949
GC II (or Convention II): Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, of 12 August 1949
GC III (or Convention III): Geneva Convention (III) Relative to the Treatment of Prisoners of War, of 12 August 1949
GC IV (or Convention IV): Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949
HR: Regulations concerning the Laws and Customs of War on Land, Annex to Convention (IV) Respecting the Laws and Customs of War on Land, of 18 October 1907
ICC: International Criminal Court
ICJ: International Court of Justice
ICLQ: International and Comparative Law Quarterly
ICRC: International Committee of the Red Cross
ICTR: International Criminal Tribunal for Rwanda
ICTY: International Criminal Tribunal for the former Yugoslavia
IHL: International Humanitarian Law
ILA: International Law Association
ILM: International Legal Materials
ILO: International Labour Organisation
ILR: International Law Review
IRRC: International Review of the Red Cross
IYHR: Israel Yearbook on Human Rights
JAG: Judge Advocate General
JILP: New York University Journal of International Law & Politics
MJIL: Michigan Journal of International Law
MSF: Médecins Sans Frontières
NGO: Non-Gouvernemental Organisation
OAU: Organisation of African Unity ("African Union" since July 2002)
OCHA: United Nations Office for the Coordination of Humanitarian Affairs
OHCHR: Office of the United Nations High Commissioner for Human Rights

OUP: Oxford University Press
POW: Prisoner of War
P I (or Protocol I): Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977
P II (or Protocol II): Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, of 8 June 1977
P III (or Protocol III): Protocol Additional to the Geneva Convention of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem, of 8 December 2005
PUF: Presses Universitaires de France
RBDI: Revue Belge de Droit International
RDMDG: Revue de Droit (Pénal) Militaire et de Droit de la Guerre
RGDIP: Revue Générale de Droit International Public
UCLA: University of California at Los Angeles
UN: United Nations
UNESCO: United Nations Educational, Scientific and Cultural Organisation
UNHCR: United Nations High Commissioner for Refugees
UNICEF: United Nations Children's Fund
UNTS: United Nations Treaty Series
US: United States of America
USSR: Union of Soviet Socialists Republics
WFP: World Food Programme
WHO: World Health Organisation
YIHL: Yearbook of International Humanitarian Law

LIST OF INTERNET SITES

Red Cross and Red Crescent:

International Committee of the Red Cross: http://www.icrc.org
International Federation of Red Cross and Red Crescent Societies: http://www.ifrc.org
International Red Cross and Red Crescent Movement: http://www.redcross.int
International Red Cross and Red Crescent Museum: http://www.micr.org

United Nations:

United Nations: http://www.un.org
United Nations High Commissioner for Refugees: http://www.unhcr.org
United Nations Office of the High Commissioner for Human Rights: http://www.ohchr.org
World Food Programme: http://www.wfp.org
UNESCO: http://www.unesco.org
UNICEF: http://www.unicef.org
United Nations Mine Action: http://www.mineaction.org
United Nations International Law Commission: http://www.un.org/law/ilc
United Nations Office for the Coordination of Humanitarian Affairs: http://ochaonline.un.org/
Official web locator for the UN System: http://www.unsystem.org
United Nations Cartographic Section: http://www.un.org/Depts/Cartographic/english/htmain.htm

International Justice:

International Criminal Tribunal for the Former Yugoslavia: http://www.icty.org
International Criminal Tribunal for Rwanda: http://www.unictr.org/
International Criminal Court: http://www.icc-cpi.int
Coalition for the International Criminal Court: http://www.iccnow.org
Trial Watch (Swiss association against impunity): http://www.trial-ch.org
International Court of Justice: http://www.icj-cij.org
Hague Justice Portal: http://www.haguejusticeportal.net/

Regional Organizations:

African Union: http://www.africa-union.org
Association of Southeast Asian Nations: http://www.aseansec.org
Council of Europe: http://www.coe.int
Economic Community of West African States: http://www.ecowas.int
European Union: http://europa.eu/
Humanitarian Aid Department of the European Commission: http://ec.europa.eu/echo/index_en.htm
North Atlantic Treaty Organisation: http://www.nato.int
Organisation for Security and Co-operation in Europe: http://www.osce.org
Organization of American States: http://www.oas.org
Organization of the Islamic Conference: http://www.oic-oci.org

International texts:

International Humanitarian Law conventions and status of participation in those treaties: http://www.icrc.org/ihl
Database "National Implementation of International Humanitarian Law": http://www.icrc.org/ihl-nat
United Nations Human Rights documents database: http://www.unhchr.ch/tbs/doc.nsf
Université libre de Bruxelles – Human Rights Network International (in English and in French): http://www.hrni.org
United Nations Treaty Collection: http://treaties.un.org/
University of Minnesota – Human Rights Library: http://www1.umn.edu/humanrts/index.html

Online Journals:

International Relations and Security Network ISN: International Humanitarian Law and Human Security: http://www.isn.ethz.ch/
York University (Canada) – Legal Journals on the Web: http://library.osgoode.yorku.ca/res_data.html
Project Muse – Scholarly Journals online (large number of indexed reviews accessible from some University libraries): http://muse.jhu.edu; see also Springer Link: http://www.springerlink.com
American Society of International Law Newsletters – ASIL Insights & International Law In Brief: http://www.asil.org/insights.cfm
Boston College International & Comparative Law Review: http://www.bc.edu/bc_org/avp/law/lwsch/interrev.html
Crimes of War Project: http://www.crimesofwar.org
Duke Journal of Comparative and International Law: http://www.law.duke.edu/journals/djcil
European Journal of International Law: http://www.ejil.org
Fletcher Forum of World Affairs: http://fletcher.tufts.edu/forum/
German Law Journal: http://www.germanlawjournal.com
Human Rights Brief: http://www.wcl.american.edu/hrbrief
Institute for International Law of Peace and Armed Conflict: http://www.ruhr-uni-bochum.de/ifhv/index.html
International Review of the Red Cross: http://www.icrc.org/eng/review
Journal of Humanitarian Assistance: http://www.jha.ac
McGill Law Journal: http://www.journal.law.mcgill.ca
Melbourne Journal of International Law: http://mjil.law.unimelb.edu.au/
New England Journal of International and Comparative Law: http://www.nesl.edu/intljournal
New York University Journal of International Law and Politics: http://www.nyu.edu/pubs/jilp
Parameters. US Army War College Quarterly: http://carlisle-www.army.mil/usawc/Parameters
The International Criminal Court Monitor: http://www.iccnow.org/?mod=monitor
UN Chronicle: http://www.un.org/Pubs/chronicle/index.html
Web Journal of Current Legal Issues: http://webjcli.ncl.ac.uk
Yale Human Rights and Development Law Journal: http://www.yale.edu/yhrdlj

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CHAPTER 1

CONCEPT, HISTORICAL EVOLUTION AND PROBLEMATIC OF INTERNATIONAL HUMANITARIAN LAW

I. Definition of International humanitarian Law

International humanitarian law (IHL) is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. International humanitarian law is also known as the law of war or the law of armed conflict.

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 or no longer directly participate in hostilities;

b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy.

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.

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.

The law of armed conflicts is characterized by both simplicity and complexity.

Simplicity:

- that its essence can be encapsulated in a few principles and set out in a few sentences,
- 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.

Complexity:

- that one and the same act is governed by rules that vary depending on the context, the relevant instruments and the legal issues concerned.
- 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!

To put things as simply as possible, these rules can be summed up in four precepts:

1- do not attack non-combatants,
2- attack combatants only by legal means,
3- treat persons in your power humanely,
4- protect the victims.

II. Historical Development of International Humanitarian Law: precursors and founding texts

One can say that the laws of war are almost as old as war itself. Even in ancient times, there were interesting — although rudimentary — customs that today would

be classified as humanitarian. It is interesting to note that the content and aim of these customs were the same for almost every civilization around the world. This spontaneous generation of humanitarian standards, at different times and among peoples or states that possessed limited means of communication with each other, is also an important phenomenon.

This phenomenon lends credence to the historical argument regarding:

• The necessity of having rules that applies to armed conflicts;
• The existence of a feeling in many civilizations that, under certain circumstances, human beings, friend or foe, must be protected and respected.

Although scholars generally agree that the birth of modern IHL was in 1864, with the adoption of the First Geneva Convention, it is also clear that the rules contained in that Convention were not entirely new. In reality, a large amount of the First Geneva Convention was derived from existing international customary law. In fact, there were rules protecting certain categories of victims in armed conflicts and customs concerning the means and methods of authorized or prohibited combat during hostilities as early as 1000 BC.

A- The "pre-history" of IHL

IHL's prohibitions rules can be found in many different civilizations, throughout the world and throughout history. For example, in many parts of Africa there were specific rules regarding the commencement of hostilities between different peoples that correspond, to a large extent, to the classical European traditional obligation of declaring war.

Moreover, in a treatise called "The Arts of the War", written in 500 BC, the Chinese writer Sun Tzu, expressed the idea that wars must be limited to military necessity, and that prisoners of war, the wounded, the sick, and civilians should be spared. Likewise, in the Indian subcontinent, similar rules can be found. For example, in the Code of Manu written in 200 BC, one finds rules relating to behaviour in combat. The Code declared that barbed or poisoned weapons were prohibited, that wounded soldiers had to be cared for, and that surrendering combatants must be spared.

These examples of humanitarian customs in various civilizations demonstrate that, even if the Geneva or Hague Conventions were not universal at inception, since they were drafted and adopted by lawyers and diplomats belonging to the

European Christian culture, their sentiments are nearly universal, since the principles they contain can be found in very different systems of thought — both European and non-European.

