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on contemporary practice in international humanitarian law

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in co-operation with
Susan Carr, Lindsey Cameron
and Thomas de Saint Maurice

HOW DOES LAW PROTECT IN WAR?

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

Volume I

Outline of International Humanitarian Law
Possible Teaching Outlines

Second Edition



ICRC



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HOW DOES
LAW
PROTECT IN
WAR

SECOND, EXPANDED AND UPDATED EDITION

VOLUME I

**PART I: OUTLINE OF INTERNATIONAL
HUMANITARIAN LAW**

PART II: POSSIBLE TEACHING OUTLINES

by

Marco Sassòli

and

Antoine A. Bouvier

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Susan Carr, Lindsey Cameron and Thomas de Saint Maurice

INTERNATIONAL COMMITTEE OF THE RED CROSS

Geneva 2006

Dedicated to Jean S. Pictet (1914-2002)
Tireless defender and advocate
of international humanitarian law

Article 83: Dissemination

1. The High Contracting Parties undertake, in time of peace as in time of armed conflict, to disseminate the Conventions and this Protocol as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction and to encourage the study thereof by the civilian population, so that those instruments may become known to the armed forces and to the civilian population.

[...]

[Source: Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.]

Preface

The International Committee of the Red Cross (ICRC) has a mandate to disseminate and work for greater understanding of international humanitarian law. The organization takes this task very seriously, since it is aware that the fate of the victims of armed conflict depends to a great extent on the knowledge and understanding that combatants have of the rules laid down in humanitarian law. This chiefly concerns the direct relationship between combatants on the one hand and prisoners, wounded people and the civilian population on the other, but it also concerns the work of the ICRC itself and of other humanitarian organizations on behalf of the victims. Respect for humanitarian *activity* necessarily implies respect for humanitarian *law*.

Inspired by this conviction, the ICRC has endeavoured for many years to promote the teaching of humanitarian law - to armed forces on a priority basis but also to the general public. Academia has a special role to play in this regard. It is crucial that political leaders and civil servants - often educated in institutions of higher learning - be aware of the main principles of humanitarian law, which they will frequently have to apply.

Despite considerable improvement in recent years, the teaching of humanitarian law in universities is unfortunately still not sufficiently widespread. This may perhaps be explained by the fact that, as Sir Hersch Lauterpacht famously wrote, "If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law."

This description should serve to remind teachers, students and practitioners of the limits of what is now known as international humanitarian law. At the same time, however, it provides a welcome justification for teaching and especially for applying humanitarian law, which is no longer the backwater of international law that it was nearly 50 years ago: today it is applied in countless situations and constantly cited by a growing number of bodies including the United Nations Security Council. Nevertheless, university courses on humanitarian law, whether compulsory or optional, whether in law, political science, history or journalism departments, remain unusual.

This may perhaps be accounted for by the lack of teaching materials likely to capture the interest of teachers and students. The authors of the present work have sought to respond to this problem by bringing together an abundance of documents relating to the most recent developments. Many cases and documents presented here are highly controversial, so much so that they might seem too delicate to discuss - but isn't that the only way to drum up real interest among academics? The authors have endeavoured to deal with

these issues by presenting a number of cases on which they themselves take no stand. They limit themselves to setting out the important questions raised by the examples without seeking to offer ready-made and necessarily reductionist answers to them.

In the preface to the previous edition, I expressed the conviction that this approach would meet with the immediate approval of universities and stimulate teaching and research in the field of international humanitarian law. Today, one can state without hesitation that this prognosis has proved accurate. Six years have passed since publication of the first English edition of this work, two since the French version appeared. Its success and the upsurge in interest since then regarding international humanitarian law demonstrate the value of the undertaking.

The number of new cases in the present edition illustrates both the topical nature of international humanitarian law and the difficulties still encountered in applying it. We should not, therefore, relax our efforts to make this branch of law better known and better understood. This second edition of the English version, which refers in Part I also to the rules found by the ICRC's recently-published study on customary international humanitarian law, is particularly welcome.

I should like to take this opportunity to emphasize two further points.

First, some issues raised here are so complex that entire doctoral dissertations could easily be devoted to them individually. The authors' praiseworthy concern to pose all the right questions obviously makes it necessary for the instructor, within the limits imposed by the time available and the students' level, to be selective in terms not only of the cases treated but also of the questions raised for each case. This work is a tool that can and must be used flexibly.

The broad range of questions demonstrates the complexity of certain aspects of international humanitarian law and opens countless directions for research. In addition, the extensive bibliography will be of immediate use to researchers and students who become intrigued by interesting problems.

Second, the issues raised often lie outside the framework not only of international humanitarian law (by touching on problems of human rights law or general problems of public international law) but also of international law itself (with sociological, cultural or political issues, or simply questions of appropriateness). One might well be concerned about losing focus. But on this point too one has to commend the choices made in this work, which aims to promote international humanitarian law, a body of law that will be fully meaningful and understood only if considered in context. In connection

with its application, ethical, cultural and social issues constantly arise, as do issues of proportionality, appropriateness, etc.

International humanitarian law is of course an integral part of the international legal system and everything must be done to reinforce strict compliance with it, as with any legal rule. This is essential for the smooth running of the international community. But humanitarian law is not merely a mechanism reserved for specialized legal experts. It is at the very heart of war and suffering, of life and death. By broadening the scope of their questions, the authors have taken into account the concrete, human dimension of the law.

Let me add one last word of thanks for the authors, Antoine Bouvier and Marco Sassòli, and for all those who contributed to this second English-language edition. They could have rested on the laurels they so richly deserved for the first English and French-language editions. But they did not. They have continued to expand the work by adding new cases relating to current affairs - I should say that it is unfortunate they were able to do so, since the many wars that are still raging form the basis for expanding the work.

When will they leave off? While a further edition will be eagerly awaited, too much should not be asked of them. In addition to its intrinsic worth, their work demonstrates the value of the method used. One can only hope that other authors will now follow suit in Spanish, Russian, Arabic, Chinese and further languages so as to add to the number of valuable dissemination tools and make them accessible all over the world. May this preface be the means of getting out that message to all those who share the authors' passion for international humanitarian law and their concern to make it better known and applied.

Yves Sandoz

Member of the ICRC

Lecturer at the Universities
of Geneva and Fribourg

Acknowledgements

Grateful acknowledgment is made to the following authors and publishers for permission to quote from their work:

BAXTER Richard R., "Multilateral Treaties as Evidence of Customary International Law", in *The British Yearbook of International Law*, 1965-66, Vol. 41, pp. 285-286.

CASSESE Antonio, *Violence and Law in the Modern Age*, Princeton, Princeton University Press, 1990, 223 pp.

D'AMATO Anthony, *The Concept of Custom in International Law*, Ithaca, Cornell University Press, 1971, 286 pp.

DAVID Éric, *Principes de droit des conflits armés*, Brussels, Bruylant, third edition, 2002, 994 pp.

HENKIN Louis, *How Nations Behave: Law and Foreign Policy*, New York, Columbia University Press, 1979, 400 pp.

HUBER Max, *The Red Cross: Principles and Problems*, Geneva, ICRC, 1941, 171 pp.

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

LAUTERPACHT Hersch, "The Problem of the Revision of the Law of War", in *The British Yearbook of International Law*, Vol. 29, 1952-53, pp. 381-382.

LAUTERPACHT Hersch, "The Law of Peace", in LAUTERPACHT Elihu (ed.), *International Law, Collected Papers*, Cambridge, Cambridge University Press, Part 2, 1975.

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

ZAYAS Alfred M. (de), *The Wehrmacht War Crimes Bureau, 1939-1945*, University of Nebraska Press, 1989, 364 pp.

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Concise Table of Contents

VOLUME I

Preface	5
Acknowledgments	8
Concise Table of Contents.	9
Introductory Note.	10
User's Guide	12
List of Abbreviations.	15
List of Internet Sites	17
Table of Court Cases	21
Introduction.	25
Detailed Table of Contents	29
Part I: Outline of International Humanitarian Law	77
Part II: Possible Teaching Outlines	385
Index	499
About the Authors	508

VOLUME II

Part III: Cases and Documents	515
Chapter 1: General Statements on International Humanitarian Law	517
Chapter 2: Cases and Documents relating to Past and Contemporary Conflicts	1011

Introductory Note to the 2nd Edition

In 1999, under the signature of the same authors, the International Committee of the Red Cross (ICRC) published the first edition of this book. The main objective was to offer a compilation of the contemporary practice of International Humanitarian Law (IHL).

In 2003, an updated version of the book was published in French ("Un Droit dans la Guerre?").

Considering the success of the first edition and in view of the sometimes spectacular developments registered in the field of IHL, an updated English version of the book was considered appropriate.

Although the general structure of this second edition corresponds to a large extent to the format of the 1999 version, several changes and improvements should be mentioned:

- To facilitate consultation of the book, the order of the different parts has been modified and they are now reproduced in two separate volumes: Volume I contains the general "Outline of International Humanitarian Law" (Part I) and a selection of "Possible Teaching Outlines" (Part II); Volume II is entirely composed of the "Cases and Documents" (Part III).
- Part I has been systematically reviewed in order to take into account new developments of IHL.
- The bibliographical references provided in Part I have been updated and developed.
- Part II has also been updated and developed. A number of Course Outlines provided by some of the most respected scholars teaching IHL have been added. The methodological chapters have been almost completely revised. Finally, to facilitate the work of those wishing to teach IHL, systematic reference to "Cases and Documents" contained in Part III has been made in the relevant parts of the "Teaching Outlines".
- The most significant changes have been made in Part III ("Cases and Documents"). While some pre-1949 cases have been discarded, some 70 new Cases and Documents focussing on the most recent practice have been introduced. In the selection of new cases, the authors have of course tried to present as balanced a perspective as possible. However, the sheer volume of the contemporary practice

of IHL made it sometimes very difficult to choose appropriate cases. Accordingly some important examples of recent practice could simply not be considered in this book.

"How Does Law Protect in War?" is the result of teamwork, carried out under the authors' supervision:

- We would like to thank Ms Susan Carr, Ms Lindsey Cameron and Mr Thomas de Saint Maurice, who carried out the initial research for new Cases and Documents; edited them; translated and edited parts of the French edition and prepared the manuscript.
- We would also like to thank Ms Jocelyne Gay-Fraret, Secretary-Assistant at the ICRC Communication Department, who helped us handle considerable administrative work.

We are very grateful:

- for the assistance of Ms Marie-Béatrice Meriboute, Ms Florence Gaspar and the entire ICRC Documentation Centre team for their assistance with the bibliographical research,
- for the assistance of the ICRC Language Unit,
- for the support given by the ICRC Production Sector,
- to Ms. Marie-Hélène Proulx, research assistant, and Ms. Nathalie Trunk, secretary, both at the University of Geneva for their help in handling and correcting page proofs,
- to Ms. Laura Olson, Legal Advisor at the ICRC, Ms. Lina Milner, ICRC delegate, Mr. Nicolas Dupic, LL.M. and Ms. Geneviève Dufour, LL.M. and doctoral student, for their important contribution to previous editions of this book in English and French, on which this book is largely based.

Last but not least, we wish to thank very warmly Ms Catherine Deman, Political Adviser, and Mr Yves Sandoz, Member of the ICRC, for their careful reading of the manuscript and their extremely useful comments and suggestions.

Of course, the authors take full responsibility for any mistakes or inaccuracies.

User's Guide

The User's Guide will help university professors, practitioners and students to use the present book in an effective and efficient manner. *How Does Law Protect in War?* is divided into three parts: Part I provides a detailed outline of the most important themes and topics of International Humanitarian Law (IHL). Part II contains possible teaching outlines. Finally, Part III (Vol. 2), the main body of the book, contains Cases and Documents. Before presenting how the book may be used, a concise description of each section is necessary.

Part I is a systematic presentation of IHL. Under each theme we provide the main elements that readers ought to know. Under each section, the information provided helps the reader to expand his/her knowledge on the subject. One may find under a specific topic an Introductory Text outlining important and non-controversial elements on that subject and, in particular, references to the pertinent parts of Cases and Documents reproduced in Part III. The reader need only note the Document or Case number and its page reference in Part I. With respect to each topic, a selected bibliography,^[1] references to articles from the Geneva Conventions and their Additional Protocols and references to the Rules of the ICRC Study on Customary IHL^[2] are also provided.

Part II provides some advice and recommendations on how to teach IHL and a series of teaching outlines, which may be useful for university professors who want to introduce a course on IHL. The suggested teaching outlines are primarily addressed to law faculties, but they also target faculties of journalism and political science. This Part ends with eleven course outlines written by experts in IHL. One is specifically addressed to members of the judiciary.

Part III, entitled Cases and Documents, is the main body of the present book. In this Part, the reader can find all the Cases and Documents in chronological and geographical order. The nature of each Case or Document varies according to the topic: the student or scholar will thus find national and international tribunal judgements, Security Council resolutions, extracts from documents, or press releases. Each Case and Document has been carefully edited according to the specific topic(s) of IHL referred to in Part I. The originality of this section lies in the second part of each case, entitled

1 For a thorough bibliographical reference, see BUGNION François, *The International Committee of the Red Cross and the Protection of War Victims*, Geneva, ICRC, 2003, 1160 pp. and also *Bibliography of International Humanitarian Law Applicable in Armed Conflicts*, Geneva, ICRC, Henry-Dunant Institute, 2nd ed., 1987, 605 pp.

2 HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge/Geneva, CUP/ICRC, 2005, 3 Vol., 5032 pp. See for the Rules **Case No. 29**, ICRC, Customary International Humanitarian Law. [Cf. C.] p. 730.

"Discussion", where the reader is asked questions that raise issues in relation to the case at hand. The authors of the book thought that providing answers to the questions would be inappropriate, having in mind that some of the questions raised do not have a clear-cut answer. Above all, some of the questions may be deemed controversial and so would be any answers provided. The questions, nevertheless, draw the attention of the reader to all issues arising under IHL in connection with a given Case and provide a structure and a starting point for discussing them. However, it is neither necessary nor recommended to answer each question in the given order, nor to systematically answer all the sub-questions. The questions are there to help identify the legal issues in the case. When dealing with long cases, we recommend that teachers select a limited number of questions, either for private study in view of a discussion in the course, or for writing short papers. In addition, to help the user to answer the questions, references are made to the relevant provisions of the Geneva Conventions and their Additional Protocols. The text of these treaties is not reproduced in the book. However, it is available for teaching purposes from the ICRC in Geneva, its field delegations, or from the ICRC website (<http://www.icrc.org/ihl>). Unlike Cases, Documents are not followed by a discussion.

How Does Law Protect in War? can be used in different ways. Two suggestions to the reader are provided: using it according to a specific **topic** or according to a **conflict**.

What is the most effective way to find information according to a specific **topic**? Two options are available: the reader can either find the page reference to that topic in the detailed table of contents (p. 29) or he/she may consult the index (p. 499) which will once again refer to the appropriate section of Part I. As soon as he/she has found the topic in Part I, four types of information may be available: one may find according to the topic or sub-topic a relevant Introductory Text, bibliographical reference, a quotation and a list of Cases and Documents (where reference is made to many Cases or Documents, bold characters indicate the most pertinent ones). These Cases and Documents discuss or illustrate the specific topic and can be found in Part III of the book at the page indicated. For instance, if the reader wishes to have some information on the concept of military objective, the first step is to look up the term in the index which refers to page 201 of Part I. Under the heading "definition of military objectives", the reader finds three types of information: first, there is an Introductory Text, second, there are references to Cases, which can be found (at the page numbers indicated) in Part III, and, finally, there is a bibliography. This is followed by the sub-title "the concept of military necessity" which also has references to Cases and a bibliography.

Another possible way to use the book is by **conflict**. Indeed, if the reader is interested in a specific conflict, he/she will have to look into the table of

contents of Part III. The Cases in this section are produced in chronological and geographical order. The reader may find under a specific conflict or country the reference to several Cases and Documents, which are illustrative of IHL. For example, if the reader seeks some information regarding the Second Gulf War (1990-1991), he/she needs to look at the table of contents, which refers to several cases arising out of that conflict. Such an approach to using this book is best shown by the three case studies: the Conflicts in the Former Yugoslavia (p. 1732), the Great Lakes (p. 2098) and Sierra Leone, Liberia and Guinea (p. 2362).

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 Yearbook of International Law
- CIHL: Customary International Humanitarian Law: Rules reproduced in Case 29 (C), drawn from HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge/Geneva, CUP/ICRC, 2005, 3 Vols. 5032 pp.
- Collected Courses: Recueil des Cours/Collected Courses, Académie de Droit International de La Haye/Hague Academy of International Law
- 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
- 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
- Convention III: Geneva Convention (III) Relative to the Treatment of Prisoners of War, of 12 August 1949
- Convention IV: Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War, of 12 August 1949
- Commentary: - PICTET Jean (ed.), [Geneva Conventions]: *Commentary*, Geneva, ICRC, 1952/1960/1960/1958, 466 pp./320 pp./764 pp./660 pp.
 - SANDOZ Yves, SWINARSKI Christophe and ZIMMERMANN Bruno, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, 1987, 1625 pp.
- CPM: Military Criminal Code (Swiss)
- 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
- Hague Regulations: 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-Governmental 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
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
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
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 Socialist Republics
WFP:	World Food Programme
WHO:	World Health Organisation
YIHL:	Yearbook of International Humanitarian Law
ZaöRV:	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht

List of Internet Sites

N.B.: The internet sites listed are intended to help students and teachers with their research. We cannot guarantee the validity of the sites hereunder and we cannot be held responsible for their content. The internet sites referred to in the book and listed here were valid in September 2005.

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 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.ict.rg>

International Criminal Court: <http://www.icc-cpi.int>

Coalition for the International Criminal Court: <http://www.iccnw.org>

International Justice Tribune (independent newsletter on international criminal justice): http://www.justicetribune.com/index_uk.htm

Trial Watch (Swiss association against impunity): <http://www.trial-ch.org>

International Court of Justice: <http://www.icj-cij.org>

Regional Organisations:

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://www.europa.eu.int>

Humanitarian Aid Department of the European Commission:
<http://europa.eu.int/comm/echo>

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.unhcr.ch/data.htm>

Université libre de Bruxelles - Human Rights Network International
(in English and in French): <http://www.hrni.org>

United Nations Treaty Collection: <http://untreaty.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.ch/news/dossier/IHL/reference/>

York University (Canada) - Legal Journals on the Web:
<http://library.osgoode.yorku.ca/mr/linksjournalyork.htm>

Project Muse - Scholarly Journals online (large number of indexed reviews accessible from some University libraries): <http://muse.jhu.edu>; see also SpringerLink: <http://www.springerlink.com>

[Hereafter is only a selection of sites of some of the international law journals likely to provide *free* online access to articles on International Humanitarian Law.]

a. Journals in English

American Society of International Law Newsletters - ASIL Insights & International Law In Brief: <http://www.asil.org/resources/e-newsletters.html>

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/djci>

European Journal of International Law: <http://www.ejil.org>

Fletcher Forum of World Affairs: <http://www.fletcherforum.org>

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 - Bofaxes:
<http://www.ruhr-uni-bochum.de/ifhv/publications/bofaxe>

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://www.law.unimelb.edu.au/mjil>

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.iccnw.org/publications/monitor.html>

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>

b. Journals in other languages:

Actualité et Droit International: <http://www.ridi.org/adi>

Cultures & Conflits: <http://www.revues.org/conflits>

Revista Electrónica de Estudios Internacionales: <http://www.reei.org>

Non-Governmental Organisations:

[Hereafter, we provide a non-exhaustive list of websites of non-governmental organisations involved in humanitarian action and/or the promotion of Human Rights or International Humanitarian Law.]

Amnesty International: <http://www.amnesty.org>

Geneva Call - Engaging Non State Actors: <http://www.genevacall.org>

Human Rights First (formerly Lawyers Committee for Human Rights):
<http://www.humanrightsfirst.org>

Human Rights Watch: <http://www.hrw.org>

Médecins sans Frontières (MSF): <http://www.msf.org>

Médecins du Monde: <http://www.mdm-international.org>

Handicap International: <http://www.handicapinternational.be>

Action against Hunger - UK: <http://www.aahuk.org/>

Care International (UK): <http://www.careinternational.org.uk>

Caritas Internationalis: <http://www.caritas.org>

Oxfam International: <http://www.oxfam.org>

Various:

Armed Groups Project: <http://www.armedgroups.org>

Avalon Project at Yale Law School. Documents in Law, History and Diplomacy: <http://www.yale.edu/lawweb/avalon/avalon.htm>

Centre de Recherches et d'Études sur les Droits de l'Homme et le Droit Humanitaire (CREDHO): <http://www.credho.org>

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Geneva Forum - Building Peace and Security Partnerships:
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Geneva Humanitarian Forum (Humanitarian Dialogue Portal of Geneva):
<http://www.genevahumanitarianforum.org>

Institute for International Law of Peace and Armed Conflict: <http://www.ifhv.de>

International Commission on Intervention and State Sovereignty (Report *The Responsibility to Protect*): <http://www.iciss.ca>

International Humanitarian Fact-Finding Commission: <http://www.ihffc.org>

International Humanitarian Law Research Initiative: <http://www.ihlresearch.org>

International Institute of Humanitarian Law (San Remo): <http://web.iihl.org>

Jean-Pictet Competition: <http://www.concourspictet.org>

Jurist - Legal News and Research: <http://jurist.law.pitt.edu>

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- Inter-American Commission on Human Rights, *Coard v. US*, 29 September 1999 - **Case No. 133**
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Introduction

Unfortunately, it is a simple fact of reality that armed conflicts continue to be waged around the world and claim an increasing number of victims, in particular those who should remain immune under the law: the civilian population. To achieve better protection for those victims, International Humanitarian Law (IHL) must be better known among those who should apply it: combatants, public officials and, especially in the growing number of situations where structures of authority have disintegrated, the whole population. States and international organizations, and more specifically the ICRC, have increased their efforts in training those who have to apply the law. In addition, it is necessary to teach IHL "preventively" to those who will be the future political *elite* and the decision-makers of tomorrow, namely, university students. They need not so much learn the individual rules of behaviour prescribed by IHL, but rather realize the relevance, realism and mode of operation of IHL. When they will be decision-makers in an armed conflict, hopefully, they will then apply it and inquire into its relevant contents. The cases and materials presented in this book aim at *relating law to practice*, thus giving it content and actuality. To relate practice to concepts and theory and also to place the law into a greater conceptual context in order to give it meaning and direction, are, in our view, the tasks of the academic teacher in his or her courses and seminars. The list of publications to which we refer should facilitate the understanding of the theory for those who wish to assimilate the subject through private reading. The questions raised after each case reproduced help to put the law and the specific issues into a larger theoretical framework, thus, making the student realize that a solution applied in a given case must also be applicable in another situation where his or her sympathies may be different (this is one of the aspects of the neutrality of the laws of war). These questions will also facilitate private study.

The reader should always examine whether the questions suggested in each case are appropriate or whether they reveal the authors' positivist bias. If so, he/she should then try to draft the questions differently to take into account his/her own perspective.^[3]

There is an increasing number of writings and analyses on IHL. Recently, several excellent textbooks on the matter have been published in different languages.^[4] The first edition of this book was however designed to fill a gap in available teaching materials perceived by the authors, that is, the apparent lack of a course book with cases and materials drawn from recent practice.

Even in universities in non-common-law countries traditional *ex cathedra* lectures are often replaced or complemented by case-studies. The reason is

3 See *supra* the User's Guide, p. 12.

4 See *infra* for a general bibliography, p. 79.

not only pedagogical: one retains more information if one has to discuss it rather than if one simply hears or reads it. It is also easier to remember a concept if one can relate (and even apply) it to real-life events. This teaching method also parallels the specific nature of international law, which largely develops and is interpreted by (often non-judicial) precedents. In addition, the relevance of IHL and its applicability to specific practical situations arising in armed conflicts is one of the messages which, if integrated by students, will make them respect it in the future. Thus in the academic world, a practice-related teaching of IHL, in our view, best fulfils the obligation of States "*in time of peace as in time of armed conflict [...] to encourage the study thereof by the civilian population*".^{5]}

Perhaps even more importantly this book is addressed to those who do not yet teach or study IHL. Too many and even the most excellent professors omit or neglect this subject in their teaching, perhaps because they fear that when confronted with its "vanishing point" their students will definitely conclude that international law is not law.

Indeed, students will notice the following gap. On the one hand, there is the well-elaborated and the still developing fabric of rules of IHL codified in black-letter conventions, claimed to be customary in scholarly articles and developed in judicial decisions. On the other hand, there is recent and contemporary practice of those who actually fight in the Balkans, the Great Lakes region, Chechnya, Liberia, Sierra Leone, Afghanistan, Sri Lanka, Sudan, Israel and the Palestinian Territories and Iraq. The growing gap may drive students of international law to despair and make them doubt whether this branch is simply a nice dogmatic fabric or whether it has an impact on international relations and reality.

This challenge must be faced. It is precisely in studying what they must consider as the "vanishing point" that students come to understand the specificity, the particular mode of operation of international law and how it does affect international relations, although differently than how national legislation affects individuals in most States. For that purpose the gap between theory and practice cannot be ignored, but must be explained. This book's main objective is precisely to allow a discussion of this gap through the cases and materials reproduced. This can be done in a course of IHL. It is also possible to show this gap by discussing the institutions and problems of general international law where they undergo their supreme test namely in armed conflict. The second part of this book therefore contains some suggestions on how the subject can be taught not only in a course of IHL, but also in a general course on international law, international Human Rights law, or in special courses on journalism. In addition to the teaching outlines proposed by the authors, Part II also provides model courses taught by some of the most respected scholars.

5 Cf. Art. 83 (1) of Protocol I and Arts. 47/48/127/144 respectively of the four Conventions which request High Contracting Parties to include it if possible in programs of civilian instruction. Art. 19 of Protocol II prescribes to disseminate it "as widely as possible".

Furthermore, the methodology of a casebook implies that in the discussion of cases and materials we rather raise questions than answer them. Where general multilateral conventions contain answers we nevertheless refer to the relevant provisions. For the rest, the short introductory texts, the suggested readings, the rules of the recently published ICRC study on Customary International Humanitarian Law (to which we refer in Part I), legal thinking, as well as the "*elementary considerations of humanity*" and "*dictates of public conscience*"^[6] which are so important in IHL will guide every student. Answers will anyway differ from teacher to teacher and from student to student. As this book is aimed at being used universally, this approach also takes into account that answers will sometimes differ according to one's own political, historical and cultural background. A discussion of the problems raised is, however, appropriate in all cultures.

Neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions which clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. In the choice of the published cases and materials, however, we did not succeed in anything near an equitable geographic distribution. This reflects that some conflicts and some events give rise to more court cases, United Nations documents, press articles and scholarly discussions than others; nonetheless IHL applies equally to the latter, which, in fact, may produce more victims and be characterized by more violations than the former. Even within one coherent set of cases (e.g. from the considerable case law of the two *ad hoc* International Tribunals) the authors - rather than selecting cases on the basis of their historical relevance or of political factors - have chosen cases and decisions that illustrate or discuss *legal issues of particular importance*.

When we had the opportunity, we reproduced the most recent cases and materials. We considered it crucial to avoid the impression that the laws of war are something of another age. Furthermore, those in search of older materials may find them in older collections,^[7] while we know of no recent collection of this dimension.

We have consciously neglected in the choice of cases and materials the law of naval warfare. This choice is not so much due to the relatively limited humanitarian importance of this branch, but mainly to the fact that a recent restatement provides an updated overview of this branch, based on new developments of the Law of the Sea and State practice in recent and older conflicts, namely the San Remo Manual. This Manual on International Law Applicable to Armed Conflicts at Sea is partly reproduced in Part III of the

6 The Martens Clause: Preamble paras. 8-9 of the Hague Convention IV, Arts. 63(4)/62(4)/142(4)/158(4) respectively of the four Conventions, Art. 1 (2) of Protocol I and Preamble para. 4 of Protocol II.

7 Cf., e.g., FRIEDMAN Leon (ed.), *The Laws of War, A Documentary History*, New York, Random House, 1972, 2 Vols., 1764 pp. or LEVIE Howard S., *Documents on Prisoners of War*, International Law Studies, U.S. Naval War College, 1979, Vol. 60, 853 pp.

present book without the detailed explanations, which can be found in the original version of the Manual.^[8]

Concerning the type of materials reproduced, a concentration on judicial precedents would have given the student the wrong impression of the real sources of IHL. For that law judicial precedents are atypical, rare and cover only some problems; unfortunately their role is still marginal compared to the central role they play, for instance, in a common-law system. The caselaw of the two *ad hoc* International Tribunals has experienced considerable developments in the last few years. However, it is very specific, extremely voluminous and easily accessible *online*. For those reasons, only a limited number of cases have been included in this book. Even so, one will find many judicial decisions in this book, as, from a teaching point of view, they have the invaluable advantage of not only referring to facts of real life but also of assessing those facts from a purely legal perspective. We also included many public documents of States and inter-governmental and non-governmental organizations. Among those, **public** documents originating from the ICRC have been favoured not only because ICRC has an international mandate relating to the application of IHL, but also because they have, from a teaching point of view, the advantage of looking at reality from an IHL perspective. To enable discussion of the IHL aspects of certain armed conflicts or situations on which no other suitable primary sources exist, we have included a number of news articles. These articles do not discuss those events from a legal point of view, but this book precisely aims at encouraging students, including, hopefully, those who will be journalists, to recognize the IHL aspect of daily news reports.

In order to produce a reasonably sized book and to respect the book's focus on practice, in principle we did not include excerpts from scholarly writings. We however encourage students and scholars to consult such writings and we hope that the selective bibliographical references given on every subject will facilitate such consultations.

The criteria for inclusion of a document is not whether historical facts are accurately described, but whether it allows a discussion of a particular aspect of IHL. **No description of alleged historical facts in a reproduced document can therefore be construed as an opinion of the ICRC or of the authors.**

All documents are reproduced either in an official English version, where it exists, or in our own translation into English.

The collection of new documents was completed on 1 May 2005.

⁸ See *infra* Document No. 68, p. 994 and the commented version, DOSWALD-BECK Louise (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge, CUP, 1995, 257 pp.

Detailed Table of Contents

- VOLUME I -

Part I

OUTLINE OF INTERNATIONAL HUMANITARIAN LAW

Chapter 1

Concept and Purpose of International Humanitarian Law

I.	Philosophy of International Humanitarian Law	81
II.	The Possibility of Legal Regulation of Warfare	83
III.	International Humanitarian Law and Cultural Relativism	85

Chapter 2

International Humanitarian Law as a Branch of Public International Law

I.	International Humanitarian Law: at the Vanishing Point of International Law	89
	1. Is international law law?	92
	2. International Humanitarian Law: the crucial test of international law	100
	3. International Humanitarian Law in a developing international environment	100
	4. Application of International Humanitarian Law by and in failed States.	101
	5. International Humanitarian Law in asymmetric conflicts	102
II.	Fundamental Distinction between <i>Ius ad Bellum</i> (on the Legality of the Use of Force) and <i>Ius in Bello</i> (on the Humanitarian Rules to be Respected in Warfare)	102
	1. The prohibition of the use of force and its exceptions	104

2. The inevitable tension between the prohibition of the use of force and International Humanitarian Law 105
3. The complete separation between *ius ad bellum* and *ius in bello* . . . 105
 - a) reasons 106
 - b) consequences of the distinction 106
 - c) contemporary threats to the distinction 107
4. The distinction in non-international armed conflicts. 108

III. International Humanitarian Law: a Branch of International Law Governing the Conduct of States and Individuals 108

1. Situations of application 108
 - a) qualification not left to the parties to the conflict 111
 - b) international armed conflicts 111
 - aa) inter-state conflicts 111
 - old concept of war abandoned 111
 - belligerent occupation (even in the absence of armed resistance) 111
 - bb) national liberation wars 111
 - c) non-international armed conflicts 112
 - d) acts of terrorism? 112
 - e) other situations 114
2. Personal scope of application 114
 - a) passive personal scope of application: who is protected? . . . 115
 - aa) the concept of "protected persons" 115
 - bb) growing importance of rules deviating from the concept
 - persons protected by International Humanitarian Law not having "protected person" status 116
 - b) active personal scope of application: who is bound? 116
3. Temporal scope of application 116
 - a) beginning of application 117
 - b) end of application 117
4. Geographical scope of application 117
5. Relations governed by International Humanitarian Law 118
 - a) Individual - State 118
 - including his or her own State in international armed conflicts? 118
 - b) State - State: International Humanitarian Law in the law of treaties 118
 - applicability of treaties based on reciprocity, but no reciprocity in the respect of treaties. 118
 - ways to be bound 118

- declarations of intention 119
- interpretation 119
- reservations 119
- denunciation 119
- amendment and revision process 119
- role of the depositary 119
- c) Individual - Individual 120

Chapter 3

**Historical Development
of International Humanitarian Law**

Chapter 4

**Sources of Contemporary
International Humanitarian Law**

- I. Treaties 131**
 - 1. Hague Conventions of 1907 133
 - 2. Four Geneva Conventions of 1949 133
 - 3. Two Additional Protocols of 1977 133
- II. Customary Law 134**
 - 1. Sources of customary International Humanitarian Law 137
 - 2. International Humanitarian Law treaties and
customary International Humanitarian Law 137
- III. Fundamental Principles of International Humanitarian Law . . . 138**
 - 1. The Martens clause 141
 - 2. Principles of International Humanitarian Law 141
 - a) humanity 141
 - b) necessity 142
 - c) proportionality 142
 - d) distinction 142
 - e) prohibition of causing unnecessary suffering 142
 - f) independence of *ius in bello* from *ius ad bellum* 142

Chapter 5

The Fundamental Distinction between Civilians and Combatants

I.	Activities	144
II.	Rights	144
III.	Punishable	145
IV.	Protection	145
V.	The Fundamental Obligation of Combatants to Distinguish themselves from the Civilian Population	146
VI.	Relativity of the Distinction in Modern Conflicts	146
	1. Guerrilla warfare	146
	2. Wars of extermination	147
	3. Situations where structures of authority have disintegrated . . .	147
	4. Conflicts aiming at the overthrowing of a regime or a government . .	147
	5. The "war on terror" and in particular the status of "unlawful combatants"	147
	a) in the conduct of hostilities	148
	b) once fallen into the power of the enemy	148

Chapter 6

Combatants and Prisoners of War

I.	Who is a Combatant?	149
	1. A member of armed forces <i>lato sensu</i>	151
	2. <i>Levée en masse</i>	151
	3. Exceptions	151
	a) spies	151
	b) saboteurs	152
	c) mercenaries	152
	d) terrorists?	153
II.	Who is a Prisoner of War?	153
	1. Presumption of combatant and prisoner-of-war status	154
	2. The Status of "Unlawful Combatants"	154

III.	Treatment of Prisoners of War	154
	- protected as prisoner of war as soon as he/she falls into the power of the adverse party	155
	- including in exceptional circumstances	156
	- no transfer to a Power which does not respect Convention III	156
	- respect of their allegiance towards the Power on which they depend	156
	- no punishment for participation in hostilities	156
	- rules on treatment during internment	156
	- rules on penal and disciplinary proceedings	156
	- punishment for acts committed prior to capture	157
	- limits to punishment for escape	157
IV.	Transmission of Information	157
	- capture cards	158
	- notification	158
	- correspondence	158
V.	Monitoring by Outside Mechanisms	158
	1. Protecting Powers	158
	2. ICRC	158
VI.	Repatriation of Prisoners of War	158
	1. During hostilities	159
	a) medical cases	159
	b) agreements of the parties	159
	2. At the end of active hostilities	159
	3. Internment in neutral countries	160

Chapter 7

Protection of the Wounded, Sick and Shipwrecked

I.	The Idea of Solferino	161
II.	Respect, Protection and Care for Wounded, Sick and Shipwrecked, without any Adverse Distinction	162
	1. Beneficiaries	162
	a) under Conventions I and II: military personnel	162
	b) under Protocol I: extension to civilians	162

2. Respect	162
3. Protection	162
4. Care	162
- equal treatment	163
- evacuation.	163
III. Medical and Religious Personnel	163
1. Definition	164
a) military (permanent or temporary) medical personnel	164
b) civilian medical personnel assigned by a Party to the conflict	164
c) religious personnel attached to the armed forces or medical units	164
d) medical personnel made available by third States or organizations to a Party to the conflict	164
e) personnel of a National Society recognized and specifically authorized by a Party to the conflict	164
2. Protection	164
a) on the battlefield (including inhabitants of the combat zone)	164
- may not be attacked	164
- may fulfil medical duties in conformity with medical ethics	164
b) once fallen into enemy hands	164
- immediate repatriation, or	164
- employment caring for prisoners of war	164
c) under control of the enemy	165
- right to perform their medical mission	165
- right not to perform acts contrary to medical ethics	165
- right to maintain medical secret, except as required by law	165
3. Duties of the medical personnel	165
a) no direct participation in hostilities	165
b) respect of medical ethics	165
c) give care without discrimination	165
d) respect principle of neutrality	165
e) identification	165
IV. Protection of Medical Goods and Objects (Including Hospitals, Ambulances, etc.)	166
1. Protection	166
2. Loss of protection	166

V.	Possible Constitution of Hospital, Safety and Neutralized Zones	167
VI.	The Emblem of the Red Cross/Red Crescent	167
	1. Two distinctive signs	168
	2. Technical means of identification	169
	3. Protective use	169
	a) to distinguish medical personnel and units	169
	b) to be displayed with the permission and under the control of the competent authority	169
	c) may be used at all times by the ICRC and by the International Federation	169
	4. Indicative use	170
	5. Repression of abuse and misuse	170
VII.	Provisions on the Dead and Missing	170
	1. Relationship between dead and missing	172
	2. Obligation to identify dead bodies and notify of deaths	172
	3. Obligation to search for persons reported missing	172
	4. Treatment of mortal remains	172
	a) respect	172
	b) decent burial	172
	c) marking of gravesites	172
	d) access to gravesites	172
	e) agreements on the return of remains	172

Chapter 8

The Protection of Civilians

I.	The Protection of the Civilian Population against the Effects of Hostilities	175
II.	Protection of Civilians against Arbitrary Treatment	175
	1. Rules benefiting to all civilians	175
	a) aid and relief	175
	b) special protection of women	175
	aa) the feminist criticism of International Humanitarian Law	175
	bb) the principles of non-discrimination and special protection	176

cc)	protection against rape and sexual violence	176
dd)	reasons justifying a preferential treatment	177
	- pregnant women or maternity cases	177
	- mothers of children under 7 years of age	177
c)	special protection of children	177
aa)	respect of children	179
bb)	prohibition of recruitment	179
cc)	status and treatment of child soldiers	179
d)	special protection of journalists	179
e)	reuniting of dispersed families and family news	179
f)	fundamental guarantees (Article 75 of Protocol I)	180
2.	Rules on protected civilians	180
a)	who is a protected civilian?	180
b)	rules on protected civilians	180
	- right to leave?	180
	- humane treatment	180
	- forced labour	181
	- prohibition of collective punishment	181
	- visits by the Protecting Power and by the ICRC	181
	- if interned: civil internees	181
	- decision of internment: individual administrative decision	181
	- reasons for internment: imperative security reasons; not punishment	181
	- treatment of civil internees	181
	- release of civil internees	182
c)	possible derogation	182

III.	Refugees and Displaced Persons in International Humanitarian Law	182
1.	Displaced persons fleeing within their own country because of an armed conflict	183
a)	protection by International Humanitarian Law	184
	- prohibition of population displacements	184
b)	need of a specific instrument?	184
2.	Persons fleeing a third country because of an armed conflict	184
a)	protected by the OAU Convention, the 1984 Cartagena Declaration and UN General Assembly Resolutions	184
b)	protected by International Humanitarian Law if	184
aa)	the third country is the adverse party in an international armed conflict	184
bb)	the third country is affected by another armed conflict	184
3.	Persons fleeing persecution: protected by International Humanitarian Law if the third country is subsequently affected by an armed conflict	185

a) loss of protection in Refugee Law and International Humanitarian Law	185
4. The principle of <i>non-refoulement</i> in International Humanitarian Law	185
5. The return of refugees and displaced persons at the end of the conflict	185
- obligation to accept those willing to return?	185
IV. Special Rules on Occupied Territories	186
1. The place of rules on military occupation in contemporary International Humanitarian Law	189
a) interstate rules, which apply following a situation arising between two States, but which also govern relations between individuals and a State and between individuals	189
b) sources	189
aa) Arts. 42-56 of the Hague Regulations	189
bb) Sections I, II and IV of Convention IV	189
cc) The contributions of Protocol I: Arts. 44(3), 63, 69, 73 and 85 (4) (a)	189
2. The applicability of the rules of IHL concerning occupied territories	189
a) independently of <i>ius ad bellum</i>	189
b) in case of armed conflict	189
c) in case of belligerent occupation encountering no resistance	190
d) absence of sovereignty of the occupying power	190
e) beginning of the occupation	190
f) annexation does not make IHL of military occupation inapplicable	190
3. Protected persons	190
a) nationals of the occupied power	190
b) nationals of third States (except of co-belligerent States)	190
c) refugees, even if they are nationals of the occupying power	190
4. Philosophy of the rules on occupied territories	190
a) protected interests of the population of the territories: its life must continue as normally as possible	190
b) protected interests of the occupying power: security of the occupying forces	190
c) protected interests of the occupied power: no change in status?	190

d) protection of workers	196
aa) limits on working obligations	196
bb) prohibition to cause unemployment	196
e) cultural property	197
11. The end of applicability of the rules on occupied territories	197
a) during an occupation according to Convention IV (Art. 6 (3)), but not to Protocol I (Art. 3 (b))	197
b) in case of self-government?	197
c) in case of a peace treaty	197
d) in case of retreat of the occupying power	197
e) by UN Security Council determination?	197
f) protection of persons who remain detained	197