The cultural history of Europe also provides examples of both barbarism and humanity. The first significant development in respect to the law of war occurred in 300 BC, with the Greek philosophical school called "stoicism". This school advocated a path towards humanity through understanding and "sympathy", the need to understand and respect each other.

B- Contemporary history of IHL

Between the 16th and 18th centuries, in the Renaissance and Age of Reason, an interesting and humanitarian practice developed in Europe. Frequently, warriors met before the hostilities and decided on guidelines to be respected during the battle. These special agreements could, for example, establish the observance of an armistice two days per week, the obligation to collect the wounded, or a responsibility to release prisoners at the end of the war. Although these agreements were concluded on an *ad hoc* basis, and had a limited scope of application, such precedents played a very significant role in the creation of IHL.

From this historical perspective developed the documented origin of IHL in the mid-19th Century. Up to that point, the practice of the accepted rules of warfare reflected the theories of philosophers, priests or jurists with local and special agreements. However, these customs were geographically limited and there were no international (states were not yet born) or universal rules. The first universal treaty on Humanitarian Law is the Geneva Convention of 1864.

a- How and why did the Convention come to life?

The conception of IHL can be traced to *the Battle of Solferino*, a terrible conflict between French and Austrian forces that took place in northern Italy in 1859. One witness of that carnage, a businessman from Geneva named Henry Dunant, was appalled not so much by the violence of that battle, but rather by the desperate and miserable situation of the wounded left on the battlefields. With the help of the local inhabitants, Dunant immediately decided to collect and care for the wounded. Back in Geneva, Dunant published a short book in 1862, *A Memory of Solferino*, in which he vividly depicted the horrors of the battle:

"*When the sun came up on the twenty-fifth June 1859 it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields…The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them… Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death struggle*".

In his book, Dunant not only described the battle, but tried to suggest and publicize possible measures to improve the fate of war victims. He presented three basic proposals designed to mitigate the suffering of the victims of war. To this end he proposed:

1) That voluntary societies be established in every country which, in time of peace, would prepare themselves to serve as auxiliaries to the military medical services.
2) That States adopt an international treaty guaranteeing legal protection to military hospitals and medical personnel.
3) That an international sign of identification and protection of medical personnel and medical facilities be adopted.

These three proposals were simple, but they have had deep and lasting consequences:

• The whole system of National Red Cross or Red Crescent Societies (of which there are today 188 around the world) stems from the first proposal;
• The second proposal gave birth to the "First Geneva Convention" in 1864;
• The third proposal led to the adoption of the protective emblem of the Red Cross or the Red Crescent.

Dunant's book enjoyed enormous success throughout Europe. Although it did not present entirely original ideas, the merit of the book is in large part due to the timeliness of its message.

At that time, a private welfare association existed in Geneva: The Society for the Public Good. Its President, Gustave Moynier, was impressed by Dunant's book and proposed to the members of the Society that they try to carry out Dunant's proposals. This suggestion was accepted and five members of the Society, Mssrs. Dunant, Moynier, Dufour, Appia and Maunoir, created a special committee [in 1863], the "International Standing Committee for Aid to Wounded Soldiers." This

committee would, 15 years later, become the International Committee of the Red Cross.

In 1863, the Committee convened military and medical experts at a conference in Geneva. The aim of that meeting was to examine the practicability and feasibility of the proposals made by Dunant. The results of the meeting were encouraging, and the members of the Committee persuaded the Swiss Federal Council to convene a diplomatic conference, whose task would be to give a legal form to Dunant's proposals.

To this end, a diplomatic conference was held in 1864 in Geneva and the 16 states represented finally adopted the "Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field." Its result was an international treaty open to universal ratification (i.e. an agreement not limited to a specific region or conflict, with binding effects on the States that would formally accept it) in which states agreed to voluntarily limit their own power in favour of the individual. For the first time, armed conflict became regulated by written, general law.

b- The Birth of Modern International Humanitarian Law

In ten concise articles, the First Geneva Convention gave a legal format to Dunant's proposals and established a special status for medical personnel. The fact that this conference lasted less than 10 days provides a clear indication of the general support given to the propositions.

Of course, this original convention has been replaced by more modern and comprehensive treaties. However, it illustrates in a concise manner the central objectives of humanitarian law treaties.

Beginning in 1866, the Geneva Convention proved its worth on the battlefield. By 1882, 18 years after its adoption, it had been universally ratified.

We should be aware of the three main characteristics that marked the IHL's evolution:

a) The constant enlargement of the categories of war victims protected by humanitarian law (military wounded; sick and shipwrecked; prisoner of war; civilians in occupied territories; the entire civilian population), as well as the

expansion of the situations in which victims are protected (international and non-international armed conflicts);
b) The regular updating and modernization of the treaties to account for the realities of recent conflicts. For example, the rules protecting the wounded adopted in 1864 were thus revised in 1906, 1929, 1949, and 1977 (critics have therefore accused IHL of being always "one war behind reality").
c) Two separate legal currents have, up until 1977, contributed to this evolution:

• The Geneva Law, mainly concerned with the protection of the victims of armed conflicts- i.e. the noncombatants and those who no longer take part in the hostilities; and
• The Hague Law, whose provisions relate to limitations and prohibitions of specific means and methods of warfare.

These two legal currents were practically merged with the adoption of the two Additional Protocols of 1977.

The Conventions currently in force have replaced the older Geneva Conventions.
Strictly speaking, the "Hague Current" originated in the Declaration of St Petersburg, which was proclaimed by a Conference convened by Alexander III, the Tsar of Russia in 1868. The Declaration prohibited the use of explosive bullets and enunciated some basic principles relating to the conduct of hostilities.

In 1899 the so-called "First Peace Conference" was convened in the Netherlands by another Tsar, Nicholas II, in The Hague. That Conference adopted several Conventions whose general goal was to limit the evils of war. Among other things, these Conventions prohibited:

• the launching of projectiles from balloons;
• the use of poisonous gases;
• the use of dumdum bullets.

The main achievement of this Conference was the adoption of a principle named for its initiator, F. Martens, the legal adviser of the Russian Tsar. The "**Martens Clause**" says that:

"*until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as the result from*

the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience".

Another important success of the 1899 Conference was the extension of the humanitarian rules from the Geneva Convention of 1864 to the victims of naval conflicts. This adaptation is included at the origin of the present Second Geneva Convention.

In 1906, the Convention of 1864 that protected the wounded and the sick of armies in the field was revised. Although the revision expanded the convention to 33 articles from the original 10 in the 1864 version, the fundamental principles remained the same.
In 1907, a second Peace Conference was convened in The Hague. On this occasion, the Conventions of 1899 were revised and some new rules were introduced. Among the additions were a definition of combatants, rules on naval warfare, rules on the rights and duties of neutral powers, rules on military occupation, and rules regarding Prisoners of War (POW).
In 1925, as a direct result of the suffering endured during the First World War (1914-1918), a Protocol prohibiting the use of gas was adopted. Although it was adopted in Geneva, this Protocol clearly belongs, according to its content, to the legal current of The Hague Law.
In 1929, a diplomatic Conference was convened in Geneva by the Swiss Confederation. The main results of that Conference were:
• The second revision (after 1906) of the 1864 Convention. This Convention was again modified. Among the new provisions, mention should be made of the first official recognition of the emblem of the Red Crescent. Although that emblem had been used as early as 1876, it was only in 1929 that it was authorized by law;
• The other remarkable success of the 1929 Conference was the adoption of the "Convention relative to the treatment of Prisoners of War" (also a result of the First World War). Partially examined during the Peace Conference of 1899 and 1907, this important issue was not deeply studied before 1929.

In 1949, just after the Second World War (note the parallel to World War I and the Conference of 1929), the four current Geneva Conventions were adopted. The First (protection of sick and wounded), Second (protection of shipwrecked), and Third Conventions (prisoners of war), are mainly revised versions of former Conventions. The Fourth Convention, establishing protection for the civilian population, is an entirely new amendment and constitutes the greatest success of the 1949 Conference. Another decisive improvement of the 1949 Diplomatic conference was the adoption of Article 3 common to the four Conventions, the first international provision applicable in situations of non-international armed conflicts.

In 1977, after four sessions of Diplomatic Conferences, two additional Protocols to the Geneva Conventions of 1949 were adopted. The First Protocol is related to the protection of victims of international armed conflicts; the second to the protection

of victims of non-international armed conflicts. To some degree, this Second Protocol can be regarded as an enlargement of Article 3 common to the four Geneva Conventions.

In 1980, another important convention was adopted under the UN auspices, the "Convention on prohibition or restrictions on the use of conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects." This instrument limits or prohibits the use of mines, boobytraps, incendiary weapons, and non-detectable fragments.

In 1993, a comprehensive Convention prohibiting the development, production, stockpiling, and use of chemical weapons was adopted. This treaty supplements the basic prohibition contained in the 1925 Geneva Protocol.
In 1995, a new Protocol, an appendage to the 1980 Convention, was adopted. This new instrument prohibited the use of laser weapons designed to cause permanent blindness.

In 1997, a Convention prohibiting the use, stockpiling, production, and transfer of antipersonnel mines was signed in Ottawa.

In 1998, the Statute of the International Criminal Court (ICC) was adopted in Rome. This accomplishment was the culmination of years of effort and showed the resolve of the international community to ensure that those who commit grave crimes do not go unpunished. The ICC has jurisdiction over serious international crimes (Genocide, Crimes against Humanity, War crimes, and Aggression) regardless of where they are committed.

In 1999, a new Protocol to the 1954 Convention on cultural property was adopted. Protocol II enables the States party to that Convention to supplement and reinforce the protection system established in 1954. It clarifies the concepts of safeguarding and respect for cultural property; it lays down new precautions in attacks and against the effects of attacks; and institutes a system of enhanced protection for property of the greatest importance for humanity.