Chapter 9

Conduct of Hostilities

I.	The Distinction between the Law of the Hague and the Law of Geneva	199
II.	The Protection of the Civilian Population against Effects of Hostilities	199
	1. Basic rule: Article 48 of Protocol I	199
	2. Field of application	200
	a) acts of violence in defence and offence	201
	b) in whatever territory including attacks on its own territory under the control of the enemy	201
	c) attacks from land, air, or sea affecting the civilian population on land	201
	3. Definition of military objectives	201
	- the concept of military necessity	203
	4. Definition of the civilian population	203
	a) definition of a civilian	204
	- consequences of the loss of protection as a civilian	205
	- what constitutes direct participation?	205
	- for how long do civilians directly participating in hostilities lose their protection against attacks?	205
	b) the presence of a combatant or a military objective among the civilian population	205
	5. Prohibited attacks	205
	a) attacks against the civilian population as such (including those intended to spread terror)	206

b)	attacks against civilian objects	206
c)	indiscriminate attacks	206
aa)	attacks not directed at a specific military objective	207
bb)	use of weapons which cannot be directed as a specific military objective	207
cc)	treating different military objectives as a single military objective	207
dd)	principle of proportionality.	207
d)	attacks against the civilian population (or civilian objects) by way of reprisals	208
6.	The civilian population shall not be used to shield military objectives	208
7.	Protected objects	209
a)	civilian objects	209
b)	specially protected objects	210
aa)	cultural objects	210
bb)	objects indispensable to the survival of the civilian population	211
-	water	211
cc)	works and installations containing dangerous forces	211
dd)	medical equipment	211
c)	the natural environment	211
8.	Precautionary measures in attack	213
a)	an attack must be cancelled if it becomes apparent that it is a prohibited one	213
b)	advance warning must be given unless circumstances do not permit	213
c)	when a choice is possible, the objective causing the least danger to the civilian population must be selected	214
d)	additional obligations of those who plan or decide upon an attack	214
-	verify that objectives are not illicit	214
-	choose means and methods avoiding or minimizing civilian losses	214
-	refrain from attacks causing disproportionate civilian losses	214
9.	Precautionary measures against the effects of attacks	214
10.	Presumptions	215
11.	Zones created to protect war victims against the effects of hostilities	215
a)	open cities	216
12.	Civil defence	216

III.	Means and Methods of Warfare	218
1.	The basic rule: Article 35 of Protocol I	218
2.	Prohibited or restricted use of weapons	218
	a) explosive bullets	219
	b) dum-dum bullets	219
	c) certain conventional weapons	220
	aa) mines	220
	bb) incendiary weapons	221
	cc) non-detectable fragments	221
	dd) blinding weapons	221
	ee) explosive remnants of war	221
	ff) other weapons under discussion concerning their limitation	222
	- light weapons	222
	- anti-vehicle mines	222
	- fragmentation weapons	222
	d) chemical weapons	222
	e) poison	222
	f) bacteriological and biological weapons	222
	g) nuclear weapons	223
	h) new weapons	224
3.	Prohibited methods of warfare	224
	a) giving or ordering no quarter	225
	b) perfidy: the distinction between perfidy and permissible ruses of war	225
	- wearing of enemy uniforms	226
	c) starvation of civilians	226
IV.	International Humanitarian Law and Humanitarian Assistance	226
1.	Principles	228
	a) starvation of civilians: a prohibited method of warfare	228
	b) the right of the civilian population to be assisted	228
	c) the primary responsibility lays with the belligerents	229
	d) medical assistance may benefit to civilians or combatants	229
2.	Definition and characteristics of humanitarian assistance	229

3. The rules of treaty law	229
a) the starting point: Art. 23 of Convention IV	229
aa) addressed to all "High Contracting Parties", not only the parties to the conflict	229
bb) but limitations	230
- of the beneficiaries	230
- of the kind of assistance	230
- conditions	230
b) in occupied territories: Art. 59 of Convention IV: the occupying power has an obligation to accept relief	230
c) a broad right to assistance: Art. 70 of Protocol I and Art. 18 (2) of Protocol II	230
aa) but subject to the consent of the State concerned	230
bb) the conditions to which a belligerent may subject its agreement to humanitarian assistance	230
cc) is the State concerned obliged to give its consent if the conditions are fulfilled?	230
4. Protection of those providing humanitarian assistance	230
5. The protection of water supplies and water engineers	230

Chapter 10

The Law of Naval Warfare

I. Scope of Application: the Different Zones	233
1. Zones	234
a) internal waters, territorial sea and archipelago waters	234
b) international straits and archipelago sea lanes	234
c) exclusive economic zone and continental shelf	234
d) high seas and sea-bed beyond national jurisdiction	234
2. Sea areas for protected vessels	234
a) stay in neutral ports - limit 24 hours	234
b) by agreement between parties: create a neutral zone	234
c) passage of protected vessels through restricted areas: exclusion zones	234
II. Principles of Naval Warfare	234
1. Traditional principles of naval warfare	235
2. The law of neutrality in naval warfare: <i>ius ad bellum</i> or <i>ius in bello</i> ?	235

3.	Additional principles	235
a)	basic rules	235
	- distinction between civilian objects and military objectives	235
b)	precautions in attack	235
c)	military objectives	235
III.	Means and Methods of Warfare at Sea	235
1.	Mine warfare	236
2.	Submarine warfare	236
3.	Blockade	236
IV.	Protected Objects	237
1.	Hospital ships	237
2.	Other protected vessels	237
a)	vessels guaranteed safe conduct by prior agreement between belligerents	237
	- cartel ships	237
	- vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population	237
b)	passenger vessels	237
c)	vessels charged with religious, non-military scientific, or philanthropic missions	237
d)	vessels transporting cultural property under special protection	237
e)	small coastal fishing vessels and small boats engaged in local trade	237
f)	vessels engaged in the protection of the marine environment	237
g)	ships which have surrendered	237
h)	life boats and rafts	237
3.	Protection of enemy merchant vessels	238
a)	except if they are military objectives	238
b)	activities which may render them military objectives	238
4.	Protection of neutral merchant vessels	238
a)	circumstances which make them subject to attack	238
5.	The protection of the maritime environment	238
V.	Maritime Exclusion Zones	238

VI.	Hospital Ships	238
	1. Specific protection	239
	- small craft used for coastal rescue operations	239
	- medical transports	239
	- neutral vessels	239
	2. Loss of protection	239
	- using codes	239
VII.	The Status and Treatment of War Victims at Sea	239

Chapter 11

The Law of Air Warfare

I.	The Specificities of the Air Environment	247
	1. The danger of surprise and the difficulty to identify	247
	2. The laws of gravity let all aircraft fall on earth or on sea	247
II.	Applicability of the General Principles	247
III.	Applicability of the General Law on the Protection of the Civilian Population against Effects of Hostilities to Aerial Bombardments against Targets on Land	247
IV.	Applicability of the General Rules on the Protection of the Civilian Population against Effects of Hostilities to Air Operations which May Affect the Civilian Population on Land	247
V.	Aircraft Over Sea Are Governed by the Law of Sea Warfare ...	247
VI.	Specific Rules for Warfare against Objectives in the Air	247
	1. Aircraft which may not be attacked	247
	a) the protection of medical aircraft and their identification	247
	aa) circumstances making them lose protection	248
	b) the protection of civil and neutral aircraft	248
	aa) circumstances making them lose protection	248
	2. Surrender of military aircraft?	248
	3. Ruses of war and perfidy	248
	4. The status of parachutists	248
	5. Precautionary measures	248
	a) in attacks	248
	b) against the effects of attacks	248
VII.	The Status and Treatment of Victims on-Board Aircraft	248

Chapter 12

The Law of Non-International Armed Conflicts

I.	International and Non-International Armed Conflicts	252
II.	Comparison of the Legal Regimes for International and for Non-International Armed Conflicts	253
	1. Fundamental difference: no protected person status	253
	2. Similarities	253
	a) protection of all those who do not or no longer directly participate in hostilities	253
	- who is protected?	253
	- the wounded and sick	254
	- prohibition of rape and other forms of sexual violence	254
	- treatment of detainees	254
	- judicial guarantees	254
	b) more absolute prohibition of forced displacements	254
III.	The Explicit Rules of Common Article 3 and of Protocol II	255
	1. Principles under Art. 3 common	255
	a) non-discrimination	255
	b) humane treatment	255
	c) judicial guarantees	255
	d) obligation to collect and care for the wounded and sick	255
	2. Additional rules under Protocol II	255
	a) more precise rules on:	255
	aa) fundamental guarantees of humane treatment	255
	bb) judicial guarantees	255
	cc) the wounded, sick and shipwrecked	255
	b) specific rules on:	255
	aa) protection of children	255
	bb) protection of medical personnel and units, duties of medical personnel and the red cross and red crescent emblems	255
	c) Rules on the conduct of hostilities	256
	aa) protection of the civilian population against attacks	256
	bb) protection of objects indispensable for the survival of the civilian population	256
	cc) protection of installations containing dangerous forces	256
	dd) protection of cultural objects	256

	d) prohibition of forced movements of civilians	256
	e) relief actions	256
IV.	Customary Law of Non-International Armed Conflicts	256
V.	Applicability of the General Principles on the Conduct of Hostilities	256
	1. Principle of distinction	257
	2. Principle of military necessity	257
	3. Principle of proportionality	257
	4. Right to relief	257
	5. Necessity to look into the law of international armed conflicts - and sometimes International Human Rights Law - for the precise meaning of principles	258
VI.	Necessity of Analogies with the Law of International Armed Conflicts	258
	1. "Combatants" must distinguish themselves from the civilian population	259
	2. Respect of International Humanitarian Law must be rewarded . . .	259
	a) internment, no imprisonment for those captured in arms	259
	b) encouragement of amnesty at the end of the conflict	259
	aa) for the mere fact of having taken part in hostilities	260
	bb) but not for war crimes or other violations	260
	3. Rules on the use of the emblem	260
	4. Prohibition of the use of certain weapons	260
	5. Limits to analogies	260
	- no combatant status	261
	- no occupied territories	261
VII.	Different Types of Non-International Armed Conflicts	261
	1. Conflicts to which common Article 3 is applicable	261
	- lower threshold	261
	2. Conflicts covered by common Article 3 and Article 8 (2) (e) of Statute of the International Criminal Court	262
	3. Conflicts to which, in addition, Protocol II is applicable	262
	4. Conflicts to which International Humanitarian Law as a whole is applicable	262
	a) recognition of belligerency by the government	262
	b) special agreements among the Parties	262
	c) significance of declarations of intention	263

5.	Problems of qualification	263
a)	traditional internationalized internal conflicts	263
b)	conflicts of secession	264
c)	foreign intervention not directed against governmental forces	264
d)	UN peacekeeping and peace-enforcement operations in a non-international armed conflict	264
e)	UN operations to restore or maintain law and order	264
6.	Practical difficulties arising out of problems of qualification	264
a)	who is a "protected person"?	264
b)	the legal regulation of "ethnic cleansing".	265
-	International Humanitarian Law and genocide	265
-	International Humanitarian Law and crimes against humanity	265
c)	working obligations and forced recruitment	265
d)	what is a war crime?	265
7.	The bottom line: Article 3 common to the Conventions	265
VIII.	Who is Bound by the Law of Non-International Armed Conflicts?	266
1.	Both parties	267
2.	All those belonging to one party	268
3.	All those affecting persons protected by International Humanitarian Law by an act linked to the armed conflict	268
IX.	Consequences of the Existence of a Non-International Armed Conflict for the Legal Status of the Parties	268

Chapter 13

Implementation of International Humanitarian Law

I.	General Problems of the Implementation of International Law and Specific Problems of International Humanitarian Law	271
II.	Measures to Be Taken in Peacetime	274
1.	Dissemination	275
a)	instruction to the armed forces	276
b)	training of police forces	276
c)	university teaching	276
d)	dissemination among civil society	276
2.	Translation (if necessary)	277

3.	Transformation (if necessary) into domestic legislation	277
4.	Legislation for application	277
	a) self-executing and non self-executing norms of International Humanitarian Law	278
	b) particular fields to be covered	278
	- penal sanctions	278
	- use of the emblem	279
	- composition of armed forces	279
5.	Training of qualified personnel	279
6.	Practical measures	279
III.	Respect by the Parties to the Conflict	280
1.	Respect	280
2.	Supervision of their agents	280
3.	Inquiries (spontaneously or following complaints)	280
4.	Appointment of Protecting Powers	280
IV.	Scrutiny by Protecting Powers and the ICRC	280
1.	The Protecting Power	280
	a) the concept of Protecting Powers	282
	b) the system of appointment of Protecting Powers	282
	c) the possible substitute for the Protecting Power	282
	d) the tasks of the Protecting Power	282
	aa) visits to protected persons	283
	bb) reception of applications by protected persons	283
	cc) transmission of information and objects	283
	dd) assistance in judicial proceedings	283
2.	The International Committee of the Red Cross (ICRC)	283
V.	The Obligation to Ensure Respect (Common Article 1)	283
1.	Scope	285
2.	Aim	286
3.	Obligations of non-belligerents	286
4.	Means to be employed	286
5.	Meetings of the State Parties	286
	a) on general problems	286
	b) on specific contexts of violations	286
VI.	Role of National Red Cross or Red Crescent Societies	287

VII.	Role of Non-Governmental Organizations (NGOs)	288
	1. Humanitarian assistance to conflict victims	288
	a) rights and obligations of NGOs under International Humanitarian Law	288
	- impartiality of humanitarian action	289
	- access to victims in need	289
	- dilemmas involved	289
	b) use of the emblem by NGOs	289
	2. Monitoring, reporting and mobilization of public opinion	289
	3. Advocacy for the development of International Humanitarian Law	289
VIII.	The United Nations	289
	1. International Humanitarian Law applicable in situations threatening international peace and security	292
	2. Violations of International Humanitarian Law as a threat to international peace and security	292
	- including in non-international armed conflicts	292
	3. International Humanitarian Law as human rights in armed conflicts	292
	4. The activities of humanitarian organizations of the UN system	293
	5. UN military forces and International Humanitarian Law	293
	a) UN forces as addressees of International Humanitarian Law and protected by International Humanitarian Law	293
	b) UN forces as a mechanism of implementation of International Humanitarian Law	295
	6. The respect of International Humanitarian Law and economic sanctions	295
	7. The necessary distinction between conflict resolution and humanitarian action	295
	a) conflict resolution must take sides, humanitarian action must be neutral	296
	b) the necessity to avoid that humanitarian action becomes an alibi	296
	- for intervention	296
	- for non-resolution of the conflict	296
IX.	The International Responsibility of the State for Violations	296
	1. Assessment of violations	298
	a) inquiry procedures	298
	b) the International Fact-Finding Commission	298

2.	Consequences of violations	299
a)	co-operation among the States Parties	299
b)	compensation	299
c)	applicability of the general rules on State responsibility	300
aa)	but strict responsibility for armed forces	300
bb)	but no defence of necessity	300
cc)	but self-defence is not a circumstance precluding wrongfulness	301
dd)	but no reciprocity	301
ee)	admissibility of reprisals	302
-	no reprisals against protected persons	302
-	no reprisals against the civilian population	303
-	conditions for reprisals where they are admissible	303
ff)	IHL obligations are <i>erga omnes</i> obligations	303
X.	Violations by Individuals	303
1.	Definition of crimes	305
a)	the concept of grave breaches of International Humanitarian Law and the concept of war crimes	305
b)	the extension of the concept of grave breaches to non-international armed conflicts	306
c)	the repression of violations of International Humanitarian Law which are not grave breaches	306
d)	crimes against humanity	307
e)	genocide	309
2.	Participation in war crimes	313
a)	participation, complicity and instigation	313
b)	command responsibility	313
3.	Defences	315
a)	self-defence?	317
b)	superior orders?	318
c)	defence of necessity?	318
4.	The prosecution of war crimes	319
a)	the universal obligation to repress grave breaches	319
aa)	relation to amnesty	320
bb)	no statutory limitations	320
cc)	link with international immunities	320
b)	mutual assistance in criminal matters	321
c)	judicial guarantees for all those accused of war crimes	321

5.	The international criminal courts	321
a)	the establishment of <i>ad hoc</i> tribunals	326
aa)	the International Criminal Tribunal for the former Yugoslavia (ICTY)	326
bb)	the International Criminal Tribunal for Rwanda (ICTR)	327
cc)	hybrid tribunals	328
-	the Special Court for Sierra Leone	328
-	the Extraordinary Chambers in the Courts of Cambodia	329
b)	the International Criminal Court	329
XI.	Implementation in Time of Non-International Armed Conflict	330
1.	Dissemination	333
2.	Other preventive measures	333
3.	The obligation of third States to ensure respect	333
4.	The right of initiative of the ICRC	333
a)	meaning	333
b)	addressees: both the government and insurgents	333
c)	ICRC activities	333
5.	International responsibility of the State and of the insurgent movement	334
6.	Repression of individual breaches of IHL	334
7.	Other mechanisms foreseen for international armed conflicts	335
XII.	Factors Contributing to Violations of International Humanitarian Law	335
XIII.	Non-Legal Factors Contributing to Respect for International Humanitarian Law	338
1.	Routine	340
2.	Military interest	340
a)	discipline	340
b)	military efficiency	340
c)	tactical principles of economy and proportionality of means	340
3.	Public opinion	340
4.	Ethical and religious factors	340

5. Positive reciprocity	340
6. Return to peace	340

Chapter 14

International Humanitarian Law and International Human Rights Law

I. Fields of Application	342
1. Material fields of application: complementarity	342
a) International Humanitarian Law is applicable in armed conflicts	343
b) Human Rights apply at all times	343
- but derogations possible in situations threatening the life of the nation	343
- no derogations from the "hard core"	344
- police operations remain at all times governed by the specific International Human Rights Law standards applicable to police operations against civilians, which may never be conducted like hostilities against combatants	344
c) gap in situations of internal disturbances and tensions	344
2. Protected persons	344
a) International Humanitarian Law: concept of protected persons	345
b) International Human Rights Law: all human beings	345
- who are under the jurisdiction of a State	345
3. Relationships affected	345
a) International Humanitarian Law	345
- Individual - State	345
- State - State	345
- Individual - Individual	345
b) International Human Rights Law	345
- Individual - State	345
4. Applicability of International Human Rights Law to occupied territories	345
II. Protected Rights	346
1. Rights protected by both branches	347

a)	but details provided by International Humanitarian Law are more adapted to armed conflicts	347
-	right to life	347
-	prohibition of inhumane and degrading treatment	347
-	right to health	347
-	right to food	347
-	right to individual freedom (in international armed conflicts)	347
b)	but International Human Rights Law gives more details	347
-	judicial guarantees	347
-	use of firearms by law enforcement officials	347
-	medical ethics	347
-	definition of torture	347
2.	Rules of International Humanitarian Law not covered by International Human Rights Law	348
3.	Human Rights outside the scope of International Humanitarian Law	348
III.	Implementation	348
1.	Differences	350
a)	due to the specificities of armed conflicts	350
b)	in the approach: charity vs. justice?	350
c)	in action	350
aa)	traditionally	350
-	International Humanitarian Law: permanent, preventive and corrective control on the field	350
-	Human Rights: <i>a posteriori</i> control, on demand, in a quasi-judicial procedure	350
bb)	contemporary tendency of Human Rights bodies to adopt an International Humanitarian Law-like approach	351
2.	Convergence	351
a)	implementation of International Humanitarian Law by Human Rights mechanisms	351
aa)	through clauses in Human Rights treaties	351
-	exception to the right to life	351
-	reference in derogation clauses	351
-	the prohibition of "arbitrary" detention	352
bb)	indirectly, through the implementation of International Human Rights Law	352

b) implementation of Human Rights by the ICRC	352
- in armed conflicts	353
- outside armed conflicts	353
3. Co-operation between ICRC and Human Rights bodies	353
a) dissemination	353
b) thought	353
c) operations	353

Chapter 15

The International Committee of the Red Cross (ICRC)

I. The Institution	365
1. The ICRC within the International Red Cross and Red Crescent Movement	365
a) National Red Cross and Red Crescent Societies	366
b) the International Federation of Red Cross and Red Crescent Societies	367
c) the International Conference	367
d) the Fundamental Principles of the International Red Cross and Red Crescent Movement	367
- humanity	367
- impartiality	367
- neutrality	367
- independence	367
- voluntary service	367
- unity	367
- universality	367
2. Legal status of the ICRC	368
3. Independence	368
4. Traditionally mono-national governing body and international action	369
5. Humanity	369
6. Neutrality and impartiality	369
7. Funding	370
II. Activities of the ICRC	370
1. In armed conflicts	370
a) visits to detained persons - interviews without witnesses	371

b)	protection of the civilian population	371
c)	supply of relief	371
d)	medical assistance	372
e)	tracing service	372
f)	the relevance of ICRC practice for the development of customary International Humanitarian Law	372
2.	Outside armed conflicts	373
3.	World-wide	373
a)	Advisory Services on International Humanitarian Law	373
b)	dissemination	373
c)	humanitarian diplomacy	374
4.	The role of the ICRC in the <i>continuum</i> between pre-conflict and post-conflict situations	374
-	ICRC's residual responsibility towards persons it has assisted during a conflict	374
5.	Co-operation between the ICRC and National Societies	374
6.	Co-operation with other humanitarian organizations	374
7.	Co-operation with political organizations	375
III.	Legal Basis of ICRC's Action	375
1.	In international armed conflicts	375
a)	right to visit protected persons (prisoners of war and civil internees)	375
b)	right of initiative	375
c)	the Central Tracing Agency	375
d)	"substitute of the Protecting Power"	376
2.	In non-international armed conflicts: the right of initiative provided for in common Article 3 to the Conventions	376
a)	meaning	376
b)	addressees	376
3.	In other situations where a neutral humanitarian intermediary is needed: the right of initiative provided for in the Statutes of the Movement	376
IV.	Importance of International Humanitarian Law in ICRC Operations	376
1.	The ICRC and the legal qualification of the situation	377
a)	competence of the ICRC to qualify armed conflicts	377
b)	practical importance to qualify a conflict	377
c)	difficulties for the ICRC to qualify a conflict	377

aa) objective difficulties	377
bb) political difficulties	377
cc) difficulties for its operational access	377
dd) advantages and shortcomings of a pragmatic approach	377
2. Reference to International Humanitarian Law in different functions of the ICRC as the guardian of International Humanitarian Law	377
a) defending International Humanitarian Law	378
b) developing International Humanitarian Law	378
c) animating reflection on International Humanitarian Law	378
d) promoting accession to International Humanitarian Law	378
e) disseminating International Humanitarian Law	378
f) implementing International Humanitarian Law	378
- monitoring respect by others	378
- implementing International Humanitarian Law through its own activities	378
g) mobilizing against violations of International Humanitarian Law	378
3. Reference to International Humanitarian Law in ICRC operations	378
a) dissemination	378
b) preventive appeal for the respect of International Humanitarian Law	378
c) argument for ICRC access to conflict victims	379
d) argument in negotiations on the behaviour of belligerents	379
e) request for inquiry into and repression of individual violations	379
f) condemnation of violations	379
- bilateral	379
- public	379
g) reference in negotiations with third States and the international community	379
- requests for support to the ICRC	379
- appeals under Article 1 common to the Conventions	379
4. Importance of International Humanitarian Law when no explicit reference is made to it	379
a) reference to the contents of a rule without reference to its source	379

	b) presentation of facts and questions	379
	c) International Humanitarian Law as political pressure in the background	379
V.	ICRC's Approach	379
	1. Confidentiality, not publicity	379
	2. Co-operation, not confrontation	384
	3. Access to victims, not investigation of violations	384

Part II

Possible Teaching Outlines

Chapter 1

Some Remarks on Teaching International Humanitarian Law

I.	Why Teaching International Humanitarian Law?	387
II.	How to Teach International Humanitarian Law?	390

Chapter 2

Courses on International Humanitarian Law

I.	A Twenty-lesson Course	401
II.	An Eight-lesson Course	404
III.	A Four-lesson Course	405
IV.	A Two-lesson Course	405
V.	A Study of one Armed Conflict	406
VI.	Possible Programme for Seminars on International Humanitarian Law for Post-Graduate Students	408
VII.	Year-long Interdisciplinary Seminar on War in the Contemporary World	416

Chapter 3

Study of International Humanitarian Law Problems in a General Course of International Law

I.	The Nature of International Law	423
II.	Sources of International Law	425
III.	The Subjects of International Law	427
IV.	The United Nations	428
V.	Fundamental Rights and Obligations of States	429
VI.	International Law and Municipal Law	429
VII.	The Law of Treaties	430
VIII.	The Law of Diplomatic Relations	431
IX.	State Jurisdiction and its Delimitation	431
X.	The Law of the Sea	432
XI.	The International Protection of the Individual	432
XII.	State Responsibility	432
XIII.	International Economic Law	434
XIV.	Protection of the Environment	434
XV.	The Peaceful Settlement of Disputes	434
XVI.	The Use of Force	435
XVII.	The Law of Disarmament	437
XVIII.	The Law of Neutrality	437

Chapter 4

Study of International Humanitarian Law in Special (International) Law Courses

I.	Possible International Humanitarian Law Elements in an International Organizations Course	439
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II.	Possible International Humanitarian Law Elements in a Human Rights Course	441
III.	Possible International Humanitarian Law Elements in a Criminal Law Course	444
IV.	Possible International Humanitarian Law Elements in a International Criminal Law Course	446
V.	Possible International Humanitarian Law Elements in an International Refugee Law Course	449
VI.	Possible International Humanitarian Law Elements in a Course on the History of International Humanitarian Law	450
VII.	Possible International Humanitarian Law Elements in a Course on State Responsibility	451

Chapter 5

Teaching of International Humanitarian Law in Journalism Faculties

Chapter 6

Examples of Course Outlines Used by University Teachers

I.	International Humanitarian Law, Topical Syllabus developed by Prof. Getachew Assefa, Dean, Faculty of Law, Ethiopian Civil Service College, January 2002	459
II.	Introduction to International Humanitarian Law, by Professor Eric David, Université Libre de Bruxelles (Belgium)	461
III.	International Humanitarian Law, by Professor Michel Deyra, University of Auvergne (France)	464
IV.	International Humanitarian Law Applicable in International Armed Conflicts, Syllabus, Prof. Yoram Dinstein, University of Tel Aviv (Israel)	469
V.	Course Outline by Prof. Akunga Momanyi, University of Nairobi (Kenya)	472

VI.	International Humanitarian Law, Course Outline, by Dr. Ray Murphy, University of Galway (Ireland)	473
VII.	International Humanitarian Law, by Prof. Xavier Philippe, University of Western Cape (South Africa)	475
VIII.	The Protection of Human Rights During Armed Conflicts, by Prof. Ryszard Piotrowicz, University of Wales, Aberystwyth (United Kingdom)	478
IX.	Armed Conflicts and International Law, by Professor Julio Jorge Urbina, University of Santiago de Compostela (Spain)	491
X.	LLM Course on IHL for Postgraduate Students at the University Center for International Humanitarian Law, by Professor Marco Sassòli, University of Geneva (Switzerland)	493
XI.	IHL Teaching Outline for the Web-Based Distance Education Diploma	496

- VOLUME II -

Part III

CASES AND DOCUMENTS

Chapter 1

General Statements on International Humanitarian Law

I.	General Multilateral Treaties	517
	Document No. 1, The Hague Regulations	517
	Document No. 2, The 1925 Geneva Chemical Weapons Protocol	524
	Document No. 3, Conventions on the Protection of Cultural Property	525
	Document No. 4, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Geneva, October 10, 1980	540
	Document No. 5, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)	545

Document No. 6, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)	545
Document No. 7, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), October 13, 1995	546
Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention)	547
Document No. 9, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts	559
Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997	560
Document No. 11, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention) November 28, 2003	571
Case No. 12, The Issue of Mercenaries	575
A. Art. 47 of Protocol I	575
B. International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 4 December 1989	576
C. UN Report submitted by M. E. Bernales Ballesteros, Special Rapporteur on the Question of the Use of Mercenaries	578
Document No. 13, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993	592
Case No. 14, Convention on the Safety of UN Personnel	602
Case No. 15, The International Criminal Court	608
A. The Statute	608
B. United States, American Service-Members' Protection Act of 2002 (ASPA)	624
C. Amnesty International, "No double standards on international justice"	629
D. United Nations, Security Council Resolution 1487 (2003)	630
Document No. 16, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000	636
II. Other International Agreements	639
Document No. 17, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa	639
Document No. 18, Agreement Between the ICRC and Switzerland	640
Document No. 19, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal	645

III. ICRC and International Red Cross and Red Crescent Movement	648
Document No. 20, Statutes of the International Red Cross and Red Crescent Movement	648
Document No. 21, ICRC, Tracing Service	660
Document No. 22, ICRC, Model Law Concerning the Emblem	665
Document No. 23, ICRC, Advisory Services on International Humanitarian Law	670
Case No. 24, Protection of Journalists	672
Case No. 25, The Environment and International Humanitarian Law	680
A. Art. 35 of Protocol I	680
B. Art. 55 of Protocol I	681
C. Article I of 1977 United Nations Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques	681
D. Report Submitted by the ICRC at the 48 th Session of the General Assembly on the Protection of the Environment in Times of Armed Conflict. 29 July 1993	681
Document No. 26, ICRC, Protection of War Victims	702
Document No. 27, ICRC, Assistance Policy	716
Case No. 28, Water and Armed Conflicts	723
A. Dying for Water	723
B. Berlin Rules on Water Resources	726
Case No. 29, ICRC, Customary International Humanitarian Law	730
A. ICRC Report 1995	730
B. ICRC, Study on Customary International Humanitarian Law	733
C. List of Customary Rules of International Humanitarian Law	734
Document No. 30, The Seville Agreement	750
Case No. 31, ICRC, The Question of the Emblem	761
A. Draft Protocol Additional to the Geneva Conventions (Protocol III)	761
B. ICRC, Diplomatic Conference on the Additional Emblem is Postponed	763
C. 28 th International Conference of the Red Cross and Red Crescent, Resolution 3, Adoption of the resolution 5 of the Council of Delegates 2003	764
Case No. 32, ICRC, Disintegration of State Structures	767
Case No. 33, ICRC's Approach to Contemporary Security Challenges	777
Document No. 34, ICRC, New Weapons	783
Document No. 35, ICRC, Biotechnology, Weapons and Humanity	785
A. Appeal by the International Committee of the Red Cross	785

B. United Nations General Assembly Resolution	788
Document No. 36, ICRC, The Challenges of Contemporary Armed Conflicts	789
IV. Periodical Meetings of the States Party to the Geneva Conventions	800
Document No. 37, First Periodic Meeting, Chairman's Report	800
V. United Nations	805
Case No. 38, ILC, Draft Articles on State Responsibility	805
A. International Law Commission Report	805
B. Commentary to Article 10 Adopted on First Reading.	816
Case No. 39, UN, ICRC Granted Observer Status	820
A. Resolution of the General Assembly.	820
B. Explanatory Memorandum	820
Document No. 40, Minimum Humanitarian Standards	823
A. Turku Declaration	823
B. UN, Minimum Humanitarian Standards.	828
Document No. 41, UN, Guiding Principles on Internal Displacement	850
Document No. 42, UN, Guidelines for UN Forces	861
A. Press Release	861
B. Guildlines for UN Forces Regarding Respect for International Humanitarian Law	862
Document No. 43, UN, The "Brahimi" Report	866
Document No. 44, UN, Report on Threats, Challenges and Change	873
Case No. 45, UN, Secretary-General's Report on the Protection of Civilians in Armed Conflict	879
Case No. 46, ICJ, Nuclear Weapons Advisory Opinion	896
VI. National Legislation	912
Case No. 47, Switzerland, Military Penal Code	912
A. The Code.	912
B. Explanations given to the National Council by Samuel Schmid, Federal Councillor, on 15 December 2003	914
Case No. 48, Germany, International Criminal Code	915
Case No. 49, Canada, Crimes Against Humanity and War Crimes Act	924

Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross"	930
Case No. 51, Ghana, National Legislation Concerning the Emblem	934
Case No. 52, Belgium, Law on Universal Jurisdiction	937
A. 2003 Criminal Code	937
B. 2003 Code of Criminal Procedure	943
C. Evolution of the Belgian Law on Universal Jurisdiction	945
Case No. 53, Ivory Coast, National Interministerial Commission	949
Case No. 54, US, War Crimes Act	952
A. War Crimes Act of 1996	952
B. 1997 Amendment of the War Crimes Act of 1996	952
VII. National Statements	955
Case No. 55, Russian Federation, Succession to International Humanitarian Law Treaties	955
Case No. 56, USSR, Poland, Hungary, and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III	955
A. USSR	955
B. Poland	956
C. Hungary	956
D. Democratic People's Republic of Korea	957
Document No. 57, France, Accession to Protocol I	958
A. Statement at the Diplomatic Conference	958
B. Reservations and Interpretative Declarations Concerning Accession by France to Protocol I	959
Case No. 58, United Kingdom and Australia, Applicability of Protocol I	962
A. Declaration by the Delegation of the United Kingdom	962
B. Australia's Explanation of Vote on Draft Protocol I	962
Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II	964
A. Belgium	964
B. Brazil	964
Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee	966
Case No. 61, US, President Rejects Protocol I	971
Case No. 62, Iran, Renouncing Use of the Red Lion and Sun Emblem	975
Document No. 63, Switzerland, Prohibition of the Use of Chemical Weapons	976
Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons	978
Case No. 65, UK, Reservations to Additional Protocol I	985

VIII. National Decisions	988
Case No. 66, UK, Interpreting the Act of Implementation	988
Case No. 67, UK, Labour Party Campaign - Misuse of the Emblem	991
A. Labour Attacked over "Misuse" of Red Cross Symbol	991
B. Labour Official Falls Foul of Red Cross	992
IX. Private Restatements	994
Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea	994

Chapter 2

Cases and Documents Relating to Past and Contemporary Conflicts

I. American Civil War	1011
Case No. 69, US, The Prize Cases	1011
II. World War II	1015
Document No. 70, Switzerland Acting as Protecting Power in World War II . . .	1015
1. War Events	1016
Document No. 71, German Invasion of Crete	1016
Document No. 72, Germany/UK, Shackling of Prisoners of War	1017
Document No. 73, British Policy Towards German Shipwrecked	1017
Document No. 74, UK/Germany, Sinking of the Tübingen in the Adriatic	1019
2. Decisions of Allied Military Tribunals in Germany	1022
Case No. 75, British Military Court at Hamburg, The Peleus Trial	1022
Case No. 76, US Military Court in Germany, Trial of Skorzeny and Others	1027
Case No. 77, US Military Tribunal at Nuremberg, The Justice Trial	1029
Case No. 78, US Military Tribunal at Nuremberg, US v. Alfried Krupp <i>et al.</i>	1030
Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case	1036
Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List	1043
Document No. 81, US Military Tribunal at Nuremberg, US v. Wilhelm von Leeb <i>et al.</i>	1048
3. Decision of the International Military Tribunal for the Far East . . .	1051
Document No. 82, The Tokyo War Crimes Trial	1051
4. Decisions of National Tribunals	1053

Case No. 83, US, <i>Ex Parte Quirin et al.</i>	1053
Case No. 84, US, <i>Johnson v. Eisentrager</i>	1056
Case No. 85, US, <i>Trial of Lieutenant General Harukei Isayama and Others</i> . .	1060
Case No. 86, US, <i>In re Yamashita</i>	1063
Case No. 87, Burma, <i>Ko Maung Tin v. U Gon Man</i>	1068
Case No. 88, Netherlands, <i>In re Pilz</i>	1069
Case No. 89, Singapore, <i>Bataafsche Petroleum v. The War Damage Commission</i>	1071
Case No. 90, US, <i>Extradition of Demjanjuk</i>	1078
III. Chinese Civil War	1085
Case No. 91, China, <i>Military Writings of Mao Tse-Tung</i>	1085
IV. Korean War	1087
Case No. 92, US, <i>US v. Batchelor</i>	1087
V. Hungary	1091
Case No. 93, Hungary, <i>War Crimes Resolution</i>	1091
VI. Goa	1097
Case No. 94, India, <i>Rev. Mons. Monteiro v. State of Goa</i>	1097
VII. Cuba	1104
Case No. 95, Cuba, <i>Status of Captured "Guerrillas"</i>	1104
VIII. Yemen	1106
Case No. 96, ICRC Report on Yemen, 1967	1106
IX. Malaysia	1109
Case No. 97, Malaysia, <i>Public Prosecutor v. Oie Hee Koi</i>	1109
Case No. 98, Malaysia, <i>Osman v. Prosecutor</i>	1112
X. Congo	1122
Case No. 99, Belgium, <i>Public Prosecutor v. G.W.</i>	1122
XI. Vietnam	1125
Case No. 100, US, <i>Screening of Detainees in Vietnam</i>	1125
Case No. 101, US, <i>US v. William L. Calley, Jr.</i>	1129
Case No. 102, US, <i>Former Prisoner of War on a Mission to Hanoi</i>	1134
XII. Nigeria	1137
Case No. 103, Nigeria, <i>Operational Code of Conduct</i>	1137
Case No. 104, Nigeria, <i>Pius Nwaoga v. The State</i>	1139

XIII. Indo-Pakistani Conflict	1142
Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement	1142
XIV. Israeli-Arab Conflict	1145
Document No. 106, ICRC Appeals on the Near East	1145
A. October 1973 Appeal	1145
B. November 2000 Appeal	1146
C. ICRC Declaration of 5 December 2001	1148
Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory	1151
A. ICJ, Legal Consequences of the Construction of a Wall	1152
B. HCJ, Beit Sourik Village Council v. The Government of Israel [<i>et al.</i>]	1189
C. Palestinians 'Made Millions' Selling Cheap Cement for Barrier they Bitterly Oppose	1204
1. Israeli Practice	1208
Case No. 108, Israel, Applicability of the Convention to Occupied Territories	1208
Case No. 109, Israel, Military Prosecutor v. Kassem and Others	1212
Case No. 110, Israel, Ayub v. Minister of Defence	1218
Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory ..	1223
A. Sakhwil <i>et al.</i> Commander of the Juda and Samaria region	1223
B. The Israeli Information Centre for Human Rights in the Occupied Territories, "Demolition for Alleged Military Purposes"	1224
C. Israel Ministry of Foreign Affairs, "The Demolition of Palestinian Structures Used for Terrorism - Legal Background"	1227
D. Amnesty International, "House Demolition: Palestinian civilians in Rafah refugee camp"	1228
E. <i>Ha'aretz</i> , "High Court allows Gaza demolitions: Army's 'operational necessity' takes precedence"	1229
Case No. 112, Israel, Al Nawar v. Minister of Defence	1232
Case No. 113, Israel, Cheikh Obeid <i>et al.</i> v. Ministry of Security	1237
Case No. 114, Israel, Cases Concerning Deportation Orders	1244
Case No. 115, Israel, Ajuri v. IDF Commander	1263
Case No. 116, Israel, Evacuation of Bodies in Jenin	1284
Case No. 117, Israel, The Rafah Case	1289
2. Positions of the International Community	1303
Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention	1303

A. UN Security Council Resolution 681 (1990)	1303
B. UN General Assembly Resolution ES-10/2	1304
C. UN General Assembly Resolution ES-10/3	1305
D. UN Secretary-General's Report	1306
E. UN General Assembly Resolution ES-10/4	1308
F. Press Release, Expert Meeting, June 1998	1309
G. Chairman's Report, Expert Meeting, October 1998	1310
H. UN General Assembly Resolution ES-10/6	1315
I. Declaration Adopted by the Conference of High Contracting Parties to the Fourth Geneva Convention, 5 December 2001	1316
J. UN General Assembly Resolution ES-10/10	1319
K. UN General Assembly Resolution ES-10/15	1319
3. Positions of Third Countries	1323
Case No. 119, UK, Position on Applicability of Fourth Convention	1323
Document No. 120, Switzerland, Prohibition of Deportation from Israeli Occupied Territories	1325
4. Reports by Non-Governmental Organisations	1328
Case No. 121, Amnesty International, Breach of the Principle of Distinction . . .	1328
A. Amnesty International Report Calls on Palestinian Armed Groups to Stop Civilian Killings	1328
B. Amnesty International, Without Distinction	1330
5. Lebanon	1333
Case No. 122, ICRC/Lebanon, Sabra and Chatila	1333
Case No. 123, ICRC/South Lebanon, Closure of Insar Camp	1335
Case No. 124, Lebanon, Helicopter Attack on Ambulances	1336
Case No. 125, Israel, Navy Sinks Dinghy off Lebanon	1337
Case No. 126, Israel, Taking Shelter in Ancient Ruins	1339
XV. Cyprus	1341
Case No. 127, ECHR, Cyprus v. Turkey	1341
XVI. Chile	1357
Case No. 128, Chile, Prosecution of Osvaldo Romo Mena	1357
XVII. Conflicts in Central America	1364
Case No. 129, Nicaragua, Helicopter Marked with the Emblem	1364
1. International decisions	1365
Case No. 130, ICJ, Nicaragua v. US	1365

2. Positions of Third Countries	1376
Case No. 131, Canada, Ramirez v. Canada	1376
Case No. 132, Switzerland, Qualification of the Conflict in El Salvador	1383
XVIII. Grenada	1387
Case No. 133, Inter-American Commission on Human Rights, Coard v. US	1387
XIX. US Operation in Panama	1399
Case No. 134, US, US v. Noriega	1399
A. Jurisdiction	1399
B. Place of Detention	1408
XX. East Africa	1420
Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict	1420
Case No. 136, Eritrea/Ethiopia, Partial Award on POWs	1423
A. Prisoners of War, Ethiopia's Claim 4	1423
B. Prisoners of Wars, Eritrea's Claim 17	1446
Case No. 137, Sudan, Eritreans Fighting in Blue Nile Area	1465
Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur	1467
A. Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General	1467
B. UN Security Council Resolution 1593 (2005)	1503
XXI. South Africa	1507
Case No. 139, South Africa, Sagarius and Others	1507
Case No. 140, South Africa, S. v. Petane	1511
Case No. 141, South Africa, AZAPO v. Republic of South Africa	1522
XXII. First Gulf War (Iran/Iraq)	1529
Case No. 142, ICRC, Iran/Iraq Memoranda	1529
A. The Memorandum of May 7, 1983	1529
B. The Memorandum of February 10, 1984	1533
Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law	1540
A. UN Doc. S/15834	1540
B. Security Council Resolution 540 (1983)	1551
C. Letter of June 28, 1984 from Iraq to the Secretary-General	1551
D. Letter of June 29, 1984 from the Secretary-General to Iran and Iraq	1552
Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated	1555
A. UN Security Council Resolution 598 (1987)	1555

B. Letter of July 17, 1989 from Iran	1556
C. Letter of July 21, 1989 from Iraq	1558
D. Iran/Iraq: more than 70,000 POWs Repatriated	1559
Case No. 145, UN/ICRC, The Use of Chemical Weapons	1562
A. Security Council Resolution 620 (1988)	1562
B. ICRC Press Release of 23 March 1988	1563
XXIII. Second Gulf War (1990-91)	1565
Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq	1565
A. Security Council Resolution 661 (1990)	1565
B. Security Council Resolution 665 (1990)	1566
C. Security Council Resolution 666 (1990)	1567
Case No. 147, UN, Detention of Foreigners	1569
Case No. 148, Saudi Arabia, Use of the Red Cross Emblem by US Forces	1570
Case No. 149, UN, Security Council Resolution 688 on Northern Iraq	1571
Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War	1573
A. Department of Defence Report to Congress on the Conduct of the Persian Gulf War	1573
B. Minutes of Evidence Taken before the Defence Committee-House of Commons UK - on Wednesday, March 6, 1991	1580
Case No. 151, US, Surrendering in the Persian Gulf War	1582
Case No. 152, UN Compensation Commission, Recommendations	1588
XXIV. Third Gulf War	1591
Case No. 153, US/UK, Conduct of the 2003 War in Iraq	1591
Document No. 154, US, Populated Area Targeting Record in Iraq	1603
Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq	1605
Case No. 156, US, The Taguba Report	1610
Case No. 157, US, The Schlesinger Report	1623
A. Final Report of the Independent Panel To Review DoD Detention Operations. August 2004	1623
B. Reactions of the International Committee of the Red Cross to the Schlesinger Panel Report on Department of Defense Detention Operations	1634
Case No. 158, Iraq, Medical Ethics in Detention	1639
A. Abu Ghraib: its Legacy for Military Medicine	1639
B. The Tokyo Declaration	1643
Case No. 159, Iraq, Occupation and Peacebuilding	1645
A. UN Security Council Resolution 1483 (2003)	1645
B. Orders of the Coalition Provisional Authority	1646