In 2000, an optional protocol to the 1989 Convention on the rights of the child was adopted. This protocol raises the minimal age for compulsory recruitment from 15 to 18 and calls on States to raise the minimum age for voluntary recruitment above 15. It provides that armed groups should not use children under 18 in any circumstances and calls on States to criminalize such practices.

In 2003, the international community adopted a treaty to help reduce the human suffering caused by explosive remnants of war and bring rapid assistance to affected communities. Explosive remnants of war are unexploded weapons such as artillery shells, mortars, grenades, bombs, and rockets left behind after an armed conflict.

In 2005, a diplomatic conference held in Geneva adopted a Third Additional Protocol to the Geneva Conventions, creating an additional emblem alongside the red cross and red crescent. The additional emblem, known as the red crystal, should provide a comprehensive and lasting solution to the emblem question. It will appear as a red frame in the shape of a square on a diagonal on a white background, and is free from any religious, political, or other connotation.

In 2008, governments negotiated and adopted the Convention on Cluster Munitions. This important international humanitarian law treaty prohibits the use, production, stockpiling, and transfer of cluster munitions, and requires States to take specific action to ensure that these weapons claim no future victims.

It is worth noting the support lent by the international community to the Treaties of IHL. Since 194 states are parties to these texts, the four Geneva Conventions are now among the most universal instruments of international law. Additionally, 172 States are parties to the First Protocol and 166 are parties to the Second.

III. Philosophy of International Humanitarian Law: can warfare be regulated by law?

In defending the acts of Milo in an internal armed conflict in Rome, Cicero pleaded, "... *silent enim leges inter arma*." ("Laws are silent among [those who use] weapons").

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.

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".

CHAPTER 2

INTERNATIONAL HUMANITARIAN LAW AS A BRANCH OF PUBLIC INTERNATIONAL LAW

I. International Humanitarian Law: at the vanishing point of international law

Public international law can be described as the law regulating coordination and cooperation between members of the international society – essentially the States and the organizations created by States.

IHL is perched at the vanishing point of international law, but is simultaneously a crucial test for international law.

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.

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.

*International Humanitarian Law in an evolving international environment

a) increasing number of non-international armed conflicts
b) peace operations
c) non-State armed groups not even aspiring to become States
d) criminalization of armed conflict and of violations of IHL

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)

The two Latin terms *jus ad bellum* and *jus in bello* 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.

This total separation 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-defense impossible.

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 (*jus ad bellum* has changed into *jus contra bellum*).

Exceptions are admitted in the case of individual and collective self-defense, based upon Security Council resolutions and, arguably, the right of peoples to self-determination (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 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.

***Consequences of the distinction between** *Jus ad bellum* and *Jus in bello*

aa) The equality of belligerents before IHL (P I, Art. 96(3)(c))

bb) IHL applies independently of the qualification of the conflict under *jus ad bellum*
cc) Arguments under *jus ad bellum* may not be used to interpret IHL
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-defense, impossible

*** The distinction between** *Jus ad bellum* and *Jus in bello* **in non-international armed conflicts**

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.

III. International Humanitarian Law: a branch of international law governing the conduct of States and individuals

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".

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."

The ICTY confirmed in the *Tadic* case that "an armed conflict exists whenever there is a resort to armed force between States […]"[1].This definition has since been used several times by the ICTY's Chambers and by other international bodies[2].

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

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 [...]"[3].

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[4] 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 lead to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognized that "wars of national liberation"[5] 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.

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[2] *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].
[3] *See* GC I-IV, Art. 2(2).
[4] *See* Case No. 53, International Law Commission, Articles on State Responsibility [Art. 8 and Commentary].
[5] 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[6].

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[7].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.

The ICRC study on customary International Humanitarian Law 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.

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

[6] 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 [...]."
[7] *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 [...]."

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 [...].”[8]

***Non-international armed conflicts**

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

***Acts of terrorism and IHL**

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. Violence does not constitute an armed conflict simply because it is committed 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).

[8] 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.

IV. International Humanitarian Law and International Human Rights Law

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.

1) IHL is applicable in armed conflicts
2) Human rights apply at all times

a) but derogations possible in situations threatening the life of the nation
b) no derogations from the "hard core" – but controversy whether and to what extent judicial guarantees belong to the "hard core"
c) 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.

3) gap in situations of internal disturbances and tensions

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.

*** International Humanitarian Law**
– individual – State
– State – State
– individual – individual

*** International Human Rights Law**
– individual – State

*PROTECTED RIGHTS

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, namely those that:

a) are particularly endangered by armed conflicts and
b) are not, as such, incompatible with the very nature of armed conflicts.

1) **Areas in which details provided by IHL are more adapted to armed conflicts**

a) right to life in the conduct of hostilities
b) prohibition of inhumane and degrading treatment
c) right to health
d) right to food
e) right to individual freedom (in international armed conflicts)

2) **Areas in which International Human Rights Law gives more details**

a) procedural guarantees in case of detention?
b) judicial guarantees in case of trial
c) use of firearms by law enforcement officials
d) medical ethics
e) definition of torture

3) **The main controversies over whether IHL or International Human Rights Law prevails**

a) the right to life of fighters in non-international armed conflict
b) procedural requirements in case of arrest and detention of fighters in non-international armed conflict

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CHAPTER 3

SOURCES OF CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW

I. Treaties: the Laws of The Hague, of Geneva and of New York

Historically, the rules of 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.

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. 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.

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. The general law of treaties governs the conclusion, entry into force, application, interpretation, amendment and modification of IHL treaties, reservations to them, and even their denunciation; the latter, however, only takes effect after the end of the armed conflict in which the denunciating State is involved. The main exception to the general rules of the law of treaties for IHL 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.

1. The Hague Conventions of 1907

The second conference, in 1907, was generally a failure, with little major advancement from the 1899 Convention. However, the meeting of major powers did prefigure later 20th-century attempts at international cooperation.

The second conference was called at the suggestion of U.S. President Theodore Roosevelt in 1904, but it was postponed because of the war between Russia and Japan. The Second Peace Conference was held from 15 June to 18 October 1907. The intent of the conference was to expand upon the 1899 Hague Convention by modifying some parts and adding new topics; in particular, the 1907 conference had an increased focus on naval warfare. The British attempted to secure limitation of armaments, but these efforts were defeated by the other powers, led by Germany, which feared a British attempt to stop the growth of the German fleet. Germany also rejected proposals for compulsory arbitration. However, the conference did enlarge the machinery for voluntary arbitration and established conventions regulating the collection of debts, rules of war, and the rights and obligations of neutrals.

The treaties, declarations, and final act of the Second Conference were signed on 18 October 1907; they entered into force on 26 January 1910. The 1907 Convention consists of thirteen treaties—of which twelve were ratified and entered into force—and one declaration:

Hague Convention (II) on the Laws and Customs of War on Land, 1899
Hague Declaration (IV,2) concerning Asphyxiating Gases, 1899
Hague Declaration (IV,3) concerning Expanding Bullets, 1899
Hague Convention (IV) on War on Land and its Annexed Regulations, 1907
Hague Declaration (XIV) on Explosives from Balloons, 1907
Hague Convention (VI) on Enemy Merchant Ships, 1907
Hague Convention (VII) on Conversion of Merchant Ships, 1907
Hague Convention (VIII) on Submarine Mines, 1907
Hague Convention (IX) on Bombardment by Naval Forces, 1907
Hague Convention (XI) on Restrictions of the Right of Capture, 1907
Hague Convention (XIII) on Neutral Powers in Naval War, 1907
Hague Convention (III) on the Opening of Hostilities, 1907

Hague Convention (V) on Neutral Powers in case of War on Land, 1907

2. The Four Geneva Conventions of 1949

The Geneva Conventions are a series of treaties on the treatment of civilians, prisoners of war (POWs) and soldiers who are otherwise rendered hors de combat, or incapable of fighting. The first Convention was initiated by the International Committee for Relief to the Wounded (which became the International Committee for the Red Cross and Red Crescent). This convention produced a treaty designed to protect wounded and sick soldiers during wartime. The Swiss Government agreed to hold the Conventions in Geneva, and a few years later, a similar agreement to protect shipwrecked soldiers was produced. In 1949, after World War II, two new Conventions were added to the original two, and all four were ratified by a number of countries. The 1949 versions of the Conventions, along with two additional Protocols, are in force today.

Convention I: for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949

This Convention protects wounded and infirm soldiers and medical personnel against attack, execution without judgment, torture, and assaults upon personal dignity (Article 3). It also grants them the right to proper medical treatment and care.

Convention II: on the Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949 and its commentary

This agreement extended the protections mentioned in the first Convention to shipwrecked soldiers and other naval forces, including special protections afforded to hospital ships.

Convention III: on Prisoners of War

One of the treaties created during the 1949 Convention, this defined what a Prisoner of War was, and accorded them proper and humane treatment as specified by the first Convention. Specifically, it required POWs to give only their name, rank, and serial number to their captors. Nations party to the Convention may not use torture to extract information from POWs.

Convention IV: on Civilians

Under this Convention, civilians are afforded the protections from inhumane treatment and attack afforded in the first Convention to sick and wounded soldiers. Furthermore, additional regulations regarding the treatment of civilians were introduced. Specifically, it prohibits attacks on civilian hospitals, medical transports, etc. It also specifies the right of internees, and those who commit acts of sabotage. Finally, it discusses how occupiers are to treat an occupied populace.

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

Protocol I: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts

In this additional Protocol to the Geneva Conventions, the signing Nations agreed to further restrictions on the treatment of "protected persons" according to the original Conventions. Furthermore, clarification of the terms used in the Conventions was introduced. Finally, new rules regarding the treatment of the deceased, cultural artifacts, and dangerous targets (such as dams and nuclear installations) were produced.