C. Daphne Eviatar, "Free Market Iraq? Not so Fast", <i>New York Times</i> (10 January 2004)	1652
Case No. 160, Iraq, The Trial of Saddam Hussein	1656
A. Iraq: Law of Occupation	1656
B. Iraq: Memorandum on Concerns Relating to Law and Order	1660
C. Tribunal Established Without Consultation	1661
D. Iraqi Special Tribunal: Questions & Answers	1662
Case No. 161, Iraq, The End of Occupation	1664
XXV. Argentina and Falklands/Malvinas	1668
Case No. 162, Argentina/UK, The Red Cross Box	1668
Case No. 163, Inter-American Commission on Human Rights, Tablada	1670
Document No. 164, ICRC, Request to Visit Gravesites in the Falklands/Malvinas	1681
XXVI. Sri Lanka	1682
Case No. 165, Sri Lanka, Jaffna Hospital Zone	1682
A. Reuters Dispatch of September 26, 1990	1682
B. ICRC Press Release of November 6, 1990	1683
Case No. 166, Canada, Sivakumar v. Canada	1685
XXVII. Somalia	1692
Case No. 167, UN, UN Forces in Somalia	1692
A. Security Council Resolution 794 (1992)	1692
B. Security Council Resolution 814 (1993)	1694
Case No. 168, Belgium, Belgian Soldiers in Somalia	1696
A. Korad Kalid v. Paracommando Soldier	1696
B. Osman Somow v. Paracommando Soldier	1701
Case No. 169, Canada, R. v. Brocklebank	1707
Case No. 170, Canada, R. v. Boland	1720
Case No. 171, Canada, R. v. Seward	1725
XXVIII. Armed Conflicts in the Former Yugoslavia	1732
1. Development of the Conflicts	1732
Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia	1732
Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts	1761
A. Yugoslavia/Croatia, Memorandum of Understanding of November 27, 1991	1761
B. Bosnia and Herzegovina, Agreement No. 1 of May 22, 1992	1765

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993	1771
A. ICRC Position Paper, The Establishment of Protected Zones for Endangered Civilians in Bosnia-Herzegovina	1771
B. Security Council Resolution 819 (1993)	1773
C. Security Council Resolution 824 (1993)	1775
Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities	1778
A. General Framework Agreement for Peace in Bosnia and Herzegovina . . .	1778
B. Tracing Missing Persons in Bosnia-Herzegovina	1779
Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers	1785
2. Positions of Third Countries	1787
Case No. 177, Germany, Government Reply on Rapes in Bosnia	1787
Case No. 178, UK, Misuse of the Emblem	1788
3. Reactions by the International Community	1791
Case No. 179, UN, Statute of the ICTY	1791
A. Security Council Resolution 827 (1993)	1791
B. Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993)	1792
C. Statute of the International Tribunal for the Prosecution of Persons responsible for Serious Violations of International humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, May 25, 1993	1794
D. Security Council Resolution 1534 (2004)	1800
4. Decisions by the ICTY	1804
Case No. 180, ICTY, The Prosecutor v. Tadic	1804
A. Jurisdiction	1804
B. Trial Chamber, Merits	1832
C. Appeals Chamber, Merits	1846
Case No. 181, ICTY, The Prosecutor v. Martić, Rule 61 Decision	1880
Case No. 182, ICTY, The Prosecutor v. Rajić, Rule 61 Decision	1888
Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel . . .	1900
A. ICTY, The Prosecutor v. Simić <i>et al.</i>	1900
B. ICC, Rules of Procedure and Evidence, Rule 73	1909
Case No. 184, ICTY, The Prosecutor v. Kupreskić <i>et al.</i>	1911
Case No. 185, ICTY, The Prosecutor v. Blaskić	1936
A. Trial Chamber	1936
B. Appeals Chamber	1952

Case No. 186, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic	1974
Case No. 187, ICTY, The Prosecutor v. Galic	1986
Case No. 188, ICTY, The Prosecutor v. Strugar	2020
A. Appeals Chamber, Decision on Interlocutory Appeal	2020
B. Trial Chamber, Judgement	2021
5. Decisions by National Courts	2055
Case No. 189, US, Kadic <i>et al.</i> v. Karadzic	2055
Case No. 190, France, Javor and Others	2060
Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G	2063
Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others	2071
6. NATO Intervention in the Federal Republic of Yugoslavia	2077
Case No. 193, Federal Republic of Yugoslavia, NATO Intervention	2077
A. Amnesty International, NATO Intervention in Yugoslavia. "Collateral Damage" or Unlawful Killings?	2077
B. ICTY, Prosecutor's Report on the NATO Bombing Campaign	2083
Case No. 194, ECHR, Bankovic and Others v. Belgium and 16 other States	2093
XXIX. Conflicts in the Great Lakes Region	2098
Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region	2098
1. Reactions by the International Community	2154
Case No. 196, UN, Statute of the ICTR	2154
A. The Statute	2154
B. Security Council Resolution 1534 (2004)	2158
Case No. 197, UN, A Multinational Force to Facilitate Humanitarian Aid	2160
Case No. 198, Germany, Law on Cooperation with the ICTR	2163
Case No. 199, Luxembourg, Law on Cooperation with the International Criminal Courts	2165
Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu	2171
A. Trial Chamber	2171
B. Appeals Chamber	2187
Case No. 201, ICTR, The Media Case	2194
2. Positions of Third Countries	2222
Case No. 202, France, Radio Mille Collines	2222
Case No. 203, France, Dupaquier, <i>et al.</i> v. Munyeshyaka	2223
Case No. 204, Switzerland, X. v. Federal Office of Police	2225
Case No. 205, Switzerland, The Niyonteze Case	2233

A. Military Court of Cassation	2233
B. Appeals Decision	2246
Case No. 206, ICJ, Democratic Republic of Congo v. Belgium	2257
XXX. Colombia	2266
Case No. 207, Colombia, Constitutional Conformity of Protocol II	2266
Case No. 208, Inter-American Court of Human Rights, The Las Palmeras Case	2281
XXXI. Burma	2288
Document No. 209, ICRC, Visits to Detainees: Interviews without Witnesses	2288
A. Withdrawal of the ICRC from Burma in 1995: Newspaper Article	2288
B. ICRC Document	2288
XXXII. Turkey	2291
Case No. 210, Germany, Government Reply on the Kurdistan Conflict	2291
XXXIII. Afghanistan	2294
1. War in Afghanistan (1978-1992)	2294
Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland	2294
2. The Taliban Regime	2297
Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women	2297
A. Women Barred from Kabul Hospitals	2297
B. Security Council Resolution 1193 (1998)	2298
Case No. 213, Afghanistan, Destruction of the Bamiyan Buddhas	2300
3. US Intervention in Afghanistan	2303
Case No. 214, Afghanistan, Operation "Enduring Freedom"	2303
A. The United States Use Cluster Bombs	2303
B. Bombing of ICRC Warehouses	2304
Case No. 215, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners	2308
Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base	2309
A. ICRC Visits to the Prison Camps of Guantánamo Bay	2309
B. "The Red Cross Needs to Get Real"	2310
C. Human Rights Watch, U.S. Officials Misstate Geneva Convention Requirements	2312
D. United States of America, Press Conference of Donald H. Rumsfeld	2316
E. Inter-American Commission on Human Rights	2324
F. United States of America, President's Military Order	2328

Case No. 217, US, Military Commission Instructions	2335
Case No. 218, US, Rasul v. Bush	2340
Case No. 219, US, Trial of John Phillip Walker Lindh	2342
A. American Taliban Flies Back, but not to the Cages of Guantánamo Bay	2342
B. Lindh Agrees to Serve 20 years	2344
Case No. 220, US, Hamdan v. Rumsfeld	2346
Case No. 221, UN, Request for an Investigation on War Crimes	2354
XXXIV. India	2356
Case No. 222, India, Press Release, Violence in Kashmir	2356
Case No. 223, India, People's Union for Civil Liberties v. Union of India	2358
XXXV. Sierra Leone/Liberia and Guinea	2362
Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea	2362
Case No. 225, Sierra Leone, Special Court Ruling on Immunity for Taylor	2388
Case No. 226, Sierra Leone, Special Court Ruling on the Recruitment of Children	2397
XXXVI. Angola	2413
Case No. 227, Angola, Famine as a Weapon	2413
XXXVII. Chechnya	2415
Case No. 228, Germany, Government Reply on Chechnya	2415
Case No. 229, Russian Federation, Chechnya, Operation Samashki	2416
Case No. 230, Russia, Constitutionality of Decrees on Chechnya	2429
Case No. 231, ECHR, Isayeva v. Russia	2433
XXXVIII. The Netherlands	2450
Case No. 232, The Netherlands, Public Prosecutor v. Folkerts	2450
XXXIX. Western Sahara	2453
Case No. 233, UN, The Situation Concerning Western Sahara	2453
Case No. 234, The Conflict in Western Sahara	2454
A. Human Rights Watch Report, October 1995	2454
B. The Issue of the "Disappeared"	2460
C. The Issue of Prisoners of War	2461
XL. United States of America	2463
Case No. 235, US, US v. Marilyn Buck	2463
Case No. 236, US, The September 11 2001 Attacks	2470
A. The Day the Free World entered a new War	2470
B. United States: ICRC Condemns Attacks	2472

PART I

OUTLINE OF INTERNATIONAL
HUMANITARIAN LAW

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[N.B.: Many articles of the International Review of the Red Cross referred to in bibliographies are online (<http://www.icrc.org/eng/review>). Other journals are also online (see the list of websites, p. 17).]

Chapter 1

CONCEPT AND PURPOSE OF INTERNATIONAL HUMANITARIAN LAW

I. PHILOSOPHY OF INTERNATIONAL HUMANITARIAN LAW

Introductory Text

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

- a) sparing those who do not^[9] or no longer^[10] directly^[11] participate in hostilities;
- b) limiting the violence to the amount necessary to achieve the aim of the conflict, which can be - independently of the causes fought for^[12] - only to weaken the military potential of the enemy.^[13]

This definition leads to the basic principles of IHL:

- 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 however also shows the inherent limits of IHL:

- it does not prohibit the use of violence;

9 For example, civilians.

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

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

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

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

- it can not protect all those affected by an armed conflict;
- it can not distinguish according to the purpose of the conflict;
- it can not prohibit a party to overcome the enemy;
- IHL presupposes that parties to an armed conflict have rational aims.

Contribution

The law of armed conflicts is characterized by both simplicity and complexity - simplicity to the extent that its essence can be encapsulated in a few principles and set out in a few sentences, and complexity to the extent that one and the same act is governed by rules that vary depending on the context, the relevant instruments and the legal issues concerned. [...]

The law of armed conflicts - as we have stated repeatedly - is simple law: with a little common sense and a degree of clear-sightedness, anyone can grasp its basic tenets for himself without being a legal expert. To put things as simply as possible, these rules can be summed up in four precepts: do not attack non-combatants, attack combatants only by legal means, treat persons in your power humanely, and protect the victims. [...]

At the same time, the law of armed conflicts is complex since it does apply only in certain situations, those situations are not always easily definable in concrete terms and, depending on the situation, one and the same act can be lawful or unlawful, not merely unlawful but a criminal offence, or neither lawful nor unlawful! ...

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

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II. THE POSSIBILITY OF LEGAL REGULATION OF WARFARE

Introductory Text

In defending the acts of Milo in an internal armed conflict in Rome, Cicero pleaded "... *silent enim leges inter arma*."^[14] Even up to today many have questioned and many deny that law can regulate behaviour in such an exceptional, anarchic, and violent situation as armed conflict - even the more so as all internal laws prohibit internal armed conflicts and international law has outlawed international armed conflicts. How can one expect that when the individual or collective survival is at stake legal considerations will restrict human behaviour?

Armed conflicts are nevertheless still a reality, and a reality perceived by all actors as being morally different from a crime committed by one side or a punishment inflicted by the other side. 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 shows that as soon as a reality appears in a society - be it highly organized or not - laws applicable to that reality appear. Internal law - military penal and disciplinary law - has moreover never been questioned concerning its applicability to behaviour in armed conflict. All to the contrary, armed conflicts distinct from anarchic chaos cannot be imagined without a minimum of regularly respected rules, e.g., that the fighters of one side may kill those of the opposing side but not their own commanders or comrades.

In the reality of even contemporary conflicts, the expectations of belligerents, and the arguments made, including the hypocrisies adopted, by governments, rebels, politicians, diplomats, fighters, and national and international public opinion refer to standards, not only on when armed violence may be used (or, rather, that it may not be used) but also on how it may be used. At the level of judgement on behaviour (and this is what law is all about) International Humanitarian Law (IHL) is omnipresent in contemporary conflicts:^[15] in United Nations Security Council resolutions and on the banners of demonstrators, in speeches of politicians and in newspaper articles, in political pamphlets of opposition movements and in reports of non-governmental organizations, in military manuals of soldiers, and in *aide-mémoires* of diplomats. People with completely different cultural and intellectual backgrounds, emotions, and political opinions agree that in an armed conflict killing an enemy soldier on the battlefield and killing women and children because they belong to the "enemy" are not equivalent acts.^[16] Conversely, no criminal justice system confers a

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

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

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

different legal qualification upon a bank-robber who kills a security guard and a bank-robber who kills a client of the bank.

One may object that all this only proves that behaviour even in war is subject to moral argument, but not that it can be subject to legal regulations. This objection either reserves the term "law" to rules regularly applied by a centralized compulsory system of adjudication and enforcement - as in any domestic legal system; then international law, and therefore also IHL as a branch of it, is not law. Or this argument fails to understand that it is precisely during such controversial activity as waging war, where each side has strong moral arguments for its cause, that the function of law to limit the kind of arguments which may be used is essential to ensure a minimum protection to war victims. As for the reality, every humanitarian worker will confirm that when pleading the victims' cause with a belligerent, be he or she a Head of State or a soldier at a roadblock, even the most basic moral arguments encounter a vast variety of counter arguments based on the collective and individual experience, the culture, religion, political opinions, and mood of those addressed, while reference to international law singularly restricts the reserve of counter arguments and, more importantly, puts all human beings, wherever they are and from wherever they come, on the same level.

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

"War anywhere is first and foremost an institutional disaster, the breakdown of legal systems, a circumstance in which rights are secured by force. Everyone who has experienced war, particularly the wars of our times, knows that unleashed violence means the obliteration of standards of behaviour and legal systems. Humanitarian action in a war situation is therefore above all a legal approach which precedes and accompanies the actual provision of relief. Protecting victims means giving them a status, goods and the infrastructure indispensable for survival, and setting up monitoring bodies. In other words the idea is to persuade belligerents to accept an exceptional legal order - the law of war or humanitarian law - specially tailored to such situations. That is precisely why humanitarian action is inconceivable without close and permanent dialogue with the parties to the conflict."¹⁷

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

17 MAURICE Frédéric, "Humanitarian ambition", in *IARC*, Vol. 289, 1992, p. 371.

assumed an attitude of open hostility. [...] [The Melians and the Athenians] sent envoys to negotiate. [...]

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

[...]

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

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

N.B. The Athenians finally lost the war

Document No. 40, Minimum Humanitarian Standards. [Cf. B., paras. 14-16.] p. 823

SUGGESTED READING: IGNATIEFF Michael, *Warrior's Honour: Ethnic War and the Modern Conscience*, New York, Metropolitan Books, 1997, 207 pp.

III. INTERNATIONAL HUMANITARIAN LAW AND CULTURAL RELATIVISM

[See also Introductory Text and Quotations under Chapter 3. Historical Development of International Humanitarian Law. p. 121.]

Introductory Text

Up until the 1970's, International Humanitarian Law (IHL) - or at least its codified norms - has been strongly influenced by Western culture and European Powers. However, the humanitarian ideas and concepts formalised by Humanitarian Law treaties are shared by many different schools of thoughts and cultural traditions.^[18]

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

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

"[...] The modern world has placed its hopes in internationalism and therein no doubt its future lies. Now, in an international environment, man's rights can only

18 See *infra*, Chapter 3. Historical Development of International Humanitarian Law. p. 121.

be on what is universal, on ideas capable of bringing together men of all races. [...] Similarity alone can be the basis for universality and, although men are different, human nature is the same the world over.

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

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

This lead to an awareness that humanitarian principles are common to all human communities wherever they may be. When different customs, ethics and philosophies are gathered for comparison, and when they are melted down, their particularities eliminated and only what is general extracted, one is left with a pure substance which is the heritage of all mankind."^[19]

Contribution

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

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

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

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

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

prisoner is treated is generally determined by the relationship between opposing clans and other groups.

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

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

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

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

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

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. [Cf. Opinion of Judge England.] p. 1237

Case No. 148, Saudi Arabia, Use of the Red Cross Emblem by US Forces. p. 1570

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

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Chapter 2

INTERNATIONAL HUMANITARIAN LAW AS A BRANCH OF PUBLIC INTERNATIONAL LAW

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

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

Introductory Text

Public international law can be described as composed of two layers: a traditional layer consisting of the law regulating the co-ordination and co-operation between the members of the international society - essentially the States and the organizations created by States - and a new layer consisting of the constitutional and administrative law of the international community of 6,5 billion human beings. While this second layer tries to overcome the typical traditional relativity of international law, international law still retains a structure fundamentally different from that of any internal legal order, essentially because the society to which it applies and which has created it is, despite all modern tendencies, infinitely less structured and formally organized than any Nation State.

To understand International Humanitarian Law (IHL) one must start from the concepts and inherent features of the traditional layer: it was born as a law regulating belligerent inter-State relations. IHL becomes however nearly irrelevant for contemporary humanitarian problems unless understood within the second layer. Indeed, inter-State armed conflicts tend to have disappeared, except in the form of armed conflicts between the organized international society or those who (claim to) represent it and States outlawed by it - a phenomenon of the second layer.

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

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

Some have suggested - albeit more implicitly than explicitly - that IHL is different from the rest of international law, whether because they wanted to protect international law where its critics claimed to have the easiest *prima facie* case against its reality or because they wanted to protect IHL from the basic political, conceptual, or ideological controversies between States and between human beings, which inevitably have their expression in basic conceptual divergences in international law and in its ever changing rules. This suggestion, however, cannot be accepted, as it fails to recognize the inherent inter-relation between IHL and other branches of international law. IHL, distinct from humanitarian morality or the simple dictates of public conscience, can not exist except as a branch of international law, and international law must contain rules concerning armed conflict, as an unfortunately traditional form of inter-State relations. Law indeed has to provide answers to reality, it has to rule over reality; it can not simply limit itself to reflect reality. The latter, the necessarily normative character of law, the inevitable distance between law on the one hand and politics and history on the other is even more evident for IHL, given the bleak reality in the armed conflicts of our times which can not possibly be called humanitarian.

Quotation 1

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

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

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

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

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

1. Is international law law?

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

[I]t would be a great mistake to refuse to examine the relations that exist between these two poles [...] on the premise that states, those "cold monsters", without souls, never listen to the voice of "law" since they are moved only by motivations of "power" and "force". In my opinion, this premise is false. On closer examination, it is not true that, when their essential military, economic and political interests are at stake, states trifle with the Tables of the Law [...]. Their strategy is more subtle than simply transgressing the legal "commandments". It consists in preventing their legal crystallisation, or - if the pressure of public opinion makes this impossible - in wording them in terms as ambiguous as possible. By so doing, they can then interpret these legal standards as best they please, adapting them to requirements of the moment and bending them to their

contingent interests. If we thumb through the records of the last forty or fifty years, we can easily see that no state, great or small, has ever admitted to breaking the commonly accepted legal canons. (Take, for example, the ban on chemical warfare, or on weapons that cause unnecessary suffering; the ban on indiscriminate attacks on undefended towns, or, on a larger scale, on acts of genocide, and so on.) Whenever they are accused of violating these and other no less important international rules, states immediately make denials, or else they point to the exceptional circumstances which they feel legitimize their course of action; or they say that the international rules prohibit not their own but other forms of behaviour. [...]

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

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

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

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

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

Above all, the lawyer will insist, critics of international law ask and answer the wrong questions. What matters is not whether the international system has legislative, judicial or executive branches, corresponding to those we have become accustomed to seek in a domestic society; what matters is whether international law is reflected in the policies of nations and in relations between nations. The question is not whether there is an effective legislature; it is whether there is law that responds and corresponds to the changing needs of a changing society. The question is not whether there is an effective judiciary, but whether disputes are resolved in an orderly fashion in accordance with international law. Most important, the question is not whether law is enforceable or even effectively enforced; rather, whether law is observed, whether it governs or influences behavior, whether international behavior reflects stability and order. The fact is, lawyers insist, that nations have accepted important limitations on their sovereignty, that they have observed these norms and undertakings, that the result has been substantial order in international relations.

Is it Law or Politics?

The reasons why nations observe international law, in particular the emphasis I have put on cost and advantage, may only increase skepticism about the reality of the law and its influence in national policy. [...] Nations decide whether to obey law or agreements as they decide questions of national policy not involving legal

obligation - whether to recognize a new regime, or to give aid to country X - on the basis of cost and advantage to the national interest. That nations generally decide to act in accordance with law does not change the voluntary character of these decisions. Nations act in conformity with law not from any concern for law but because they consider it in their interest to do so and fear unpleasant consequences if they do not observe it. In fact, law may be largely irrelevant. Nations would probably behave about the same way if there were no law. The victim would respond to actions that adversely affect its interests and the threat of such reaction would be an effective deterrent, even if no law were involved.

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

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

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

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

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

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

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

consequences. In international society, too, the reactions to a violation - as in Korea in 1950 or at Suez in 1956 - reaffirm the law and strengthen its deterrent effect for the future.

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

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

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

The deficiencies of international law and the respects in which it differs from domestic law do not justify the conclusion that international law is not law, that it is voluntary, that its observance is "only policy." They may be relevant in judging claims for the law's success in achieving an orderly society. In many domestic societies, too, the influence of law is not always, everywhere, and in all respects certain and predominant; the special qualities of international society, different perhaps only in degree, may be especially conducive to disorder. Violations of international law, though infrequent, may have significance beyond their numbers: international society is a society of states, and states have power to commit violations that can be seriously disruptive; also, the fact that the units of international society are few may increase the relative significance of each violation. Still, violations of international law are not common enough to destroy the sense of law, of obligation to comply, of the right to ask for compliance and to react to violation. Rarely is even a single norm so widely violated as to lose its quality as law. Agreements are not violated with such frequency that nations cease to enter into them, or to expect performance or redress for violation. Colonialism apart, even political arrangements continue to thrive and to serve their purposes, although they may not run their intended course. Over-all, nations maintain their multivaried relations with rare interruptions. There is, without doubt, order in small, important things.

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

The Law's Supporters and its Critics

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

organizations for collective defense also owe their efficacy to the expectation that the undertakings will be carried out. International law supports the numerous contemporary arrangements for cooperation in the promotion of welfare, their institutions and constitutions. Finally, there is the crux of international order in law prohibiting war and other uses of force between nations.

The law works. Although there is no one to determine and adjudge the law with authoritative infallibility, there is wide agreement on the content and meaning of law and agreements, even in a world variously divided. Although there is little that is comparable to executive law enforcement in a domestic society, there are effective forces, internal and external, to induce general compliance. Nations recognize that the observance of law is in their interest and that every violation may also bring particular undesirable consequences. It is the unusual case in which policy-makers believe that the advantages of violation outweigh those of law observance, or where domestic pressures compel a government to violation even against the perceived national interest. The important violations are of political law and agreements, where basic interests of national security or independence are involved, engaging passions, prides, and prejudices, and where rational calculation of cost and advantage is less likely to occur and difficult to make. Yet, as we have seen, the most important principle of law today is commonly observed: nations have not been going to war, unilateral uses of force have been only occasional, brief, limited. Even the uncertain law against intervention, seriously breached in several instances, has undoubtedly deterred intervention in many other instances. Where political law has not deterred action it has often postponed or limited action or determined a choice among alternative actions.

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

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

Quotation 3 [A] third idea of rules or norms may be emphasized: that of prescriptive statements which exert, in varying amounts, a psychological "pressure" upon national decision-makers to comply with their substantive content. For example, the norms relating to "freedom of the seas" probably exert an effective pressure against all nation-state officials not to attempt to expropriate to their own use the Atlantic Ocean, and not to interfere with numerous foreign shipping or fishing activities on the high seas. The idea of a

rule of law as an indicator of a psychological pressure upon the person to whom it is addressed might be illustrated by a hypothetical example of one of the simplest of all possible rules of law - a "stop" sign on a street or highway. Imagine that one of these traffic signs exists in a community where every driver habitually does not bring his motor vehicle to a full "stop" at the particular sign, but rather shifts into low gear or otherwise slows down his motor vehicle when approaching the sign and then passes it. Has the traffic ordinance represented by the sign been violated? Yes, from a technical, as well as a legal, point of view. A policeman could, if he so desired, arrest any or all of the drivers in that community for failing to observe the "stop" sign. But does the violation of the "stop" sign mean that the sign is of no value in that particular community? Here the answer would have to be in the negative, for the sign functions as a kind of "pressure" upon drivers to *slow down*. If its purpose was to help to prevent traffic accidents, it may have succeeded admirably by getting motor vehicles to slow down and proceed with caution. [...] [O]ne might very well interpret many international rules relating to rights of neutrals, prisoners of war, and so forth, as "pressures" that have some influence in shaping the conduct of war, no matter how many outright violations of those rules occur. [...]

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

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

3. International Humanitarian Law in a developing international environment

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 1. 1.] p. 702

Document No. 36, ICRC, The Challenges of Contemporary Armed Conflicts. p. 789

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base [Cf. B. and D.], p. 2309

Case No. 236, US, The September 11 2001 Attacks. p. 2470

SUGGESTED READING: BUGNION François, "Le droit international humanitaire à l'épreuve des conflits de notre temps", in *IRRC*, No. 835, September 1999, 487-498 pp. BYERS Michael, "Terrorism, the Use of Force and International Law after 11 September", in *ICLQ*, Vol. 51/2, 2002, pp. 401-414. CASSESE Antonio, "Terrorism is also Disrupting Crucial Legal Categories of International Law", in *EJIL*, Vol. 12/5, 2001, pp. 993-1001. CONDORELLI Luigi & NAQVI Yasmin, "The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?", in BIANCHI Andrea (ed.), *Enforcing International Law Norms against Terrorism*, Oxford, Hart, 2004, pp. 25-37. GREENWOOD Christopher, "International Law and the 'War against Terrorism'", in *International Affairs*, Vol. 78/2, 2002, pp. 301-317. HERRMAN Irène & PALMIERI Daniel, "Les nouveaux conflits: une modernité archaïque ?", in *IRRC*, No. 849, March 2003, pp. 23-44. HOFFMAN, Michael H., "State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats", *IYHR*, Vol. 34, 2004, pp. 231-249. KING Faiza Patel & SWAAK-GOLDMAN Olivia, "The Applicability of International Humanitarian Law to the 'War against Terrorism'", in *Hague Yearbook of International Law*, Vol. 15, 2002, pp. 39-49. LAVOYER Jean-Philippe, "Should International Humanitarian Law be Reaffirmed, Clarified or Developed?", in *IYHR*, Vol. 34, 2004, pp. 35-58. MCDONALD Neil & SULLIVAN Scott, "Rational Interpretation in Irrational Times: The Third Geneva Convention and War on Terror", in *Harvard International Law Journal*, Vol. 44/1, 2003, pp. 301-316. MULINEN Frédéric de, "La nécessité de

comprendre le droit des conflits armés au 21^{ème} siècle", in *RDMDG*, Vol. 38-1/4, 1999, pp. 313-327. MURPHY Ray, "Contemporary Challenges to the Implementation of International Humanitarian Law", in *The Quarterly Journal*, Vol. 3/3, 2004, pp. 99-113. "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Excerpt of the Report Prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003-March 2004", in *IRRC*, No. 853, March 2004, pp. 213-244. NOONE Gregory P. et al., "Prisoners of War in the 21st Century: Issues in Modern Warfare", in *Naval Law Review*, Vol. 50, 2004, pp. 1-69. PFANNER Toni, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", in *IRRC*, No. 857, March 2005, pp. 149-174. REISMAN William Michael, "Assessing Claims to Revise the Laws of War", in *AJIL*, Vol. 97/1, 2003, pp. 82-90. SANDOZ Yves, "Prospects for Future Developments in International Humanitarian Law", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (ed.), *Making the Voice of Humanity Heard*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, pp. 339-355. SASSÒLI Marco, "La 'guerre contre le terrorisme', le droit international humanitaire et le statut de prisonnier de guerre", in *CYL*, Vol. 39, 2001, pp. 211-252. SASSÒLI Marco, "Use and Abuse of the Laws of War in the 'War Against Terrorism'", in *Law and Inequality: A Journal of Theory and Practice*, Vol. 22, 2004, pp. 195-221. SKERKER Michael, "Just War Criteria and the New Face of War: Human Shields, Manufactured Martyrs, and Little Boys with Stones", in *Journal of Military Ethics*, Vol. 3/2, 2004, pp. 27-39. TIGROUDJA Hélène, "Quel(s) droit(s) applicable(s) à la 'guerre au terrorisme' ?", in *AFDI*, Vol. 48, 2002, pp. 81-102. VEUTHEY Michel, "Le droit international humanitaire face à la guerre contre le terrorisme", in DOUCET Ghislaine (ed.), *Terrorisme, victimes et responsabilité pénale internationale*, Paris, Calmann-Lévy, 2003, pp. 516-529. WIPPMAN David & EVANGELISTA Matthew (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, 303 pp.

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

Case No. 32, ICRC, Disintegration of State Structures. [Cf. II. 2.] p. 767

Document No. 37, First Periodic Meeting, Chairman's Report. [Cf. II. 2.] p. 800

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. A. and C.] p. 2098

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 1. and 2.] p. 2362

SUGGESTED READING: CAIN Kenneth L., "The Rape of Dinah: Human Rights, Civil War in Liberia, and Evil Triumphant", in *Human Rights Quarterly*, Vol. 21/2, 1999, pp. 265-307. KRITSIOTIS Dino, "International Humanitarian Law and the Disintegration of States", in *IYHR*, Vol. 30, 2000, pp. 17-35. SMITH Stephen, *Somalie. La guerre perdue de l'humanitaire*, Paris, Calman-Lévy, 1993, 243 pp. THUERER Daniel, "The 'Failed State' and International Law", in *IRRC*, No. 836, December 1999, pp. 731-761. THUERER Daniel, "Der Wegfall effektiver Staatsgewalt: Der 'failed State'", in *Berichte der Deutschen Gesellschaft für Völkerrecht*, Vol. 34, Heidelberg, 1995, pp. 9-47. VAN CREVELD Martin, *The Transformation of War*, New York, Free Press, 1991, 254 pp. *Armed Conflicts and Disintegration of States: Humanitarian Challenge: 21st Round Table on Current Problems of International Humanitarian Law, 2-5 September 1996*, San Remo, International Institute of Humanitarian Law, 1996, 107 pp.

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5. International Humanitarian Law in asymmetric conflicts

Both sides consider that they cannot "win" without violating (or "reinterpreting") International Humanitarian Law.

see Quotation: Thucydides on might and right, *supra*, p. 84.

SUGGESTED READING: MÜNKLER Herfried, "The Wars of the 21st Century", in *IRRC*, No. 849, March 2003, pp. 7-22. OULD MOHAMEDOU Mohammad-Mahmoud, "Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States", Harvard Program on Humanitarian Policy and Conflict Research, <http://www.hpcr.org>. PFANNER Toni, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", in *IRRC*, No. 857, March 2005, pp. 149-174. VALASEK Tomas, "New Threats, New Rules", in *World Policy Journal*, Vol. 20/1, Spring 2003, pp. 17-24.

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

Introductory Text

International Humanitarian Law (IHL) developed at a time when the use of force was a lawful form of international relations, when States were not prohibited to wage war, when they had the right to make war (*i.e.*, when they had the *ius ad bellum*). There was no logical problem for international law to prescribe them the respect of certain rules of behaviour in war (the *ius in bello*) if they resorted to that means. Today the use of force between States is prohibited by a peremptory rule of international law^[20] (the *ius ad bellum* has changed into a *ius contra bellum*). Exceptions of this prohibition are admitted in case of individual and collective self-defence,^[21] Security Council enforcement measures,^[22] and arguably to enforce the right of peoples to self-determination^[23] (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 of IHL. All municipal laws of the world equally prohibit the use of force against (governmental) law enforcement agencies.

Although armed conflicts are prohibited, they happen, and it is today recognised that international law has to address this reality of international life not only by combating the phenomenon, but also by regulating it to

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

21 Recognized in Art. 51 of the UN Charter.

22 As foreseen in Chapter VII of the UN Charter.

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

ensure a minimum of humanity in this inhumane and illegal situation. For practical, policy, and humanitarian reasons, IHL has however 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, the respect of IHL could otherwise not be obtained, as, at least between the belligerents, it is always controversial which belligerent is resorting to force in conformity with the *ius ad bellum* and which violates the *ius contra bellum*. In addition, from a humanitarian point of view, the victims of the conflict on both sides need the same protection, and they are not necessarily responsible for the violation of the *ius ad bellum* committed by "their" party.

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

The two latin terms were born only in the last century, but Emmanuel Kant already distinguished the two ideas. In earlier times of the doctrine of just war, Grotius' *temperamenta belli* (restraints to the waging of war) were only addressed to those who fought a just war. Later, when war became a simple fact in international relations, there was no need to distinguish *ius ad bellum* and *ius in bello*. It is only with the prohibition of the use of force that the separation between the two became essential and it has been recognised in the preamble of Protocol I reading:

"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 *ius ad bellum* and *ius in bello* implies that IHL applies whenever there is *de facto* an armed conflict, however that conflict can be qualified under *ius ad bellum*, and that no *ius ad bellum* arguments may be used in interpreting IHL; it also, however, implies, for the

drafting of rules of IHL, that they may not render the *ius ad bellum* impossible to be implemented, e.g., render efficient self-defence impossible.

Some consider that with the growing institutionalization of international relations through the UN, leading to a legal monopoly of the use of force in its hands, or in a hegemonic international law, IHL would again fall into the status of *temperamenta belli*, addressed to those who fight for international legality. This would fundamentally modify the philosophy of existing IHL.

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

Case No. 38, ILC, Draft Articles on State Responsibility. [A., Arts. 21 and 25 and Commentary.] p. 805

SUGGESTED READING: BACOT Guillaume, *La doctrine de la guerre juste*, Paris, Economica, 1989, 86 pp. BUTLER William E. (ed.), *The Non-use of Force in International Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, 250 pp. CASSESE Antonio (ed.), *The Current Legal Regulation of the Use of Force*, Dordrecht, Martinus Nijhoff Publishers, 1986, 536 pp. CASSESE Antonio, "Article 51", in COT Jean-Pierre & PELLET Alain (ed.), *La Charte des Nations Unies*, 2nd edition, Brussels/Paris, Bruylant/Economica, 1991, pp. 769-794. CASSESE Antonio, *Self-Determination of Peoples: a Legal Reappraisal*, Cambridge, CUP, 1995, 393 pp. CHESTERMAN Simon, *Just War or Just Peace: Humanitarian Intervention and International*

Law, Oxford, OUP, 2001, 295 pp. DINSTEIN Yoram, *War, Aggression and Self-Defence*, 3rd edition, Cambridge, CUP, 2001, 318 pp. GARDHAM Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, CUP, 2004, 259 pp. GRAY Christine, *International Law and the Use of Force*, 2nd ed., Oxford, OUP, 2004, 334 pp.

2. The inevitable tension between the prohibition of the use of force and International Humanitarian Law

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

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

3. The complete separation between *ius ad bellum* and *ius in bello*

Preambular para. 5 of Protocol I

Quotation PUBLIC LAW II - International Law

Paragraph 53:

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

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

Paragraph 57:

The determination of what constitutes Right *in War* is the most difficult problem of the Right of Nations and International Law. It is difficult even to form a conception of such a Right, or to think of any Law in this lawless state without

falling into a contradiction. *Inter arma silent leges*. It must then be just the right to carry on War according to such principles as render it always still possible to pass out of that natural condition of states in their external relations to each other, and to enter into a condition of Right.

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

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 1.] p. 958

Case No. 58, United Kingdom and Australia, Applicability of Protocol I. p. 962

Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List. [Cf. B.] p. 1043

Case No. 163, Inter-American Commission on Human Rights, Tablada. [Cf. para. 173.] p. 1670

a) Reasons

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 1.] p. 702

Case No. 77, US Military Tribunal at Nuremberg, The Justice Trial. p. 1029

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

b) Consequences of the distinction

- aa) The equality of belligerents before International Humanitarian Law

Art. 96 (2) (c) of Protocol I

Case No. 58, United Kingdom and Australia, Applicability of Protocol I. [Cf. B.] p. 962

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

SUGGESTED READING: MEYROWITZ Henri, *Le principe de l'égalité des belligérants devant le droit de la guerre*, Paris, Pedone, 1970, 418 pp.

- bb) International Humanitarian Law applies independently of the qualification of the conflict under *ius ad bellum*

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 108, Israel, Applicability of the Convention to Occupied Territories. p. 1208

Case No. 121, Amnesty International, Breach of the Principle of Distinction. [Cf. B.] p. 1328

Case No. 134, US, US v. Noriega. [Cf. B. II. A.] p. 1399

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 26.] p. 1732

- cc) Arguments under *ius ad bellum* may not be used to interpret International Humanitarian Law

Case No. 15, The International Criminal Court. [Cf. A., Art. 31 (1) (c).] p. 608

Case No. 38, ILC, Draft Articles on State Responsibility. [Cf. A. Art. 25 and Commentary.] p. 805

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. paras. 30, 39, 43, 96, 97, and 105.] p. 896

Document No. 57, France, Accession to Protocol I. [Cf. A.] p. 958

Case No. 77, US Military Tribunal at Nuremberg, The Justice Trial. p. 1029

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* [Cf. 4 (iii).] p. 1030

Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List. [Cf. 3. (v).] p. 1043

Case No. 89, Singapore, Bataafsche Petroleum v. The War Damage Commission. p. 1071

Case No. 108, Israel, Applicability of the Convention to Occupied Territories. p. 1208

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. p. 1555

- dd) *Ius ad bellum* may not render application of International Humanitarian Law impossible
- ee) International Humanitarian Law may not render the application of *ius ad bellum*, e.g. self defence, impossible

c) Contemporary threats to the distinction

Case No. 14, Convention on the Safety of UN Personnel. p. 602

Case No. 15, The International Criminal Court. [Cf. B., C. and D.] p. 608

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 167, UN, UN Forces in Somalia. p. 1692

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. paras. 19 and 26.] p. 1732

Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers. p. 1785

- aa) New concepts of "just" (or even "humanitarian") war
- bb) "International police action": International armed conflicts turn into law enforcement actions directed by the international community, those who represent it or claim at least to represent it, against "outlaw States"

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

4. The distinction in non-international armed conflicts

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II. [*Cf.* B.] p. 964

Case No. 69, US, The Prize Cases. p. 1011

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* para. 246.] p. 1365

Case No. 163, Inter-American Commission on Human Rights, Tablada. [*Cf.* para. 174.] p. 1670

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* paras. 20 and 21.] p. 2266

- a) International law does not prohibit non-international armed conflicts; domestic law does
- b) International Humanitarian Law treats parties to a non-international armed conflict equally; it, however, cannot request domestic laws to do so

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

1. Situations of application

Introductory Text

International Humanitarian Law (IHL) applies in two very different types of situations: *international armed conflicts* and *non-international armed conflicts*.

a) International armed conflict

IHL relating to international armed conflict 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."^[24]

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

According to the *Commentary to the First Geneva Conventions of 1949*,^[25] "[t]he substitution of this much more general expression ("armed conflict") for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war". A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict"

²⁴ *Cf.* Art. 2 (1) common to the Conventions.

²⁵ See PICTET Jean S., *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952, p. 32.

makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [...] even if one of the Parties denies the existence of a state of war [...]."

The 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 [...]."^[26]

In application of a standard rule on the attribution of unlawful acts of the law of State responsibility, 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 behavior is attributable to the third State^[27] and governed by 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 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"^[28] should also be considered as international armed conflicts.

b) Non-international armed conflict

Traditionally non-international armed conflicts (or, to use an outdated terminology: *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.

In spite of its extreme importance, it should be underlined that Article 3 does not offer a clear definition of the notion of non-international armed conflict.^[29]

During the Diplomatic Conference of 1974-1977, 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

26 Cf. Art. 2 (2) common to the Conventions

27 See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Art. 8 and Commentary.] p. 805.

28 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 [...]."

29 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 [...]."

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. The definition does not apply to Article 3 common to the four Geneva Conventions.^[30] Practically, there are thus situations of non-international armed conflicts in which only Article 3 will apply, the level of organization of the dissidents groups being insufficient for Protocol II to apply.

Moreover, the Statute of the International Criminal Court provides an intermediary threshold of application. There is no longer a requirement for the conflict to take place between governmental forces and rebel forces, for the latter to control part of the territory, nor for there to be a responsible command.^[31] The conflict must however be protracted and the armed groups must be organised.

c) Other situations

IHL is not applicable in situations of **internal violence and tensions**.

This point has been clearly made in Article 1 (2) of Additional Protocol II which states: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts [...]"^[32]

Case No. 38, ILC, Draft Articles on State Responsibility. [Cf. A. Art 8 and Commentary.] p. 805

Case No. 69, US, The Prize Cases. p. 1011

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 115, 116, and 219.] p. 1365

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, paras. 67-70 and 96.] p. 1804

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., para. 601.] p. 2171

30 Cf. Art. 1 of Protocol II: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions [...] without modifying its existing conditions of application [...]"

31 See **Case No. 15**, The International Criminal Court. [A., The Statute, Art. 8 (2) (f)] p. 608.

32 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.