Protocol II: Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts

In this Protocol, the fundamentals of "humane treatment" were further clarified. Additionally, the rights of interned persons were specifically enumerated, providing protections for those charged with crimes during wartime. It also identified new protections and rights of civilian populations.

Protocol III: Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem

Those drafting the Geneva Convention of 1864 foresaw the need for a universal symbol of protection easily recognizable on the battlefield. In honor of the origin of this initiative, the symbol of a red cross on a white background (the reverse of the Swiss flag) was identified as a protective emblem in conflict areas. The Red Crescent and red lion and sun emblems were later recognized by nations at a diplomatic conference in 1929, although the red lion and sun is no longer in use. In

December 2005, governments adopted the Third Additional Protocol adding the red crystal.

**Common Article 3 of Geneva Conventions*

Article 3 is applicable in case of armed conflict not of international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves. Protocol II which is supplementary to this article has expanded this provision. Article 3 offers an international minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations specifically stated in the article.

Humane and non-discriminatory treatment, are two important protections offered under this provision. It prohibits certain acts as against protected person, which are enumerated in this article. Common article 3 assumes greater importance than Protocol II to the Geneva Conventions, 1949 for the reasons that the Geneva Conventions 1949 have been ratified by large number of States and also that article 3 has been claimed to be declaratory of customary international law on this point. However, this article is applicable to the situation of non-international armed conflicts in a limited way as circumscribed in the provision itself.

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed ' hors de combat ' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

4. Treaties relating to IHL and New York Conventions

- Convention on the Rights of the Child, 1989
- Optional Protocol on the involvement of children in armed conflict, 2000

METHODS AND MEANS OF WARFARE

- Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, 1925
- Institute of International Law Resolution on Military Objectives, 1969
- Convention on the Prohibition of Biological Weapons, 1972
- Resolution on Small-Calibre Weapon Systems, 1979
- Final Act on the Conference on Certain Conventional Weapons (CCW), 1980
- Convention prohibiting Certain Conventional Weapons (CCW), 1980
- CCW Protocol (I) on Non-Detectable Fragments, 1980
- CCW Protocol (II) prohibiting Mines, Booby-Traps and Other Devices, 1980
- CCW Protocol (III) prohibiting Incendiary Weapons, 1980
- Convention prohibiting Chemical Weapons, 1993
- CCW Protocol (IV) on Blinding Laser Weapons, 1995
- CCW Protocol (II) prohibiting Mines, Booby-Traps and Other Devices, amended, 1996
- Anti-Personnel Mine Ban Convention, 1997

- Convention prohibiting Certain Conventional Weapons (CCW), amended Article 1, 2001
- CCW Protocol (V) on Explosive Remnants of War, 2003
- Convention on Cluster Munitions, 2008

NAVAL AND AIRWARFARE

- Havana Convention on Maritime Neutrality, 1928
- London Treaty on Limitation and Reduction of Naval Armaments, 1930
- Procès-verbal on Submarine Warfare of the Treaty of London, 1936
- Nyon Agreement, 1937
- San Remo Manual on Armed Conflicts at Sea, 1994

CULTURAL PROPERTY

- Roerich Pact for the Protection of Artistic and Scientific Institutions, 1935
- Final Act on the Protection of Cultural Property, The Hague, 1954
- Hague Convention for the Protection of Cultural Property, 1954
- Hague Protocol for the Protection of Cultural Property, 1954
- Resolutions on Cultural Property, The Hague, 1954
- Second Hague Protocol for the Protection of Cultural Property, 1999

CRIMINAL REPRESSION

- Charter of the Nuremberg Tribunal, 1945
- United Nations Principles for the Nuremberg Tribunal, 1946
- Convention Statutory Limitations to War Crimes, 1968
- European Convention on Non-Applicability of Statutory Limitations to War Crimes, 1974
- Statute of the International Criminal Tribunal for the Former Yugoslavia, 1993
- Statute of the International Criminal Tribunal for Rwanda, 1994
- Statute of the International Criminal Court, 1998
- Statute of the Special Court for Sierra Leone, 2002

OTHER TREATIES RELATING TO IHL

- Convention on the Prevention and Punishment of Genocide, 1948
- Convention prohibiting environnemental modification techniques (ENMOD), 1976
- OAU Convention on Mercenaries, 1977

- Convention on Mercenaries, 1989
- Arms Trade Treaty, 2013

II. Customary Law

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.

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 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 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.

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.

III. Fundamental principles of IHL

"General principles of law recognized by civilized nations" 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.

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**, 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.

Express recognition of the existence and particularly important examples of the general principles of IHL are the "elementary considerations of humanity" and the so-called "Martens clause".

1. The Martens Clause

GC I-IV, Arts 63/62/142/158 respectively
P I, Art. 1(2)
P II, Preamble, para. 4

The Martens Clause has formed a part of the laws of armed conflict since its first appearance in the preamble to the 1899 Hague Convention (II) with respect to the laws and customs of war on land:

"Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."

The Clause was based upon and took its name from a declaration read by Professor von Martens, the Russian delegate at the Hague Peace Conferences 1899.

The Martens Clause is important because, through its reference to customary law, it stresses the importance of customary norms in the regulation of armed conflicts. In addition, it refers to "the principles of humanity " and " the dictates of the public conscience ". It is important to understand the meaning of these terms. The expression " principles of humanity " is synonymous with " laws of humanity " ; the earlier version of the Martens Clause (Preamble, 1899 Hague Convention II) refers to " laws of humanity " ; the later version (Additional Protocol I) refers to " principles of humanity " . The principles of humanity are interpreted as prohibiting means and methods of war which are not necessary for the attainment of a definite military advantage.

Jean Pictet interpreted humanity to mean that " ... capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain; that captivity be made as endurable as possible."

2. Principles of International Humanitarian Law

a) Humanity
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?

c) Proportionality
d) Distinction
e) Prohibition on causing unnecessary suffering (The basic rule: Article 35 of Protocol I)
f) Independence of jus in bello from jus ad bellum

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CHAPTER 4
THE FUNDAMENTAL DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

The basic axiom underlying 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 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.

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, 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.

"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 defenseless 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).

DEFINITION AND CHARACTERISTICS OF CIVILIANS AND COMBATANTS

CIVILIANS	COMBATANTS
all persons other than combatants	members of armed forces *lato sensu*

I. Activities

CIVILIANS	COMBATANTS
Do not take a direct part in hostilities	Take a direct part in hostilities

II. Rights

CIVILIANS	COMBATANTS
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)

III. Punishable

CIVILIANS	COMBATANTS
May be punished for their mere participation in hostilities	May not be punished for their mere participation in hostilities

IV. Protection

CIVILIANS	COMBATANTS
Are protected because they do not participate: – as civilians in the hands of the enemy – against attacks and effects of hostilities	Are protected when they no longer participate: – if they have fallen into the power of the enemy – if wounded, sick or 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

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

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?

VI. The fundamental obligation of combatants to distinguish themselves from the civilian population

P I, Art. 44(3) :

"[…] 3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1."

CIHL, Rules 1-6:

Distinction between Civilians and Combatants

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. [IAC/NIAC]

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited. [IAC/NIAC]

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel. [IAC]

Rule 4. The armed forces of a party to the conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. [IAC]

Rule 5. Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. [IAC/NIAC]

Rule 6. Civilians are protected against attack, unless and for such time as they take a direct part in hostilities. [IAC/NIAC]

VII. Relativity of the distinction in modern conflicts

1. Guerrilla warfare

2. Wars of extermination

3. Situations where structures of authority have disintegrated

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 fulfill the (collective or individual) requirements for combatant status)

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)?

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?

6. "Civilianization" of armed conflicts

a) growing involvement of private military and security companies

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.

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[9], it may be argued that IHL implicitly prohibits States from outsourcing direct participation in hostilities to persons who are not combatants.

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

PMSC staff normally does not fall under the very restrictive definition of mercenaries in IHL[10]. 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.

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 defense of military targets against common criminals or the defense 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 criminal law defense 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-defense.

If the person attacked – and under the domestic legislation of some countries even if the object attacked – is civilian, criminal law self-defense may justify the use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defense and defense of others and by doubts whether the criminal law defense of self-defense 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-defense 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.

[10] *See* P I, Art. 47,

In our view, self-defense 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-defense, 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 does not lose their protection as civilians, they should therefore not be put in ambiguous situations.

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

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CHAPTER 5
COMBATANTS AND PRISONERS OF WAR

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 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.

I. Who is a combatant?

A combatant is either:

– 1- a member of the armed forces *stricto sensu* of a party to an international armed conflict[11]:
• respecting the obligation to distinguish himself/herself from the civilian population

Or

– 2- a member of another armed group[12]:
• 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

[11] *See* GC III, Art. 4(A)(1) a
[12] *See* Art. GC III, 4(A)(2)

And
• individually respecting the obligation to distinguish himself/herself from the civilian population

Or
– 3- a member of another armed group[13] 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[14] the obligation to distinguish himself/herself from the civilian population[15]:
- 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.

1. Members of armed forces *lato sensu*

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

2. ***Levée en masse***

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

3. **Particular cases**

a) spies

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

b) saboteurs

c) mercenaries

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

d) terrorists?

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

e) members of private military and security companies

[13] *See* P I, Art. 43
[14] *See* P I, Art. 44(5)
[15] *See* P I, Art. 44(3)

II. Who is a prisoner of war?

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

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

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

2. The status of "unlawful combatants"

III. Treatment of prisoners of war

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[16].