SUGGESTED READING: GREENWOOD Christopher, "Scope of Application of Humanitarian Law", in FLECK Dieter (ed.), *Handbook of Humanitarian Law in Armed Conflicts*, OUP, 1995, pp. 39-49. KWAKWA Edward K., *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht, Kluwer, 1992, 208 pp. SASSÒLI Marco, "The Legal Qualification of the Conflicts in the former Yugoslavia: Double Standards or New Horizons for International Humanitarian Law?", in WANG Tieya & YEE Sienho (ed.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, pp. 307-333. SCHINDLER Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", in *Collected Courses*, Vol. 163, 1979, pp. 119-163. SIOTIS Jean, *Le droit de la guerre et les conflits armés d'un caractère non international*, Paris, LGDJ, 1958, 248 pp. THAHZIB-LIE Bahia and SWAAK-GOLDMAN Olivia, "Determining the Threshold for the Application of International Humanitarian Law", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (ed.), *Making the Voice of Humanity Heard*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, pp. 239-253.

a) qualification not left to the parties to the conflict

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II. [Cf. B.] p. 964

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., para. 603.] p. 2171

b) international armed conflicts

Art. 2 common to the Conventions

Case No. 14, Convention on the Safety of UN Personnel. p. 602

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

aa) inter-state conflicts

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 108, Israel, Applicability of the Convention to Occupied Territories. p. 1208

Case No. 134, US, US v. Noriega. [Cf. B. II. A.] p. 1399.

Case No. 137, Sudan, Eritreans Fighting in Blue Nile Area. p. 1465

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 26.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. C., paras. 87-162.] p. 1804

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. A.] p. 2098

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. C. and D.] p. 2309

- old concept of war abandoned

Case No. 69, US, The Prize Cases. p. 1011

- belligerent occupation (even in the absence of armed resistance)

(See *infra*, Chapter 8, IV. Special Rules on Occupied Territories, in particular 2. The Applicability of the Rules of IHL Concerning Occupied Territories. p. 189.)

Art. 2 (2) common to the Conventions

bb) national liberation wars

Art. 1 (4) of Protocol I

- Document No. 57, France, Accession to Protocol I. [Cf. B. para. 4.] p. 958
 Case No. 58, United Kingdom and Australia, Applicability of Protocol I. p. 962
 Case No. 61, US, President Rejects Protocol I. p. 971
Case No. 139, South Africa, Sagarius and Others. p. 1507
Case No. 140, South Africa, S. v. Petane. p. 1511
 Case No. 141, South Africa, AZAPO v. Republic of South Africa. p. 1522
 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [paras. 23 and 24.] p. 1732
 Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291
 Case No. 232, The Netherlands, Public Prosecutor v. Folkerts. p. 2450
 Case No. 234, The Conflict in Western Sahara. p. 2454
Case No. 235, US, US v. Marilyn Buck. p. 2463

SUGGESTED READING: ABI-SAAB Georges, "Wars of National Liberation in the Geneva Conventions and Protocols", in *Collected Courses*, Vol. 165, 1979, pp. 353-445. KOENIG Christian, *Wars of National Liberation and Modern International Humanitarian Law. A Consideration of the Scope of Application of Article I, para. 4 of Additional Protocol I to the 1949 Geneva Conventions*, Frankfurt, Peter Lang, Europäische Hochschulschriften, Vol. 752, 1988, 209 pp.

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c) non-international armed conflicts

(See *infra*, Chapter 12. The Law of Non-International Armed Conflicts. p. 249.)

d) Acts of terrorism?

Introductory Text

Although there is no internationally recognised definition of an act of terrorism, in the context of an armed conflict, it can be considered as an act banned by IHL protecting civilians, which provokes terror among individuals, certain groups or the civilian population as a whole. Some authors have suggested that even outside of an armed conflict, an act responding to these criteria borrowed from IHL, should be qualified as terrorist. Even in the most legitimate of fights, the IHL of international and non-international armed conflicts prohibits attacks against civilians,^[33] acts or threats whose main aim is to spread terror among the civilian population^[34] and acts of "terrorism" aimed against civilians in the power of the enemy.^[35]

33 Cf. Art. 51 (2) of Protocol I and Art. 13 (2) of Protocol II.

34 *Ibid.*

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

Acts of terrorism are prohibited, whether they are committed during armed conflicts, situations of internal violence or in time of peace. These two last situations are not covered by IHL but acts of terrorism are also prohibited by internal and international criminal law.^[36] These acts can also start an international armed conflict (when committed by a state - or its agents *de jure* or *de facto* - against an other state) or a non-international armed conflict (when committed by an organised armed group fighting against a state and its governmental authorities). In this case (or when committed during a pre-existing armed conflict), acts of terrorism are, as we have seen, prohibited by IHL. In most cases they are considered as war crimes which must be universally prosecuted.^[37]

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

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 4.] p. 958

Case No. 58, United Kingdom and Australia, Applicability of Protocol I. [Reservation (d).] p. 962

Case No. 121, Amnesty International, Breach of the Principle of Distinction. p. 1328

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B. and C.] p. 2309

Case No. 220, US, Hamdan v. Rumsfeld. p. 2346

Case No. 236, US, The September 11 2001 Attacks. p. 2470

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

37 Cf. *infra* Chapter 13. X. Violations by Individuals, p. 303; Art. 147 of Convention IV; Art. 85 (3) (a) of Protocol I and Art. 8 (2) (e) (i) of the Statute of the International Criminal Court. (See **Case No. 15**, The International Criminal Court. [Cf. A.] p. 608.)

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e) Other situations

Art. 1 (2) of Protocol II

2. Personal scope of application

Introductory Text

As International Humanitarian Law (IHL) developed as law of international armed conflicts covering, in conformity with the traditional function of international law, inter-State relations, it mainly aimed at protecting "enemies" in the sense of enemy nationals. IHL therefore defines a category of "protected persons," consisting basically of enemy nationals, who enjoy its full protection.^[38] Nevertheless victims of armed conflicts who are not "protected persons" do not completely lack protection. In conformity with and under the influence of International Human Rights Law, they benefit from a growing number of protective rules, which, however, never offer the

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

full protection foreseen for "protected persons". Already the First Geneva Convention of 1864 prescribed that "[w]ounded or sick combatants, to whatever nation they may belong, shall be collected and cared for."^[39] The rules on the conduct of hostilities equally apply to all hostilities in international armed conflicts, and all victims benefit equally from them.^[40] The law of non-international armed conflict by definition protects persons against their fellow-citizens, *i.e.*, it applies equally to all persons equally affected by such a conflict. Finally, an increasing number of rules of IHL provide basic, human-rights-like guarantees to all those not benefiting from more favourable treatment under IHL.^[41] A 1999 judgement of the International Criminal Tribunal for the former Yugoslavia (ICTY) suggested adjusting the concept of "protected persons", beyond the text of the Fourth Convention, to the reality of the contemporary conflicts where allegiance could be determined more by ethnicity than by nationality. The ICTY thus renounced using the latter as a decisive criteria and replaced it with the criteria of allegiance to the enemy.^[42] It remains to be seen if this criteria can be applied in actual conflicts, not only *a posteriori* by a tribunal, but also by parties to a conflict, by victims and humanitarian actors on the ground.

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

Case No. 194, ECHR, *Bankovic and Others v. Belgium and 16 other States*. p. 2093

aa) the concept of "protected persons"

Art. 13 of Convention I; Art. 13 of Convention II; Art. 4 of Convention III; Art. 4 of Convention IV

Case No. 88, Netherlands, *In re Pilz*. p. 1069

Case No. 172, Case Study, *Armed Conflicts in the Former Yugoslavia*. [*Cf.* paras. 2, 9, and 15.] p. 1732

Case No. 173, *Former Yugoslavia, Special Agreements Between the Parties to the Conflicts*. p. 1761

Case No. 180, ICTY, *The Prosecutor v. Tadic*, [*Cf. A., Jurisdiction, para. 81; C., Appeals Chamber, Merits, paras. 163-169.*] p. 1804

Case No. 182, ICTY, *The Prosecutor v. Rajic*, Rule 61 Decision. [*Cf.* paras. 34-37.] p. 1888

Case No. 185, ICTY, *The Prosecutor v. Blaskic*. [*Cf. A., paras. 127-146.*] p. 1936

Case No. 191, Switzerland, *Military Tribunal of Division 1, Acquittal of G.* p. 2063

Case No. 195, Case Study, *Armed Conflicts in the Great Lakes Region*. [*Cf. 3.*] p. 2098

Case No. 219, US, *Trial of John Phillip Walker Lindh*. p. 2342

SUGGESTED READING: SASSÒLI Marco & OLSON Laura M., "The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?", in *IRRC*, No. 839, September 2000, pp. 733-769.

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

40 *Cf.* Art. 13 of Convention IV on the field of application of Arts. 14-26 and Arts. 49 and 50 of Protocol I.

41 *Cf., e.g.*, Art. 75 of Protocol I.

42 *See Case No. 180*, ICTY, *The Prosecutor v. Tadic*. [*C., Appeals Chamber, Merits, para. 166.*] p. 1804.

- bb) growing importance of rules deviating from the concept - persons protected by International Humanitarian Law not having "protected person" status

Case No. 101, US, US v. William L. Calley, Jr. p. 1129

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., para. 629.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. B. III., ch. 3. D. 1.] p. 2233

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

(See *infra*, Chapters 2. III. 5. c) individual - individual. p. 120 and 12. VIII. 2. All those belonging to one party. p. 268.)

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B., paras. 425-446.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. A., para. 9 and B. III., ch. 3. D. 2.] p. 2233

3. Temporal scope of application

Art. 5 of Convention I; Art. 5 of Convention III; Art. 6 of Convention IV; Art. 3 of Protocol I; Art. 2 (2) of Protocol II

Introductory Text

With the exception of its rules already applicable in peacetime,^[43] International Humanitarian Law (IHL) starts to apply as soon as an armed conflict arises, *e.g.*, as soon as the first (protected) person is affected by the conflict, the first portion of territory occupied, the first attack launched, etc.

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

The difficulty to define the end of application of IHL also results from the texts, as they use vague terms to define the end of their application, *e.g.*, "general close of military operations"^[44] for international armed conflicts and "end of the armed conflict"^[45] for non-international armed conflicts. As for occupied territories, Protocol I has extended the applicability of IHL until the termination of the occupation,^[46] while under Convention IV it ended one year after the

43 See in particular the provisions on preparatory measures in the field of implementation to be taken already in peacetime (such as dissemination of its rules) and the obligations of all States relating to armed conflicts affecting third States. (See *infra*, Chapter 13. II. Measures to be Taken in Peacetime. p. 274 and V. The obligation to ensure respect (Common Article 1). p. 283.)

44 Cf. Art. 6 (1) and (2) of Convention IV and Art. 3 (b) of Protocol I.

45 Cf. Art. 2 (2) of Protocol II.

46 Cf. Art. 3 (b) of Protocol I.

general close of military operations, except for important provisions applicable as long as the occupying power "exercises the functions of government".^[47]

What limits the inconveniences resulting from such vagueness and the grey areas appearing in practice - and is therefore very important in practice - is that IHL continues to protect persons restricted of their liberty^[48] until they are released, repatriated, or, in particular if they are refugees, re-established.^[49] This leaves, however, the regime of those who refuse to be repatriated open. Furthermore, in the law of international armed conflicts, this extension concerns only persons who had been arrested during the conflict, while only the law of non-international armed conflict applies the same to the quite frequent cases of persons arrested after the end of the conflict - but even here only if their arrest is related to the conflict and not if it is related to the post-conflictual tension.^[50]

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, paras. 67-69.] p. 1804

SUGGESTED READING: ARY Vaughn A., "Concluding Hostilities: Humanitarian Provisions in Cease-Fire Agreements", in *Military Law Review*, Vol. 148, 1995, pp. 186-273. CAMPBELL Colm, "Peace and the Laws of War: the Role of International Humanitarian Law in the Post-conflict Environment", in *IRRC*, No. 839, September 2000, pp. 627-652. DINSTEIN Yoram, "The Initiation, Suspension and Termination of War", in SCHMITT Michael N. (ed.), *International Law Across the Spectrum of Conflict*, Newport, R.I., 2000, pp. 131-159.

a) beginning of application

Case No. 236, US, The September 11 2001 Attacks. p. 2470

b) end of application

Case No. 94, India, Rev. Mons. Monteiro v. State of Goa. p. 1097

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Cf. A., para. 125.] p. 1151

Case No. 161, Iraq, The End of Occupation. p. 1664

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. p. 2098

4. Geographical scope of application

Document No. 30, The Seville Agreement. [Cf. Art. 5. 1. A) a.)] p. 750

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, paras. 68 and 69.] p. 1804

47 Cf. Art. 6 (2) of Convention IV.

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

49 Cf. Art. 5 of Convention I, Art. 5 of Convention III, Art. 6 (3) of Convention IV and Art. 3 (b) of Protocol I.

50 Cf. Art. 2 (2) of Protocol II.

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., para. 635.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. B. III., ch. 3. B.] p. 2233

5. Relations governed by International Humanitarian Law

Introductory Text

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

Case No. 93, Hungary, War Crimes Resolution. [Cf. IV.] p. 1091

a) Individual - State

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

Case No. 92, US, US v. Batchelor. p. 1087

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

- Applicability of treaties based on reciprocity, but no reciprocity in the respect of treaties

(See below, Chapter 13. IX. 2. c) applicability of the general rules on State responsibility, dd) but no reciprocity. p. 301.)

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 3.] p. 966

Case No. 137, Sudan, Eritreans Fighting in Blue Nile Area. p. 1465

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291

- ways to be bound

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

Case No. 55, Russian Federation, Succession to International Humanitarian Law Treaties. p. 955

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 3.] p. 966

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. A., paras. 124-128.] p. 1423

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291

Case No. 232, The Netherlands, Public Prosecutor v. Folkerts. p. 2450

- declarations of intention

Case No. 140, South Africa, *S. v. Petane*. p. 1511

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291

- interpretation

Case No. 114, Israel, Cases Concerning Deportation Orders. [Cf. 3. and Separate Opinion Bach.] p. 1244

Case No. 180, ICTY, *The Prosecutor v. Tadic*. [Cf. A., paras. 71-93 and C., paras. 282-304.] p. 1804

- reservations

Case No. 56, USSR, Poland, Hungary, and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III. p. 955

Case No. 65, UK, Reservations to Additional Protocol I. p. 985

Case No. 157, US, *The Schlesinger Report*. p. 1623

SUGGESTED READING: GAUDREAU Julie, "Les réserves aux Protocoles additionnels aux Conventions de Genève pour la protection des victimes de la guerre", in *IRRC*, No. 849, March 2003, pp. 143-184. PILLOUD Claude, "Reservations to the Geneva Conventions of 1949", in *IRRC*, No. 180, April 1976, pp. 107-124; No. 181, June 1976, pp. 163-187.

- denunciation

Arts. 63/62/142/158, respectively, of the four Conventions; Art. 88 of Protocol I; Art. 25 of Protocol II

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357

- amendment and revision process

Art. 97 of Protocol I; Art. 24 of Protocol II

Case No. 31, ICRC, *The Question of the Emblem*. p. 761

- role of the depositary

Arts. 57/56/136/158; Arts. 61/60/140/156; Arts. 64/63/143/159, respectively, of the four Conventions; Arts. 100-102 of Protocol I; Arts. 26-28 of Protocol II

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. p. 1303

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

c) Individual - Individual

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* [Cf. 4. (ii) and (vii).] p. 1030

Document No. 82, The Tokyo War Crimes Trial. p. 1051

Case No. 189, US, Kadic *et al.* v. Karadzic. p. 2055

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

Chapter 3

HISTORICAL DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

Introductory Text

It is commonly agreed that the birth of modern, codified International Humanitarian Law (IHL) occurred in 1864 with the adoption of the First Geneva Convention. However, it should be clearly stated that these rules (and those of the subsequent treaties) were not completely new, but derived to a large extent from customary rules and uses.

The laws of war are probably as old as war itself. Even in very ancient times, one can find very interesting - though primitive - customs and agreements containing "humanitarian" elements. It should be underlined that almost everywhere around the world and in most cultures these customs had very similar patterns and objectives.

This global phenomenon proves two things:

- a common understanding of the necessity to have some kind of regulations even during wars;
- the existence of the feeling that under certain circumstances, human beings, *friend or foe*, deserve some protection.

When looking into Universal History, one can find, as early as 3000 years BC, rules protecting certain categories of victims of armed conflicts, or regulations limiting or prohibiting the use of certain means and methods of warfare.

These ancient customs might not have been adopted for a humanitarian *purpose* but rather with a purely tactical or economical objective; their *effect* was however humanitarian. For instance (taking only two examples out of a much longer list), the *prohibition to poison wells* - very common in African traditional law and reaffirmed in modern treaties - was most probably rather made in order to permit the exploitation of conquered territories than to spare the lives of the local inhabitants. Similarly, the *prohibition to kill prisoners of war* had for main objective to guarantee the availability of future slaves, much rather than to save the lives of former combatants.

The existence of such customs, which can be found in cultures, regions, and civilizations as diverse as Asia, Africa, pre-Columbian America, and Europe is of fundamental importance. It should always be kept in mind when studying the modern rules of IHL. It indeed demonstrates that although most of the modern rules are not universal by *birth* - they have until recently been drafted and adopted mainly by European Powers, they are universal by *nature* since the principles they codify can be found in most non-European systems of thought.

In spite of their humanitarian importance, all these ancient rules and customs suffered serious weaknesses. In most cases, their applicability was limited to specific regions and very often limited to a specific war. Additionally, their implementation was under the sole responsibility of the belligerents.

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

Witness of this carnage, Henry Dunant, a businessman from Geneva was struck not so much by the violence of that fight but rather by the miserable fate of the wounded left on the battlefield. Together with the women of the surrounding villages, he tried to alleviate this suffering.

Back in Geneva, Dunant published in 1862 a short book "A Memory of Solferino"^[51] in which he vividly evoked the horrors of the battle, but also tried to find remedies to the sufferings he had witnessed. Among other proposals, Dunant invited the States "to formulate some international principle, sanctioned by a Convention inviolate in character" and giving a legal protection to the military wounded in the field.

Dunant's proposals met an enormous success all over Europe. A few months after the publication of his book, a small Committee, the ancestor of the International Committee of the Red Cross,^[52] was founded in Geneva. Its main objective was to examine the feasibility of Dunant's proposals and to identify ways to formalize them. After having consulted military and medical experts in 1863, the Geneva Committee persuaded the Swiss Government to convene a diplomatic conference.

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

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

Modern IHL was born.

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

52 See *infra*, Chapter 15. The International Committee of the Red Cross (ICRC). p. 355.

The diagram shown on p. 126 illustrates the spectacular development experienced by IHL since the adoption of the 1864 Geneva Convention. Without entering into the details of this development, mention should be made of the three main characteristics that have marked this evolution:

- a) the constant *enlargement of the categories of war victims protected* by humanitarian law (military wounded; sick and shipwrecked; prisoners of war; civilians in occupied territories; the whole civilian population), as well as by 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*, taking into account the realities of the most recent conflicts: as an 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 development:
 - the **Geneva Law**, mainly concerned with the protection of the *victims* of armed conflicts, *i.e.*, the non-combatants and those who do not take part anymore to the hostilities;
 - the **Hague Law**, whose provisions relate to limitations or prohibitions of specific *means*^[53] and *methods*^[54] of warfare.

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

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [Cf. para. 9] p. 2266

SUGGESTED READING: BEST Geoffrey, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfeld and Nicholson, 1980, 400 pp. DRAPER Gerald I.A.D, "The Development of International Humanitarian Law", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1988, pp. 67-90. GOLDSTONE Richard, "Reflections on the Development of the Law of War", in *McGill Law Journal*, Vol. 46/1, 2000, pp. 279-290. HAGGENMACHER Peter, "Just War and Regular War in Sixteenth Century Spanish Doctrine", in *IRRC*, No. 290, September-October 1992, pp. 434-445. HAGGENMACHER Peter, *Grotius et la doctrine de la guerre juste*, Paris, PUF, 1983, 682 pp. MERIBOUTE Zidane, "Humanitarian Rules and Sanctions in the Major Philosophical and Religious Traditions", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (ed.), *Making the Voice of Humanity Heard*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, pp. 365-384. PICTET Jean, "La formation du droit international humanitaire", in *IRRC*, No. 321, June 2002, pp. 321-344. SCHINDLER Dietrich, "International Humanitarian Law: Its Remarkable Development and its Persistent Violation", in *Journal of the History of International Law*, Vol. 5, 2003, pp. 165-188.

53 See *infra*, Chapter 9. III. 2. Prohibited or restricted use of weapons. p. 218.

54 See *infra*, Chapter 9. III. 3. Prohibited methods of warfare. p. 224.

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

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

[Source: Moses Leviticus XIX, 18.]

"It is not this (rather) the fact that I will choose? To open the snares of wickedness, to undo the bands of the yoke, and to let the oppressed go free, and that ye should break asunder every yoke? It is not to distribute thy bread to the hungry, and that thou bring the afflicted poor into thy house? When thou seest the naked, that thou clothe him: and that thou hide not thyself from the own flesh?"

[Source: Isaiah, LVIII, 6-7.]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

"When you fight for the glory of God, behave like men, do not run away, nor let the blood of women or children and old people stain your victory. Do not destroy palm trees, do not burn houses or fields of wheat, never cut down fruit trees and kill cattle only when you need to eat it. When you sign a treaty, make sure you respect its clauses. As you advance, you will meet men of faith living in monasteries and who serve God through prayer; leave them alone, do not kill them and do not destroy their monasteries ..."

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

Development of International Humanitarian Law

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

Document No. 1, The Hague Regulations. p. 517

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

1925	Geneva Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare.
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Document No. 2, The 1925 Geneva Chemical Weapons Protocol. p. 524

1929	First Geneva Convention on prisoners of war
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Document No. 81, US Military Tribunal at Nuremberg, US v. Wilhelm von Leeb *et al.* p. 1048
Case No. 90, US, Extradition of Demjanjuk. p. 1078
Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf. A., Jurisdiction, para. 97.*] p. 1804

Second World War

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

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 2. 2.] p. 966

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

Document No. 3, Conventions on the Protection of Cultural Property. p. 525

Decolonisation, guerilla wars

1977 Protocols Additional to the Geneva Conventions

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. para. 75] p. 896

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 2. 3.] p. 966

Case No. 207, Colombia, Constitutional Conformity of Protocol II. p. 2266

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

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

Protocol II: applicable to non-international armed conflicts

- Contents: - Extension and more precise formulation of the fundamental guarantees protecting all those who do not or no longer actively participate in hostilities
- Protection of the civilian population against the effects of hostilities
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Document No. 57, France, Accession to Protocol I. p. 958

Case No. 58, United Kingdom and Australia, Applicability of Protocol I. p. 962

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II. p. 964

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 140, South Africa, S. v. Petane. p. 1511

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

Document No. 4, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Geneva, October 10, 1980. p. 540

Document No. 5, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention). p. 545

Document No. 6, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention). p. 545

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

Document No. 13, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993. p. 592

"Ethnic cleansing" in the Former Yugoslavia and genocide in Rwanda

1993/1994 Establishment of International Criminal Tribunals for the Former Yugoslavia (in The Hague) and Rwanda (in Arusha)

Case No. 179, UN, Statute of the ICTY. p. 1791

Case No. 196, UN, Statute of the ICTR. p. 2154

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

Document No. 7, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), October 13, 1995. p. 546

Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons. p. 978

- New Protocol II on Anti-Personnel Land Mines

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3 1996 (Protocol II to the 1980 Convention). p. 547

1997 Ottawa Convention Banning Anti-Personnel Land Mines

Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560

1998 Adoption in Rome of the Statute of the International Criminal Court

Case No. 15, The International Criminal Court. p. 608

1999 Protocol II to the Convention on the Protection of Cultural Property

Document No. 3, Conventions on the Protection of Cultural Property. p. 525

2000 Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflicts (amending article 38 of the Convention)

Document No. 16, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000. p. 636

2001 Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts

Document No. 9, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts. p. 559

2002 Entry into force of the Statute of the International Criminal Court, on July 1 2002

Case No. 15, The International Criminal Court. p. 608

2003 Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), 28 November 2003

Document No. 11, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), November 28, 2003. p. 571

2005 Publication of the ICRC Study on Customary International Humanitarian Law

Case No. 29, ICRC, Customary International Humanitarian Law. p. 730

Chapter 4

SOURCES OF CONTEMPORARY INTERNATIONAL HUMANITARIAN LAW

I. TREATIES

(For a more complete list of International Humanitarian Law treaties and reference to Cases and Documents referring specifically to each treaty, *see supra*, Chapter 3. Historical Development of international Humanitarian law. p. 121. The text of International Humanitarian Law treaties and the current status of participation in those treaties are also available on the ICRC web-site at <http://www.icrc.org>)

Introductory Text

Historically, rules of International Humanitarian Law (IHL) (in particular on the treatment and exchange of prisoners and wounded) have since long been laid down in bilateral treaties. The systematic codification and progressive development of this branch in general multilateral treaties also started relatively early compared with other branches of international law - in the midst of the 19th century. Most often a new set of treaties supplemented or replaced with more details earlier ones after major wars, taking into account new technological or military developments. Treaties of IHL have therefore been accused of being "one war behind reality." This is however true for all law. Only rarely has it been possible to regulate or even to outlaw a new means or method of warfare before it has been applied.^[55]

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

These treaties have the great advantage of putting their rules relatively beyond doubt and controversy, "in black and white," ready to be applied by a soldier without needing first to make a doctoral research on practice. They furthermore legitimize their rules for the majority of "new States" which were

55 The rare examples are the 1868 St. Petersburg Declaration Renouncing the Use, in Time of War, of Certain Explosive Projectiles Under 400 Grammes Weight and the 1995 Protocol IV on Blinding Laser Weapons to the 1980 UN Weapons Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons. (*see infra*, Document No. 7. p. 546.)

able to influence them in the elaboration process and which can more easily accept to be bound by them in their frequently voluntarist approach.

The disadvantages of these treaties, as of all treaty law, are that they are technically unable to have a general effect - automatically to bind all States. Fortunately most of the treaties of IHL count today among the most universally accepted treaties and only few States are not bound.^[56] This process of acceptance in the forms of treaty law takes however generally decades - after decades of "*travaux préparatoires*." This is one of the reasons that the 1977 Additional Protocols, which are so crucial for the protection of victims of contemporary armed conflicts, are still not binding for nearly 40 States - among them not astonishingly some major powers frequently involved in armed conflicts.

The traditional process of drafting new international treaties, which is based on the rule of consensus between nearly 200 States, ends up conferring a "triple victory" on those who have been described as "digging the grave of international humanitarian law", those who did not want better protection to exist in a given domain. "They slow the process, they water down the text, and then do not even ratify the treaty once adopted"^[57]. They thus leave the States Parties who had desired a revision of the law with a text which falls short of their original wishes. To avoid this unsatisfactory state of affairs, some States that genuinely want an improvement have resorted to what is referred to as the "Ottawa procedure" because it was applied for the first time during the debate on the Ottawa Convention on the prohibition of the use, stockpiling, production and transfer of anti-personnel mines and on their destruction of 18 September 1997. Only those States that wished to achieve the result indicated in the title of that treaty were involved in negotiating it. Its opponents were then free to agree to the standards that were set by that method or not.

However important the treaty rules of IHL may be - even if they constitute obligations *erga omnes*, belong to *ius cogens*, and if their respect is not subject to reciprocity - as treaty law they are only binding on States Parties to those treaties and, as far as international armed conflicts are concerned, only in their relation with other States Parties to those treaties.^[58] The general law of treaties^[59] governs the conclusion, entry into force, reservations, application, interpretation, amendment, modification of IHL treaties,^[60] and even their denunciation, which, however, only takes effect after the end of an armed conflict in which the denouncing State is involved.^[61] The main

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

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

58 See *supra*, Chapter 2 III. 5. b), State - State: International Humanitarian Law in the law of treaties, p. 118. Customary law, including the numerous rules of the International Humanitarian Law treaties which reflect customary law or have grown into customary law, is obviously binding on all States in relation to all States.

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

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

61 Cf. Arts. 63/62/142/158 respectively of the four Geneva Conventions, Art. 99 of Protocol I, and Art. 25 of Protocol II. In practice there has never been such a denunciation. The aforementioned articles of the Geneva Conventions explicitly refer to the Martens clause (See *infra* Chapter 4. III. 1. The Martens Clause. p. 141.) to clarify the legal situation after such a denunciation has become effective.

exception to the general rules of the law of treaties for IHL treaties is provided for by that law of treaties itself: Once an IHL treaty has become binding for a State, even a substantial breach of its provisions by another State - including by its enemy in an international armed conflict - does not permit the termination or suspension of the operation of that treaty as a consequence of that breach.^{62]}

1. Hague Conventions of 1907

[available on <http://www.icrc.org/ihl>]

Document No. 1, The Hague Regulations. p. 517

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 2. 2.] p. 966

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. [Cf. 8.] p. 2291

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory [Cf. A. para. 89.]. p. 1151

SUGGESTED READING: SCOTT James Brown, *The Hague Peace Conferences of 1899 and 1907*, Baltimore, The Johns Hopkins Press, 1909, 2 Vol.

2. Four Geneva Conventions of 1949

[available on <http://www.icrc.org/ihl>]

SUGGESTED READING: PICTET Jean (ed.), *The Geneva Conventions of 12 August 1949: Commentary*, Geneva ICRC, 4 Vol.: Vol. I, *Geneva Convention for the Amelioration of the Condition of the Wounded an Sick in Armed Forces in the Field*, 1952, 466 pp.; Vol. II, *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 1960, 320 pp.; Vol. III, *Geneva Convention Relative to the Treatment of Prisoners of War*, 1960, 764 pp.; Vol. IV, *Geneva Convention for the Protection of Civilian Persons in Time of War*, 1958, 660 pp. [See Commentaries online: <http://www.icrc.org/ihl>]. SANDOZ Yves, "Le demi-siècle des Conventions de Genève", in *IRRC*, No. 834, 1999, pp. 246-263.

3. Two Additional Protocols of 1977

[available on <http://www.icrc.org/ihl>]

SUGGESTED READING: BOTHE Michael, PARTSCH Karl J., SOLF Waldemar A., with the collaboration of EATON Martin, *New Rules for Victims of Armed Conflicts: Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, The Hague, Martinus Nijhoff Publishers, 1982, 746 pp. KOSIRNIK René, "The 1977 Protocols: a Landmark in the Development of International Humanitarian Law", in *IRRC*, No. 320, September-October 1997, pp. 483-505. LEVIE Howard S., *Protection of War Victims: Protocol I to the 1949 Geneva Conventions*, New York, Oceana Publications, 2 Vol., 1979-1981. LEVIE Howard S. (ed.), *The Law of Non-International Armed Conflict: Protocol II to the 1949 Geneva Conventions*, Dordrecht, Martinus Nijhoff Publishers, 1987, 635 pp. SANDOZ Yves, SWINARSKI Christophe & ZIMMERMANN Bruno

⁶² Cf. Art. 60 (5) of the Vienna Convention on the Law of Treaties (See *infra*, Chapter 13. IX. 2. c) applicability of the general rules on State responsibility. p. 301, also for the distinct question of the prohibition of reprisals.)

(ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, Dordrecht, ICRC, Martinus Nijhoff Publishers, 1987, 1625 pp. [See Commentaries online: <http://www.icrc.org/ihl>]. JUNOD Sylvie S., "Additional Protocol II: History and Scope", in *American University Law Review*, Vol. 33/1, 1983, pp. 29-40.

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

II. CUSTOMARY LAW

Introductory Text

Those who follow a traditional theory of customary law and consider it to stem from the actual behaviour of States in conformity with an alleged norm, face particular difficulties in the field of International Humanitarian Law (IHL). First, for most rules this approach would limit practice to that of belligerents, *i.e.*, a few subjects whose practice it is difficult to qualify as "general" and even more as "accepted as law."⁶³ Second, the actual practice of belligerents is difficult to identify, particularly as it often consists of omissions. There are also additional difficulties, *e.g.*, war propaganda manipulates truth and secrecy makes it impossible to know which objectives were targeted and whether their destruction was deliberate. Finally, States are responsible for the behaviour of individual soldiers even if the latter did not act in conformity with their instructions, but this does not imply that such behaviour is also State Practice constitutive of customary law. It is therefore particularly difficult to determine which acts of soldiers count as State practice.

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

To identify "general" practice, statements of third States on the behaviour of belligerents and on a claimed norm in diplomatic fora have to be considered similarly. Military manuals are even more important, because they contain instructions by States restraining their soldiers' actions, which are somehow "statements against interest." Too few States, generally Western States, have however sophisticated manuals available to the public to consider their contents as evidence for "general" practice in the contemporary international community. In addition, some of them are claimed to reflect policy rather than law.

For all these reasons particular consideration has to be given in the field of IHL to treaties as a source of customary international law - in particular to the

⁶³ This is however the definition of custom in Art. 38 (1) (b) of the Statute of the International Court of Justice.

general multilateral codification conventions and the process leading to their elaboration and acceptance. Taking an overall view of all practice it may, *e.g.*, be found that a rule of the two 1977 Additional Protocols corresponds today to customary law binding on all States and belligerents, either because it codified (*stricto sensu*) previously existing general international law,⁶⁴ because it translated a previously existing practice into a rule, because it combined, interpreted, or specified existing principles or rules,⁶⁵ because it concluded the development of a rule of customary international law or finally because it was a catalyst for the creation of a rule of customary IHL through subsequent practice and multiple consent of States to be bound by the treaty. It is therefore uncontroversial that most, but clearly not all rules of the two 1977 Additional Protocols today provide a formulation for parallel rules of customary international law. Even persistent objectors could not escape from *ius cogens* obligations, thus from most of the IHL obligations.

Although IHL is a branch widely codified in widely accepted multilateral conventions, customary rules remain important to protect victims on issues not covered by treaties, when non-parties to a treaty are involved in a conflict, where reservations have been made against 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 comprehensive study recently completed by the International Committee of the Red Cross (See **Case No. 29**, ICRC, Customary International Humanitarian Law. p. 730) clearly demonstrates that the great majority of the rules of the Geneva Conventions and the Additional Protocols have now acquired a customary nature. The study also leads to the conclusion that most of the rules on the conduct of hostilities - initially designed to apply solely to international armed conflicts - are also applicable as customary rules in non-international conflicts, thus considerably expanding the law applicable in those situations.

Given the time consuming nature and other difficulties of treaty-making in an international society with more than 190 members and the rapidly evolving needs of war victims for protection against new technological and other inhumane phenomena, the importance of custom - redefined or not - may even increase in this field in the future.

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

64 *Cf.*, *e.g.*, Art. 48 of Protocol I.

65 *Cf.*, *e.g.*, Art. 57 (2) (a) (iii) of Protocol I.

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

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

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

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

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

Case No. 29, ICRC, Customary International Humanitarian Law. p. 730

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. para. 66, 82.] p. 896

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. p. 966

Case No. 61, US, President Rejects Protocol I. p. 971

Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List. [Cf. 3. (ii)]. p. 1043

Document No. 106, ICRC Appeals on the Near East. p. 1145

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237

Case No. 114, Israel, Cases Concerning Deportation Orders. [Cf. 4. to 7.] p. 1244

Case No. 130, ICJ, Nicaragua v. US. [Cf. para. 186.] p. 1365

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 156-165.] p. 1467

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 140, South Africa, S. v. Petane. p. 1511

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, para. 99.] p. 1804

Case No. 184, ICTY, The Prosecutor v. Kupreskic *et al*. [Cf. paras. 527-534 and 540.] p. 1911

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [Cf. para. 6-10.] p. 2266

SUGGESTED READING: GREENWOOD Christopher, "Customary Law Status of the 1977 Additional Protocols", in DELISSEN Astrid J.-M. & TANJA Gerard J. (ed.), *Humanitarian Law of Armed Conflicts, Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 119-126. HENCKAERTS Jean-Marie & DOSWALD-BECK Louise, *Customary International Humanitarian Law*, Cambridge/Geneva, CUP/ICRC, 2005, 3 Vol., 5032 pp. HENCKAERTS Jean-Marie, "Study on Customary Rules of International Humanitarian Law: Purpose, Coverage and Methodology", in *IRRC*, No. 835, September 1999, pp. 660-668. HENCKAERTS Jean-Marie, "International Humanitarian Law as Customary International Law", in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 186-193. HENCKAERTS Jean-Marie, "Importance actuelle du droit coutumier", in TAVERNIER Paul & BURGORGUE-LARSEN Laurence, *Un siècle de droit international humanitaire*, Bruxelles, Bruylant, 2001, pp. 21-28. HENCKAERTS Jean-Marie, "Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict", in *IRRC*, No. 857, March 2005, pp. 175-212. MERON Theodor, *Human Rights and Humanitarian Norms as Customary Law*, Oxford, Clarendon Press, 1989, 263 pp. MERON Theodor, "The Continuing Role of Custom in the Formation of International Humanitarian Law", in *AJIL*, Vol. 90/2, 1996, pp. 238-249. SASSÖLI Marco, *Bedeutung einer Kodifikation für das allgemeine Völkerrecht, mit besonderer Betrachtung der Regeln zum Schutz der Zivilbevölkerung vor den Auswirkungen von Feindseligkeiten*, Basel, Frankfurt am Main, Helbing & Lichtenhahn, 1990, 590 pp. VALE MAJERUS Isabel, *De quel droit? Le droit international humanitaire et les dommages collatéraux*, Paris, Le Serpent à Plumes, 2002, 229 pp.

FURTHER READING: BELLO Emmanuel G., *African Customary Humanitarian Law*, Geneva, ICRC, 1980, 158 pp. BRUDERLEIN Claude, "Customs in International Humanitarian Law", in *IRRC*, No. 285, November-December 1991, pp. 579-595. CASSESE Antonio, "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts" in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318. HOFFMANN Michael H., "State Practice, the Customary Law of War and Terrorism: Adapting Old Rules to Meet New Threats", in *IYHR*, Vol. 34, 2004, pp. 231-249.

1. Sources of Customary International Humanitarian Law

2. International Humanitarian Law Treaties and Customary International Humanitarian Law

Quotation For the contention that a treaty becomes binding upon all nations when a great majority of the world has expressly accepted it would suggest that a certain point is reached at which the will of non-parties to the treaty is overborne by the expression of a standard or an obligation to which the majority of States subscribe. The untenability of that view is quite clear in the case of treaties establishing the basic law of an international organization or laying down detailed rules concerning such matters as copyrights or customs duties or international commercial arbitration [...] Treaties of an essentially humanitarian character might be thought to be distinguishable by reason of their laying down restraints on conduct that would otherwise be anarchical. In so far as they are directed to the protection of human rights, rather than to the interests of States, they have a wider claim to application than treaties concerned, for example, with the purely political and economic interests of States. The passage of humanitarian treaties into customary international law might further be justified on the ground that each new wave of such treaties builds upon the past conventions, so that each detailed rule of

the Geneva Conventions for the Protection of War Victims is nothing more than an implementation of a more general standard already laid down in an earlier convention, such as the Regulations annexed to Convention No. IV of The Hague. These observations, however, are directed to a distinction which *might* be made but which is not yet reflected in State practice or in other sources of the positive law.

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

Case No. 60, Sweden, Report of the Swedish International Humanitarian Law Committee. [Cf. 3. 2. 2.] p. 966

Document No. 81, US Military Tribunal at Nuremberg, US v. Wilhelm von Leeb *et al.* p. 1048

Document No. 106, ICRC Appeal on the Near East. p. 1145

Case No. 110, Israel, Ayub v. Minister of Defence. p. 1218

Case No. 114, Israel, Cases Concerning Deportation Orders. [Cf. 4.-7.] p. 1244

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 174-178, 181, 185 and 218.] p. 1365

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. A., paras. 29-32, 56-62.] p. 1423

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 140, South Africa, S. v. Petane. p. 1511

Case No. 163, Inter-American Commission on Human Rights, Tablada. [Cf. para. 177.] p. 1670

Case No. 179, UN, Statute of the ICTY. [Cf. A., Resolution 827, para. 2.] p. 1791

Case No. 188, ICTY, The Prosecutor v. Strugar. [Cf. A.] p. 2020

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. paras. 608-610.] p. 2171

SUGGESTED READING: CASSESE Antonio, "The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict and Customary International Law", in *UCLA Pacific Basin Law Journal*, Vol. 3/1-2, 1984, pp. 55-118. GREENWOOD Christopher, "Customary Law Status of the 1977 Geneva Protocols", in *Humanitarian Law of Armed Conflict – Challenges Ahead, Essays in Honour of Frits Kalshoven*, Dordrecht, Martinus Nijhoff Publishers, 1991, pp. 93-114. MERON Theodor, "The Geneva Conventions as Customary Law", in *AJIL*, Vol. 81/2, 1987, pp. 348-370.

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

III. FUNDAMENTAL PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

Introductory Text

"General principles of law recognized by civilized nations"^[66] may first be understood as those principles of domestic law which are common to all

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

legal orders. Given the great number of States and the great variety of their legal systems, only very few such principles can be formulated which are precise enough to be operational. Such principles, e.g., good faith and proportionality, which have also become customary law and have been codified, however also apply in armed conflict and can be useful in supplementing and implementing International Humanitarian Law (IHL).

Other principles may be seen as intrinsic to the idea of law and based on logic rather than a legal rule. Thus if it is prohibited to attack civilians, it is not law but logic which prescribes that an attack directed at a military objective has to be stopped when it becomes apparent that the target is (exclusively) civilian.^[67]

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**,^[68] and the **prohibition of causing unnecessary suffering**. Those principles, however, are not based on a separate source of international law, but on treaties, custom, or general principles of law. On the one hand, they can and must often be derived from the existing rules, expressing those rules' substance and meaning. On the other hand, they inspire existing rules, support those rules, make those rules understandable, and have to be taken into account when interpreting those rules.

An express recognition of the existence and particularly important examples of the general principles of IHL are the "elementary considerations of humanity"^[69] and the so called "Martens clause" which prescribes that in cases not covered by treaties (and traditional customary international law) "civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".^[70] It is recognized that this clause itself belongs to customary international law. It is very important that both clauses underline that not everything that is not prohibited is lawful in war and that answers to questions in the field of the protection of war victims cannot be found exclusively through a purely positivist approach; it is, however, not easy to find precise answers to real problems arising on the battlefield through these clauses. In a world with extremely varied cultural and religious traditions, with diverging interests, and peoples with different historical experiences, those clauses can generally no more than indicate in which direction a solution has to be found.

67 This has now been codified in Art. 57 (2) (b) of Protocol I.

68 As a limit to military action, codified, e.g., in Art. 57 (3) of Protocol I.

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

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

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

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

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

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

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

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

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

Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. [Cf. Preamble para. 10.] p. 560

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. para. 78.] p. 896

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 215, 218 and Indiv. Op. Ago, para. 6.] p. 1365

Case No. 184, ICTY, The Prosecutor v. Kupreskic et al. [Cf. paras. 525-527.] p. 1911

SUGGESTED READING: ABI-SAAB Rosemary, "The 'General Principles' of Humanitarian Law According to the International Court of Justice", in *IRRC*, No. 259, July 1987, pp. 367-375. DUPUY Pierre-Marie, "Les 'considérations élémentaires d'humanité' dans la jurisprudence de la Cour internationale de Justice", in *Mélanges en l'honneur de Nicolas Valticos*, Paris, Pedone, 1999, pp. 117-130. GREIG D.W., "The Underlying Principles of International Humanitarian Law", in

Australian Yearbook of International Law, Vol. 9, 1985, pp. 46-85. MERON Theodor, "The Martens Clause, Principles of Humanity and Dictates of Public Conscience", in *AJIL*, Vol. 94/1, 2000, pp. 78-89. MERON Theodor, "The Humanization of Humanitarian Law", in *AJIL*, Vol. 94/2, 2000, pp. 239-278. PICTET Jean, *Development and Principles of International Humanitarian Law*, Geneva, Dordrecht, Henry-Dunant Institute, Martinus Nijhoff Publishers, 1985, 99 pp.