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

GC III, Art. 5

b) including in exceptional circumstances

P I, Art. 41(3)

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

GC III, Art. 12

d) respect for their allegiance towards the power on which they depend

[16] *See* GC III, Art. 7

e) no punishment for participation in hostilities

f) rules on treatment during internment

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

g) rules on penal and disciplinary proceedings

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

h) punishment for acts committed prior to capture

GC III, Art. 85

i) limits to punishment for escape

GC III, Arts 91-94

IV. Transmission of information

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

GC III, Art. 70 and Annex IV B.

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

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

c) correspondence

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

V. Monitoring by outside mechanisms

1. Protecting Powers

GC III, Arts 8 and 126; P I, Art. 5

2. ICRC

GC III, Arts 9 and 126(4); P I, Art. 5(3)-(4) [CIHL, Rule 124]

VI. Repatriation of prisoners of war

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[17].

1. During hostilities

GC III, Art. 109-117

a) medical cases

GC III, Annexes I and II

b) agreements between the parties

2. At the end of active hostilities

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

a) when do active hostilities end?
b) no reciprocity
c) fate of POWs who refuse repatriation

3. Internment in neutral countries

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

[17] *See* GC IV, Art. 6(4)

CHAPTER 6
PROTECTION OF THE WOUNDED, SICK AND SHIPWRECKED

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"[18].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[19].

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.

I. The idea of Solferino

Please check Chapter I, p. 4 & s.

II. Respect, protection and care for the wounded, sick and shipwrecked, without any adverse distinction

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

1. Beneficiaries

Provided that they refrain from any act of hostilities.

a) under Conventions I and II: military personnel

GC I-II, Art 13

[18] Protected persons are defined in GC I-II, Art. 13
[19] *See* P I, Art. 8(a) and (b); GC IV, Art. 16

b) under Protocol I: extension to civilians

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

2. Respect
3. Protection
4. Care

– equal treatment

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

– evacuation

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

III. Medical and religious personnel

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[20]. They are not to be attacked on the battlefield and must be allowed to perform their medical or religious duties[21]. 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[22]. Conventions I and IV provide protection for civilians caring for sick and wounded combatants and civilians[23]. Protocol I further expanded the category of persons (permanent or temporary personnel, military or civilian) protected by virtue of their medical or religious functions[24]. Aid societies are granted the same protection if they meet the requirements laid out in the Conventions[25].

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

[20] *See* GC I, Arts 24 and 25; GC III, Arts 36 and 37
[21] *See* GC I, Arts 24-27; GC II, Arts 36 and 37; P I, Arts 15-20; P II, Art. 9
[22] *See* GC I, Arts 28 and 30; GC II, Art. 37; GC III, Art. 33
[23] *See* GC I, Art. 18; GC IV, 20(1)
[24] *See* P I, Art. 8(c) and (d)
[25] *See* GC I, Arts 26 and 27; GC II, Arts 25 and 36; P I, Art. 9(2)

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

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]
– may perform medical duties in conformity with medical ethics

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
– 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
3. Duties of medical personnel

a) no direct participation in hostilities
– they may be armed, but only with light weapons
– and may only use them for their own defense of for that of the wounded and sick under their care

b) respect for medical ethics
c) give care without discrimination

d) respect principle of neutrality
e) identification

GC I, Annex II

IV. Protection of medical goods and objects (including hospitals and ambulances)

IHL establishes comprehensive and detailed protection for medical units[26], medical transports[27] and medical material[28]. These goods must be respected and protected at all times by the belligerents[29] 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[30]. 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.

1. Protection

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

2. Loss of protection

GC I, Arts 21 and 22

[26] *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, organized 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 centers, preventive medicine centers and institutes, medical depots and the medical and pharmaceutical stores of such units. Medical units may be fixed or mobile, permanent or temporary."
[27] *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."
[28] *See* GC I, Arts 33-34
[29] *See* GC I, Arts 19, 33, and 35; GC II, Arts 22-27; P I, Art. 12(1)
[30] *See* GC I, Art. 21; GC II, Art. 34; P I, Art. 13(1)

V. Possible constitution of hospital, safety and neutralized zones

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

VI. The emblem of the Red Cross/Red Crescent/Red Crystal

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[31]. However, today only the first three authorized emblems are utilized. 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[32])[33]. To be effective in such circumstances the emblem must be visible and therefore large. 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[34].

In order to avoid undermining the protection the emblem provides, abuse and misuse of the emblem, which in certain situations constitutes a war crime[35], must be prevented; thus, the emblem may be neither imitated nor used for private or

[31] *See* GC I, Art. 38; GC II, Art. 41; P I, Art. 8(1); P II, Art. 12; and, for the red crystal, P III.
[32] 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
[33] *See* GC I, Arts 39-43; GC II, Art. 41-43; P I, Art. 18; P II, Art. 12
[34] *See* GC I, Art. 44(2)-(4)
[35] *See* P I, Arts 37(1) and 85(3)(f)

commercial purposes[36]. 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[37].

1. Three distinctive signs

GC I, Art. 38

2. Technical means of identification

P I, Annex I

3. Protective use

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

a) to distinguish medical personnel and units
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

4. Indicative use

GC I, Art. 44

5. Repression of abuse and misuse

GC I, Arts 53-54

VII. Provisions on the dead and missing

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"[38]. 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[39].

[36] *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
[37] *See* GC I, Art. 54; GC II, Art. 45
[38] *See* P I, Art. 32
[39] *See* P I, Art. 33(1)

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[40].

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 reestablished, *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[41]. 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[42], transmission of capture or internment cards[43], and the right to correspond with the family[44]. 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[45].

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[46], – which is easier to do if the deceased wear identity cards or tags as prescribed for combatants by IHL[47] – including by agreeing to establish search teams[48]. 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[49]. Understandably, relatives will wish to have access to the graves and often even to have the remains of their

[40] 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)
[41] *See* GC IV, Arts 25 and 26
[42] *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)
[43] *See* GC III, Art. 70; GC IV, Art. 106
[44] *See* GC III, Art. 71; GC IV, Art. 107
[45] *See* GC III, Art. 122(7); GC IV, Art. 137(1)
[46] *See* GC I, Art. 16; P I, Art. 33(2)
[47] *See* GC III, Art. 17(3)
[48] *See* P I, Art. 33(4)
[49] *See* GC I, Art. 17; P I, Art. 34(1)

loved ones returned to them. This requires an agreement between the parties concerned, which can generally only be reached once the conflict has ended[50].

1. Relationship between the dead and the missing
2. Obligation to identify dead bodies and notify deaths

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

3. Obligation to search for persons reported missing

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

4. Treatment of remains

a) respect

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

b) decent burial

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

c) marking of gravesites

d) access to gravesites

e) agreements on the return of remains

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

VIII. Transmission of information

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]

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[50] *See* P I, Art. 34(2) and (4)

CHAPTER 7
PROTECTION OF CIVILIANS

Increasingly, civilians make up the overwhelming majority of the victims of armed conflict, even though IHL stipulates that attacks should only be directed at combatants and military objectives and that civilians and civilian objects should be respected.

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, but most apply only to "protected civilians", i.e. 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, the second contains more detailed and protective rules applying to protected civilians whose territory is occupied by the enemy, while the third encompasses provisions common to the enemy's own territory and occupied territories. 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.

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 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.

I. The protection of the civilian population against the effects of hostilities

(See infra, Chapter 8. II. The Protection of the Civilian Population against Effects of Hostilities),

II. The protection of civilians against arbitrary treatment

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*, Chapter 8. IV. IHL 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. However, IHL also takes into account the fact that women are more vulnerable, and gives them preferential treatment in some particular 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.

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, 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.

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

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

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.

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.

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. 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 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.

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
cc) status and treatment of child soldiers

d) special protection of journalists

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

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]

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

3. *Rules on protected civilians*

a) who is a protected civilian?
GC IV, Art. 4

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

cc) humane treatment
GC IV, Art. 27 [CIHL, Rule 87]

dd) forced labour
GC IV, Arts 40, 51 and 95 [CIHL, Rule 95]

ee) prohibition of collective punishment
GC IV, Art. 33 [CIHL, Rule 103]

ff) visits by the Protecting Power and by the ICRC
GC IV, Arts 9-10, 30 and 143 [CIHL, Rule 124 A]

gg) if interned: civilian internees
GC IV, Arts 41-43, 68 and 78-135
– decision of internment: individual administrative decision
GC IV, Art. 78
– reasons for internment: imperative security reasons; not punishment
GC IV, Arts 41, 42 and 78
– treatment of civilian internees
GC IV, Arts 83-131, Annex III [CIHL, Rules 118-123 and 125-127]
– release of civilian internees
GC IV, Arts 132-135 [CIHL, Rule 128 B]

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

III. Refugees and displaced persons in IHL

If States consistently and fully observed the principles of IHL protecting civilians, 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, while the IHL of international armed conflicts stipulates such a general prohibition only for occupied territories. 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. Civilians displaced by internal armed conflict enjoy similar but less detailed protection.

Refugees, in contrast, are those who fled their country. IHL protects such individuals, as civilians affected by hostilities, only if they have fled to a State taking part in an international armed conflict (or if that State is beset by internal armed conflict).

IHL specifically protects refugees entering the territory of an enemy State against unfavourable treatment (based on their nationality).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, which also provides special guarantees for those who fled to territory which becomes occupied by the State of which they are nationals. 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.

IV. Special rules on occupied territories

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 nor to try to liberate that territory by violent means. 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.

In practice, this has the following consequences: except concerning the protection of the occupying power’s security, local laws remain in force and local courts remain competent. Except when rendered absolutely necessary by military

operations, private property may not be destroyed and may only be confiscated under local legislation. Public property (other than that of the municipalities) 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. The local population may not be deported; the occupying power may not transfer its own population into the occupied territory.

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, as well as for ensuring hygiene and public health and food and medical supplies. Its legitimate interest is to control the territory for the duration of the occupation, i.e., until the territory is liberated by the former sovereign or transferred to the sovereignty of the occupying power under a peace treaty. The IHL of military occupation protects all civilians, except nationals of the occupying power other than refugees.

V. Transmission of information

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 8
CONDUCT OF HOSTILITIES

I. The distinction between the Law of The Hague and the Law of Geneva

(See Supra Chapter I, II- Historical Development of International Humanitarian Law, p. 3 & s.)

II. The protection of the civilian population against the effects of hostilities

1. 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

2. Definition of military objectives

P I, Art. 52(2) and (3) [CIHL, Rule 8]

When the focus of the law on the conduct of hostilities shifted from the prohibition to attack undefended towns and villages 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.

Under the definition provided in Article 52(2) of Protocol I, an object[51] must cumulatively[52] meet two criteria to be a military objective.

[51] 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.

[52] 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

First, the object, by its "nature, location, purpose or use", has to contribute effectively to the military action of the enemy. "Nature" refers to the object's intrinsic character. "Location" admits that an object may be a military objective simply because it is situated in an area that is a legitimate target.

"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.

3. Definition of the civilian population

P I, Art. 50

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, 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. 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.

4. Prohibited attacks

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. IHL also proscribes attacks directed at civilian objects. Even those attacks directed at a legitimate military objective are regulated by IHL; such attacks must not be indiscriminate, i.e. the weapons utilized must be capable of being directed at the

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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.

specific military objective and the means used must be in proportion to the military necessity.

Reprisals against civilians or civilian objects are prohibited under IHL.

a) attacks against the civilian population as such (including those intended to spread terror)

P I, Art. 51(2) [CIHL, Rule 2]

b) attacks against civilian objects

P I, Art. 52(1) [CIHL, Rule 10]

c) indiscriminate attacks

[CIHL, Rule 11]

aa) attacks not directed at a specific military objective

P I, Art. 51(4)(a) [CIHL, Rule 12(a)]

bb) use of weapons which cannot be directed at a specific military objective

P I, Art. 51(4)(b) [CIHL, Rule 12(b)]

cc) treating different military objectives as a single military objective

P I, Art. 51(5)(a) [CIHL, Rule 13]

dd) principle of proportionality

P I, Art. 51(5)(b) [CIHL, Rule 14]

– also covers reasonably foreseeable incidental effects

d) attacks against the civilian population (or civilian objects) by way of reprisals

P I, Art. 51(6) and 52(1)

5. ***Loss of protection: The concept of direct participation in hostilities and its consequences***

P I, Art. 51(3); PI, Art. 13(3) [CIHL, Rule 6]

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. Neither treaty nor customary law defines this concept.

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 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.

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."

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);

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)."

*6. **The civilian population is not to be used to shield military objectives***

P I, Art. 51(7) [CIHL, Rule 97]

IHL prohibits attacks against the civilian population and civilian objects. 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. The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions 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. It is generally agreed that involuntary human shields nevertheless remain civilians. Care must therefore be taken to spare them when attacking a legitimate objective.

*7. **Protected objects***

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; 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.

Specially protected objects include: cultural objects; objects indispensable for the survival of the civilian population, such as water; 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 population. The special protection of these works and installations ceases only under limited circumstances. 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. Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited.

a) civilian objects

P I, Art. 52(1) [CIHL, Rule 9]

b) specially protected objects

aa) cultural objects

P I, Art. 53 [CIHL, Rules 38-40]

bb) objects indispensable to the survival of the civilian population

P I, Art. 54 [CIHL, Rules 53 and 54]

– water

cc) works and installations containing dangerous forces

P I, Art. 56 [CIHL, Rule 42]

dd) medical equipment

c) the natural environment

P I, Arts 35(3) and 55 [CIHL, Rules 44 and 45]

8. ***Precautionary measures in attack***

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]

b) advance warning must be given, unless circumstances do not permit

P I, Art. 57(2)(c) [CIHL, Rule 20]

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]

aa) verify that objectives are not illicit
bb) choose means and methods avoiding or minimizing civilian losses
cc) refrain from attacks causing disproportionate civilian losses

9. ***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]

III. Means and methods of warfare

1. ***The basic rule: Art. 35 of Protocol I***

[CIHL, Rule 70]

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. [...]

a) explosive bullets

[CIHL, Rule 78]

b) dum-dum bullets

[CIHL, Rule 77]

c) certain conventional weapons

aa) mines

[CIHL, Rules 80-83]

bb) incendiary weapons

[CIHL, Rules 84 and 85]

cc) non-detectable fragments
[CIHL, Rule 79]
dd) blinding weapons
[CIHL, Rule 86]
ee) explosive remnants of war
ff) cluster munitions
gg) other weapons for which limitations are under discussion
– light weapons
– anti-vehicle mines
– fragmentation weapons

d) chemical weapons
[CIHL, Rules 74-76]

e) poison
HR, Art. 23(a) [CIHL, Rule 72]

f) bacteriological and biological weapons
[CIHL, Rule 73]

g) nuclear weapons

CHAPTER 9

THE LAW OF NAVAL WARFARE AND THE LAW OF AIR WARFARE

"Naval warfare" is the term used to denote "the tactics of military operations conducted on, under, or over the sea". The general principles of 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 work codifying the law of war at sea was done in 1907, the year in which The Hague Conventions were adopted. Eight of the Conventions tackle different aspects of naval warfare. 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". However, these two fundamental instruments still failed to clarify matters concerning the conduct of hostilities at sea.

In the other side, 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 explain the difficulties encountered in perfecting treaty provisions specifically governing air warfare. 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 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.

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, along the lines of what the San Remo Manual did for naval warfare, taking new technological developments and the practice of major air forces into account.

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". Cultural property and places of worship are protected against any form of attack by The Hague Convention of 1954 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 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 and some useful clarifications. 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. 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.

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 from those principles must certainly also be taken in this respect by States not parties to Protocol I.

I. Scope of application of the Law of naval warfare : the different zones

a- Zones:

1. internal waters, territorial sea and archipelagic waters
2. international straits and archipelagic sea lanes
3. exclusive economic zone and continental shelf
4. high seas and seabed beyond national jurisdiction

b- Sea areas for protected vessels:

1. stay in neutral ports – limit 24 hours

2. by agreement between parties: create a neutral zone
3. passage of protected vessels through restricted areas: exclusion zones

II- 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

III- Principles, Means and methods of warfare at sea

A- Principles of naval warfare

1. Traditional principles of naval warfare
2. The law of neutrality in naval warfare: *jus ad bellum* or *jus in bello*?
3. Additional principles
   a) basic rules
   – distinction between civilian objects and military objectives
   b) precautions in attack
   c) military objectives

B-Means and methods of warfare at sea

1. Mine warfare
2. Submarine warfare
3. Blockade

IV- 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]

b) The protection of civil and neutral aircraft

2. Surrender of military aircraft?
3. Ruses of war and perfidy

4. The status of parachutists

P I, Art. 42

5. Precautionary measures
a) In attacks

P I, Art. 57(4)

b) Against the effects of attacks

V- Protected objects in naval warfare

1. Hospital ships

GCII, Arts 22-35; PI, Art. 22

a- Specific protection
aa) small craft used for coastal rescue operations
ab) medical transports
ac) neutral vessels
b- Loss of protection (using codes)

2. Other protected vessels

a) vessels guaranteed safe conduct by prior agreement between belligerents
aa) cartel ships
bb) vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population

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

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
5. Protection of the maritime environment

VI. The status and treatment of victims and the general rules on the protection of civilian population in war victims at sea and on board aircraft

The same status and treatment is applied for the victims, as well, aircraft over sea are governed by the law of naval Warfare.

a) 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)

b) 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)

CHAPTER 10

THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS

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.

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 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; in the crimes defined in the ICC Statute; because States have accepted that recent treaties on weapons and on the protection of cultural objects are applicable to both categories of conflicts; under the growing influence of International Human Rights Law; and according to the outcome of the ICRC Study on Customary International Humanitarian Law. 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 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 ICRC Study on customary international humanitarian law 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.

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 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.

I. International and non-international armed conflicts

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[53].

II. Comparison of the legal regimes for international and for non-international armed conflicts

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).

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;

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).

3. Uncontroversial similarities and differences

a) protection of all those who do not or no longer directly participate in hostilities
b) more absolute prohibition of forced displacements

III. Different types of non-international armed conflicts

1. Conflicts to which common Art. 3 is applicable
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
4. Material field of application of the customary IHL of non-international armed Conflicts

[53] Commission of Experts appointed to investigate violations of IHL in the Former Yugoslavia. UN Doc. S/1994/674, para. 52.

5. Conflicts to which IHL as a whole is applicable
   a) recognition of belligerency by the government
   b) special agreements between the parties
   c) meaning of declarations of intention

6. Problems of qualification
   a) traditional internationalized internal conflicts
   b) conflicts of secession
   c) foreign intervention not directed against governmental forces
   d) non-international armed conflicts that spread into a neighbouring country
   e) UN peacekeeping and peace-enforcement operations in a non-international armed conflict
   f) UN operations to restore or maintain law and order
   g) the "global war on terror"

IV. The explicit rules of common Article 3 and of Protocol II

1- Principles under common Art. 3

a) non discrimination
b) humane treatment
c) judicial guarantees
d) obligation to collect and care for the wounded and sick

2- 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]

bb) judicial guarantees
P II, Art. 6 [CIHL, Rules 100-102]

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]

b) specific rules on:

aa) protection of children

P II, Art. 4(3) [CIHL, Rules 136 and 137]

bb) protection of medical personnel and units, duties of medical personnel

P II, Arts 9-12 [CIHL, Rules 25, 26 and 28-30]

c) rules on the conduct of hostilities

aa) protection of the civilian population against attacks

P II, Art. 13 [CIHL, Rules 1 and 6]

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]

dd) protection of cultural objects

P II, Art. 16 [CIHL, Rules 38-40]

d) prohibition of forced movements of civilians

P II, Art. 17 [CIHL, Rule 129 B]

e) relief operations

P II, Art. 18 [CIHL, Rules 55 and 56]

V- Applicability of the general principles on the conduct of hostilities

1. Principle of distinction
2. Principle of military necessity
3. Principle of proportionality
4. Right to relief
5. Need to look into the law of international armed conflicts – and sometimes International Human Rights Law – for the precise meaning of principles

VI- Who is bound by the law of non-international armed conflicts?