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1. The Martens Clause

Arts. 63/62/142/158 of the four Conventions

Art. 1 (2) of Protocol I

Document No. 40, Minimum Humanitarian Standards. [*Cf.* B., paras. 84 and 85.] p. 823

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* para. 218.] p. 1365

Case No. 184, ICTY, The Prosecutor v. Kupreskic et al. [*Cf.* paras. 525-526.] p. 1911

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* para. 22.] p. 2266

SUGGESTED READING: CASSESE Antonio, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, in *EJIL*, Vol. 11, No. 1, 2000, pp. 187-216. PUSTOGAROV Vladimir V., "The Martens Clause in International Law", in *Journal of the History of International Law*, Vol. 1/2, 1999, pp. 125-135. TICEHURST Rupert, "The Martens Clause and the Laws of Armed Conflict", in *IRRC*, No. 317, March-April 1997, pp. 125-134. VEUTHEY Michel, "Public Conscience in International Humanitarian Law Today", in FISCHER Horst, FROISSART Ulrike, HEINTSCHEL VON HEINEGG Wolff, RAAP Christian (ed.), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 611-642.

2. Principles of International Humanitarian Law

a) humanity

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* para. 242.] p. 1365

SUGGESTED READING: COUPLAND Robin, "Humanity: What is it and how does it influence International Law?", in *IRRC*, No. 844, December 2001, pp. 969-990. SLIM Hugo, "Sharing a Universal Ethic: the Principle of Humanity in War", in *International Journal of Human Rights*, Vol. 2/4, 1998, pp. 28-48. MERON Theodor, "The Humanization of International Humanitarian Law", in *AJIL*, Vol. 94/2, 2000, pp. 239-278.

b) necessity

(See *infra*, Chapter 9. II. 3: Definition of Military Objectives. p. 201.)

SUGGESTED READING: PROKOSCH Éric, "Arguments for Restricting Cluster Weapons: Humanitarian Protection Versus 'Military Necessity'", in *IRRC*, No. 299, March-April 1994, pp. 183-193. VENTURINI Gabriella, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano, Giuffrè, 1988, 193 pp.

c) proportionality

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* B., paras. 36-85.] p. 1151

(See *also infra*, Chapter 9. II. 5. c) dd) principle of proportionality. p. 207.)

d) distinction

(See *infra*, Chapter 5. The Fundamental Distinction between Civilians and Combatants. p. 143.)

e) prohibition of causing unnecessary suffering

(See *infra*, Chapter 9. III. 1. The basic rule: Article 35 of Protocol I. p. 218.)

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

(See *supra*, Chapter 2. II. Fundamental Distinction between *Ius ad Bellum* (Legality of the Use of Force) and *Ius in Bello* (Humanitarian Rules to be Respected in Warfare). p. 102.)

Chapter 5

THE FUNDAMENTAL DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

Introductory Text

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

The dividing line between the two categories developed over time between the conflicting interests of the mighty, well equipped forces wishing a strict definition and a clear identification of combatants on the one hand, and the weaker forces wanting to retain the option to use flexibly additional human resources enabling the continuation of hostilities even when their territory is under control of the enemy, which is practically impossible if combatants have to identify themselves permanently, on the other hand. In non-international armed conflicts IHL does not even refer explicitly to the concept of combatants, mainly because States do not want to confer on anyone the right to fight against governmental forces. Nevertheless, in such conflicts too, a distinction must exist if IHL is to be respected: civilians can and will only be respected if enemy combatants can expect those looking like civilians not to attack them.

Today, the axiom itself is challenged by the reality in the field. If the aim of the conflict is "ethnic cleansing", it is logical and necessary to attack civilians and not combatants. If some fighters no longer wish to achieve victory, but to earn their living - by looting or controlling some economic sectors - it is logical for them to attack defenceless civilians instead of combatants. Finally, if the aim of a party is to change the enemy country's regime, without

defeating its army or occupying its territory this party will possibly be tempted to achieve this objective by pushing the enemy civilian population to overthrow its own government. If this pressure is based on attacks or is provoking starvation it constitutes a violation of IHL. Anyway, the efficiency of such methods is doubtful. Indeed, experience shows, that confronted with such constraints, the population tends to support its government rather than foment rebellion.

DEFINITION AND CHARACTERISTICS OF CIVILIANS AND COMBATANTS

CIVILIANS

= all persons other than combatants

COMBATANTS

= members of armed forces *lato sensu*
 (See for a definition *infra*, Chapter 6. I.
 Who is a Combatant? p. 149.)

I. ACTIVITIES

Do not take a direct part in hostilities

Do take a direct part in hostilities

II. RIGHTS

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

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

Case No. 83, US, *Ex Parte Quirin et al.* p. 1053

Case No. 121, Amnesty International, Breach of the Principle of Distinction. p. 1328

Case No. 157, US, The Schlesinger Report, p. 1623

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. p. 2309

III. PUNISHABLE

May be punished
for their mere participation in hostilities

May not be punished
for their mere participation in hostilities

(See *infra* Chapter 6. III. Treatment
of Prisoners of War. p. 154.)

Case No. 14, Convention on the Safety of UN Personnel. p. 602

Case No. 83, US, *Ex Parte Quirin et al.* p. 1053

Case No. 104, Nigeria, *Pius Nwaoga v. The State.* p. 1139

Case No. 140, South Africa, *S. v. Petane.* p. 1511

Case No. 217, US, Military Commission Instructions. [Section 6.3.] p. 2335

IV. PROTECTION

Are protected because they do not
participate:

- as civilians in the hands of the enemy

(See *infra*, Chapter 8. II. Protection of Civilians
against Arbitrary Treatment. p. 175, and IV.
Special Rules on Occupied Territories. p. 186.)

- against attacks and effects of hostilities

(See *infra*, Chapter 9. II. The Protection of the Civilian
Population against the Effects of Hostilities. p. 199.)

Are protected when they do no longer
participate:

- if they have fallen into the power of
the enemy

(See *infra*, Chapter 6. III. Treatment of Prisoners
of War, p. 154.)

- if wounded, sick or shipwrecked

(See *infra*, Chapter 7. Protection of the wounded,
sick and shipwrecked. p. 161.)

- if parachuting out of an aircraft in
distress (*Cf.* Art. 42 of Protocol I.)

- are protected against some means and
methods of warfare even while fighting

(See *infra*, Chapter 9. III. Means and Methods
of Warfare. p. 218.)

Relativity of the difference: everyone in the hand of the enemy is protected

Case No. 101, US, *US v. William L. Calley, Jr.* p. 1129

V. THE FUNDAMENTAL OBLIGATION OF COMBATANTS TO DISTINGUISH THEMSELVES FROM THE CIVILIAN POPULATION

Art. 44 (3) of Protocol I [Rule 106 of OIHL]

Document No. 57, France, Accession to Protocol I. [*Cf.* B., para. 8.] p. 958

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 104, Nigeria, Pius Nwaoga v. The State. p. 1139

Document No. 106, ICRC Appeals on the Near East. [*Cf.* B.], p. 1145

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VI. RELATIVITY OF THE DISTINCTION IN MODERN CONFLICTS

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1. Guerrilla warfare

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 35.] p. 1732

2. Wars of extermination

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Conventions.

[*Cf.* G. II. 2.] p. 1303

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. A. and 3. C.] p. 2098

3. Situations where structures of authority have disintegrated

Case No. 32, ICRC, Disintegration of State Structures. p. 767

Document No. 37, First Periodic Meeting, Chairman's Report. [*Cf.* II. 2.] p. 800

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 3. A. and C.] p. 2098

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 1. and 2.] p. 2362

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4. Conflicts aiming at the overthrowing of a regime or a government

5. The "War on terror" and in particular the status of "unlawful combatants"

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

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tional Humanitarian Law to the 'War on Terrorism', in *Hague Yearbook of International Law*, 2003, Vol. 15, 2002, pp. 39-49. MCDONALD Neil & SULLIVAN Scott, "Rational Interpretation in Irrational Times: The Third Geneva Convention and War on Terror", in *Harvard International Law Journal*, Vol. 44/1, 2003, pp. 301-316. LIETZAU William, "Combating Terrorism: The Consequences of Moving from Law Enforcement to War", in WIPPMAN David & EVANGELISTA Matthew (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 31-51. NEUMAN Gerald L., "Humanitarian Law and Counterterrorist Force", in *EJIL*, Vol. 14/2, April 2003, pp. 283-298. PARKER Tom, "The Proportionality Principle in the War on Terror", in *Hague Yearbook of International Law*, Vol. 15, 2002, pp. 3-15. PFANNER Toni, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action", in *IRRC*, No. 857, March 2005, pp. 149-174. ROBERTS Adam, "Counter-terrorism, Armed Force and the Laws of War", in *Survival*, Vol. 44/1, 2002, pp. 7-32. ROBERTS Adam, "The Laws of War in the War on Terror", in *IYHR*, Vol. 32, 2002, pp. 193-245. RUBIN Alfred P., "Applying the Geneva Conventions: Military Commissions, Armed Conflict, and Al-Qaeda", in *The Fletcher Forum of World Affairs*, Vol. 26/1, 2002, pp. 79-81. SASSÒLI Marco, "La 'guerre contre le terrorisme', le droit international humanitaire et le statut de prisonnier de guerre", in *CYIL*, Vol. 39, 2001, pp. 211-252. SASSÒLI Marco, "Use and Abuse of the Laws of War in the 'War Against Terrorism'", in *Law and Inequality: A Journal of Theory and Practice*, Vol. 22, 2004, pp. 195-221. TIGROUDJA H  l  ne, "Quel(s) droit(s) applicable(s)    la 'guerre au terrorisme'?", in *AFDI*, Vol. 48, 2002, pp. 81-102. VEUTHEY Michel, "Le droit international humanitaire face    la guerre contre le terrorisme", in DOUCET Ghislaine (ed.), *Terrorisme, victimes et responsabilit   p  nale internationale*, Paris, Calmann-L  vy, 2003, pp. 516-529. WATKIN Kenneth, "Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict", in WIPPMAN David & EVANGELISTA Matthew (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 137-179. WEDGWOOD Ruth, "Responding to Terrorism: the Strikes against Bin Laden", in *The Yale Journal of International Law*, Vol. 24/2, 1999, pp. 559-576. YOO John C. & HO James C., "The Status of Terrorists", in *Virginia Journal of International Law*, Vol. 44, Fall 2003, pp. 207-228.

a) In the conduct of hostilities

May they be attacked until they are "hors de combat" (like combatants) or only while they directly participate in hostilities (like civilians)?

b) Once fallen into the power of the enemy

Are they protected civilians or may they be detained like combatants without any individual decision, although not benefiting from POW status?

Chapter 6

COMBATANTS AND PRISONERS OF WAR

Introductory Text

Combatants are members of armed forces. The main feature of their status in international armed conflicts is that they have a right to directly participate in hostilities. If fallen into the power of the enemy, they become prisoners of war who may not be punished for having directly participated in hostilities.

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

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I. WHO IS A COMBATANT?

Introductory Text

A combatant is either:

- a member of the armed forces *stricto sensu* of a party to an international armed conflict:^[71]
- respecting the obligation to distinguish himself/herself from the civilian population

71 Cf. Art. 4 (A) (1) of Convention III.

or

- a member of another armed group:^[72]
 - belonging to a party to the international armed conflict; and
 - fulfilling, as a group, the following conditions:
 - being under responsible command
 - wearing a fixed distinctive sign
 - carrying arms openly
 - respecting IHL
 - and who individually respects the obligation to distinguish himself/herself from the civilian population

or

- a member of another armed group,^[73] who is under a command responsible to a party to the international armed conflict and subject to an internal disciplinary system, under the condition that this member respects, individually, at the time of his or her capture^[74] the obligation to distinguish him/herself from the civilian population:^[75]
 - normally, while engaged in an attack or a military operation preparatory to an attack
 - in exceptional situations (e.g. occupied territories, national liberation wars) by carrying his or her arms openly
 - during each military engagement, and
 - as long as he is visible to the enemy while engaged in a military deployment preceding the launching of an attack in which he or she is to participate

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72 Cf. Art. 4 (A) (2) of Convention III.

73 Cf. Art. 43 of Protocol I.

74 Cf. Art. 44 (5) of Protocol I.

75 Cf. Art. 44 (3) of Protocol I.

1. A member of armed forces *lato sensu*

Art. 4 (A) (1)-(3) of Convention III and Art. 43 of Protocol I [Rules 3 and 4 of CIHL]

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- Case No. 14, UN, Convention on the Safety of UN Personnel. p. 602
 Document No. 57, France, Accession to Protocol I. [Cf. B., para. 7.] p. 958
 Case No. 61, US, President Rejects Protocol I. p. 971
 Case No. 83, US, *Ex Parte* Quirin *et al.* p. 1053
 Case No. 84, US, Johnson v. Eisentrager. p. 1056
Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112
 Case No. 100, US, Screening of Detainees in Vietnam. p. 1125
Case No. 109, Israel, Military Prosecutor v. Kassem and Others. p. 1212
 Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335
 Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., para. 422.] p. 1467
 Case No. 139, South Africa, Sagarius and Others. p. 1507
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 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 19.] p. 1732
 Case No. 210, Germany, Government Reply on the Kurdistan Conflict. [Cf. 8.] p. 2291
Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B., C., D. and F.] p. 2309
 Case No. 235, US, US v. Marilyn Buck. p. 2463
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2. *Levée en masse*

Art. 4 (A) (6) of Convention III

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- Case No. 38, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 9 and Commentary.] p. 805
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3. Exceptions

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a) spies

Art. 46 of Protocol I [Rule 107 of CIHL]

Case No. 83, US, *Ex Parte Quirin et al.* p. 1053

Case No. 137, Sudan, Eritreans Fighting in Blue Nile Area. p. 1465

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b) saboteursCase No. 83, US, *Ex Parte Quirin et al.* p. 1053**Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112**

Case No. 104, Nigeria, Pius Nwaoga v. The State. p. 1139

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c) mercenaries

Art. 47 of Protocol I [Rule 108 of CIHL]

Case No. 12, The Issue of Mercenaries. p. 575

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Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 1. B. (1).] p. 2362

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d) terrorists?

(See *supra*, Chapter 2. III. 1. d) Acts of terrorism? p. 112.)

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B., C. and D.] p. 2309

Case No. 217, US, Military Commission Instructions. p. 2335

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II. WHO IS A PRISONER OF WAR?

Art. 4 of Convention III; Art. 44 of Protocol I [Rule 106 of CIHL]

Case No. 56, USSR, Poland, Hungary and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III. p. 955

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 8.] p. 958

Case No. 84, US, Johnson v. Eisentrager. p. 1056

Case No. 88, Netherlands, *in re Pliz*. p. 1069

Case No. 95, Cuba, Status of Captured "Guerrillas". p. 1104

Case No. 97, Malaysia, Public Prosecutor v. Oie Hee Koi. p. 1109

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 100, US, Screening of Detainees in Vietnam. p. 1125

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. [Cf. paras. 30-32 and 48-50.] p. 1387**Case No. 134, US, US v. Noriega. [Cf. B. II. A.] p. 1399**

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 29.] p. 1732

Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland. p. 2294

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B., C. and D.] p. 2309

Case No. 219, US, Trial of John Phillip Walker Lindh. p. 2342

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

Art. 5 of Convention III, Art. 45 (1)-(2) of Protocol I

Case No. 97, Malaysia, Public Prosecutor v. Oie Hee Koi. p. 1109

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 100, US, Screening of Detainees in Vietnam. p. 1125

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B., C., D and E.] p. 2309**Case No. 220, US, Hamdan v. Rumsfeld. p. 2346**

Case No. 235, US, US v. Marilyn Buck. [Cf. 5.] p. 2463

2. The Status of "Unlawful Combatants"

(See *supra*, Chapter 5. VI. 5.b. p. 148.)

III. TREATMENT OF PRISONERS OF WAR

Introductory Text

Those who hold prisoner-of-war status (and the persons mentioned in Art. 4 (B) of Convention III, Art. 28 (2) of Convention I, and Art. 44 (5) of Protocol I)

enjoy prisoner-of-war treatment. Prisoners of war may be interned without any particular procedure or 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 which may be imposed on them under the very detailed regulations of Convention III serves only this purpose. The protection by those regulations constitutes a compromise between the interest of the detaining power, the interest of the power on which the prisoner depends, and the prisoner's own interests. Under the influence of developing human rights standards, the importance of the latter factor is growing, but International Humanitarian Law continues to see the prisoner of war as a soldier of his country. Due to this inter-State aspect and in his own interest, he can not renounce his rights and his status.

Document No. 81, US Military Tribunal at Nuremberg, *US v. Wilhelm von Leeb et al.* p. 1048
 Case No. 85, US, Trial of Lieutenant General Harukei Isayama and Others. p. 1060
 Case No. 92, US, *US v. Batchelor.* p. 1087
 Case No. 102, US, Former Prisoner of War on a Mission to Hanoi. p. 1134
Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. p. 1423
Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529
Case No. 156, US, The Taguba Report. p. 1610
Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B., C., D and F.] p. 2309

SUGGESTED READING: BORELLI Silvia, "Casting Light on the Legal Black Hole: International Law and Detentions Abroad in the "War on Terror", in *IRRC*, No. 857, March 2005, pp. 39-68. CRYER Robert, "The Fine Art of Friendship: *jus in bello* in Afghanistan", in *Journal of Conflict and Security Law*, Vol. 7/1, 2002, pp. 37-83. ESGAIN Albert J. & SOLF Waldemar A., "The 1949 Geneva Conventions Relating to the Treatment of Prisoners of War: Its Principles, Innovations and Deficiencies", in *North Carolina Law Review*, Vol. 41/3, 1963, pp. 537-596. FISCHER Horst, "Protection of Prisoners of War", in FLECK Dieter (ed.), *Handbook of Humanitarian Law*, Oxford, OUP, 1995, pp. 321-367. LEVIE Howard S., "The Employment of Prisoners of War", in *AJIL*, Vol. 57/2, 1963, pp. 318-353. RODLEY Nigel S., *The Treatment of Prisoners under International Law*, Paris, UNESCO, 1987, 374 pp. ROSAS Allan, *The Legal Status of Prisoners of War: A Study of International Humanitarian Law Applicable in Armed Conflicts*, Helsinki, Suomalainen Tiedekatemia, 1976, 523 pp.

FURTHER READING: LEVIE Howard S., "Legal Aspects of the Continued Detention of the Pakistani Prisoners of War by India", in *AJIL*, Vol. 67 (3), 1973, pp. 512-516. MEYER Michael A., "Liability of POWs for Offences Committed Prior to Capture - The Astiz Affair", in *ICLQ*, Vol. 32, 1983. PREUX Jean de, "L'homme de confiance des prisonniers de guerre", in *IRRC*, No. 414, 1953, pp. 449-475. RISIUS Gordon & MEYER Michael A., "The Protection of Prisoners of War against Insults and Public Curiosity", in *IRRC*, No. 295, October 1993, pp. 288-299. SADAT Leila Nadya, "International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces", in *ASIL Insight Newsletter*, May-July 2004, online: <http://www.asil.org/insights/insigh134.htm>. WILHELM René-Jean, "Peut-on modifier le statut des prisonniers de guerre?", in *IRRC*, No. 415 & 417, July & September 1953, pp. 516-543 & 681-690.

- protected as prisoner of war as soon as he/she falls into the power of the adverse party

Document No. 82, The Tokyo War Crimes Trial. p. 1051

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. A. paras. 68-80.] p. 1423

- including in exceptional circumstances

Art. 41 (3) of Protocol I

Document No. 72, Germany/UK, Shackling of Prisoners of War. p. 1017

- no transfer to a Power which does not respect Convention III

Art. 12 of Convention III

Case No. 100, US, Screening of Detainees in Vietnam. p. 1125

- respect of their allegiance towards the Power on which they depend
-

Case No. 92, US, US v. Batchelor. p. 1087

Case No. 95, Cuba, Status of Captured "Guerillas". p. 1104

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. B., paras. 84-86.] p. 1423

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

- no punishment for participation in hostilities
-

Case No. 14, Convention on the Safety of UN Personnel. p. 602

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 104, Nigeria, Pius Nwaoga v. The State. p. 1139

Case No. 109, Israel, Military Prosecutor v. Kassem and Others. p. 1212

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 217, US, Military Commission Instructions. [Cf. 6. 3.] p. 2335

- rules on treatment during internment

Arts. 12-81 of Convention III [Rules 118-123 and 127 of CIHL]

Document No. 70, Switzerland Acting as Protecting Power in World War II. p. 1015

Document No. 72, Germany/UK, Shackling of Prisoners of War. p. 1017

Document No. 81, US Military Tribunal at Nuremberg, US v. Wilhelm von Leeb *et al.* p. 1048

Case No. 95, Cuba, Status of Captured "Guerillas". p. 1104

Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335

Case No. 134, US, US v. Noriega. [Cf. A. III. and B. III.] p. 1399

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. A. paras. 75-150 and B., paras. 59-142.] p. 1423

Case No. 156, US, The Taguba Report. p. 1610

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 234, The Conflict in Western Sahara. [Cf. A.] p. 2454

- rules on penal and disciplinary proceedings

Art. 82-108 of Convention III [Rules 100-102 of CIHL]

Case No. 85, US, Trial of Lieutenant General Harukei Isayama and Others. p. 1060

Case No. 95, Cuba, Status of Captured "Guerrillas". p. 1104

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 134, US, US v. Noriega. [Cf. A. III.] p. 1399

Case No. 140, South Africa, S. v. Petane. p. 1511

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 220, US, Hamdan v. Rumsfeld. p. 2346

SUGGESTED READING: FARRELL Norman, "International Humanitarian Law and Fundamental Judicial Guarantees", in *Annual Conference/The African Society of International and Comparative Law*, Vol. 10, 1998, pp. 130-141. GASSER Hans-Peter, "Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: the Part Played by ICRC Delegates", in *IRRC*, No. 287, March-April 1992, pp. 121-142. MEYER Michael A., "Liability of POWs for Offences Committed Prior to Capture - The Astiz Affair", in *ICLQ*, Vol. 32, 1983. SASSÒLI Marco, "La 'guerre contre le terrorisme', le droit international humanitaire et le statut de prisonnier de guerre", in *CYIL*, Vol. 39, 2001, pp. 211-252. SASSÒLI Marco, "La peine de mort en droit international humanitaire et dans l'action du Comité international de la Croix-Rouge", in *Revue internationale de droit pénal*, 58, 1987, pp. 583-592. WILSON Robert R., "Escaped Prisoners of War in Neutral Jurisdiction", in *AJIL*, Vol. 35, 1941, pp. 519-530.

- punishment for acts committed prior to capture

Art. 85 of Convention III

Case No. 56, USSR, Poland, Hungary, and the Democratic People's Republic of Korea, Reservations to Article 85 of Convention III. p. 955

Case No. 83, US, *Ex Parte Quirin et al.* p. 1053

Case No. 84, US, Johnson v. Eisentrager. p. 1056

Case No. 85, US, Trial of Lieutenant General Harukei Isayama and Others. p. 1060

Case No. 134, US, US v. Noriega. [Cf. A. III.] p. 1399

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. C., D and F.] p. 2309

Case No. 219, US, Trial of John Phillip Walker Lindh. p. 2342

- limits to punishment for escape

Arts. 91-94 of Convention III

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036

IV. TRANSMISSION OF INFORMATION

Document No. 21, ICRC, Tracing Service. [Cf. 4.] p. 660

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

- capture cards

Art. 70 and Annex IV B. of Convention III

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

- notification

Arts. 69, 94, 104, 107, 120 and 122 of Convention III

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. p. 1555

- correspondence

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

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

V. MONITORING BY OUTSIDE MECHANISMS

1. Protecting Powers

Arts. 8 and 126 of Convention III, Art. 5 of Protocol I

Case No. 140, South Africa, S. v. Petane. p. 1511

SUGGESTED READING: LEVIE Howard S., "Prisoners of War and the Protecting Power", in *AJIL*, Vol. 55, 1961, pp. 374-397.

2. ICRC

Arts. 9 and 126 (4) of Convention III, Art. 5 (3)-(4) of Protocol I [Rule 124 of CIHL]

Document No. 21, ICRC, Tracing Service. [*Cf.* 4.] p. 660

Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict. p. 1420

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [*Cf.* A., paras. 55-62.] p. 1423

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* A. and B.] p. 2309

VI. REPATRIATION OF PRISONERS OF WAR

Introductory Text

As prisoners of war are only retained to hinder their 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 refuelling mutual distrust, it is suggested that the will of the prisoner is controlling, but difficulties remain to establish his free will and his fate if the Detaining Power is unwilling to grant him asylum.

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

FURTHER READING: BAXTER Richard R., "Asylum to Prisoners of War", in *BYIL*, Vol. 30, 1953, pp. 489-498.

1. During hostilities

Art. 109-117 of Convention III

Case No. 95, Cuba, Status of Captured "Guerrillas". p. 1104

a) medical cases

Annexes I and II to Convention III

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

b) agreements of the parties

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 18.] p. 1732

2. At the end of active hostilities

Arts. 118-119 of Convention III [Rule 128 A. of CIHL]

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement. [*Cf.* Arts. 3-11 and 13-15] p. 1142

Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict. p. 1420

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [*Cf.* B., paras. 143-163.] p. 1423

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. [Cf. B., C. and D.] p. 1555

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 8. and 21.] p. 1732

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778

Case No. 234, The Conflict in Western Sahara. [Cf. A. and C.] p. 2454

3. Internment in neutral countries

Arts. 110 (2)-(3), 111 and Annex I of Convention III

Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland. p. 2294

SUGGESTED READING: OZERDEN Kemal, *Le sort des militaires belligérants, victimes de la guerre, débarqués dans un port neutre, d'après la Convention de Genève*, Paris, Pedone, 1971, 237 pp. STEINER M., *Die Internierung von Armeeehörigen kriegführender Mächte in neutralen Staaten, insbesondere in der Schweiz während des Weltkrieges 1939/45*, Ernst Lang, Zurich, 1947, 103 pp. REICHEL Daniel, "L'internement et le rapatriement des militaires soviétiques réfugiés en Suisse pendant le Seconde Guerre Mondiale", in *Actes du symposium 1982*, Lausanne, Éditions du Centre d'Histoire, 1982, pp. 77-90.

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

Chapter 7

PROTECTION OF THE WOUNDED, SICK, AND SHIPWRECKED

Introductory Text

The sight of thousands of wounded soldiers on the battlefield at Solferino moved Henry Dunant to initiate the process that resulted in the Geneva Conventions. Conventions I and II wholly dedicate themselves to safeguarding the wounded, sick, and shipwrecked, as well as the support (personnel and equipment) necessary to aid them. Once wounded, sick or shipwrecked and if they refrain from any act of hostility, even former combatants become "protected persons."^[76] They must 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.^[77]

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

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

I. THE IDEA OF SOLFERINO

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

⁷⁶ Protected persons are defined in Art. 13 of Convention I and Art. 13 of Convention II.

⁷⁷ Cf. Art. 8 (a) and (b) of Protocol I and Art. 16 of Convention IV.

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

Art. 12 of Conventions I and II [Rules 109-111 of CIHL]

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

1. Beneficiaries

Provided that they refrain from any act of hostilities.

Document No. 71, German Invasion of Crete. p. 1016

Document No. 73, British Policy Towards German Shipwrecked. p. 1017

Case No. 125, Israel, Navy Sinks Dinghy off Lebanon. p. 1337

a) under Conventions I and II: military personnel

Art 13 of Convention I and II

Case No. 88, Netherlands, *In re Pilz*. p. 1069

b) under Protocol I: extension to civilians

Art. 8 (a) and (b) of Protocol I

2. Respect

Document No. 71, German Invasion of Crete. p. 1016

Document No. 73, British Policy Towards German Shipwrecked. p. 1017

Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 125, Israel, Navy Sinks Dinghy off Lebanon. p. 1337

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

3. Protection

4. Care

Case No. 88, Netherlands, *In re Pilz*. p. 1069

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

- equal treatment

Art. 12 of Conventions I and II [Rule 110 of CIHL]

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

- evacuation

Art. 15 of Conventions I and II [Rule 109 of CIHL]

Case No. 117, Israel, The Rafah Case. [Cf. paras. 40-44.] p. 1289

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 3.] p. 1732

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

III. MEDICAL AND RELIGIOUS PERSONNEL

Introductory Text

Conventions I and II, designed to protect the wounded, sick, and shipwrecked, also extend protection to medical personnel, administrative support staff, and religious personnel.^[78] On the battlefield they are not to be attacked and must be allowed to fulfil their medical or religious duties.^[79] If fallen into the hands of the adverse Party, medical or religious personnel are not to be considered prisoners of war and may only be retained if they are needed to care for the prisoners of war.^[80] Conventions I and IV provide protection for civilians caring for sick and wounded combatants and civilians.^[81] Protocol I further expanded the category of persons (permanent or temporary, military or civilian) protected by virtue of their medical or religious functions.^[82] Aid societies will be granted the same protection if they meet the appropriate requirements laid out in the Conventions.^[83]

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

FURTHER READING: HIEBEL Jean-Luc, "Human Rights Relating to Spiritual Assistance as Embodied in the Geneva Conventions of 1949", in *IRRC*, No. 214, January 1980, pp. 3-28. LUNZE Stefan, "Serving God and Caesar: Religious Personnel and their Protection in Armed

78 Cf. Arts. 24 and 25 of Convention I and Arts. 36 and 37 of Convention II.

79 Cf. Arts. 24-27 of Convention I, Arts. 36 and 37 of Convention II, Arts. 15-20 of Protocol I and Art. 9 of Protocol II.

80 Cf. Arts. 28 and 30 of Convention I, Art. 37 of Convention II and Art. 33 of Convention III.

81 Cf. Art. 18 of Convention I and 20 (1) of Convention IV.

82 Cf. Art. 8 (c) and (d) of Protocol I.

83 Cf. Arts. 26 and 27 of Convention I, Arts. 25 and 36 of Convention II and Art. 9 (2) of Protocol I.

Conflict", in *IRRC*, No. 853, March 2004, pp. 69-91. TOOLE Mike, "Frontline Medicine", in Médecins Sans Frontières (ed.), *World in Crisis*, New York, Routledge, 1996, pp. 16-36.

1. Definition

a) military (permanent or temporary) medical personnel

Arts. 24-25 of Convention I; Arts. 36-37 of Convention II

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

Art. 20 of Convention IV; Art. 8 of Protocol I

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

Art. 8 of Protocol I

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

Art. 8 of Protocol I

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

Art. 26 of Convention I; Art. 24 of Convention II; Art. 8 of Protocol I

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

2. Protection

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

- may not be attacked

Arts. 24-25 of Convention I; Arts. 36-37 of Convention II; Arts. 15-16 of Protocol I [Rules 25 and 30 of CIHL]

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No. 124, Lebanon, Helicopter Attack on Ambulances. p. 1336

- may fulfil medical duties in conformity with medical ethics

Case No. 178, UK, Misuse of the Emblem. p. 1788

b) once fallen into enemy hands

Arts. 28-32 of Convention I

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

c) under control of the enemy

Arts. 15-16 of Protocol I [Rule 26 of CIHL]

- right to perform their medical mission

Document No. 106, ICRC Appeals on the Near East. [*Cf. C., 9.*] p. 1145

- right not to perform acts contrary to medical ethics
- right to maintain medical secret, except as required by law

Case No. 178, UK, Misuse of the Emblem. p. 1788

3. Duties of the medical personnel

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

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

a) no direct participation in hostilities

Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

b) respect of medical ethics

Case No. 158, Iraq, Medical Ethics in Detention. p. 1639

c) give care without discrimination

Case No. 158, Iraq, Medical Ethics in Detention. p. 1639

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

Annex II of Convention I

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

Introductory Text

International Humanitarian Law establishes comprehensive and detailed protection for medical units,^[84] medical transports,^[85] and medical material.^[86]

These goods must be respected and protected at all times by the belligerents^[87] and shall not be the object of attack. Under no circumstances shall protected installations be used in an attempt to shield military objectives from attack.

The protection to which medical installations are entitled shall not cease unless they are used to commit, outside their humanitarian function, acts harmful to the enemy.^[88] In such instances their protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded.

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 5.] p. 1732

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

1. Protection

Arts. 19 and 35 of Convention I [Rules 28, 29 and 30 of CIHL]

Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross". [Cf. Arts. 7-9.] p. 930

Case No. 124, Lebanon, Helicopter Attack on Ambulances. p. 1336

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [Cf. A, Annex, paras. 41 and 44] p. 1540

2. Loss of protection

Arts. 21 and 22 of Convention I

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

85 Cf. Arts. 35-37 of Convention I, Arts. 38-40 Convention II, Arts. 21-22 Convention IV, and Arts. 8 (g) and 21-31 of Protocol I. According to Art. 8 (g) of Protocol I: "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."

86 Cf. Arts. 33-34 of Convention I.

87 Cf. Arts. 19, 33, and 35 of Convention I, Arts. 22-27 of Convention II and Art. 12 (1) of Protocol I.

88 Cf. Art. 21 of Convention I, Art. 34 of Convention II and Art. 13 (1) of Protocol I.

V. POSSIBLE CONSTITUTION OF HOSPITAL, SAFETY, AND NEUTRALIZED ZONES

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

(See also *infra*, Chapter 9. II. 11. Zones created to protect war victims against the effects of hostilities. p. 215.)

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 5.] p. 1732

SUGGESTED READING: LAVOYER Jean-Philippe, "International Humanitarian Law, Protected Zones and the Use of Force", in BIERMANN Wolfgang & VADSET Martin (ed.), *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia*, Aldershot, Ashgate, 1998, pp. 262-279. SANDOZ Yves, "Localités et zones sous protection spéciale", in *Quatre études du droit international humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 35-47.

VI. THE EMBLEM OF THE RED CROSS/RED CRESCENT

Introductory Text

The Conventions and Additional Protocols authorize the use of three emblems: the red cross, the red crescent, and the red lion and sun on a white background.^[89] However, today only the former two authorized emblems are utilized. For a number of years the International Red Cross and Red Crescent Movement has encountered problems arising from use of a plurality of other emblems. This plurality threatens the protected emblem's essential universality, neutrality, and impartiality, thus, ultimately undermining the protection it provides.

The emblem serves both protective and indicative functions. The emblem's main application is that of protection during conflict by distinguishing for combatants certain persons and objects protected by the Conventions and the Additional Protocols (e.g., medical personnel, medical units, and means of transport^[90]).^[91] To be effective in such circumstances the emblem must be large, ensuring visibility.^[92] It may only be displayed for medical purposes, and such use must be authorized by and under the control of the State. The indicative use of the emblem mainly occurs in peacetime, as it does not signify protection. Such use depicts persons, equipment, and activities (in conformity with Red Cross principles) affiliated with the Red Cross or the Red Crescent.^[93] Utilization for indicative purposes must comply with national

89 Cf. Art. 38 of Convention I, Art. 41 of Convention II, Art. 8 (1) of Protocol I and Art. 12 of Protocol II.

90 For transport by land cf. Art. 35 of Convention I, by sea cf. Art. 22, 24, 26, 27 and 43 of Convention II, or by air cf. Art. 36 of Convention I and Art. 39 of Convention II.

91 Cf. Arts. 39-43 of Convention I, Art. 41-43 of Convention II, Art. 18 of Protocol I and Art. 12 of Protocol II.

92 For technical means of identification cf. Arts. 4-5 of Annex I of Protocol I.

93 Cf. Art. 44 (2)-(4) of Convention I.

legislation, and ordinarily the emblem must be small in size. In contrast to the limitations mentioned above placed on National Red Cross or Red Crescent Societies and other users, International Red Cross organizations may use the emblem at all times and for all their activities.

In order to avoid undermining the protection the emblem provides, abuse and misuse of the emblem, which in certain situations constitutes a war crime,^[94] must be prevented; thus, it may neither be imitated nor used for private or commercial purposes.^[95] 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 misuse and abuse of the emblem.^[96]

Document No. 22, ICRC, Model Law Concerning the Emblem. p. 665

Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross".
p. 930

SUGGESTED READING: BOUVIER Antoine, "Special Aspects of the Use of the Red Cross or Red Crescent Emblem", in *IRRC*, No. 272, September-October 1989, pp. 438-458. BUGNION François, *The Emblem of the Red Cross: a Brief History*, Geneva, ICRC, 1977, 81 pp. & in *IRRC*, No. 193/194/195, April/May/June 1977, pp. 167-190/229-256/283-296. MACCORMACK Timothy L.H., "What's in an Emblem? Humanitarian Assistance under any other Banner Would be as Comforting", in *Melbourne Journal of International Law*, Vol. 1/1, 2000, pp. 175-183. MERIBOUTE Zidane, "The Emblems of the 1949 Geneva Conventions: their Content and Meaning", in *YIHL*, Vol. 3, 2000, pp. 258-272. SLIM Habib, "Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse", in *IRRC*, No. 272, September-October 1989, pp. 420-437.

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

1. Two distinctive signs

Art. 38 of Convention I

Case No. 31, ICRC, The Question of the Emblem. p. 761

Case No. 62, Iran, Renouncing Use of the Red Lion and Sun Emblem. p. 975

Case No. 148, Saudi Arabia, Use of the Red Cross Emblem by US Forces. p. 1570

SUGGESTED READING: BUGNION François, "The Red Cross and Red Crescent Emblems", in *IRRC*, No. 272, September-October 1989, pp. 408-419. BUGNION François, "Towards a Comprehensive Solution to the Question of the Emblem", revised 3rd edition, Geneva, ICRC, 2005, 72 pp. SANDOZ Yves, "The Red Cross and Red Crescent Emblems: What is at Stake?", in

94 Cf. Arts. 37 (1) and 85 (3) (f) of Protocol I.

95 Cf. Art. 23 (f) of the Hague Regulations, Art. 53 of Convention I, Art. 45 of Convention II, Arts. 38 and 85 (3) (f) of Protocol I and Art. 12 of Protocol II.

96 Cf. Art. 54 of Convention I and Art. 45 of Convention II.

IRRC, No. 272, September-October 1989, pp. 405-407. SOMMARUGA Cornelio, "Unity and Plurality of the Emblems", in *IRRC*, No. 289, July-August 1992, pp. 333-338.

FURTHER READING: EBERLIN Philippe, "Technical Note on the Colours of the Red Cross and Red Crescent Emblem", in *IRRC*, No. 233, March 1983, pp. 77-80. LANORD Christophe, *Quelques considérations sur le projet de Protocole III additionnel aux Conventions de Genève de 1949*, in *L'observateur des Nations Unies*, No. 10, Spring-Summer 2001, pp. 13-34. ROSENNE Shabtai, "The Red Cross, Red Crescent, Red Lion and Sun and the Red Shield of David", in *IYHR*, Vol. 5, 1975, pp. 9-54.

2. Technical means of identification

Annex I to Protocol I

SUGGESTED READING: BOUVIER Antoine, "Humanitarian Protection and Armed Conflicts at Sea: Means and Methods of Identifying Protected Craft", in *Syracuse Journal of International Law and Commerce*, Vol. 14, 1988, pp. 759-765. CAUDERAY Gérald C., "Means of Identification for Protected Medical Transports", in *IRRC*, No. 300, May-June 1994, pp. 266-278. CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. EBERLIN Philippe, "La modernisation de la signalisation protectrice et les communications des unités et moyens de transport sanitaires", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva/The Hague, ICRC/Martinus Nijhoff Publishers, 1984, pp. 47-75. EBERLIN Philippe, "Underwater Acoustic Identification of Hospital Ships", in *IRRC*, No. 267, November-December 1988, pp. 505-518.

3. Protective use

Arts. 39-43 and 53-54 of Convention I [Rule 30 of CIHL]

Document No. 22, ICRC, Model Law Concerning the Emblem. [Cf. Arts. 3-5, 8, and 9] p. 665
Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross". [Cf. Arts. 7-9.] p. 930

a) to distinguish medical personnel and units

Case No. 31, ICRC, The Question Emblem. p. 761
 Case No. 62, Iran, Renouncing Use of the Red Lion and Sun Emblem. p. 975
 Case No. 124, Lebanon, Helicopter Attack on Ambulances. p. 1336
 Case No. 148, Saudi Arabia, Use of the Red Cross Emblem by US Forces. p. 1570
Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682
 Case No. 178, UK, Misuse of the Emblem. p. 1788

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 by the International Federation

Document No. 22, ICRC, Model Law Concerning the Emblem. [Cf. Art. 7] p. 665
 Case No. 178, UK, Misuse of the Emblem. p. 1788
 Case No. 214, Afghanistan, Operation "Enduring Freedom". [Cf. B.] p. 2303

4. Indicative use

Art. 44 of Convention I

Document No. 22, ICRC, Model Law Concerning the Emblem. [*Cf.* Art. 6.] p. 665
 Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross".
 [*Cf.* Arts. 4-6.] p. 930

Case No. 67, UK, Labour Party Campaign, Misuse of the Emblem. p. 991

Case No. 76, US Military Court in Germany, Trial of Skorzeny and Others. p. 1027

SUGGESTED READING: BOUVIER Antoine, "Special Aspects of the Use of the Red Cross or Red Crescent Emblem", in *IRRC*, No. 272, September-October 1989, pp. 438-458.

5. Repression of abuse and misuse

Arts. 53-54 of Convention I

Document No. 22, ICRC, Model Law Concerning the Emblem. [*Cf.* Arts. 10-12.] p. 665
 Case No. 67, UK, Labour Party Campaign, Misuse of the Emblem. p. 991
 Case No. 129, Nicaragua, Helicopter Marked with the Emblem. p. 1364
 Case No. 178, UK, Misuse of the Emblem. p. 1788

SUGGESTED READING: MEYER Michael, "Protecting the Emblems in Peacetime: The Experiences of the British Red Cross", in *IRRC*, No. 272, September-October 1989, pp. 459-464.
 SLIM Habib, "Protection of the Red Cross and Red Crescent Emblems and the Repression of Misuse", in *IRRC*, No. 272, September-October 1989, pp. 420-437.