1. Both parties
2. All those belonging to one party
3. All those affecting persons protected by IHL by an action linked to the armed Conflict

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," 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 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).

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. 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.

VII- Consequences of the existence of a non-international armed conflict on the legal status of the parties

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.

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.

RECAPITULATION
The legal texts applicable to non-international conflicts

Two key treaty provisions set thresholds for identifying the law applicable to armed conflicts of a non-international character:
- Common Article 3 to the 1949 Geneva Conventions; and
- Article 1 of 1977 Additional Protocol II to the 1949 Geneva Conventions.

In the *Tadić* case, the International criminal Tribunal for Ex-Yugoslavia (ICTY) affirmed that:
"A non-international armed conflict exists when there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State." In addition, in this judgment, the ICTY has confirmed that: "the rules contained in Common Article 3 are part of customary international law applicable in non-international armed conflict". Thus, in the view of the ICTY, for there to be a non-international armed conflict, non-state armed groups must carry out protracted hostilities; and these groups must be organized.

According to the judgement rendered in 2008 by the Trial Chamber in the *Haradinaj* case: "the ICTY cases highlight the principle that an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the "organization" criterion is fulfilled. Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords".

Pursuant to the International Court of Justice, and in its Advisory Opinion dated 1996 on the "Legality of the Threat or Use of Nuclear Weapons", the great majority of the provisions of the Four Geneva Conventions of 1949 are considered to be part of customary international law (ratified already by 196 States).

As well, the International Court of Justice, in its judgment of 1986 in the Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), has previously considered that common Article 3 of the Four Geneva Conventions of 1949 related to the Non-international conflict, is considered as a part of the customary international law.

N.B.: while nearly 168 States have ratified Additional Protocol II, several States have not done so (like USA, Turkey, Pakistan, Syrian Arab Republic, Somalia, Israel, Mexico, Democratic People's Republic of Korea, India, Indonesia, Iraq, Islamic Republic of Iran, Azerbaijan) in some of those mentioned States non-international armed conflicts are taking place. In these non-international armed conflicts, common Article 3 of the four Geneva Conventions often remains the only applicable humanitarian treaty provision.

Only a limited number of treaties apply to non-international armed conflicts, namely the Convention on Certain Conventional Weapons as amended, the Statute of the International Criminal Court, the Ottawa Convention on the Prohibition of Anti-personnel Mines, the Chemical Weapons Convention, the Hague Convention for the Protection of Cultural Property and its Second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions.

While common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards. Additional Protocol II usefully supplements common Article 3, but it is still less detailed than the rules governing international armed conflicts in the Geneva Conventions and Additional Protocol I.

This Protocol only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as common Article 3, which applies in all situations of non-international armed conflict. Additional Protocol II contains a mere 15 substantive articles, whereas "Additional Protocol I" has more than 80.

CHAPTER 11

IMPLEMENTATION OF IHL & THE CRIMINAL REPRESSION OF IHL CRIMES

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.

I. Problems in the implementation of International Law in general and IHL specifically

The general mechanisms of international law to ensure respect and to sanction violations are even less satisfactory and efficient regarding 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.

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. 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.

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.

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.

IHL is certainly not a self-contained system. 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, those incompatible with its purpose and aim and those general international law permits only as a reaction to certain kinds of violations.

II. IHL crimes

(Check ICC Statute : article 5[54])

a) The concept of grave breaches of IHL and the concept of war crimes

GC I-IV, Arts 50 /51/130/147 respectively; P I, Arts 11(4), 85 and 86
[CIHL, Rule 151 and 156]

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, judicial decisions, 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.

b) Crimes against humanity

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.

[54]Article 5: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes: (a) The crime of genocide; (b) Crimes against humanity; (c) War crimes; (d) The crime of aggression.

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": 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.

c) Genocide

For a legal definition of genocide, the best source is the Convention on the Prevention and Punishment of the Crime of Genocide, 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. The explanations given below are broadly based on the case law of those courts.

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.

III. National Criminal Justice applying IHL

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. 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. 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 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.

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.

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]

b) mutual assistance in criminal matters

P I, Art. 88 [CIHL, Rule 161]

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)

IV. International Criminal Justice

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.

a) the establishment of *ad hoc* tribunals

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. 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. 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.

aa) the International Criminal Tribunal for the former Yugoslavia (ICTY)

The Court was established by Resolution 827 of the United Nations Security Council, which was passed on 25 May 1993. It has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The maximum sentence it can impose is life imprisonment. Various countries have signed agreements with the UN to carry out custodial sentences.

bb) the International Criminal Tribunal for Rwanda (ICTR)

The International Criminal Tribunal for Rwanda (ICTR) is an international court established in November 1994 by the United Nations Security Council in Resolution 955 in order to judge people responsible for the Rwandan Genocide and other serious violations of international law in Rwanda, or by Rwandan citizens in nearby states, between 1 January and 31 December 1994. The tribunal has jurisdiction over genocide, crimes against humanity and war crimes, which are defined as violations of Common Article Three and Additional Protocol II of the Geneva Conventions (dealing with war crimes committed during internal conflicts).

b) hybrid tribunals

aa) the Special Court for Sierra Leone

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.

bb) 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.

cc) War Crimes Chamber in Bosnia and Herzegovina

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.

c) The International Criminal Court (ICC)

The International Criminal Court (ICC), governed by the Rome Statute, is the first permanent, treaty-based, international criminal court established to help end impunity for the perpetrators of the most serious crimes of concern to the international community. The ICC is an independent international organisation, and is not part of the United Nations system. Its seat is at The Hague in the Netherlands. Although the Court's expenses are funded primarily by States Parties to the Rome Statute, it also receives voluntary contributions from governments, international organisations, individuals, corporations and other entities. The international community has long aspired to the creation of a permanent international court and, in the 20th century, it reached consensus on definitions of genocide, crimes against humanity and war crimes. The Nuremberg and Tokyo trials addressed war crimes, crimes against peace, and crimes against humanity committed during the Second World War. In the 1990s after the end of the Cold War, tribunals like the International Criminal Tribunal for the former Yugoslavia and for Rwanda were the result of consensus that impunity is unacceptable. However, because they were established to try crimes committed only within a specific time-frame and during a specific conflict, there was general agreement that an independent, permanent criminal court was needed. On 17 July 1998, the international community reached an historic milestone when 120 States adopted the Rome Statute, the legal basis for establishing the permanent International Criminal Court. The Rome Statute entered into force on 1 July 2002 after ratification by 60 countries.

I- Founding Treaty : The Rome Statute

The creation of the Rome Statute in 1998 was in itself a historic event, marking a milestone in humankind's efforts towards a more just world.

The Rome Statute then took effect in 2002, upon ratification by 60 States. In addition to founding the Court and defining the crimes of genocide, war crimes, crimes against humanity and – as of amendments made in 2010 – the crime of aggression, the Rome Statute also sets new standards for victims' representation in the Courtroom, and ensures fair trials and the rights of the Defence. The Court seeks global cooperation to protect all people from the crimes codified in the Rome Statute.

Today the treaty serves as the ICC's guiding legal instrument, which is elaborated in such other legal texts as the Elements of Crimes, Rules of Procedure and Evidence and more.

II- The Assembly of States Parties

The Assembly of States Parties is the Court's management oversight and legislative body and is composed of representatives of the States which have ratified or acceded to the Rome Statute.

Until March 2020, 123 countries are States Parties to the Rome Statute of the International Criminal Court. Out of them 33 are African States, 19 are Asia-Pacific States, 18 are from Eastern Europe, 28 are from Latin American and Caribbean States, and 25 are from Western European and other States.

Three permanent members of the Security Council are not States Parties to the Rome Statute: The United States of America, The Russian Federation and China.

In the Arab world, only three States are parties to the Rome Statute: Jordan (11 April 2002), Tunisia (24 June 2011) and the State of Palestine (2 January 2015).

In accordance with article 112 of the Rome Statute, the Assembly of States Parties meets at the seat of Court in The Hague or at the United Nations Headquarters in New York once a year and, when circumstances so require, may hold special sessions.

Each State Party has one representative in the Assembly who may be accompanied by alternatives and advisers. The Rome Statute further provides that each State Party has one vote, although every effort shall be made to reach decisions by consensus. States that are not party to the Rome Statute may take part in the work of the Assembly as observers, without the right to vote. The President, the Prosecutor and the Registrar or their representatives may also participate, as appropriate, in the meetings of the Assembly.

In accordance with article 112 of the Rome Statute, the Assembly is tasked with providing management oversight to the Presidency, the Prosecutor and the Registrar regarding administration of the Court. In addition, the Assembly adopts the Rules of Procedure and Evidence and the Elements of Crime.

At its annual sessions, the Assembly considers a number of issues, including the budget of the Court, the status of contributions and the audit reports. In addition, the Assembly considers the reports on the activities of the Bureau, the Court and the Board of Directors of the Trust Fund for Victims.

The Assembly is further tasked with election of, *inter alia*, the Judges, the Prosecutor and Deputy Prosecutors. The Assembly may also decide, by secret ballot, on the removal from office of a Judge, the Prosecutor or Deputy Prosecutors.

III- The institutional aspect of the ICC :

The ICC is composed of Four organs

Presidency
Conducts external relations with States, coordinates judicial matters such as assigning judges, situations and cases to divisions, and oversees the Registry's administrative work.

Judicial Divisions
18 judges in 3 divisions – Pre-Trial, Trial and Appeals – conduct judicial proceedings.

OTP (The Office of the Prosecutor)
Conducts preliminary examinations, investigations, and prosecutions.

Registry
Conducts non-judicial activities, such as security, interpretation, outreach, support to Defence and victims' lawyers, and more.

Today the Court has:

- Over 900 staff members: From approximately 100 States.
- 6 official languages: English, French, Arabic, Chinese, Russian and Spanish.
- In addition to the Headquarters in The Hague (the Netherlands), there are 6 field offices: Kinshasa and Bunia (Democratic Republic of the Congo, "DRC"); Kampala (Uganda); Bangui (Central African Republic, "CAR"); Nairobi (Kenya), Abidjan (Côte d'Ivoire).
- 2 working languages: English and French.

- 2019 budget: €148,135,100

IV- The Crimes falling within the ICC's jurisdiction:

The Court's founding treaty, called the Rome Statute, grants the ICC jurisdiction over four main crimes.

First, the **crime of genocide**: is characterised by the specific intent to destroy in whole or in part a national, ethnic, racial or religious group by killing its members or by other means: 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; or forcibly transferring children of the group to another group.
Second, the ICC can prosecute **crimes against humanity**, which are serious violations committed as part of a large-scale attack against any civilian population. The 15 forms of crimes against humanity listed in the Rome Statute include offences such as murder, rape, imprisonment, enforced disappearances, enslavement – particularly of women and children, sexual slavery, torture, apartheid and deportation.

Third, **war crimes** which are grave breaches of the Geneva conventions in the context of armed conflict and include, for instance, the use of child soldiers; the killing or torture of persons such as civilians or prisoners of war; intentionally directing attacks against hospitals, historic monuments, or buildings dedicated to religion, education, art, science or charitable purposes.

Finally, the fourth crime falling within the ICC's jurisdiction is **the crime of aggression**. It is the use of armed force by a State against the sovereignty, integrity or independence of another State. The definition of this crime was adopted through amending the Rome Statute at the first Review Conference of the Statute in Kampala, Uganda, in 2010.

On 15 December 2017, the Assembly of States Parties adopted by consensus a resolution on the activation of the jurisdiction of the Court over the crime of aggression as of 17 July 2018.

V- Jurisdiction

The Court may exercise jurisdiction in a situation where genocide, crimes against humanity or war crimes were committed on or after 1 July 2002 and:

- the crimes were committed by a State Party national, or in the territory of a State Party, or in a State that has accepted the jurisdiction of the Court; or
- the crimes were referred to the ICC Prosecutor by the United Nations Security Council (UNSC) pursuant to a resolution adopted under chapter VII of the UN charter.

As of 17 July 2018, a situation in which an act of aggression would appear to have occurred could be referred to the Court by the Security Council, acting under Chapter VII of the United Nations Charter, irrespective as to whether it involves States Parties or non-States Parties.
In the absence of a UNSC referral of an act of aggression, the Prosecutor may initiate an investigation on her own initiative or upon request from a State Party. The Prosecutor shall first ascertain whether the Security Council has made a determination of an act of aggression committed by the State concerned. Where no such determination has been made within six months after the date of notification to the UNSC by the Prosecutor of the situation, the Prosecutor may nonetheless proceed with the investigation, provided that the Pre-Trial Division has authorized the commencement of the investigation. Also, under these circumstances, the Court shall not exercise its jurisdiction regarding a crime of aggression when committed by a national or on the territory of a State Party that has not ratified or accepted these amendments.

VI- Complementarity

The ICC is intended to complement, not to replace, national criminal systems; it prosecutes cases only when States do not are unwilling or unable to do so genuinely.

VII- Cooperation

As a judicial institution, the ICC does not have its own police force or enforcement body; thus, it relies on cooperation with countries worldwide for support, particularly for making arrests, transferring arrested persons to the ICC detention centre in The Hague, freezing suspects' assets, and enforcing sentences.

While not a United Nations organization, the Court has a cooperation agreement with the United Nations. When a situation is not within the Court's jurisdiction, the United Nations Security Council can refer the situation to the ICC granting it jurisdiction. This has been done in the situations in Darfur (Sudan) and Libya.

The ICC actively works to build understanding and cooperation in all regions, for example, through seminars and conferences worldwide. The Court cooperates with both States Parties and non-States Parties.

The Court works in particularly close cooperation with its host state, the Netherlands, regarding practical matters such as constructing the Court's new permanent buildings, transferring suspects to the ICC Detention Centre, facilitating their appearances before the Court, and many other matters.

Countries and other entities, including civil society groups such as NGOs, also cooperate with the Court in numerous ways, such as raising awareness of and building support for the Court and its mandate. The Court seeks to increase this ongoing cooperation through such means as seminars and conferences.

VIII- Activities of the ICC

Until March 2020, there have thus far been 27 cases before the Court, with some cases having more than one suspect.

ICC judges have issued 34 arrest warrants. Thanks to cooperation from States, 16 people have been detained in the ICC detention centre and have appeared before the Court. 15 people remain at large. Charges have been dropped against 3 people due to their deaths.

ICC judges have also issued 9 summonses to appear.

The judges have issued 8 convictions and 4 acquittals.

Preliminary Examinations:

- Colombia
- Nigeria
- Gabon
- Guinea
- Honduras
- Iraq/UK
- State of Palestine
- Registered Vessels of Comoros, Greece and Cambodia
- Republic of Korea
- The Philippines
- Ukraine
- Venezuela I
- (Alleged crimes committed since at least April 2017, in the context of demonstrations and related political unrest).
- Venezuela II
- (On 13 February 2020, the Office of the Prosecutor of the ICC received a referral from the Government of the Bolivarian Republic of Venezuela a referral under article 14 of the Rome Statute regarding the situation in its own territory, in accordance with its prerogatives as a State Party to the Rome Statute).

Situations under Investigation

- Uganda
- The Democratic Republic of the Congo
- Darfur, Sudan
- Central African Republic
- The Republic of Kenya
- Libya
- Côte d'Ivoire
- Mali
- Central African Republic II
- Georgia
- Burundi
- Bangladesh/Myanmar
- Afghanistan

27 Cases in 9 Situations

Situations : Côte d'Ivoire : 2, Darfur (Sudan) : 5, Kenya: 4, Libya : 2, Mali : 3, Central African Republic : 2, Central African Republic II : 1, DRC: 6, Uganda: 2.

Cases :

1. Abu Garda (Bahr Idriss Abu Garda) /Darfur-Sudan
2. Al Bashir (Omar Hassan Ahmad Al Bashir) /Darfur-Sudan
3. Al Hassan (Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud)/Mali
4. Al Mahdi (Ahmad Al Faqi Al Mahdi)/Mali
5. Al-Werfalli (Mahmoud Mustafa Busayf Al-Werfalli)/Libya
6. Banda (Abdallah Banda Abakaer Nourain) /Darfur-Sudan
7. Barasa (Walter Osapiri Barasa)/Kenya
8. Bemba (Jean-Pierre Bemba Gombo) / Central African Republic
9. Bemba et al. (Jean-Pierre Bemba Gombo, Aimé Kilolo Musamba, Jean-Jacques Mangenda Kabongo, Fidèle Babala Wandu and Narcisse Arido)/ Central African Republic
10. Gaddafi (Saif Al-Islam Gaddafi)/Libya
11. Gbagbo and Blé Goudé (Laurent Gbagbo & Charles Blé Goudé)/Côte d'Ivoire
12. Gicheru and Bett (Paul Gicheru et Philip Kipkoech Bett)/Kenya
13. Harun and Ali Kushayb (Ahmad Muhammad Harun et Ali Muhammad Ali Abd-Al-Rahman) /Darfur-Sudan
14. Hussein (Abdel Raheem Muhammad Hussein)/Darfur-Sudan
15. Katanga (Germain Katanga) / DRC
16. Kenyatta (Uhuru Muigai Kenyatta)/Kenya
17. Khaled (Al-Tuhamy Mohamed Khaled)/ Libya
18. Kony et al. (Joseph Kony and Vincent Otti) /Uganda
19. Lubanga (Thomas Lubanga Dyilo) / DRC
20. Mbarushimana (Callixte Mbarushimana) / DRC
21. Mudacumura (Sylvestre Mudacumura) / DRC
22. Ngudjolo Chui (Mathieu)/ DRC
23. Ntaganda (Bosco)/DRC
24. Ongwen(Dominic) /Uganda
25. Ruto and Sang (William Samoei Ruto and Joshua Arap Sang) /Kenya
26. Simone Gbagbo / Côte d'Ivoire
27. Yekatom et Ngaïssona / Central African Republic II

IX- Trust Fund for Victims

Though the Trust Fund for Victims is separate from the Court, it was created in 2004 by the Assembly of States Parties, in accordance with article 79 of the Rome Statute. The Fund's mission is to support and implement programmes that address harms resulting from genocide, crimes of humanity, war crimes and aggression. To achieve this mission, the TFV has a two-fold mandate: (i) to implement Court-Ordered reparations and (ii) to provide physical, psychological, and material support to victims and their families. By assisting victims to return to a dignified and contributory life within their communities, the TFV contributes to realizing sustainable and long-lasting peace by promoting restorative justice and reconciliation.