VII. PROVISIONS ON THE DEAD AND MISSING

Introductory Text

It is not primarily to protect the dead and the missing themselves that International Humanitarian Law (IHL) contains specific rules concerning them. The main consideration is "the right of families to know the fate of their relatives."^[97] Persons are considered as 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.^[98]

In reality, the missing persons are either dead or alive. If they are alive, they are either detained by the enemy or free, but separated from their families by frontlines or borders. In such a 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 considered as missing - except if they wish to sever their links with their family or country.^[99]

⁹⁷ *Cf.* Art. 32 of Protocol I.

⁹⁸ *Cf.* Art. 33 (1) of Protocol I.

⁹⁹ This case is not a problem for International Humanitarian Law - except that it has to avoid notifications which may be detrimental to the persons concerned. *Cf.* Art. 137 (2) of Convention IV.

If the person is missing because of the usual interruption of postal relations and the frequent population movements in times of armed conflict, family links should soon be re-established, *inter alia* through the Central Tracing Agency of the ICRC, as long as the parties respect their obligation to favour the exchange of family news and reunification of families.^[100] If a person is missing because of detention or hospitalization by the enemy, the uncertainty of the families should not last for long, as IHL prescribes information on their hospitalization or detention to be forwarded rapidly to their families and authorities through three channels: notification of hospitalization, capture or arrest,^[101] transmission of capture or internment cards,^[102] and the right to correspond with their family.^[103] A lawfully detained person can therefore not be missing for long, as detaining authorities are also under an obligation to answer inquiries about protected persons.^[104]

If the missing person is dead, it is as important but more difficult to inform the family. As it is impossible, there can be no obligation for each party to identify every dead body found. Every party has to simply try and collect information aiding in the identification of dead bodies^[105] - which is easier if the deceased wear identity cards or tags as prescribed by International Humanitarian Law^[106] - including by agreeing to establish search teams.^[107] If such identification is successful, the family has to be notified. In any case, mortal remains must be respected, buried decently, and gravesites marked.^[108] Understandably, relatives wish to have access to such gravesites and often even to have the mortal remains of their beloved ones returned to them. This can, however, only be achieved based on an agreement between the parties concerned, which can generally only be made at the end of the conflict.^[109]

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

Document No. 21, ICRC, Tracing Service. [Cf. 5.] p. 660
 Case No. 102, US, Former Prisoner of War on a Mission to Hanoi. p. 1134
 Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237
 Case No. 127, ECHR, Cyprus v. Turkey. [Cf. paras. 129-157.] p. 1341
 Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [Cf. B., paras. 159-160.] p. 1423
 Document No. 164, ICRC, Request to Visit Gravesites in the Falklands/Malvinas. p. 1681
 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 22.] p. 1732

100 Cf. Arts. 25 and 26 of Convention IV.

101 Cf. Art. 16 of Convention I, Art. 19 of Convention II, Arts. 122 and 123 of Convention III, Arts. 136 and 140 of Convention IV and Art. 33 (2) of Protocol I.

102 Cf. Art. 70 of Convention III and Art. 106 of Convention IV.

103 Cf. Art. 71 of Convention III and Art. 107 of Convention IV.

104 Cf. Art. 122 (7) of Convention III and Art. 137 (1) of Convention IV.

105 Cf. Art. 16 of Convention I and Art. 33 (2) of Protocol I.

106 Cf. Art. 17 (3) of Convention III.

107 Cf. Art. 33 (4) of Protocol I.

108 Cf. Art. 17 of Convention I and Art. 34 (1) of Protocol I.

109 Cf. Art. 34 (2) and (4) of Protocol I.

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778

Case No. 234, The Conflict in Western Sahara. p. 2454

SUGGESTED READING: Special Issue "Missing Persons", in *IRRC*, No. 848, December 2002, pp. 720-902. SASSÒLI Marco, "Les disparus de guerre: Les règles du droit international et les besoins des familles entre espoir et incertitude", in *Frontières*, vol. 15/2, Spring 2003, pp. 38-44.

1. Relationship between dead and missing

Case No. 152, UN Compensation Commission, Recommendations. p. 1588

2. Obligation to identify dead bodies and notify of deaths

Art. 16 of Convention I and Art. 33 (2) of Protocol I [Rules 112 and 116 of CIHL]

Case No. 116, Israel, Evacuation of Bodies in Jenin. p. 1284

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

3. Obligation to search for persons reported missing

Art. 33 (1) of Protocol I [Rule 117 of CIHL]

Case No. 127, ECHR, Cyprus v. Turkey. [*Cf.* paras. 129-150.] p. 1341

Case No. 234, The Conflict in Western Sahara. [*Cf.* A. and B.] p. 2454

4. Treatment of mortal remains

a) respect

Art. 15 of Convention I and Art. 34 (1) of Protocol I [Rule 113 of CIHL]

Document No. 71, German Invasion of Crete. p. 1016

Case No. 116, Israel, Evacuation of Bodies in Jenin. p. 1284

b) decent burial

Art. 17 of Convention I and Art. 34 (1) of Protocol I [Rule 115 of CIHL]

Case No. 116, Israel, Evacuation of Bodies in Jenin. p. 1284

Case No. 117, Israel, The Rafah Case. [*Cf.* paras. 46-53.] p. 1289

c) marking of gravesites

d) access to gravesites

e) agreements on the return of remains

Art. 34 (2) and (4) of Protocol I

Case No. 116, Israel, Evacuation of Bodies in Jenin. p. 1284

Chapter 8

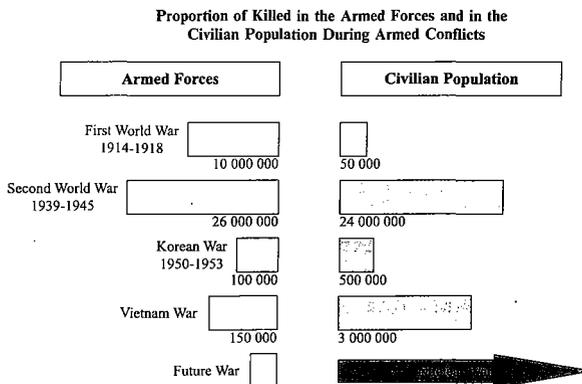
THE PROTECTION OF CIVILIANS

Introductory Text

Increasingly, civilians have become the overwhelming majority of the victims of armed conflict^[110] despite International Humanitarian Law (IHL), which stipulates that attacks should only be directed at combatants and military objectives and that civilians should be respected. However, even if IHL was perfectly respected, civilians could become victims of armed conflicts, as attacks and military operations directed at military objectives are not prohibited merely because they may also affect civilians.

Civilians in war need on the one hand respect by those in whose hands they are, who could, *e.g.*, arrest them, ill-treat them, harass them, confiscate their property, or not provide them with food or medical assistance. Under IHL some of those protections are prescribed for all

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



civilians;^[111] most of them only for the benefit of "protected civilians,"^[112] *i.e.*, basically those who are in the hands of the enemy - whether because they find themselves on enemy territory^[113] or because their territory is occupied by the enemy.^[114] The most detailed rules concern the treatment of civilians interned - in both aforementioned cases - in relation with the conflict, for imperative security reasons and not in view of a trial.^[115] This detailed regime for civil internees is justified by the fact that such internment is an exception to the general rule that enemy civilians, unlike combatants, may not be detained. It largely follows the regime provided for by Convention III for prisoners of war.

Civilians in war also need, on the other hand, to be respected by the belligerent opposing those in whose hands they are, who could, *e.g.*, bomb their towns, attack them on the battlefield, or hinder the receipt of food supplies or family messages. Those rules on the protection of the civilian population against the effects of hostilities, mainly contained in Protocol I^[116] 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.^[117]

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

SUGGESTED READING: BEST Geoffrey, *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts*, London, Weidenfels & Nicholson, 1980, 400 pp. DOSWALD-BECK Louise, "The Value of the 1977 Protocols for the Protection of Civilians", in MEYER Michael A. (ed.), *Armed Conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Convention*, London, British Institute of International and Comparative Law, 1989, pp. 137-172. KALSHOVEN Frits, "Reaffirmation and Development of International Humanitarian Law in Armed Conflicts: The Diplomatic Conference, Geneva, 1974-1977, Part II", in *Netherlands Yearbook of International Law*, Vol. 9, 1978, pp. 107-171.

111 Cf. Part II of Convention IV (Arts. 13-26) and Section II of Part IV of Protocol I (Arts. 72-79, in particular the fundamental guarantees provided for in Art. 75).

112 While International Humanitarian Law protects all civilians, this is a term of art defined in Art. 4 of Convention IV in line with the traditional inter-State structure of International Humanitarian Law and does not therefore cover those who are in the hands of a belligerent of which they are nationals.

113 Cf. Arts. 27-46 and 79-135 of Convention IV.

114 Cf. Arts. 27-34 and 47-135 of Convention IV.

115 Cf. Arts. 79-135 of Convention IV.

116 Cf. in particular, Arts. 48-71 of Protocol I.

117 Cf. Arts. 49 (2) and 50 (1) of Protocol I.

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

(See *infra*, Chapter 9. II. The Protection of the Civilian Population against Effects of Hostilities. p. 199.)

II. PROTECTION OF CIVILIANS AGAINST ARBITRARY TREATMENT

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention.
[*Cf.* E. II. 2.] p. 1303

1. Rules benefiting all civilians

a) aid and relief

(See *infra*, Chapter 9. IV. International Humanitarian Law and Humanitarian Assistance. p. 226.)

b) special protection of women

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

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No. 186, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. [*Cf.* paras. 127-186.]
p. 1974

Case No. 177, Germany, Government Reply on Rapes in Bosnia. p. 1787

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

Case No. 222, India, Press Release, Violence in Kashmir. p. 2356

SUGGESTED READING: KRILL Françoise, "The Protection of Women in International Humanitarian Law", in *IRRC*, No. 249, November 1985, pp. 337-363. LINDSEY Charlotte, "Women and War", in *IRRC*, No. 839, September 2000, pp. 561-580. NUMMINEN Jutta, "Violence à l'égard des femmes en situation de conflit armé: analyse effectuée selon le point de vue féminin sur la protection de la femme dans le droit international humanitaire", in *The Finnish Yearbook of International Law*, Vol. 9, 1998, pp. 453-473.

aa) the feminist criticism of international humanitarian law

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

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

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

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

bb) the principles of non-discrimination and special protection

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

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

cc) protection against rape and sexual violence

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 333-358.] p. 1467

SUGGESTED READING: ANTONIONI Antonio, "Le viol et le droit de la guerre dans la doctrine", in *Journal of the History of International Law*, Vol. 4/1, 2002, pp. 100-114. ASKIN Kelly Dawn, "Sexual Violence in Decisions and Indictments of the Yugoslav and Rwandan Tribunal: Current Status", in *AJIL*, Vol. 93/1, 1999, pp. 97-123. CHINKIN Christine, "Rape and Sexual Abuse of Women in International Law", in *EJIL*, Vol. 5/3, 1994, pp. 326-341. COPELON Rhonda, "Gender Crimes as War Crimes: Integrating Crimes Against Women into International Criminal Law", in *McGill Law Journal*, Vol. 46/1, 2000, pp. 217-240. DIXON Rosalind, "Rape as a Crime in International Humanitarian Law: Where to From Here?", in *EJIL*, Vol. 13/3, June 2002, pp. 697-719. GUENIVET Karima, "Violences sexuelles: la nouvelle arme de guerre", Paris, Michalon, 2001, 206 pp. KENNEDY-PIPE Caroline & PENNY Stanley, "Rape in War: Lessons of the Balkan Conflicts in the 1990s", in *International Journal of Human Rights*, Vol. 4/3-4, 2000,

pp. 67-84. LAVIOLETTE Nicole, "Commanding Rape: Sexual Violence, Command Responsibility, and the Prosecution of Superiors by the International Criminal Tribunals for the former Yugoslavia and Rwanda", in *CYL*, Vol. 36, 1998, pp. 93-149. MERON Theodor, "Rape as a Crime under International Humanitarian Law", in *AJIL*, Vol. 87/3 1993, pp. 424-428. MORRIS Madeline, "By Force of Arms: Rape, War and Military Culture", in *Duke Law Journal*, Vol. 45/4, 1996, pp. 651-781. NIARCHOS Catherine N., "Women, War, and Rape: Challenges Facing the International Tribunal for the Former Yugoslavia", in *Human Rights Quarterly*, Vol. 17/4, 1995, pp. 649-690. PAPACONSTANTINO Maria, "Rape as Crime under International Humanitarian Law", in *Revue Hellénique de Droit International*, Vol. 51/2, 1998, pp. 477-499. PILCH Frances T., "The Crime of Rape in International Humanitarian Law", in *Journal of Legal Studies*, Vol. 9, 1998-99, pp. 99-119. QUENIVET Noëlle N.R., *Sexual Offenses in Armed Conflict and International Law*, Ardsley, Transnational Publishers, 2005, 230 pp.

- dd) reasons justifying preferential treatment
- pregnant women or maternity cases
 - mothers of children under seven years of age

c) special protection of children

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

Quotation Article 38.

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

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

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

[...]

Article 1

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

Article 2

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

Article 3

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

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

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

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- Document No. 16, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000. p. 636
 Document No. 21, ICRC, Tracing Service. [Cf. 2.] p. 660
 Case No. 96, ICRC Report on Yemen, 1967. p. 1106
 Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., para. 418.] p. 1467
 Case No. 226, Sierra Leone, Special Court Ruling on the Recruitment of Children. p. 2397
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- aa) respect of children
- bb) prohibition of recruitment
 - the age threshold
 - under the 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 the direct participation in hostilities and for compulsory recruitment

Document No. 16, Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed Conflict, 25 May 2000. p. 636

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 2., A.] p. 2362

Case No. 226, Sierra Leone, Special Court Ruling on the Recruitment of Children. p. 2397

cc) status and treatment of child soldiers

d) special protection of journalists

Arts. 13/13/4 respectively of Conventions I, II and III; Art. 79 of Protocol I [Rule 34 of CIHL]

Case No. 24, Protection of Journalists. p. 672

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e) reuniting of dispersed families and family news

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

Document No. 21, ICRC, Tracing Service. p. 660

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement. [Cf. Art. 12.] p. 1142

Case No. 133, Inter-American Commission on Human Rights, *Coard v. US*. p. 1387

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f) fundamental guarantees (Article 75 of Protocol I)

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2. Rules on protected civilians

a) who is a protected civilian?

Art. 4 of Convention IV

(*See supra*, Chapter 2. III.2. Personal scope of application. p. 114.)

Case No. 88, Netherlands, *In re Pilz*. p. 1069

Case No. 100, US, Screening of Detainees in Vietnam. p. 1125

Case No. 114, Israel, Cases Concerning Deportation Orders. p. 1244

Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335

Case No. 133, Inter-American Commission on Human Rights, *Coard v. US*. p. 1387

Case No. 147, UN, Detention of Foreigners. p. 1569

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. C. Merits, Appeal, paras. 163-169.] p. 1804

Case No. 185, ICTY, The Prosecutor v. Blaskic. [Cf. paras. 127-146.] p. 1936

Case No. 182, ICTY, Prosecutor v. Rajic, Rule 61 Decision. [Cf. paras. 34-37.] p. 1888

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SUGGESTED READING: SASSÒLI Marco & OLSON Laura M., "The Decision of the ICTY Appeals Chamber in the Tadic Case: New Horizons for International Humanitarian and Criminal Law?", in *IRRC*, No. 839, September 2000, pp. 733-769.

b) rules on protected civilians

- right to leave?

Arts. 35-37 and 48 of Convention IV

Case No. 147, UN, Detention of Foreigners. p. 1569

- humane treatment

Art. 27 of Convention IV [Rule 87 of CIHL]

Document No. 21, ICRC, Tracing Service. [Cf. 4.] p. 660

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237

Case No. 117, Israel, The Rafah Case. [Cf. paras. 21 and 52.] p. 1289

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

Case No. 169, Canada, R. v. Brocklebank. [Cf. paras. 24, 25, 49, 60, 62, and 64-66.] p. 1707

Case No. 170, Canada, R. v. Boland. p. 1720

Case No. 171, Canada, R. v. Seward. p. 1725

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 10.] p. 1732

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- forced labour

Arts. 40, 51 and 95 of Convention IV [Rule 95 of CIHL]

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 9.] p. 1732

- prohibition of collective punishment

Art. 33 of Convention IV [Rule 103 of CIHL]

Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory. p. 1223

- visits by the Protecting Power and by the ICRC

Arts. 9-10, 30 and 143 of Convention IV [Rule 124 A of CIHL]

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. p. 1387

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* A. and B.] p. 2309

- if interned: civil internees

Arts. 41-43, 68 and 78-135 of Convention IV

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 157, US, The Schlesinger Report. p. 1623

- decision of internment: individual administrative decision

Arts. 78 of Convention IV

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. [*Cf.* paras. 52-59.] p. 1387

- reasons for internment: imperative security reasons; not punishment

Arts. 41, 42 and 78 of Convention IV

Case No. 113, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. p. 1387

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 12.] p. 1732

- treatment of civil internees

Arts. 83-131 of Convention IV; Annex III to Convention IV [Rules 118-123 and 125-127 of CIHL]

Case No. 113, Israel, Cheikh Obeid *et al/v.* Ministry of Security. p. 1237
 Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335
 Case No. 156, US, The Taguba Report. p. 1610
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- release of civil internees

Arts. 132-135 of Convention IV [Rule 128 B. of CIHL]

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement. [*Cf.* Arts. 3-11 and 13-15] p. 1142
 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 18. and 21.] p. 1732

c) possible derogation

Art. 5 of Convention IV

Case No. 113, Israel, Cheikh Obeid *et al/v.* Ministry of Security. [*Cf.* para. 6.] p. 1237

III. REFUGEES AND DISPLACED PERSONS IN INTERNATIONAL HUMANITARIAN LAW

Introductory Text

If States consistently and fully observed the principles of International Humanitarian Law (IHL) protecting civilians,^[118] most population movements due to armed conflicts would be prevented. IHL of non-international armed conflicts contains a general prohibition of forced movements of civilians,^[119] while IHL of international armed conflicts creates such a general prohibition only for occupied territories.^[120] Recognizing that such situations and population movements due to other reasons than armed conflicts nevertheless occur, 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 due to international armed conflict, e.g., granting the right to receive items essential to survival.^[121] Civilians displaced by internal armed conflict enjoy similar but less detailed protection.^[122]

118 For example, prohibitions against direct or reprisal attacks on civilians, including those intended to spread terror among the population and against starvation of civilians. (*Cf.* Arts. 51 and 54 of Protocol I.)

119 *Cf.* Art. 17 of Protocol II.

120 *Cf.* Art. 49 of Convention IV.

121 *Cf.* Art. 23 of Convention IV and Art. 70 of Protocol I.

122 *Cf.* Art. 3 common to the Conventions and Protocol II (repeating and expanding the rules in Art. 3 common).

Refugees, in contrast, consist of those who fled *from* their country. IHL protects these individuals, as civilians affected by hostilities,^[123] only if they fled to a State taking part in an international armed conflict^[124] (or if that State is beset by internal armed conflict^[125]). IHL specifically protects refugees entering the territory of an enemy State against unfavourable treatment (based on their nationality).^[126] Those considered refugees prior to the outbreak of hostilities (including those from a neutral State) are always considered protected persons under IHL of international armed conflicts,^[127] which also provides special guarantees for those who fled to territory which becomes occupied by the State of which they are nationals.^[128] Finally, regarding non-refoulement, the Conventions expressly state that protected persons may not be transferred to a State where they fear persecution for political or religious beliefs.^[129]

SUGGESTED READING: BUGNION François, "Réfugiés, personnes déplacées et droit international humanitaire", in *Revue suisse de droit international et de droit européen*, Vol. 3, 2001, pp. 277-288. LAVOYER Jean-Philippe, "Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC", in *IRRC*, No. 305, March-April 1995, pp. 162-180. MAURICE Frédéric & COURTEN Jean de, "ICRC Activities for Refugees and Displaced Civilians", in *IRRC*, No. 280, January-February 1991, pp. 9-21. Special Issue "50th Anniversary of the 1951 Refugee Convention. The Protection of Refugees in Armed Conflicts", in *IRRC*, No. 843, September 2001, pp. 571 ff.

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1. Displaced persons fleeing within their own country because of an armed conflict

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 2. A.] p. 2098
Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 2. C.] p. 2362

SUGGESTED READING: CONTAT HICKEL Marguerite, "The Challenge Posed by Displaced Persons", in *Refugee Survey Quarterly*, Vol. 20, February 2001, pp. 51-54. LAVOYER Jean-Philippe, "Guiding Principles on Internal Displacement", in *IRRC*, No. 324, September 1998, pp. 467-480. LUOPAJÄRVI Katja, "Is There an Obligation on States to Accept International

123 The 1951 UN Convention Relating to the Status of Refugees and its 1967 Protocol define a refugee in much narrower terms (generally, as one fleeing persecution). Only the Organization of African Unity Convention Governing the Specific Aspects of Refugee Problems in Africa includes people fleeing armed conflicts under the concept of refugee. Yet, civilians must rely upon these Conventions and the United Nations High Commissioner for Refugees for protection and benefits when fleeing to territory not involved in armed conflict, as IHL is inapplicable.

124 *Cf.* Arts. 35 to 46 of Convention IV.

125 In this case Art. 3 common to the Conventions and Protocol II would apply.

126 *Cf.* Art. 44 of Convention IV.

127 *Cf.* particularly Art. 73 of Protocol I.

128 *Cf.* Art. 70 (2) of Convention IV.

129 *Cf.* Art. 45 (4) of Convention IV.

Humanitarian Assistance to Internally Displaced Persons under International Law?" in *International Journal of Refugee Law*, Vol. 15/4, 2004, pp. 678-714. PHUONG Catherine, *The International Protection of Internally Displaced Persons*, Cambridge, CUP, 2004, 293 pp. PLATTNER Denise, "The Protection of Displaced Persons in Non-International Armed Conflicts", in *IRRC*, No. 291, November-December 1992, pp. 567-580. "Internally Displaced Persons: The Mandate and Role of the International Committee of the Red Cross", in *IRRC*, No. 838, June 2000, pp. 491-500.

a) protection by International Humanitarian Law

- prohibition of population displacements

(See *infra*, Chapter 8. IV. 8. a) Deportations, p. 194, and Chapter 12. II. 2. b) more absolute prohibition of forced displacement. p. 254.)

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

b) need of a specific instrument?

Document No. 41, UN, Guiding Principles on Internal Displacement. p. 850

SUGGESTED READING: GOLDMAN Robert, "Codification of International Rules on Internally Displaced Persons", in *IRRC*, No. 324, September 1998, pp. 463-466. LAVOYER Jean-Philippe, "Guiding Principles on Internal Displacement", in *IRRC*, No. 324, September 1998, pp. 467-480.

2. Persons fleeing into a third country because of an armed conflict

a) protected by the OAU Convention, the 1984 Cartagena Declaration and UN General Assembly Resolutions

Document No. 17, OAU Convention Governing the Specific Aspects of Refugee Problems in Africa. p. 639

The Cartagena Declaration on Refugees is available on <http://www1.umn.edu/humanrts/instree/cartagena1984.html>. The UN General Assembly Resolutions are available on <http://www.un.org/documents/resga.htm>.

b) protected by International Humanitarian Law if

- aa) the third country is the adverse party in an international armed conflict

Arts. 44 of Convention IV

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098

- bb) the third country is affected by another armed conflict

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098

3. Persons fleeing persecution: protected by International Humanitarian Law if the third country is subsequently affected by an armed conflict

Art. 70 (2) of Convention IV; Art. 73 of Protocol I

Case No. 184, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf.* paras. 587-588.] p. 1911
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098

SUGGESTED READING: LAVOYER Jean-Philippe, "Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC", in *IRRC*, No. 305, March-April 1995, pp. 162-180.

a) loss of protection in Refugee Law and International Humanitarian Law

Case No. 131, Canada, Ramirez v. Canada. p. 1376
 Case No. 166, Canada, Sivakumar v. Canada. p. 1685
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098
 Case No. 205, Switzerland, The Niyonteze Case. [*Cf.* A., consid. 10.] p. 2233

SUGGESTED READING: PEJIC Jelena, "Article 1F(a): The Notion of International Crimes", in *International Journal of Refugee Law*, Special supplementary issue, Vol. 12, 2000, pp. 11-45.

4. The principle of *non-refoulement* in International Humanitarian Law

Art. 45 (4) of Convention IV

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 16.] p. 1732
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098

5. The return of refugees and displaced persons at the end of the conflict

Document No. 40, Minimum Humanitarian Standards. [*Cf.* A., Art. 7 (1)] p. 823
 Document No. 41, UN, Guiding Principles on Internal Displacement. [*Cf.* Principles 28-30] p. 850
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. D.] p. 2098

- obligation to accept those willing to return?

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement. [*Cf.* Art. 12.] p. 1142

IV. SPECIAL RULES ON OCCUPIED TERRITORIES

Introductory Text

From the point of view of International Humanitarian Law (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^[130] nor to try to liberate that territory by violent means.^[131]

Starting from this philosophy, it is logical that the obligations of the occupying power can be summed up as permitting life in the occupied territory to continue as normally as possible. IHL is therefore strong in protecting the *status quo ante*, while weak in responding to new needs of the population of the occupied territory. The longer the occupation lasts, the more shortcomings of the regime established by IHL therefore appear.

Practical consequences of this philosophy are the following: Except concerning the protection of the occupying power's security, local laws remain in force^[132] and local courts remain competent.^[133] Except when rendered absolutely necessary by military operations, private property may not be destroyed,^[134] and it may only be confiscated under local legislation.^[135] Public property (other than that of the municipalities^[136]) 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.^[137] The local population may not be deported;^[138] the occupying power may not transfer its own population into the occupied territory.^[139]

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,^[140] as well as for

130 Except in the framework of a *levée en masse* against the approaching enemy, in which case they become combatants. (Cf. Art. 4 (A) (6) of Convention III.)

131 If they commit hostile acts, they may be punished under legislation introduced by the occupying power, but do not lose their status of protected civilians. (They may however lose their communication rights under Art. 5 (2) of Convention IV.) Except if and for as long as they directly participate in hostilities, they benefit from the protection of civilians against effects of hostilities. (Cf. Art. 51 (3) of Protocol I.)

132 Cf. Art. 43 of the Hague Regulations and Art. 64 of Convention IV.

133 Cf. Art. 66 of Convention IV.

134 Cf. Art. 53 of Convention IV.

135 Cf. Art. 46 of the Hague Regulations.

136 Cf. Art. 56 of the Hague Regulations.

137 Cf. Art. 55 of the Hague Regulations.

138 Cf. Art. 49 (1) of Convention IV.

139 Cf. Art. 49 (6) of Convention IV.

140 Cf. Art. 43 of the Hague Regulations.

ensuring hygiene and public health^[141] and food and medical supplies.^[142] 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 under the sovereignty of the occupying power under a peace treaty. Neutral on *ius ad bellum* issues, IHL has no preference for one of these two solutions, but international law tries to ensure that no measures are taken during the occupation which compromise a return to the former sovereign.

The rules of IHL on occupied territories apply whenever a territory comes, during an armed conflict, under control of the enemy of the power previously controlling that territory,^[143] as well as in every case of belligerent occupation, even when it does not encounter armed resistance and there is therefore no armed conflict.^[144] The rules protect all civilians, except nationals of the occupying power^[145] other than refugees.^[146] Unilateral annexation of the occupied territory by the occupying power - whether lawful or unlawful under *ius ad bellum* - or agreements concluded by the occupying power with local authorities of the occupied territory can not deprive protected persons from the protection offered by IHL.^[147]

Document No. 106, ICRC Appeals on the Near East. [Cf. C.] p. 1145

SUGGESTED READING: ANDO Nisuke, *Surrender, Occupation and Private Property in International Law*, Oxford, Clarendon Press, 1991, 208 pp. BENVENISTI Eyal, *The International Law of Occupation*, Princeton, Princeton University Press, 1993, 241 pp. BOTHE Michael, "Belligerent Occupation", in *Encyclopaedia of Public International Law*, Vol. 4, 1982, p. 65. GASSER Hans-Peter, "From Military Intervention to Occupation of Territory: New Relevance of International Law of Occupation", in FISCHER Horst, FROISSART Ulrike, HEINTSCHEL VON HEINEGG Wolff, RAAP Christian (ed.), *Crisis Management and Humanitarian Protection: In Honour of Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 139-159. KÄLIN Walter (ed.), *Human Rights in Times of Occupation: The Case of Kuwait*, Bern, Laws Books in Europe, 1994, 156 pp. KRETZMER David, *The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories*, Albany, State University of New York Press, 2002, 262 pp. LIJNZAAD Liesbeth, "How not to be an Occupying Power: Some Reflections on UN Security Council Resolution 1483 and the Contemporary Law of Occupation", in LIJNZAAD Liesbeth, VAN SAMBEEK Johanna & TAHZIB-LIE Bahia (ed.), *Making the Voice of Humanity Heard*, Leiden/Boston, Martinus Nijhoff Publishers, 2004, pp. 291-305. PLAYFAIR Emma (ed.), *International Law and the Administration of Occupied Territories, Two Decades of Israeli Occupation of the West Bank and the Gaza Strip*, Oxford, Clarendon Press, 1992, 524 pp. ROBERTS Adam,

141 Cf. Art. 56 of Convention IV.

142 Cf. Art. 55 of Convention IV.

143 Cf. Art. 42 of the Hague Regulations and Art. 2 (1) of Convention IV.

144 Cf. Art. 2 (2) of Convention IV.

145 Cf. Art. 4 (1) of Convention IV.

146 Cf. Art. 73 of Protocol I and Art. 70 (2) of Convention IV.

147 Cf. Art. 47 of Convention IV.

"Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", in *AJIL*, Vol. 84, 1990, pp. 44-103. ROBERTS Adam, "What is Military Occupation?", in *BYIL*, Vol. 55, 1984, pp. 249-305. WATSON Geoffrey R. *et al.*, "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory", in *AJIL*, Vol. 99/1, January 2005, pp. 1-141. ZWANENBURG Marten, "Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation", in *IRRC*, No. 856, December 2004, pp. 745-768.

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1. The place of rules on military occupation in contemporary International Humanitarian Law

a) **Interstate rules, which apply following a situation arising between two States, but which also govern relations between individuals and a State and between individuals**

b) Sources

aa) Arts. 42-56 of the Hague Regulations

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. para. 124.] p. 1151

bb) Sections I, III and IV of Convention IV

cc) The contributions of Protocol I: Arts. 44(3), 63, 69, 73 and 85(4)(a)

2. The applicability of the rules of IHL concerning occupied territories

Document No. 106, ICRC Appeals on the Near East. [Cf. C., para. 2.] p. 1145

Case No. 108, Israel, Applicability of the Conventions to Occupied Territories. p. 1208

Case No. 110, Israel, Ayub v. Minister of Defence. p. 1218

Case No. 112, Israel, Al Nawar v. Minister of Defence. p. 1232

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [Cf. A., E. II. 2., and G.] p. 1303

Document No. 120, Switzerland, Prohibition of Deportation from Israeli Occupied Territories. p. 1325

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 127, ECHR, Cyprus v. Turkey. p. 1341

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 2., 6., 15 and 33.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. B., Trial Chamber, Merits, paras. 580-581.] p. 1804

Case No. 234, The Conflict in Western Sahara. [Cf. A.] p. 2454

SUGGESTED READING: HAGGENMACHER Peter, "L'occupation militaire en droit international: genèse et profil d'une institution juridique", in *Relations Internationales*, No. 79, automne 1994, pp. 285-301. ROBERTS Adam, "Prolonged Military Occupation: The Israeli-Occupied Territories since 1967", in *AJIL*, Vol. 84/1, 1990, p. 44-103. ROBERTS Adam, "What is military occupation?", in *BYIL*, Vol. 55, 1984, p. 249-305.

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a) **Independently of *jus ad bellum***

b) **In case of armed conflict**

Art. 2 (1) of Convention IV

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A., paras. 90-101 and B., para. 23.] p. 1151

c) In case of belligerent occupation encountering no resistance

Art. 2 (2) of Convention IV

d) Absence of sovereignty of the occupying power

e) Beginning of the occupation

Art. 42 of the Hague Regulations - also applicable to Convention IV?

f) Annexation does not make IHL of military occupation inapplicable

Art. 47 of Convention IV

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfried Krupp, *et al.* [Cf. 4. (iv).] p. 1030
Case No. 94, India, Rev. Mons. Monteiro v. State of Goa. p. 1097

3. Protected persons

Art. 4 of Convention IV

a) Nationals of the occupied power

b) Nationals of third States (except of co-belligerent States)

c) Refugees, even if they are nationals of the occupying power

Art. 73 of Convention IV

4. Philosophy of the rules on occupied territories

Document No. 106, ICRC Appeals on the Near East. [Cf. B. and C.] p. 1145

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [Cf. E. II. 2.] p. 1303

Case No. 127, ECHR, Cyprus v. Turkey. p. 1341

a) Protected interests of the population of the territory: its life must continue as normally as possible

Case No. 87, Burma, Ko Maung Tin v. U Gon Man. p. 1068

Document No. 106, ICRC Appeals on the Near East. [Cf. C. para. 3.] p. 1145

b) Protected interests of the occupying power: security of the occupying forces

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. B. paras. 27-31.] p. 1151

c) Protected interests of the occupied power: no change in status?

5. Legal order of an occupied territory

SUGGESTED READING: Harvard Program on Humanitarian Policy and Conflict Research, International Humanitarian Law Research Initiative, *Occupation and Peacebuilding*, online: <http://www.ihlresearch.org> (with references to doctrine, news, and presentations of issues from an IHL perspective, including: SASSÖLI Marco, "Article 43 of the Hague Regulations and Peace Operations in the Twenty-First Century", 2004, online: <http://www.ihlresearch.org/ihl/pdfs/sassoli.pdf>). KAIKOBAD Kaiyan Homi, "Problems of Belligerent Occupation: The Scope of Powers Exercised by the Coalition Provisional Authority in Iraq, April/May 2003 - June 2004", in *ICLQ*, Vol. 54/1, January 2005, pp. 253-264. MURPHY Sean D., "Coalition Laws and Transitional Arrangements During Occupation of Iraq", in *AJIL*, Vol. 98, 2004, pp. 601-606. SCHWENK Edmund H., "Legislative Powers of the Military Occupant under Article 43, Hague Regulations", in *Yale Law Journal*, Vol. 54, 1945, pp. 393 ff. SCHEFFER David J., "Beyond Occupation Law", in *AJIL*, Vol. 97, 2003, pp. 842-860.

a) The principle concerning legislation: occupying powers must leave local legislation in force

Case No. 78, US Military Tribunal at Nuremberg, *US v. Alfried Krupp, et al.* p. 1030
Case No. 87, *Burma, Ko Maung Tin v. U Gon Man.* p. 1068

Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory. p. 1223

- aa) The relationship between Article 43 of the Hague Regulations and Article 64 of Convention IV
- bb) Applicability of Article 43 to legislation made by local authorities under the global control of an occupying power

b) Exceptions to the prohibition to legislate

Case No. 159, *Iraq, Occupation and Peacebuilding.* [Cf. B.] p. 1645

- aa) The occupying power may legislate to ensure its security
- bb) The occupying power may adopt legislation essential for the implementation of IHL

Case No. 160, *Iraq, The Trial of Saddam Hussein.* p. 1656

- cc) The occupying power may legislate where indispensable to implement International Human Rights Law
- dd) The occupying power may legislate where necessary to maintain public order

Case No. 159, *Iraq, Occupation and Peacebuilding.* [Cf. B. 1bis.] p. 1645

- ee) May the occupying power legislate to maintain civil life in an occupied territory?
- ff) May an occupying power legislate to enhance civil life in an occupied territory?

Case No. 159, *Iraq, Occupation and Peacebuilding.* [Cf. B. 5., 5bis., 5ter; C.] p. 1645

gg) Security Council authorization?

Case No. 159, Iraq, Occupation and Peacebuilding. [Cf. A.] p. 1645

c) Special rules on criminal law

Arts. 64, 65, 67 and 70 of Convention IV

aa) Penal laws in force are applied by existing local tribunals

Case No. 159, Iraq, Occupation and Peacebuilding. [Cf. B. 3 and 4] p. 1645

Case No. 160, Iraq, The Trial of Saddam Hussein. p. 1656

bb) Legislation introduced by the occupying Power (for the reasons mentioned under b) above)

Case No. 160, Iraq, The Trial of Saddam Hussein. p. 1656

- Non-retroactive

Art. 67 of Convention IV

- Prosecution of offences committed before the occupation

Art. 70 of Convention IV

- Competent military tribunals

Art. 66 of Convention IV

- Detailed judicial guarantees

Arts. 68-75 of Convention IV

6. Protection of persons deprived of liberty

Case No. 123, ICRC/South Lebanon, Closure of Insar camp. p. 1335

a) The principle: unlike combatants, civilians may not be deprived of their liberty

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. p. 1387

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 12.] p. 1732

b) Indicted or convicted persons

aa) Judicial guarantees

Arts. 71-75 of Convention IV

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 159, Iraq, Occupation and Peacebuilding. [Cf. B. 1ter.] p. 1645

Case No. 160, Iraq, The Trial of Saddam Hussein. p. 1656

SUGGESTED READING: FARRELL Norman, "International Humanitarian Law and Fundamental Judicial Guarantees", in *Annual Conference/The African Society of International and*

Comparative Law, Vol. 10, 1998, pp. 130-141. GASSER Hans-Peter, "Respect for Fundamental Judicial Guarantees in Time of Armed Conflict: The Part Played by ICRC Delegates", in *IRRC*, No. 287, March-April 1992, pp. 121-142. SASSÒLI Marco, "La peine de mort en droit international humanitaire et dans l'action du Comité international de la Croix-Rouge", in *Revue internationale de droit pénal*, Vol. 58, 1987, pp. 583-592.

bb) Detention in the occupied territory

Art. 76 of Convention IV

cc) Humane treatment

Art. 76 of Convention IV

Case No. 159, Iraq, Occupation and Peacebuilding. [*Cf.* B. 2.] p. 1645

dd) Handing over to local authorities at the end of the occupation

Art. 77 of Convention IV

c) Interned civilians

aa) Decision on internment or assignment to residence

Art. 78 of Convention IV

Case No. 115, Israel, Ajuri v. IDF Commander. p. 1263

Case No. 157, US, The Schlesinger Report. p. 1623

- For imperative reasons of security
- Individual administrative decision
- Possibility of appeal
- Review every six months

Case No. 156, US, The Taguba Report. p. 1610

bb) Detailed rules on their treatment

Arts. 79-135 of Convention IV

d) Re-interned prisoners of war

Art. 4 (B) (1) of Convention III

7. Protection of private property

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* p. 1030

Case No. 89, Singapore, Bataafsche Petroleum v. The War Damage Commission. p. 1071

Case No. 110, Israel, Ayub v. Minister of Defence. p. 1218

Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory. p. 1223

Case No. 112, Israel, Al Nawar v. Minister of Defence. p. 1232

Case No. 116, Israel, Evacuation of Bodies in Jenin. p. 1284

Case No. 127, ECHR, Cyprus v. Turkey. [*Cf.* paras. 183-189 and 165-270.] p. 1341

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [*Cf.* A., Annex, paras. 32, 34, 50, 55 and 56.] p. 1540

SUGGESTED READING: ABOUALI Gamal, "Natural Resources under Occupation: The Status of Palestinian Water under International Law", in *Pace International Law Review*, Vol. 10/2, 1998, pp. 411-574. ANDO Nisuke, *Surrender, Occupation and Private Property in International Law*, Oxford, Clarendon Press, 1991, 208 pp. DINSTEIN Yoram, "The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses", in *IYHR*, Vol. 29, 1999, pp. 285-304. WATSON Geoffrey R. *et al.*, "Agora: ICJ Advisory Opinion on Construction of a Wall in the Occupied Palestinian Territory", in *AJIL*, Vol. 99/1, January 2005, pp. 1-141.

a) Prohibition of pillage

Art. 33 (2) of Convention IV and Arts. 28 and 47 of the Hague Regulations [Rule 52 of CIHL]

b) Prohibition of confiscation of private property

Art. 46 (2) of the Hague Regulations [Rule 51 (c) of CIHL]

c) Limited admissibility of requisitions

Art. 52 of the Hague Regulations

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* A. para. 132 and B. paras. 8 and 32.] p. 1151

8. Specific Prohibitions

a) Deportations

Art. 49 (1) of Convention IV [Rule 129 A. of CIHL]

Case No. 94, India, Rev. Mons. Monteiro v. State of Goa. p. 1097

Case No. 114, Israel, Cases Concerning Deportation Orders. p. 1244

Case No. 115, Israel, Ajuri v. IDF Commander. [*Cf.* paras. 20-22.] p. 1263

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [*Cf.* A.] p. 1303

Document No. 120, Switzerland, Prohibition of Deportations from Israeli Occupied Territories. p. 1325

Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

SUGGESTED READING: DINSTEIN Yoram, "The Israel Supreme Court and the Law of Belligerent Occupation: Deportations", in *IYHR*, Vol. 23, 1993, pp. 1-26. LAPIDOTH Ruth, "The Expulsion of Civilians from Areas which Came under Israeli Control in 1967: Some Legal Issues", in *EJIL*, Vol. 1, 1991, pp. 97-109. SHERRY Virginia N., *Persona Non Grata: The Expulsion of Lebanese Civilians from Israeli-Occupied Lebanon*, New York, Human Rights Watch, 1999, 83 pp., <http://www.hrw.org/reports/1999/lebanon>.

b) Transfer of the occupying power's own population

Art. 49 (6) of Convention IV [Rule 130 of CIHL]

Document No. 106, ICRC Appeals on the Near East. [*Cf.* B. and C., para. 5.] p. 1145

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* A. paras. 120 and 135.] p. 1151

Case No. 110, Israel, Ayub v. Minister of Defence. p. 1218

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention.
[Cf. B. and F.] p. 1303

Case No. 234, The Conflict in Western Sahara. [Cf. A.] p. 2454

aa) Status and protection of settlers

Document No. 106, ICRC Appeals on the Near East. [Cf. C., para. 5.] p. 1145

Case No. 121, Amnesty International, Breach of the Principle of Distinction. p. 1328

SUGGESTED READING: AL-RAYYES Nasser, *The Israeli Settlements from the Perspective of International Humanitarian Law*, Ramallah, Al-Haq Institute, 2000, 139 pp. MALLISON William T., "A Juridical Analysis of the Israeli Settlements in the Occupied Territories", in *The Palestine Yearbook of International Law*, Vol. 10, 1998-99, pp. 1-26.

c) Destruction of property

Art. 53 of Convention IV

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. paras. 132 and 135.] p. 1151

Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory. p. 1223

SUGGESTED READING: DINSTEIN Yoram, "The Israel Supreme Court and the Law of Belligerent Occupation: Demolitions and Sealing off of Houses", in *IYHR*, Vol. 29, 1999, pp. 285-304.

9. The Administration of an Occupied Territory**a) Responsibility for public order and safety ("la vie et l'ordre publics")**

Art. 43 of the Hague Regulations

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* p. 1030

Case No. 86, US, *In re Yamashita*. p. 1063

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 127, ECHR, Cyprus v. Turkey. [Cf. paras. 69 and 77.] p. 1341

Case No. 159, Iraq, Occupation and Peacebuilding. [Cf. B. 1 bis.] p. 1645

aa) Field of application: not only security, but also welfare

bb) An obligation of means and not of result

cc) An obligation subject to the limitations Human Rights Law sets for any State action

Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq. p. 1605

b) Taxation

Arts. 48, 49 and 51 of the Hague Regulations

c) Administration of public property

Art. 55 of the Hague Regulations [Rule 51 (a) and (b) of CIHL]

SUGGESTED READING: ABOUALI Gamal, "Natural Resources under Occupation: The Status of Palestinian Water under International Law", in *Pace International Law Review*, Vol. 10/2, 1998, pp. 411-574. BENVENISTI Eyal, "Water Conflicts During the Occupation in Iraq", in *AJLL*, Vol. 97, 2003, pp. 860-872.

- aa) But no confiscation, except concerning property which may be used for military operations

Art. 53 of the Hague Regulations

d) Respect for the status of civil servants

Art. 54 of Convention IV

10. Protection of economic, social and cultural rights

a) Food and medical supplies

Arts. 55 and 59-62 of Convention IV; Art. 69 of Protocol I

Case No. 117, Israel, The Rafah Case. [*Cf.* paras. 27-28.] p. 1289

- aa) Obligation not to interfere with local supply system
- bb) Obligation to furnish supplies
- cc) Obligation to allow free passage of aid

b) Public health and hygiene

Arts. 56, 57 and 63 of Convention IV

Case No. 117, Israel, The Rafah Case. [*Cf.* paras. 40-44.] p. 1289

- aa) Obligation to guarantee them
- bb) Respect of Medical personnel
- cc) Respect of Hospitals
- dd) Respect the National Society of the Red Cross or Red Crescent

c) Children and their education

Art. 50 of Convention IV

d) Protection of workers

- aa) Limits on working obligations

Art. 51 of Convention IV

- bb) Prohibition to cause unemployment

Art. 52 of Convention IV

e) Cultural property

(See Document No. 3, Conventions on the Protection of Cultural Property. [C. Second Hague Protocol for the Protection of Cultural Property, Art. 9.] p. 525.)

11. The end of the applicability of the rules on occupied territories

Case No. 161, Iraq, The End of Occupation. p. 1664

SUGGESTED READING: ALONZO-MAIZLISH David, "When Does it End? Problems in the Law of Occupation" in ARNOLD Roberta and HILDBRAND Pierre-Antoine (ed.), *International Humanitarian Law and the 21st Century's Conflicts*, Lausanne, Edis, 2005, pp. 97-116. ROBERTS Adam, "The End of Occupation in Iraq (2004)", in *ICLQ*, Vol. 54, 2005, pp. 27 (also online: <http://www.ihlresearch.org/iraq/feature.php?a=51>).

a) During an occupation according to Convention IV (Art. 6 (3)), but not to Protocol I (Art. 3(b))

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* para. 125.] p. 1151

- b) In case of self-government?**
- c) In case of a peace treaty**
- d) In case of retreat of the occupying power**
- e) By UN Security Council determination?**

Case No. 161, Iraq, The End of Occupation. p. 1664

f) Protection of persons who remain detained

Art. 6 (4) of Convention IV

Chapter 9

CONDUCT OF HOSTILITIES

SUGGESTED READING: ARRASSEN Mohamed, *Conduite des hostilités, droit des conflits armés et désarmement*, Brussels, Bruylant, 1986, 605 pp. BAXTER Richard R., "The Duties of Combatants and the Conduct of Hostilities (The Law of the Hague)", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1986, pp. 93-133. DINSTEIN Yoram, "Jus in Bello Issues Arising in the Hostilities in Iraq in 2003", in *IYHR*, Vol. 34, 2004, pp. 1-14. DINSTEIN Yoram, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, CUP, 2004, 296 pp. EPSTEIN Melissa & BUTLER Richard, "The Customary Origins and Elements of Select Conduct of Hostilities Charges before the International Criminal Tribunal for the Former Yugoslavia: A Potential Model for Use by Military Commissions", in *Military Law Review*, Vol. 179, 2004, pp. 68-127. KALSHOVEN Frits & ZEGVELD Liesbeth, *Constraints on the Waging of War*, Geneva, ICRC, 2001, 223 pp.

I. THE DISTINCTION BETWEEN THE LAW OF THE HAGUE AND THE LAW OF GENEVA

(See *Supra* Chapter 3, Historical Development of International Humanitarian Law. p. 121.)

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [*Cf.* para. 75] p. 896

Document No. 57, France, Accession to Protocol I. [*Cf.* A.] p. 958

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* para. 6] p. 2266

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

1. Basic rule: Article 48 of Protocol I

[Rule 7 of CIHL]

Quotation 1 Article 48: Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian

population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

[Source: Protocol I.]

Quotation 2 Considering:

[...]

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men. [...]

[Source: *Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles under 400 Grammes Weight*, Saint Petersburg, November 29/December 11, 1868, paras. 2-3 of the Preamble; original text in French; English translation in *Parliamentary Papers*, vol. LXIV, 1869, p. 659; reprinted from Schindler, D. & Toman, J. (eds.), *The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents*, 4th ed., Leiden, Boston, Nijhoff Publishers, 2004, p. 91; also available on <http://www.icrc.org/ihl>.]

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122

Document No. 106, ICRC Appeals on the Near East. p. 1145

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 13.] p. 1732

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. p. 2077

SUGGESTED READING: SOLF Waldemar A., "Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I", in *American University Journal of International Law and Policy*, Vol. 1, 1986, pp. 107-135.

FURTHER READING: DOSWALD-BECK Louise, "The Value of the Geneva Protocols for the Protection of Civilians", in MEYER Michael (ed.), *Armed conflict and the New Law: Aspects of the 1977 Geneva Protocols and the 1981 Weapons Conventions*, London, 1989, pp. 137-172. GEHRING Robert W., "Protection of Civilian Infrastructures", in *Law and Contemporary Problems*, Vol. 42/2, 1978, pp. 86-139. OBRADOVIC Konstantin, "La protection de la population civile dans les conflits armés internationaux", in CASSESE Antonio (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, Editoriale Scientifica, Vol. I, 1979, pp. 128-160. SAUSSURE Hamilton de, "Belligerent Air Operations and the 1977 Geneva Protocol I", in *Annals of Air and Space Law*, Vol. 1, 1976, pp. 33-47. SPAIGHT James M., *Air Power and War Rights*, London, Longmans, 1947, 523 pp. URBINA Julio Jorge, *Protección de las víctimas de los conflictos armados, Naciones Unidas y derecho internacional humanitario: desarrollo y aplicación del principio de distinción entre objetivos militares y bienes de carácter civil*, Valencia, Tirant Monografias, 2000, 439 pp.

2. Field of application

Art. 49 of Protocol I

SUGGESTED READING: SOLF Waldemar A., "Protection of Civilians Against the Effects of Hostilities under Customary International Law and under Protocol I", in *The American University Journal of International Law and Policy*, Vol. 1, 1986, pp. 107-135. MEYROWITZ Henri, "Une révolution inaperçue: l'article 49 (2) du Protocole additionnel I aux Conventions de Genève de 1949", in *Oesterreichische Zeitschrift für öffentliches Recht und Völkerrecht*, Vol. 32, 1981, pp. 29-57.

a) acts of violence in defence and offence

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

SUGGESTED READING: KRETZMER David, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", in *EJIL*, Vol. 16/2, 2005, pp. 171-212.

b) in whatever territory including attacks on its own territory under the control of the enemy

c) attacks from land, air, or sea affecting the civilian population on land

(See also Chapter 11, The Law of Air Warfare, p. 241.)

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. p. 2077

SUGGESTED READING: BOURBONNIERE Michel, "Law of Armed Conflict (LOAC) and the Neutralization of Satellites or *Ius in Bello Satellitis*", in *Journal of Conflict and Security Law*, Vol. 9, 2004, pp. 43 ff. CANESTARO Nathan, "Legal and Policy Constraints on the Conduct of Aerial Precision Warfare", in *Vanderbilt Journal of Transnational Law*, Vol. 37/2, 2004, 431-484. ROSCINI Marco, "Targeting and Contemporary Aerial Bombardment", in *ICLQ*, Vol. 54/2, 2005, p. 411-444.

3. Definition of military objectives

Art. 52 (2) and (3) of Protocol I [Rule 8 of CIHL]

Introductory Text

As soon as the focus of the law on the conduct of hostilities shifted from the prohibition to attack undefended towns and villages^[148] to the rule that only military objectives may be attacked, the definition of military objectives became crucial. The principle of distinction is practically worthless without a definition of at least one of the categories between which the attacker has to distinguish. From the point of view of the philosophy of International Humanitarian Law it would have been more satisfactory to define civilian objects. However, as it is not due to its intrinsic character, but according to its use by the enemy or potential use by the attacker that an object becomes a military objective, military objectives had to be defined. Indeed, every object other than those benefiting from special protection^[149] can become a military objective. For this same reason it has neither been possible to formulate an exhaustive list of military objectives, although such a list would have greatly simplified practical implementation. Most definitions are therefore abstract but provide a list of examples. Protocol I chooses to exemplify its definition by an open list of examples of civilian objects which are presumed not to be military objectives.^[150]

148 Cf. Art. 25 of the Hague Regulations.

149 Those specially protected objects, e.g., dams, dikes, and hospitals, may not be used by those who control them for military action and should therefore never become military objectives. If they are however used for military purposes, even they can under restricted circumstances become military objectives. (Cf., e.g., Art. 56 (2) of Protocol I and Art. 19 of Convention IV.)

150 Cf. Art. 52 (3) of Protocol I.

Under the definition provided for by Article 52 (2) of Protocol I an object^[151] must cumulatively^[152] fulfil two criteria to be a military objective. First, the object has to contribute effectively to military action of one side,^[153] and, second, its destruction, capture, or neutralization has to offer a definite military advantage for the other side.^[154] What counts is first that the action and the advantage have to be "military"; the political aim of victory may be achieved through violence only by using violence against military objectives, *i.e.*, by weakening the military potential of the enemy.^[155] Second, both criteria must be fulfilled "in the circumstances ruling at the time". Without this limitation to the actual situation, the principle of distinction would be void, as every object could *in abstracto*, under possible future developments, *e.g.*, if used by enemy troops, become a military objective.

Case No. 54, US, War Crimes Act. p. 952

Document No. 57, France, Accession to Protocol I. p. 958

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [Cf. A.] p. 1540

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 19 and 27.] p. 1732

Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [Cf. para. 54] p. 1888

Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others. p. 2071

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. [Cf. A., paras. 10-18 and B., paras. 55 and 71-79.] p. 2077

Case No. 217, US, Military Commission Instructions. [Cf. 5. D.] p. 2335

SUGGESTED READING: DOUGHERTY Bernard & QUENIVET Noëlle, "Has the Armed Conflict in Iraq Shown once more the Growing Dissension Regarding the Definition of a Legitimate Target?: What and Who can be Lawfully Targeted?", in *Humanitäres Völkerrecht*, Vol. 4, 2003, pp. 188-196. ROBERTSON Horace B., "The Principle of the Military Objective in the Law of Armed Conflict", in *International Law Studies*, US Naval War College, Vol. 72, 1998, pp. 197-223. SASSÖLI Marco, "Targeting: The Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts", in WIPPMAN David & EVANGELISTA Matthew (ed.), *New Wars, New Laws? Applying the Laws of War in 21st Century Conflicts*, New York, Transnational Publishers, 2005, pp. 181-210. SCHMITT Michael, "Targeting and Humanitarian Law: Current Issues", in *IYHR*, Vol. 34, 2004, pp. 59-104 (online: <http://www.michaelschmitt.org>).

151 Indeed, only a material object can be a military objective under International Humanitarian Law, as immaterial objectives can only be achieved, not attacked. It is the basic idea of International Humanitarian Law 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.

152 In practice, however, one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy.

153 One cannot imagine how it could do this other than by its "nature, location, purpose or use." Those elements foreseen in Art. 52 (2) only clarify that not only objects of a military nature are military objectives.

154 Characterizing the contribution as "effective" and the advantage as "definite" - as Art. 52 (2) does - avoids that everything can be considered as a military objective, taking into account indirect contributions and possible advantages; thus, the limitation to "military" objectives could be too easily undermined.

155 If force could be used to achieve the political aim by directing it at any advantage, not just military objectives, even the civilian population as such would be attacked, as they might well influence the enemy government. Then, however, there would be no more International Humanitarian Law, merely considerations of effectiveness.

- the concept of military necessity

(See also *infra*, Chapter 9. III. 1. The basic rule: Article 35 of Protocol I. p. 218.)

Case No. 38, ILC, Draft Articles on State Responsibility. p. 805

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 151, US, Surrendering in the Persian Gulf War. p. 1582

SUGGESTED READING: DRAPER Gerald I.A.D., "Military Necessity and Humanitarian Imperatives", in *RDMDG*, Vol. 12/2, 1973, pp. 129-151. RAUCH Elmar, "Le concept de nécessité militaire dans le droit de la guerre", in *RDMDG*, Vol. 18, 1980, pp. 205-237.

FURTHER READING: DUNBAR N.C.H., "The Significance of Military Necessity in the Law of War", in *Juridical Review*, Vol. 67/2, 1955, pp. 201-212. O'BRIEN William V., *Military Necessity: The Development of the Concept of Military Necessity and its Interpretation in the Modern Law of War*, Georgetown University, Thesis, 1953, 318 pp. RAGONE P.A., "The Applicability of Military Necessity in the Nuclear Age", in *JILP*, Vol. 16/4, 1984, pp. 701-714. VENTURINI Gabriella, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano, Giuffrè, 1988, 189 pp.

4. Definition of the civilian population

Art. 50 of Protocol I

Introductory Text

The principle of distinction can only be respected if not only the permissible objectives but also the persons who may be attacked are defined. As combatants are characterized by a certain uniformity and civilians by their great variety,^[156] it is logical that Art. 50 (1) of Protocol I defines civilians by exclusion from the complementary category of combatants: Everyone who is not a combatant - or a civilian while unlawfully directly participating in hostilities^[157] - is a civilian benefiting from the protection provided for by the law on the conduct of hostilities.^[158] The complementarity of the two categories is very important for the completeness and effectiveness of International Humanitarian Law (IHL) in order to avoid that some people may fight but not be fought against or others may be attacked but may not defend themselves - a privilege and a sanction which would never be respected and would undermine the whole fabric of IHL in a given conflict.

Recently, some scholars and governments have argued that persons belonging to an armed group failing to fulfil the collective requirements for combatant status, may nevertheless be attacked like combatants and not only, as civilians, when and for such time as they directly participate in hostilities. Such a theory, which could justify acts that would otherwise qualify as extra-judicial executions, is at least incompatible with the wording

¹⁵⁶ This variety justifies the presumption of civilian status provided for in Art. 50 (1) of Protocol I.

¹⁵⁷ Cf. Art. 51 (3) of Protocol I.

¹⁵⁸ The definition of civilians benefiting from protected civilian status under the Convention IV is more restrictive in that it excludes those in the power of their own side, but it is also complementary to that of the combatant. (Cf. Art. 4 of Convention IV.)

of Art. 50 (1) of Protocol I. Because of the difficulties to identify such persons in the conduct of hostilities, this would also put other civilians at risk.

Thus, under this definition there is no and under IHL there may logically be no category of "quasi-combatants", *i.e.*, civilians contributing so fundamentally to the war effort (*e.g.*, workers in ammunition factories) that they lose their civilian status although not directly participating in hostilities. If the civilian population shall be protected, only one distinction is practicable: the distinction between those who (may) directly participate in hostilities, on the one hand, and all others, on the other hand, who do not, may not, and cannot hinder the enemy militarily from obtaining control over their country in the form of a complete military occupation - regardless of whatever their contribution to the war effort may be otherwise.

To allow attacks on persons other than combatants would also violate the principle of necessity, because victory can be achieved by overcoming only the combatants of a country - however efficient its armament industry and however genial its politicians may be. All this obviously does not exclude that military objectives, such as armament factories, may be attacked, and - subject to the principle of proportionality - the attack on a military objective does not become unlawful because of the risk that a civilian who works or is otherwise present in a military objective may be harmed by such an attack.

If one person so defined is a civilian, any number of such persons constitute the civilian population.^[159] According to proportionality as a general principle of law, the presence of individual non-civilians among a great number of civilians does not deprive the latter of the character of a civilian population,^[160] but this does not mean that the non-civilians may not be individually attacked with the necessary precautions.

SUGGESTED READING: GEHRING Robert W., "Loss of Civilian Protections under the Fourth Geneva Convention and Protocol I", in *RDMDG*, Vol. 19, 1980, pp. 9-48. TURNER Lisa NORTON Lynn G., "Civilians at the Tip of the Spear", in *Air Force Law Review*, Vol. 51, 2001, pp. 21 ff. GUILLORY Michael E., "Civilianizing the Force: Is the United States Crossing the Rubicon?", in *Air Force Law Review*, Vol. 51, 2001, pp. 111 ff.

a) definition of a civilian

Art. 50 (1) of Protocol I [Rule 5 of CIHL]

Document No. 106, ICRC Appeals on the Near East. [*Cf.* C., para. 7.] p. 1145

Case No. 109, Israel, Military Prosecutor v. Kassem and Others. [*Cf.* II. E. 4.] p. 1212

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 27.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Trial Chamber, Merits, paras. 639 and 640.] p. 1804

Case No. 185, ICTY, The Prosecutor v. Blaskic. [*Cf.* paras. 211-214.] p. 1936

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 291, 292 and 422.] p. 1467

159 *Cf.* Art. 50 (2) of Protocol I.

160 *Cf.* Art. 50 (3) of Protocol I.

- consequences of the loss of protection as a civilian

Art. 51 (3) of Protocol I [Rule 6 of CIHL]

**Case No. 163, Inter-American Commission on Human Rights, *Tablada*.
[Cf. paras. 178 and 189.] p. 1670**

SUGGESTED READING: KRETZMER David, "Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?", in *EJIL*, Vol. 16/2, 2005, pp. 171-212.

- what constitutes direct participation?
- for how long do civilians directly participating in hostilities lose their protection against attacks?

b) the presence of a combatant or a military objective among the civilian population

Art. 50 (3) of Protocol I

Case No. 116, Israel, *Evacuation of Bodies in Jenin*. p. 1284

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 263-267.] p. 1467

Case No. 188, ICTY, *The Prosecutor v. Strugar*. [Cf. para. 282.] p. 2020

5. Prohibited attacks

(See also *infra*, Chapter 9. III. Means and Methods of Warfare. p. 218.)

Introductory Text

Under International Humanitarian Law (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 those attacks with the purpose of terrorizing the population.^[161] IHL also proscribes attacks directed at civilian objects.^[162] Even those attacks directed at a legitimate military objective^[163] are regulated by IHL; such attacks must not be indiscriminate, thus, the weapons utilized must be capable of being directed at the specific military objective and the means used must be in proportion to the military necessity.^[164] In addition, if not only military objectives but also civilians or civilian objects may be affected by the attack, precautionary measures must be taken.^[165] Reprisals against civilians or civilian objects are also prohibited under IHL.^[166]

161 Cf. Arts. 48, 51 (2) and 85 (3) of Protocol I and Art. 13 of Protocol II.

162 Cf. Arts. 52-56 and 85 (3) of Protocol I.

163 Cf. Art. 52 (2) of Protocol I.

164 Cf. Art. 22 of the Hague Regulations and Art. 51 (4) and (5) of Protocol I.

165 Cf. Arts. 26 and 27 of the Hague Regulations, Art. 19 of Convention IV (concerning hospitals) and Art. 57 (2) of Protocol I.

166 Cf. Arts. 51 (6), 52 (1), 53 (c), 54 (4), 55 (2) and 56 (4) of Protocol I.

Document No. 57, France, Accession to Protocol I. [*Cf.* A.] p. 958
 Case No. 61, US, President Rejects Protocol I. p. 971
 Case No. 85, US, Trial of Lieutenant General Harukei Isamaya and Others. p. 1060
 Document No. 106, ICRC Appeals on the Near East. [*Cf.* C., para. 7.] p. 1145
 Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540

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

(*See also supra*, Chapter 2. III. 1. d) acts of terrorism? p. 112.)

Art. 51 (2) of Protocol I [Rule 2 of CIHL]

Case No. 96, ICRC Report on Yemen, 1967. p. 1106
 Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112
 Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122
 Document No. 106, ICRC Appeals on the Near East. [*Cf.* C. para. 7.] p. 1145
Case No. 121, Amnesty International, Breach of the Principle of Distinction. p. 1328
 Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540
 Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696
 Case No. 181, ICTY, The Prosecutor v. Martić, Rule 61 Decision. [*Cf.* paras. 8, 10-14, and 24-32.] p. 1880
 Case No. 182, ICTY, The Prosecutor v. Rajić, Rule 61 Decision. [*Cf.* paras. 51-56.] p. 1888
Case No. 187, ICTY, The Prosecutor v. Galic. [*Cf.* paras. 16-137 and 561-593.] p. 1986
Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* A. and B., paras 220-222 and 280-288.] p. 2020
 Case No. 192, Croatia, Prosecutor v. Rajko Radulović and Others. p. 2071

b) attacks against civilian objects

Art. 52 (1) of Protocol I [Rule 10 of CIHL]

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540
Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* B., paras 223-228 and 282.] p. 2020

c) indiscriminate attacks

[Rule 11 of CIHL]

Case No. 139, South Africa, Sagarius and Others. p. 1507
 Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529
 Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540
 Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591
 Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq. p. 1605
Case No. 187, ICTY, The Prosecutor v. Galic. [*Cf.* paras. 372-387.] p. 1986

SUGGESTED READING: CASSESE Antonio, "The Prohibition of Indiscriminate Means of Warfare", in AKKERMAN Robert J. (ed.), *Declarations on Principles, A Quest for Universal Peace, Liber Amicorum Discipulorumque Prof. Dr Bert V.A. Röling*, Leiden, 1977, pp. 171-194. BLIX Hans, "Area Bombardment: Rules and Reasons", in *BYIL*, Vol. 49, 1978, pp. 31-69. MEYROWITZ Henri, "Le bombardement stratégique d'après le Protocol I aux Conventions de Genève", in *ZaöRV*, Vol. 41, 1981, pp. 1-68.

FURTHER READING: CARNAHAN Burrus, "'Linebacker II' and Protocol I: The Convergence of Law and Professionalism", in *American University Law Review*, Vol. 31/4, 1982, pp. 861-870. PARKS William H., "Conventional Aerial Bombing and the Law of War", in *United States Naval Institute Proceedings*, Vol. 108, No. 951, 1982, pp. 98-117. PARKS William H., "Linebacker and the Law of War", in *Air University Review*, January-February 1983, pp. 2-30.

aa) attacks not directed at a specific military objective

Art. 51 (4) (a) of Protocol I [Rule 12 (a) of CIHL]

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

Art. 51 (4) (b) of Protocol I [Rule 12 (b) of CIHL]

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573
Case No. 181, ICTY, The Prosecutor v. Martić, Rule 61 Decision. [Cf. paras. 30 and 31.] p. 1880

cc) treating different military objectives as a single military objective

Art. 51 (5) (a) of Protocol I [Rule 13 of CIHL]

dd) principle of proportionality

(See also *supra*, Chapter 4. III. 2. c) proportionality p. 142.)

Art. 51 (5) (b) of Protocol I [Rule 14 of CIHL]

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. para. 43.] p. 896
Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573
Case No. 184, ICTY, The Prosecutor v. Kupreskić et al. [Cf. para. 526.] p. 1911
Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. [Cf. A., paras. 4, 18-19 and B., paras. 75-78.] p. 2077

SUGGESTED READING: BROWN Bernard L., "The Proportionality Principle in the Humanitarian Law of Warfare: Recent Efforts at Codification", in *Cornell International Law Journal*, Vol. 10, 1976, pp. 134-155. FENRICK William J., "The Rule of Proportionality and Protocol I in Conventional Warfare", in *Military Law Review*, Vol. 98, 1980, pp. 541-595. GARDAM Judith, *Necessity, Proportionality and the Use of Force by States*, Cambridge, CUP, 2004, 259 pp. GARDAM Judith, "The Proportionality as a Restraint on the Use of Force", in *AYIL*, Vol. 20, 1999, pp. 161-173. PARKER Tom, "The Proportionality Principle in the War on Terror", in *Hague Yearbook of International Law*, Vol. 15, 2002, pp. 3-15.

FURTHER READING: FENRICK William J., "The Law Applicable to Targeting and Proportionality after Operation Allied Force: A View from the Outside", in *YIHL*, Vol. 3, 2000, pp. 53-

80. FENRICK William J., "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia", in *EJIL*, Vol. 12/3, 2001, pp. 489-502. KRÜGER-SPRENGEL Friedhelm, "Le concept de proportionnalité dans le droit de la guerre, Rapport présenté au Comité pour la protection de la vie humaine dans les conflits armés, VIII^e Congrès de la Société internationale de droit pénal militaire et de droit de la guerre", in *RDMDG*, Vol. 19, 1980, pp. 177-204. MEDENICA Olivera, "Protocol I and Operation Allied Force: did NATO Abide by Principles of Proportionality?", in *Loyola of Los Angeles International and Comparative Law Review*, Vol. 23, 2001, pp. 329-426. REYNOLDS Jefferson, "Collateral Damage on the 21st Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground", in *Air Force Law Review*, Vol. 56, 2005, 169 pp. SHUE Henry and WIPPMAN David, "Limiting attacks on Dual Use Facilities performing Indispensable Civilian Functions" in *Cornell International Law Journal*, Vol. 35, 2002, pp. 559-579. "Symposium: The International Legal Fallout from Kosovo " (articles of GAZZINI Tarcisio, HILPOLD Peter, CERONE John, FENRICK William J., BENVENUTI Paolo & BOTHE Michael), in *EJIL*, Vol. 12/3, 2001, pp. 391-536. VENTURINI Gabriella, *Necessità e proporzionalità nell'uso della forza militare in diritto internazionale*, Milano, Giuffrè, 1988, 189 pp.

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

Art. 51 (6) and 52 (1) of Protocol I

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 65, UK, Reservations to Additional Protocol I. p. 985

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 184, ICTY, The Prosecutor v. Kupreskic et al. [Cf. paras. 527-536.] p. 1911

SUGGESTED READING: See *infra* Chapter 13.IX.2.c) ee) Admissibility of Reprisals. p. 302.

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

Art. 51 (7) of Protocol I [Rule 97 of CIHL]

Introductory Text

International Humanitarian Law (IHL) prohibits attacks against the civilian population and civilian objects.^[167] IHL also prohibits abuse of this prohibition: civilians and the civilian population and civilian objects may not be used to shield a military objective from attack.^[168] Military objectives do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects.^[169] Nevertheless, care must be taken to spare the civilian population and objects when attacking a legitimate objective.^[170] Furthermore, the mere presence of individuals not fitting the definition of civilian does not deprive the civilian population of its civilian character, nor of the protection against effects of hostilities.^[171] Therefore, the attacking party

167 Cf. Art. 51 (2), 52-56, Art. 85 (3) of Protocol I and Art. 13 of Protocol II.

168 Cf. Art. 28 of Convention IV and Art. 51 (7) of Protocol I.

169 Cf. Art. 52 of Protocol I.

170 Cf. Arts. 51 (8) and 57 of Protocol I.

171 Cf. Art. 50 of Protocol I.

retains at all times its obligations for the benefit of the civilian population and objects, even when attacking a legitimate military objective.^[172]

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [Cf. C. and D.] p. 1540

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

7. Protected objects

Introductory Text

In order to further safeguard the civilian population during armed conflict, International Humanitarian Law (IHL) protects specific objects from attack. IHL prohibits attack of civilian objects, which are all objects not falling under the definition of military objectives;^[173] thus, a civilian object is one failing to contribute to military action because of, *e.g.*, its location or function and because its destruction would provide no military advantage.

In addition, IHL grants other objects special protection. These include cultural objects^[174] and objects indispensable for the survival of the civilian population, such as water.^[175] Means or methods of warfare with the potential to cause widespread, long-term, and severe damage to the environment are prohibited.^[176] Works and installations containing dangerous forces (*e.g.*, dams, dykes, and nuclear electrical power generating stations) are also considered specially protected objects and may not be attacked, even if they constitute military objectives. Attack of a military objective in the near vicinity of such installations is also prohibited when it would cause damage sufficient to endanger the civilian population.^[177] The special protection of these works and installations ceases only under limited circumstances.^[178] Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited.^[179]

a) civilian objects

Art. 52 (1) of Protocol I [Rule 9 of CIHL]

¹⁷² Arts. 51 (8) and 57 of Protocol I.

¹⁷³ *Cf.* Arts. 25 and 27 of the Hague Regulations and Arts. 48, 52, and 85 (3) of Protocol I.

¹⁷⁴ *Cf.* The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14 1954 (See **Document No. 3**, Conventions on the Protection of Cultural Property. [*Cf.* A.] p. 525.), Arts. 53 and 85 (4) of Protocol I, Art. 16 of Protocol II, Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999 (See **Document No. 3**, Conventions on the Protection of Cultural Property. [*Cf.* C.] p. 525.)

¹⁷⁵ *Cf.* Art. 54 of Protocol I and Art. 14 of Protocol II.

¹⁷⁶ *Cf.* Art. 55 of Protocol I; *see also* Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

¹⁷⁷ *Cf.* Art. 56 of Protocol I and Art. 15 of Protocol II.

¹⁷⁸ *Cf.* Art. 56 (2) of Protocol I.

¹⁷⁹ *Cf.* Arts. 19 (1) and 36 (1) of Convention I, Arts. 22, 24-27, and 39 (1) of Convention II, Arts. 18-19 and 21-22 of Convention IV, Arts. 20 and 21-31 of Protocol I and Art. 11 of Protocol II.

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- Case No. 111, Israel, House Demolitions in the Occupied Palestinian Territory. [*Cf.* D and E.] p. 1223
- Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540
- Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [*Cf.* paras. 39 and 42.] p. 1888
- Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* B., para. 282.] p. 2020
- Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others. p. 2071
- Case No. 214, Afghanistan, Operation "Enduring Freedom". [*Cf.* B.] p. 2303
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SUGGESTED READING: JIA Bing Bing, "Protected Property' and its Protection in International Humanitarian Law", in *Leiden Journal of International Law*, Vol. 15/1, 2002, pp. 131-153. SASSOLI Marco & CAMERON Lindsey, "The Protection of Civilian Objects - Current State of the Law and Issues *de Lege Ferenda*", in RONZITTI Natalino & VENTURINI Gabriella (ed.), *Current Issues in the International Humanitarian Law of Air Warfare*, Utrecht, Eleven, 2005, pp. 35-74.

b) specially protected objects

aa) cultural objects

Art. 53 of Protocol I [Rules 38-40 of CIHL]

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- Document No. 3, Conventions on the Protection of Cultural Property. p. 525
- Document No. 57, France, Accession to Protocol I. [*Cf.* B., para. 13.] p. 958
- Case No. 126, Israel, Taking Shelter in Ancient Ruins. p. 1339
- Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [*Cf.* A., Annex, para. 50.] p. 1540
- Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573
- Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* B., paras. 229-233 and 298-329.] p. 2020**
- Case No. 213, Afghanistan, Destruction of the Bamiyan Buddhas. p. 2300
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bb) objects indispensable to the survival of the civilian population

Art. 54 of Protocol I [Rules 53 and 54 of CIHL]

- water

Case No. 28, ICRC, Water in Armed Conflicts. p. 723

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cc) works and installations containing dangerous forces

Art. 56 of Protocol I [Rule 42 of CIHL]

Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others. p. 2071

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dd) medical equipment

c) the natural environment

Arts. 35 (3) and 55 of Protocol I [Rules 44 and 45 of CIHL]

Case No. 25, The Environment and International Humanitarian Law. p. 680

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. paras. 30 and 33.] p. 896

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540

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Vol. 7, 1991, pp. 269-290. YUZON E.F.J., "Deliberate Environmental Modification Through the Use of Chemical and Biological Weapons: Greening the International Laws of Armed Conflict to Establish an Environmentally Protective Regime", in *American University Journal of International Law and Policy*, Vol. 11, 1996, pp. 793-846. "Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict", in *IRRC*, No. 311, March-April 1996, pp. 230-237.

8. Precautionary measures in attack

Introductory Text

Under International Humanitarian Law (IHL) only military objectives may be attacked.^[180] Even such attacks, however, are not without restrictions. An attack must be cancelled if it becomes apparent that it is of the type prohibited.^[181] If circumstances permit, an advance warning must be given for those attacks which may affect the civilian population.^[182] In determining the objective of an attack, the one causing least danger to the civilian population must be selected, when a choice is possible.^[183] Furthermore, IHL requires that those planning and deciding upon an attack shall take precautionary measures,^[184] including refraining from attacking when incidental loss of civilian life or destruction of civilian objects outweighs the military advantage of the attack.^[185]

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 27.] p. 1732

a) an attack must be cancelled if it becomes apparent that it is a prohibited one

Art. 57 (2) (b) of Protocol I [Rule 19 of CIHL]

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 16.] p. 958

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. [Cf. A., para. 6.] p. 2077

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

Art. 57 (2) (c) of Protocol I [Rule 20 of CIHL]

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 16.] p. 958

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. [Cf. A., paras. 18, 20, 22-25 and B., para. 77.] p. 2077

180 Cf. Art. 52 (2) of Protocol I.

181 Cf. Art. 57 (2) (b) of Protocol I.

182 Cf. Art. 26 of the Hague Regulations, Art. 19 of Convention IV (concerning hospitals), and Art. 57 (2) (c) of Protocol I.

183 Cf. Art. 57 (3) of Protocol I.

184 Cf. Art. 57 (2) (a) of Protocol I.

185 Cf. Art. 57 (2) (a) (iii) of Protocol I.

c) when a choice is possible, the objective causing the least danger to the civilian population must be selected

Art. 57 (3) of Protocol I [Rule 21 of CIHL]

d) additional obligations of those who plan or decide upon an attack

Art. 57 (2) (a) of Protocol I [Rules 16 and 17 of CIHL]

Case No. 117, Israel, The Rafah Case. [Cf. paras. 54-58.] p. 1289

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq. p. 1605

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. p. 2077

Case No. 214, Afghanistan, Operation "Enduring Freedom". [Cf. B.] p. 2303

- verify that objectives are not illicit

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

- choose means and methods avoiding or minimizing civilian losses

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

- refrain from attacks causing disproportionate civilian losses

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

9. Precautionary measures against the effects of attacks

Arts. 18 (5) of Convention IV and Art. 58 of Protocol I [Rules 22-24 of CIHL]

Introductory text

Contrary to Art. 57 of Protocol I,^[186] which lays down rules for the conduct to be observed in attacks on the territory under the control of the enemy, Art. 58 of Protocol I relates to specific measures which every Power must take in its own territory in favour of its nationals, or in territory under its control. These *precautionary measures against the effects of attacks* (which are often referred to as "Conduct of Defence"^[187]) include three specific obligations that Parties to a conflict shall discharge "to the maximum extent feasible".^[188]

- 1) they shall "endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives."^[189] In most cases, only specific categories of the

186 See *supra*, Chapter 9. II. 8. Precautionary measures in attack. p. 213.

187 See Mulinen, F de: *Handbook on the Law of War for Armed Forces*, ICRC, 1987, p. 104.

188 Cf. Art. 58 (1) of Protocol I.

189 Cf. Art. 58 (a) of Protocol I.

population (*i.e.*, children, the sick, or women) will be evacuated; sometimes the whole of the population shall be evacuated. It should be underlined that, when carrying out such measures, occupying powers remain bound by the strict limitations spelled out in Art. 49 of Convention IV;

- 2) they shall "avoid locating military objectives within or near densely populated areas".^[190] This obligation, which covers "both permanent and mobile objectives [...] should already be taken into consideration in peacetime";^[191]
- 3) they shall "take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations".^[192] Practically speaking, the "other measures" mainly include building shelters to provide adequate protection against the effect of hostilities for the civilian population and the training of efficient civil defence services.

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [*Cf.* C. and D.] p. 1540

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

10. Presumptions

Arts. 50 (1) and 52 (3) of Protocol I

Document No. 57, France, Accession to Protocol I. [*Cf.* B., para. 9.] p. 958

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

11. Zones created to protect war victims against the effects of hostilities

Art. 23 of Convention I, Arts. 14 and 15 of Convention IV, Arts. 59 and 60 of Protocol I [Rules 35-37 of CIHL], See also Table p. 217.

Introductory Text

While International Humanitarian Law (IHL) mainly tries to protect civilians and other categories of protected persons by placing on combatants the obligation to identify positively military objectives and to attack only them, respecting civilians wherever they happen to be, IHL also foresees different types of zones aimed at separating civilians from military objectives. The following table summarizes the different types of protected zones. They have

¹⁹⁰ *Cf.* Art. 58 (b) of Protocol I.

¹⁹¹ See Sandoz, Y., Swinarski, C., Zimmermann, B. (eds.) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, Martinus Nijhoff Publishers, 1987, Art. 58, para. 2251.

¹⁹² *Cf.* Art. 58 (c) of Protocol I.

in common the purpose of protecting war victims from the effects of hostilities, not from falling under the control of the enemy, by assuring enemy forces that no military objectives exist in a defined area where war victims are concentrated. Thus, if the enemy respects IHL, the war victims run no risk of being harmed by the effects of hostilities. Those zones under the *ius in bello* have to be distinguished from the safe areas, humanitarian corridors, or safe havens recently created under Chapter VII of the UN Charter, *i.e.*, *ius ad bellum*, to avoid certain areas and the war victims found there from falling under enemy control.

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 14.] p. 1732

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

SUGGESTED READING: LAVOYER Jean-Philippe, "International Humanitarian Law, Protected Zones and the Use of Force", in BIERMANN Wolfgang & VADSET Martin (ed.), *UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia*, Ashgate, Aldershot, 1998, pp. 262-279. OSWALD Bruce M., "The Creation and Control of Places of Protection During United Nations Peace Operations", in *IRRC*, No. 844, December 2001, pp. 1013-1036. SANDOZ Yves, "Localités et zones sous protection spéciale", in *Quatre études du droit international humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 35-47. TORELLI Maurice, "Les zones de sécurité", in *RGDIP*, Vol. 99/4, 1995, pp. 787-848.

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a) open cities

SUGGESTED READING: ELKIN G., "Application of the 'Open City' Concept to Rome 1942-1944", in *Air Force Law Review*, 1980-1981, pp. 188-200.

12. Civil defence

Arts. 61-67 of Protocol I

SUGGESTED READING: JAKOVLJEVIC Bosko, *New International Status of Civil Defence*, Geneva/The Hague, Henry-Dunant Institute/Martinus Nijhoff Publishers, 1982, 142 pp. JEANNET Stéphane, "Civil Defence 1977-1997: From Law to Practice", in *IRRC*, No. 325, December 1998, pp. 715-723. SCHULTZ E., *Civil Defence in International Law*, Copenhagen, Danish National Civil Defence and Emergency Planning Directorate, 1977, 59 pp.

Protected Zones According to International Humanitarian Law

		International				Non International
Armed conflict	Article 23 of Convention I and Annex I to Convention I	Article 15 of Convention IV	Article 59 of Protocol I	Article 60 of Protocol I	Article 3 (3) Common to the Conventions	
Legal Basis	Hospital zones and localities	Hospital and safety zones and localities	Non-defended localities	Demilitarized zones	"Neutralized zones"	
Terminology	Sick, wounded, and related personnel	Specific categories of civilians: wounded, sick, aged persons, children under 15, expectant mothers and mothers of children under 7	Civilian population (in its place of residence)	Civilian population (in its place of residence)	Civilian population	
Categories of Protected Persons	Written agreement between the Parties or unilateral declaration with recognition of the opposing party	Written agreement between the Parties or unilateral declaration with recognition of the opposing party	Notification to the opposing Party (or <i>ad hoc</i> agreement if not all conditions satisfied)	Express agreement	Agreement between the Parties Practice of the ICRC	
Modality of Creation	Distant from the front Durable	Distant from the front Durable	Near or inside the combat zone; Open to occupation; Military personnel and equipment evacuated	Prohibition to extend military operations to such zones	By analogy with the principles of Article 15 of Convention IV	
Characteristics: - location - time-frame	Red cross/crescent	Oblique red bands on white ground	To be defined	To be agreed upon by the Parties	Red cross emblem (if under authority of the ICRC)	
Markings						

III. MEANS AND METHODS OF WARFARE

(See also *supra*, Chapter 9. II. 5. Prohibited attacks. p. 205.)

Arts. 22-34 of the Hague Regulations

SUGGESTED READING: CASSESE Antonio, "Means of Warfare: The Traditional and the New Law", in CASSESE Antonio (ed.), *The New Humanitarian Law of Armed Conflict*, Naples, Editoriale Scientifica, 1976, pp. 161-198. MYJER Eric P., "Means and Methods of Warfare and the Coincidence of Norms between the Humanitarian Law of Armed Conflict and the Law of Arms Control", in HEERE Wybo P. (ed.), *International law and The Hague's 750th anniversary*, Cambridge, CUP, 1999, pp. 371-383.

1. The basic rule: Article 35 of Protocol I

[Rule 70 of CIHL]

Quotation

Part III: Methods and means of warfare [...]

Section I: Methods and means of warfare

Article 35 - Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
[...]

[Source: Protocol I.]

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. para. 78.] p. 896

Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons.
[Cf. 4. and 8.] p. 978

Case No. 151, US, Surrendering in the Persian Gulf War. p. 1582

SUGGESTED READING: COUPLAND Robin M., "The SIRUS Project: Towards a Determination of Which Weapons Cause 'Superfluous Injury or Unnecessary Suffering'", Geneva, ICRC, 1997, 43 pp., MEYROWITZ Henri, "The Principle of Superfluous Injury or Unnecessary Suffering: From the Declaration of St. Petersburg of 1868 to Additional Protocol I of 1977", in *IRRC*, No. 299, October 1994, pp. 98-122.

2. Prohibited or restricted use of weapons

Introductory Text

Diminishing the cruelty between combatants and protecting those *hors de combat* and the civilian population in a more effective manner necessitates

c) certain conventional weapons

Document No. 4, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Geneva, October 10, 1980. p. 540

Document No. 9, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts. p. 559

SUGGESTED READING: KALSHOVEN Frits, "The Conventional Weapons Convention: Underlying Legal Principles", in *IRRC*, No. 279, 1990, pp. 510-520. MATHEWS Robert J., "The 1980 Convention on Certain Conventional Weapons: A Useful Framework Despite Earlier Disappointments", in *IRRC*, No. 844, December 2001, pp. 991-1012. SANDOZ Yves, "A New Step Forward in International Law: Prohibitions or Restriction on the Use of Certain Conventional Weapons. United Nations Conference on Prohibition or Restrictions of Use of Certain Conventional Weapons", in *IRRC*, No. 220, January 1981, pp. 3-18. "Report of the ICRC for the Review Conference of the 1980 UN Conventions on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to Have Indiscriminate Effects", in *IRRC*, No. 299, March-April 1994, pp. 123-182.

FURTHER READING: AUBERT Maurice, "The International Committee of the Red Cross and the Problem of Excessively Injurious or Indiscriminate Weapons", in *IRRC*, No. 279, November-December 1990, pp. 477-497. BRETTON Philippe, "La Convention du 10 avril 1981 sur l'interdiction ou la limitation de certaines armes classiques qui peuvent être considérées comme produisant des effets traumatiques excessifs ou comme frappant sans discrimination", in *AFDI*, 1981, pp. 127-146. COWLING M.G., "The Relationship between Military Necessity and the Principle of Superfluous Injury and Unnecessary Suffering in the Law of Armed Conflict", in *South African Yearbook of International Law*, Vol. 25, 2000, pp. 131-160. PROKOSCH Eric, "The Swiss Draft Protocol on Small-Calibre Weapon Systems", in *IRRC*, No. 307, July-August 1995, pp. 411-425.

aa) mines

[Rules 80-83 of CIHL]

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II to the 1980 Convention). p. 547

Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560

SUGGESTED READING: CARNAHAN Burrus, "The Law of Land Mine Warfare: Protocol II to the United Nations Convention on Certain Conventional Weapons", in *Military Law Review*, Vol. 105, 1984, p. 73-95. CAUDERAY Gérald C., "Anti-Personnel Mines", in *IRRC*, No. 295, July-August 1993, pp. 273-287. MARESCA Louis & MASLEN Stuart (ed.), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross [1955-1999]*, Cambridge, CUP, 2000, 670 pp. MASLEN Stuart, "Anti-Personnel Mines under Humanitarian Law: A View from the Vanishing Point", Antwerp, Intersentia, Transnational Publishers, 2001, 327 pp. MASLEN Stuart & HERBY Peter, "An International Ban on Anti-Personnel Mines: History and Negotiation of the 'Ottawa Treaty'", in *IRRC*, No. 325, December 1998, pp. 693-713. PETERS Ann, "Landmines in the 21st Century", in *International Relations*, Vol. 13, 1996, pp. 37-50.

FURTHER READING: DOSWALD-BECK Louise & CAUDERAY Gérald C., "The Development of New Anti-Personnel Weapons", in *IRRC*, No. 279, November-December 1990, pp. 565-577. RAUCH Elmar, "The Protection of the Civilian Population in International Armed Conflicts and the Use of Land Mines", in *German Yearbook of International Law*, Vol. 24, 1981, p. 262-287. ROGERS Anthony P.V., "Mines, Booby-Traps and other Devices", in *IRRC*, No. 279, November-December 1990, pp. 521-534. SCHERER Sabine, "L'extinction des sentinelles éternelles, les mines antipersonnel", in *Défense nationale*, Vol. 55/12, 1999, pp. 91-103. SHARNETZKA Craig S., "The Oslo Land Mine Treaty and an Analysis of the United States Decision not to Sign", in *Dickinson Journal of International Law*, Vol. 16/3, 1998, pp. 661-689. *Landmines Must be Stopped*, Geneva, ICRC, September 1995, 65 pp.

bb) incendiary weapons

[Rules 84 and 85 of CIHL]

Document No. 6, Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention). p. 545
Case No. 163, Inter-American Commission on Human Rights, *Tablada*. [Cf. para. 186.] p. 1670

SUGGESTED READING: PARKS William H., "The Protocol on Incendiary Weapons", in *IRRC*, No. 279, November-December 1990, pp. 584-604.

cc) non-detectable fragments

[Rule 79 of CIHL]

Document No. 5, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention). p. 545

dd) blinding weapons

[Rule 86 of CIHL]

Document No. 7, Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), October 13, 1995. p. 546
Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons. p. 978

SUGGESTED READING: CARNAHAN Burrus & ROBERTSON Marjorie, "The Protocol on Blinding Laser Weapons: A New Direction for Humanitarian Law", in *AJIL*, Vol. 90/3, 1996, pp. 484-490. DOSWALD-BECK Louise, "New Protocol on Blinding Laser Weapons", in *IRRC*, No. 312, May-June 1996, pp. 272-299.

FURTHER READING: PETERS Ann, "Blinding Laser Weapons: New Limits on the Technology of Warfare", in *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 18, 1998, pp.733-766.

ee) explosive remnants of war

Document No. 11, Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention), November 28, 2003. p. 571
Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 28.] p. 1732

SUGGESTED READING: MARESCA Louis, "A New Protocol on Explosive Remnants of War: The History and Negotiation of Protocol V to the 1980 Convention on Certain Conventional Weapons", in *IRRC*, No. 856, December 2004, pp. 815-835.

- ff) other weapons under discussion concerning their limitation
 - light weapons
 - anti-vehicle mines
 - fragmentation weapons

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. [*Cf. II.*, Cluster Bomb Strikes.] p. 1591
 Case No. 214, Afghanistan, Operation "Enduring Freedom" . [*Cf. A.*] p. 2303

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d) chemical weapons

[Rules 74-76 of CIHL]

Document No. 2, The 1925 Geneva Chemical Weapons Protocol. p. 524
 Document No. 13, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993. p. 592
 Document No. 63, Switzerland, Prohibition of the Use of Chemical Weapons. p. 976
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e) poison

Art. 23 (a) of the Hague Regulations [Rule 72 of CIHL]

f) bacteriological and biological weapons

[Rule 73 of CIHL]

Document No. 2, The 1925 Geneva Chemical Weapons Protocol. p. 524
 Document No. 13, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993. p. 592
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g) nuclear weapons

Quotation 3. Mr. PAOLINI (France) made the following statement:

[...]

[A]lready in 1973, the French Government noted that the ICRC did not include any regulations on nuclear weapons in its drafts. In participating in the preparation of the additional Protocols, therefore, the French Government has taken into consideration only conflicts using conventional weapons. It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons.

[Source: *Official Records of the Diplomatic Conference on the reaffirmation and development of International Humanitarian Law applicable in armed conflicts, Geneva (1974-1977)*, Federal Political Department, Bern, Vol. II, 1978, p. 193.]

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [Cf. paras 84-86, 95, and 105.] p. 896

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 2.] p. 958
Case No. 66, UK, Interpreting the Act of Implementation. p. 988

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h) new weapons

Art. 36 of Protocol I

Document No. 34, ICRC, New Weapons. p. 783

Case No. 64, US, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons. [Cf. 2.] p. 978

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3. Prohibited methods of warfare

Introductory Text

The concept of method of warfare encompasses any tactical or strategical procedure to outweigh and weaken the adversary.

The limitations or prohibitions to resort to specific methods of warfare stipulated in International Humanitarian Law (IHL) derive from three premises:

- the choice of the methods of warfare is not unlimited,^[199]
- the use of methods of a nature to cause unnecessary suffering or superfluous injury is forbidden;^[200]
- the only legitimate object of war is to weaken the military forces of the enemy;^[201]

199 Cf. Art. 22 of the Hague Regulations and Art. 35 (1) of Protocol I.

200 Cf. Art. 23 (e) of the Hague Regulations and Art. 35 (2) of Protocol I.

201 Cf. Preamble of the St Petersburg Declaration of 1868.

Contemporary IHL forbids, for instance the methods of warfare which use terror,^[202] famine,^[203] reprisals against protected persons and objects,^[204] pillage,^[205] taking of hostages,^[206] enforced enrolment of protected persons,^[207] and deportations.^[208]

Under the specific heading "prohibited methods of warfare" are normally discussed two methods of warfare, namely perfidy and denial of quarter.

Unlike the ruses of war^[209] which are lawful, perfidy^[210] is outlawed in IHL. Ruses of war are intended to mislead an adversary or to induce him to act recklessly. On the contrary perfidy invites the confidence of an adversary to lead him to believe that he is entitled or is obliged to protection under the rules of IHL.

The prohibition of the denial of quarter^[211] has for its main objective to protect the combatants when they are falling under the power of the enemy from being killed. The main aim of such a prohibition is to avoid the following acts: to order that there shall be no survivors, to threaten the adversary therewith, or to conduct hostilities on this basis.

Most cases of perfidy and the denial of quarter are grave breaches of IHL and hence war crimes.

a) giving or ordering no quarter

Art. 40 of Protocol I [Rule 46 of CIHL]

Document No. 73, British Policy Towards German Shipwrecked. p. 1017

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122

Case No. 125, Israel, Navy Sinks Dinghy off Lebanon. p. 1337

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 151, US, Surrendering in the Persian Gulf War. p. 1582

Case No. 163, Inter-American Commission on Human Rights, Tablada.

[Cf. paras. 182-185.] p. 1670

b) perfidy: the distinction between perfidy and permissible ruses of war

Art. 37 of Protocol I [Rules 57-65 of CIHL]

Case No. 76, US Military Court in Germany, Trial of Skorzeny and Others. p. 1027

Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers. p. 1785

202 Cf. Art. 51 (2) of Protocol I and Art. 13 of Protocol II.

203 Cf. Art. 54 of Protocol I and Art. 14 of Protocol II.

204 Cf. Arts 46/47/13 (3)/33 respectively of the four Conventions and Arts. 20 and 41-56 of Protocol I.

205 Cf. Art. 15 of Convention I, Art. 18 of Convention II, Arts. 13 and 33 of Convention IV, and Art. 4 of Protocol I.

206 Cf. Art. 3 common to the Conventions, Art. 34 of Convention IV, and Art. 75 of Protocol I.

207 Cf. Art. 130 of Convention III and Art. 51 of Convention IV.

208 Cf. Art. 49 of Convention IV and Art. 17 of Protocol II and *see also supra*, Chapter 8. IV. Special Rules on Occupied Territories. p. 186.

209 Cf. Art. 24 of the Hague Regulations and Art. 37 (2) of Protocol I.

210 Cf. Art. 23 of the Hague Regulations and Art. 40 of Protocol I.

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- wearing of enemy uniforms

Art. 39 (2) of Protocol I [Rule 62 of CIHL]

Case No. 76, US Military Court in Germany, Trial of Skorzeny and Others. p. 1027
Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers. p. 1785

c) starvation of civilians

(See *infra*, Chapter 9. IV. International Humanitarian Law and Humanitarian Assistance. p. 226.)

Case No. 227, Angola, Famine as a Weapon. p. 2413

IV. INTERNATIONAL HUMANITARIAN LAW AND HUMANITARIAN ASSISTANCE

Introductory Text

International Humanitarian Law recognizes that the civilian population of a State affected by an armed conflict is entitled to receive humanitarian assistance. It regulates in particular the conditions for providing humanitarian assistance, in the form of food, medicines, medical equipment or other vital supplies for civilians in need.

During an *international armed conflict*, belligerents are thus under the obligation to permit relief operations for the benefit of the civilians, including the enemy civilians.

Article 23 of Convention IV delineates the basic principles applicable to relief assistance to particularly vulnerable groups among the civilian population: children under fifteen and pregnant and nursing mothers. It also grants to the concerned States the right to inspect the contents and verify the destination of the relief supplies, as well as to refuse the passage of these goods if they have well founded reasons to believe that they will not be distributed to the victims, but rather contribute to the military effort.

Article 70 of Protocol I has considerably developed the right to humanitarian assistance. Under this provision relief operations must be carried out for the benefit of the entire civilian population if there is a general shortage of indispensable supplies. However Art. 70 contains a severe limitation: it

stipulates that the consent of all the parties concerned - including that of the State receiving the aid - is necessary for such assistance.

In occupied territories, the Occupying Power has to make sure that the population receives adequate medical and food supplies.^[212] If this proves impossible, the said Power is obliged to permit relief operations by third States or by an impartial organisation, and to facilitate such operations.^[213]

The rules regulating humanitarian assistance in times of *non-international armed conflicts* are far less developed. However Art. 18 (2) of Protocol II stipulates that: "If the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as food-stuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken subject to the consent of the High Contracting Party concerned."

Although Art. 18 undoubtedly enhances the protection of the civilian population, it has been strongly criticized because it also subjects relief actions to the consent of the government. Article 18 can, however, also be read as implying that the government has to give this consent when the stipulated conditions are fulfilled.

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212 Cf. Arts. 55 and 56 of Convention IV.

213 Cf. Art. 59 of Convention IV and Art. 69 of Protocol I.

Humanitarian Assistance", in *IRRC*, No. 283, September-October 1991, pp. 440-459. PÉROUSE DE MONTCLOS Marc-Antoine, *L'aide humanitaire, aide à la guerre?*, Brussels, Complexe, 2001, 207 pp. PLATTNER Denise, "Assistance to the Civilian Population: The Development and Present State of International Humanitarian Law", in *IRRC*, No. 288, May-June 1992, pp. 249-263. SANDOZ Yves, "'Droit' or 'devoir d'ingérence' and the right to assistance: the issues involved", in *IRRC*, No. 288, June 1992, pp. 215-227. SANDVIK-NYLUND Monika, *Caught in Conflicts: Civilian Victims, Humanitarian Assistance and International Law*, Turku/Abo, Abo Akademi University, Institute for Human Rights, 2003, 2nd ed., 174 pp. SHOTWELL B. Charles, "Food and the Use of Force, the Role of Humanitarian Principles in the Persian Gulf Crisis and Beyond", in *Revue de Droit Pénal et de Criminologie*, Vol. 30, 1999, pp. 347-377. STOFFELS Ruth-Abril, "Legal Regulation of Humanitarian Assistance in Armed Conflict: Achievements and Gaps", in *IRRC*, No. 855, September 2004, pp. 514-546. STUDER Meinrad, "The ICRC and Civil-Military Relations in Armed Conflict", in *IRRC*, No. 842, June 2001, pp. 367-391. WILLS Siobhan, "Military Interventions on Behalf of Vulnerable Populations: The Legal Responsibilities of States and International Organizations Engaged in Peace Support Operations", in *Journal of Conflict and Security Law*, Vol. 9-3, Winter 2004, pp. 387-418.

1. Principles

a) starvation of civilians: a prohibited method of warfare

[Rule 53 of CIHL]

Case No. 227, Angola, Famine as a Weapon. p. 2413

SUGGESTED READING: DOMESTICI-MET Marie-José, "Contre la faim provoquée, les outils du droit", in *Action contre la Faim, Géopolitique de la faim, Édition 2000*, Paris, PUF, 1999, pp. 285-294. MACALISTER-SMITH Peter, "Protection of the Civilian Population and the Prohibition of Starvation as a Method of Warfare - Draft Texts on International Humanitarian Assistance", in *IRRC*, No. 283, September-October 1991, pp. 440-459. MAYER Jean, "Starvation as a Weapon", in ROSE Steven (ed.), *CBW: Chemical and Biological Warfare, London conference on CBW*, London, Harrap, 1968, pp. 76-84.

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b) the right of the civilian population to be assisted

[Rules 55 and 56 of CIHL]

Document No. 57, France, Accession to Protocol I. [*Cf.* B. para. 17.] p. 958

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565

Case No. 149, UN, Security Council Resolution 688 on Northern Iraq. [*Cf.* para. 3] p. 1571

Case No. 167, UN, UN Forces in Somalia. p. 1692

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* paras. 3 and 13.] p. 1732

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

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c) the primary responsibility lays with the belligerents

d) medical assistance may benefit to civilians or combatants

2. Definition and characteristics of humanitarian assistance

[Rule 55 of CIHL]

Document No. 41, UN Guiding Principles on Internal Displacement. [*Cf.* Principle 24 (1)] p. 850

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* paras. 242 and 243] p. 1365

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. [*Cf.* B.] p. 1565

SUGGESTED READING: BRAUMAN Rony, *L'action humanitaire*, Paris, Flammarion, 2000. SLIM Hugo, "Doing the Right Thing: Relief Agencies, Moral Dilemmas and Moral Responsibility in Political Emergencies and Wars", in *Studies on Emergencies and Disaster Relief*, No. 6, Nordiska Afrikainstitutet, Uppsala, 1997, 18 pp.

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3. The rules of treaty law

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a) the starting point: Art. 23 of Convention IV

aa) addressed to all "High Contracting Parties", not only the parties to the conflict

- bb) but limitations
 - of the beneficiaries
 - of the kind of assistance
 - conditions

b) in occupied territories: Art. 59 of Convention IV: the occupying power has an obligation to accept relief

c) a broad right to assistance: Art. 70 of Protocol I and Art. 18 (2) of Protocol II

- aa) but subject to the consent of the State concerned

Case No. 149, UN, Security Council Resolution 688 on Northern Iraq. p. 1571

- bb) the conditions to which a belligerent may subject its agreement to humanitarian assistance

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 242 and 243.] p. 1365

Case No. 146, UN Security Council, Sanctions Imposed upon Iraq. p. 1565

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 13 and 36.] p. 1732

- cc) is the State concerned obliged to give its consent if the conditions are (i.e. fulfilled)?

4. Protection of those providing humanitarian assistance

[Rules 31 and 32 of CIHL]

Case No. 15, The International Criminal Court. [Cf. A. The Statute, Art. 8 (2) (b) (iii)] p. 608

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 3.] p. 702

Document No. 37, First Periodical Meeting, Chairman's Report. [Cf. II. 1.] p. 800

Case No. 167, UN, UN Forces in Somalia. p. 1692

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

5. The protection of water supplies and water engineers

Case No. 28, Water and Armed Conflicts. p. 723

SUGGESTED READING: See *supra*, Chapter 9.II.7.b) bb) - Water. p. 211.

Chapter 10

THE LAW OF NAVAL WARFARE

(For attacks from the sea on objectives on land, *see supra*, Chapter 9. Conduct of Hostilities. p. 199.)

Introduction

"Naval warfare" is the term used to denote "the tactics of military operations conducted on, under, or over the sea".^[214] The general principles of international humanitarian law applicable to conflicts on land (which have to do primarily with sparing non-combatants and civilian property) apply to this type of military operations. However, there are certain singular features of naval warfare that necessitate a specific set of rules.

Most of the international instruments governing the law of war at sea were adopted in the early twentieth century.^[215] However, the various conflicts that occurred throughout that century drew attention to the fact that the former rules governing war at sea had become obsolete. It was not until the early 1990s that experts and government officials drew up the San Remo Manual, which clarifies the law of war at sea and brings it up to date, taking account of the developments that had occurred over the previous hundred years.

Though incomplete, the great work codifying the law of war at sea dates back to 1907, the year in which the Hague Conventions were adopted.^[216] Eight of them tackle different aspects of naval warfare. The provisions deal both with the conduct of hostilities (the laying of underwater mines: Convention No. VIII; bombardment by naval forces: Convention No. IX; protection of the sick, wounded and shipwrecked: Convention No. X) and the protection of certain ships (the status of merchant ships and their conversion into warships: Conventions No. VI and No. VII; the right of capture: Conventions No. XI and No. XII, which never came into force; the rights and duties of neutral powers: Convention No. XIII).

214 Encyclopedia Britannica, online: <http://www.britannica.com>

215 To consult all these texts, see SCHINDLER Dietrich and TOMAN Jiri, *The Laws of Armed Conflicts*, Fourth ed., Leiden/Boston, Nijhoff Publishers, 2004, pp. 1055-1178 and 1409-1430.

216 These texts are available at <http://www.icrc.org/ihl>

The inability of the rules adopted in those Conventions to limit the number of victims of naval hostilities became evident during the two world wars. They also proved outdated in the light of the technological progress made during that time. In the interwar period, a treaty adopted in London in 1936 stipulated that submarines were bound by the same rules as surface ships. However, that was to prove insufficient, with the Second World War being ridden with torpedo attacks on neutral vessels, merchant ships and hospital ships, the indiscriminate laying of underwater mines, etc.

In 1949 the Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea replaced Hague Convention No. X of 1907. And Additional 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".^[217] However, these two fundamental instruments still failed to clarify matters concerning the conduct of hostilities at sea.

The Falklands/Malvinas War (1982), for example, raised the problems of the use of exclusion zones by the warring parties and the Second Geneva Convention's prohibition of the use of secret codes by hospital ships.^[218] Moreover, during the armed conflict between Iran and Iraq (1980-1988), there were frequent attacks on neutral civilian ships as well as the use of underwater mines.

Between 1987 and 1994 a number of meetings were convened by the San Remo Institute of Humanitarian Law. They brought together experts and high-ranking government officials from 24 countries and enabled the San Remo Manual^[219] to be drafted. It is a non-binding document - modelled after its ancestor, the Oxford Manual^[220] - but one which laudably clarifies what is currently set out in the law of naval warfare.

The main virtue of this text is that it allows the post-war developments in international law, in particular those of International Humanitarian Law (1949 Geneva Conventions and Additional Protocol I of 1977), to be explicitly combined.

The San Remo Manual recalls the fact that the key principles of the law of war on land are applicable to war at sea. For example, the principle of distinction and the requirement to take precautionary measures when launching an attack are clearly formulated. The concept of "military objective" was included and adapted to war at sea.

The Manual also sets out to clear up certain problems specific to maritime hostilities: detail was provided regarding the use of certain weapons (mines

217 Article 49 (3).

218 Article 34 (2) of Convention II; see also **Case No. 162**, Argentina/UK, The "Red Cross Box", p. 1668.

219 *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea. Prepared by International Jurists and Naval Experts Brought Together by the San Remo International Institute of Humanitarian Law.* Adopted in June 1994. Reproduced in *IHLRC*, No. 816, 1995, pp. 583-637. See **Document No. 68**, San Remo Manual on International Law Applicable to Armed Conflict at Sea, p. 994.

220 *Manual of the Laws of Naval War*, Oxford, 1913; available at <http://www.icrc.org/ihl>

and torpedoes); interaction between ships and aircraft was addressed; developments in the law of the sea were taken into account by distinguishing between different maritime zones, etc.

The non-binding nature of this text and the infrequent occurrence of wars at sea do nothing to rob the San Remo Manual of its usefulness today. The States now have at their disposal a coherent document enabling them to take account of the law of war at sea in their actions and their legislation.^[221] It is today the main reference document for the law of naval warfare.

SUGGESTED READING: DOSWALD-BECK Louise (ed.), *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge, CUP, 1995, 257 pp. HEINTSCHEL VON HEINEGG Wolff, *Regions of Operations of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea*, Canadian Ministry of Defence, Canadian Red Cross, Ottawa 25-28 September 1992, Bochum, N. Brockmeyer, Vol. III, 1995, 150 pp. MEYROWITZ Henri, "Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime", in *RGDIP*, Vol. 89/2, 1985, pp. 243-298. POLITAKIS George P., *Modern Aspects of the Laws of Naval Warfare and Maritime Neutrality*, London, New York, Kegan Paul International, 1998, 678 pp. RAUCH Elmar, *The Protocol Additional to the Geneva Conventions for the Protection of Victims of International Armed Conflicts and the United Nations Convention on the Law of Sea: Repercussions on the Law of Naval Warfare*, Berlin, Duncker & Humblot, 1984, 165 pp. ROACH J. Ashley, "The law of naval warfare at the turn of two centuries", in *AJIL*, Vol. 94/1, 2000, pp. 64-77. SHEARER I. A., "International Humanitarian Law and Naval Operations", in *Quatre Études du Droit International Humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 17-34.

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I. SCOPE OF APPLICATION: THE DIFFERENT ZONES

SUGGESTED READING: HEINTSCHEL VON HEINEGG Wolff, *Regions of Operations of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea*, Canadian Ministry of Defence, Canadian Red Cross, Ottawa 25-28 September 1992, Bochum, N. Brockmeyer, Vol. III, 1995, 150 pp.

221 The German military manual, for example, was based on the work carried out at San Remo: Humanitarian law in armed conflicts - Manual, Federal Ministry of Defence, Germany, VR II 3, DSK VV207320067, Zdv 15/2, August 1992, pp. 97-112. The recent military manuals of the US and the UK equally follow, as far as the law of sea warfare is concerned, largely the San Remo Manual.

FURTHER READING: HEINTSCHEL VON HEINEGG Wolff, "The Law of Naval Warfare and International Straits", in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 263-292. LECKOW Ross, "The Iran-Iraq Conflict in the Gulf: The Law of War Zones", in *ICLQ*, Vol. 37, 1988, pp. 629-644.

1. Zones

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 10, 11, and 12.] p. 994

a) internal waters, territorial sea, and archipelago waters

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 14-22.] p. 994

b) international straits and archipelago sea lanes

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 23-33.] p. 994

c) exclusive economic zone and continental shelf

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 34-35.] p. 994

d) high seas and sea-bed beyond national jurisdiction

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 36-37.] p. 994

2. Sea areas for protected vessels

a) stay in neutral ports - limit 24 hours

b) by agreement between parties: create a neutral zone

Case No. 162, Argentina/UK, *The Red Cross Box*. p. 1668

c) passage of protected vessels through restricted areas: exclusion zones

II. PRINCIPLES OF NAVAL WARFARE

Case No. 180, ICTY, *The Prosecutor v. Tadic*. [*Cf.* A., Jurisdiction, para. 100.] p. 1804

SUGGESTED READING: BOELAERT-SUOMINEN Sonja, *International Environmental Law and Naval War: The Effect of Marine Safety and Pollution Conventions during International Armed Conflict*, Newport, Naval War College, 2000, 364 pp. HEINTSCHEL VON HEINEGG Wolff, *Visit, Search, Diversion and Capture: The Effect of the United Nations Charter on the Law of Naval Warfare: Reports and Commentaries of the Round-Table of Experts on International Humanitarian Law Applicable to Armed Conflicts at Sea, Norwegian Navy School of Tactics, Norwegian Red Cross, Bergen 20-24 September 1991*, Bochum, N. Brockmeyer, Vol. IV, 1995, 210 pp. MEYROWITZ Henri, "Le Protocole additionnel I aux Conventions de Genève et le droit de la guerre maritime", in *RGDIP*, Vol. 89, 1989, pp. 243-298. MOINEVILLE Hubert, *La guerre navale*, Paris, PUF, 1982, 152 pp.

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1. Traditional principles of naval warfare

2. The law of neutrality in naval warfare: *ius ad bellum* or *ius in bello*?

3. Additional principles

a) basic rules

- distinction between civilian objects and military objectives

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [Cf. paras. 38-41.] p. 994

b) precautions in attack

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [Cf. para. 46.] p. 994

c) military objectives

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [Cf. para. 40.] p. 994
Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

III. MEANS AND METHODS OF WARFARE AT SEA

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. p. 994

1. Mine warfare

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [Cf. paras. 80-92.] p. 994

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 80, 215, and 254.] p. 1365

SUGGESTED READING: DINSTEIN Yoram, "The Laws of War at Sea", in *IYHR*, Vol. 10, 1980, pp. 38-69. HEINTSCHEL VON HEINEGG Wolff, "The International Law of Mine Warfare at Sea", in *IYHR*, Vol. 23, 1993, pp. 53-76. REED J., "Damm the Torpedoes: International Standards Regarding the Use of Automatic Submarine Mines", in *Fordham International Law Journal*, Vol. (2), 1984-1985, pp. 286-322. STEPHEN D. J. & FITZPATRICK M. D., "Legal aspects of contemporary naval mine warfare", in *Loyola of Los Angeles International and Comparative Law Journal*, Vol. 21/4, 1999, pp. 553-590.

FURTHER READING: LIENANT J.-C., "La guerre des mines au Viet-Nam", in *Revue Maritime*, No. 299, 1974, pp. 696-703.

2. Submarine warfare

Document No. 73, British Policy Towards German Shipwrecked. p. 1017

Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

SUGGESTED READING: MIDDLETON Drew, *Submarine, The Ultimate Naval Weapon*, Chicago, Playboy Press, 1976, 256 pp. PARKS William H., "Making Law of War Treaties: Lessons for Submarine Warfare Regulation", in SCHMITT Michael N. (ed.), *International Law across the Spectrum of Conflict*, Newport, R.I., 2000, pp. 339-385. WEISS C.J., "Problems of Submarine Warfare under International Law", in *Intramural Law Review*, Vol. 22, 1967, pp. 136-151.

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3. Blockade

Document No. 57, France, Accession to Protocol I. [Cf. B., para. 17.] p. 958

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [Cf. paras. 93-104.] p. 994

Case No. 69, US, The Prize Cases. p. 1011

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. [Cf. B.] p. 1565

SUGGESTED READING: MEYROWITZ Henri, "Le Protocole additionnel I aux Conventions de Genève de 1949 et le droit de la guerre maritime", in *RGDIP*, Vol. 89/2, 1985, pp. 243-298. SWAYZE Frank B., "Traditional Principles of Blockade in Modern Practice: United States Mining of Internal and Territorial Waters of North Vietnam", in *JAG Journal*, Vol. 29/2, 1977, pp. 143-173. WHITEMAN, Marjorie M., "Blockade", in *Digest of International Law*, Vol. 10, Chapter XXXI: Belligerent Interference with Neutral Commerce, US Department of State Publication 8367, Washington DC, Government Print. Off., 1968, pp. 861-879.

FURTHER READING: ROWSON S.W.D., "Modern Blockade: Some Legal Aspects", in *BYIL*, Vol. 23, 1946, pp. 346-353.

IV. PROTECTED OBJECTS

1. Hospital ships

(See *infra*, VI. Hospital Ships. p. 238.)

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 47-51.] p. 994
 Case No. 162, Argentina/UK, The Red Cross Box. p. 1668

2. Other protected vessels

a) vessels guaranteed safe conduct by prior agreement between belligerents

- cartel ships

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 47 and 48.] p. 994

- Vessels engaged in humanitarian missions, including vessels carrying supplies indispensable to the survival of the civilian population

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 47 and 48.] p. 994

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

Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

SUGGESTED READING: CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. EBERLIN Philippe, "The Protection of Rescue Craft in Period of Armed Conflict", in *IRRC*, No. 246, June 1985, 16 pp. PREUX Jean de, "Protection du sauvetage maritime côtier", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, Martinus Nijhoff Publishers, 1984, pp. 103-111.

3. Protection of enemy merchant vessels

- a) except if they are military objectives
- b) activities which may render them military objectives

4. Protection of neutral merchant vessels

- a) circumstances which make them subject to attack

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* para. 67.] p. 994

SUGGESTED READING: JENKINS M., "Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals", in *Boston College International and Comparative Law Review*, Vol. 8/2, 1985, pp. 517-549. NAVIAS Martin S. & HOOTON E.R., *Tanker Wars: The Assault on Merchant Shipping During the Iran-Iraq Conflict, 1980-88*, London, Tauris Academic Studies, 1996, 244 pp. WALKER George K., *The Tanker War, 1980-88: Law and Policy*, Newport, Naval War College, 2000, 627 pp.

5. The protection of the maritime environment

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FURTHER READING: JENKINS M., "Air Attacks on Neutral Shipping in the Persian Gulf: The Legality of the Iraqi Exclusion Zone and Iranian Reprisals", in *Boston College International and Comparative Law Review*, Vol. 8/2, 1985, pp. 517-549.

VI. HOSPITAL SHIPS

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 47 and 49-51.] p. 994

Document No. 74, UK/Germany, Sinking of the Tübingen in the Adriatic. p. 1019

SUGGESTED READING: JUNOD Sylvie S., "Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action", Geneva, ICRC, 1985, 45 pp.

FURTHER READING: CAUDERAY Gerald C. & BOUVIER Antoine, *Manual for the Use of Technical Means of Identifications by Hospital Ships, Coastal Rescue Craft, Other Protected Craft and Medical Aircraft*, Geneva, ICRC, 1995, 196 pp. EBERLIN Philippe, "The Identification of Medical Aircraft in Periods of Armed Conflict. Identification of Hospital Ships and Ships

Protected by the Geneva Conventions of 12 August 1949", in *IRRC*, No. 229 & 231, November-December 1982, 31 pp. EBERLIN Philippe, "The Protection of Rescue Craft in Period of Armed Conflict", in *IRRC*, No. 246, June 1985, 16 pp. PREUX Jean de, "Protection du sauvetage maritime côtier", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, Martinus Nijhoff Publishers, 1984, pp. 103-111.

1. Specific protection

- small craft used for coastal rescue operations
- medical transports
- neutral vessels

2. Loss of protection

- using codes

Case No. 162, Argentina/UK, The Red Cross Box. p. 1668

VII. THE STATUS AND TREATMENT OF WAR VICTIMS AT SEA

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 161-168.] p. 994

Case No. 125, Israel, Navy Sinks Dinghy off Lebanon. p. 1337

SUGGESTED READING: JUNOD Sylvie S., "Protection of the Victims of Armed Conflict Falkland-Malvinas Islands (1982): International Humanitarian Law and Humanitarian Action", Geneva, ICRC, 1985, 45 pp. SHEARER I. A., "International Humanitarian Law and Naval Operations", in *Quatre Études du Droit International Humanitaire*, Geneva, Henry-Dunant Institute, 1985, pp. 17-34.

Chapter 11

THE LAW OF AIR WARFARE

Introductory text

The continuous and rapid technological progress in the area of aviation, the key role played by air forces in present-day warfare and the major economic importance of this sector of the armaments industry^[222] explain the difficulty of perfecting treaty provisions specifically governing air warfare.

Air warfare has evolved considerably in line with technological advances. Initially used for reconnaissance (airships at the end of the nineteenth century), then gradually as a powerful strike force during the twentieth century, air power has more recently been a vital instrument of the "zero-casualty" wars conducted by the United States and its allies, a doctrine aimed at eliminating war on land or subordinating it to air strikes (the main examples being the Gulf War in 1991, strikes against the Federal Republic of Yugoslavia in 1999, and, to a certain extent, air strikes in Afghanistan in 2001-02, and in Iraq since 2003.). Technological developments such as electronic means of target recognition and evaluation, "intelligent" munitions or unmanned aerial vehicles may assist in respecting traditional principles, but they may also give the individuals who have to apply the rules an illusion of diminished responsibility in regard to respecting IHL. Nonetheless, the problems posed by air warfare have far more to do with traditional concepts of the laws of war on land (target selection, principles of proportionality and discrimination, etc.) than with the specificities of air combat in the strict sense of the term.

The legal instruments specifically dealing with the subject of air warfare are thus few in number and limited in effect. The Hague Declaration of 1907^[223] prohibited the discharge of projectiles and explosives from balloons or other similar new methods at a time when air technology was not sufficiently advanced to permit the precise targeting of objectives to be destroyed. After

222 Air weapons are said to represent 90% of the total trade in war materials; see GUIZÁNDEZ GÓMEZ Javier, "The Law of Air Warfare", *IARC*, No. 323, June 1998, pp. 347-362. <http://www.icrc.org/eng/review>

223 Declaration (XIV) Prohibiting the Discharge of Projectiles and Explosives from Balloons, The Hague, 18 October 1907, available at <http://www.icrc.org/ihl>

the First World War another specific instrument was drafted. The Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare (commonly referred to as "The Hague Rules")^[224] were drafted in 1922 and 1923. Although those rules were never ratified by States, large parts are considered to be customary law binding the whole of the international community. Certain rules defined in that instrument - such as the distinction between military aircraft and other aircraft, and the prohibition of bombing targets other than military objectives - remain crucial. The latter point was recalled by the Assembly of the League of Nations, which adopted a resolution^[225] to that effect 15 years later. As for civil aviation, it is protected in time of peace by conventions which ban the capture or destruction of civilian aircraft and define a number of offences against civilian aircraft which may occur on board or in airports.^[226] However, the extent to which these conventions apply in times of war is controversial. Currently, a group of experts is trying to formulate a Manual on Air and Missile Warfare restating the law applicable to such warfare in a way similar to what the San Remo Manual (mentioned above) did for sea warfare.^[227]

As for the current legal regulation, firstly, air attacks on targets on land are governed by the rules regarding war on land. Secondly, when an aircraft flies over the open sea or is engaged in a combat with naval forces, the law of naval warfare applies, a field which is largely restated by the San Remo Manual.^[228] What remains is air-to-air warfare, a relatively infrequent situation of limited humanitarian importance.

As for the first aspect, already the Hague Regulations include the prohibition of "bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended".^[229] Cultural property and places of worship are protected against any form of attack by the Hague Convention of 1954^[230] 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.

As important air Powers are not party to Protocol I, the question arises whether also under customary law the same rules apply to all attacks on

224 Rules concerning the Control of Wireless Telegraphy in Time of War and Air Warfare, drafted by a Commission of Jurists at the Hague, December 1922 - February 1923, available at <http://www.icrc.org/ihl>

225 Protection of civilian populations against bombing from the air in case of war, Resolution adopted on 30 September 1938, in SCHINDLER Dietrich and TOMAN Jiri, *The Laws of Armed Conflicts*, 4th ed., Leiden/Boston, Nijhoff Publishers, 2004, pp. 329-330.

226 For details of these conventions, see the website of the International Civil Aviation Organization, <http://www.icao.int> and the United Nations website devoted to terrorism, <http://www.un.org/terrorism>

227 In the framework of the International Humanitarian Law Research Initiative, the Harvard Program on Humanitarian Policy and Conflict Research launched in 2004 an academic research project to restate the rules of IHL applicable to air and missile warfare. See International Humanitarian Law Research Initiative, IHL in Air and Missile Warfare, online: <http://www.ihlresearch.org/arm>

228 See above, Chapter 10, The Law of Naval Warfare, p. 231.

229 See **Document No. 1**, The Hague Regulations, 18 October 1907. [*Cf.* Art. 25.] p. 517.

230 See **Document No. 3**, Conventions on the Protection of Cultural Property. [*Cf.* A.] p. 525.

targets on land, including if directed from the air, even though the latter case was traditionally discussed under the heading of the law of air warfare. The answer must be affirmative for several reasons. Foremost, modern technology makes attacks on a given target by the air force, missiles or artillery interchangeable. Secondly, most discussions on the law of the conduct of hostilities in recent years, by States, NGOs, the Prosecutor of the International Criminal Tribunal for the former Yugoslavia (ICTY) (See **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. p. 2077) and authors refer mainly to aerial attacks, but no one claims that the law applicable to land attacks would be different. The U.S. Department of Defense Report on the Conduct of the 1991 Gulf War (See **Case No. 150**, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573), e.g., discusses targeting mainly in relation to cases which actually consisted of aerial bombardments, but makes no distinction between those attacks coming from the air or by missiles or artillery. As for the standards it applies, it refers exclusively to the law of land warfare, including Article 23 (g) of the Hague Regulations, and applies or criticizes (indifferently for air and land warfare) certain provisions of Protocol I. At the diplomatic conference which adopted Article 49 (3), there were considerable controversies about that provision, in particular as to whether the rules of the Protocol should only apply to attacks against objectives "on land," but no State questioned the idea that at least those attacks should be covered.^[231]

Protocol I therefore prohibits attacks on the civilian population and civilian property regardless of whether the attack is on land, from the air or from the sea. In addition, International Humanitarian Law prohibits indiscriminate attacks, attacks on installations and works containing dangerous forces and the use of methods and means of warfare which are intended or may be expected to cause damage to the natural environment and thereby to prejudice the health or survival of the population. All these specific rules in Protocol I also apply to air warfare, as long as there is a connection with protecting the civilian population on land.

As for the second aspect, in terms of the law of naval warfare, the San Remo Manual on international law applicable to armed conflicts at sea reiterates or specifies several provisions related to the law of air warfare. The Manual states that civilian airliners and medical aircraft in particular may not be attacked if they respect certain conditions^[232] and do not meet the definition of a military objective.^[233] The principle of discriminating between military aircraft (combatants) and other aircraft (civilian, commercial, airliners, etc., i.e. non-combatant) applies in full.

231 See *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts, Geneva (1974-1977)*, Bern, 1978, vol. XIV, pp. 13-25, 85, and in particular, *ibid.*, vol. XV, p. 255, a working group reporting to the competent committee of the conference that it was unanimously of the view that the rules should at least cover military operations from the air against persons and objects on land.

232 See **Document No. 68**, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [See paragraph 53 *et seq.*] p. 994.

233 *Ibid.* [See paragraphs 40 and 62 *et seq.*].

For the third aspect, air-to-air warfare, it is uncontroversial, as formulated by Oppenheim/Lauterpacht, that the same "humanitarian principles of unchallenged applicability [apply as in land warfare, including] the fundamental prohibition of direct attack upon non-combatants [and therefore, we would add, also the principle of distinction and the prohibition of indiscriminate attacks]. Whenever a departure from these principles is alleged to be necessary, its cogency must be proved by reference either to express agreement or to the peculiar conditions of air warfare."^[234]

Examples of express agreement which does not depart from but rather applies the general principles can be found in the Geneva Conventions' rules protecting medical aircraft, which were greatly improved and developed in Protocol I.^[235] Another specific treaty provision is Article 57 (4) of Protocol I, which states that in air warfare "each Party to the conflict shall take all reasonable precautions to avoid losses of civilian lives and damage to civilian objects." The standard of "reasonable" is undoubtedly slightly different from and a little less far-reaching than the expression "take all feasible precautions", used in paragraph 2. The provision is anyway much more vague than the detailed obligations prescribed in paragraphs 2 and 3, which, however, may be considered as a more detailed and precise formulation of the principle stated in paragraph 4, as they are in respect to the principle of precaution as codified in paragraph 1. Third, the provision is explicitly qualified by a reference to the existing rules ("in conformity with its rights and duties under rules of international law applicable to armed conflict"). This must probably be understood as a simple saving clause in respect of those rules applicable to air warfare. It nevertheless indicates an authoritative understanding of the States drafting Protocol I that "reasonable precautions" have to be taken according to those other rules which are not yet codified in a treaty.^[236]

For the rest, as mentioned above, any modification of the fundamental principles, and we would add of the rules for attacks on targets on land which specify them, must be "proved by reference to the peculiar conditions of air warfare." In this respect, the Hague Rules and the provisions of the San Remo Manual (concerning aircraft in sea warfare) may assist in identifying in what respect the details must be adapted to the physical realities of the air environment. One of the realities of that environment, mentioned by Oppenheim/Lauterpacht, is that "the danger of surprise on the part of apparently inoffensive civil aircraft will probably impose upon the latter special restraints as the price of immunity."^[237]

234 Oppenheim, *International Law - A Treatise*, 7th edition, edited by Hersch Lauterpacht, Vol. II, *Disputes, War and Neutrality*, London, 1952, p. 520. A US Air Force Pamphlet stipulates that "[t]he law of armed conflict affecting aerial operations is not entirely codified. Therefore, the law applicable to air warfare must be derived from general principles, extrapolated from the law affecting land and sea warfare, or derived from other sources including the practice of states reflected in a wide variety of sources" (US Air Force Pamphlet 110-31, 19 November 1976, para 1-3 (c) , at 1-7.

235 See Arts. 36-37 of Convention I, Arts. 39-40 of Convention II, Art. 22 of Convention IV, and Arts. 24-31 of Protocol I.

236 See in this sense the report of the competent committee of the Diplomatic Conference, *Official Records*, *supra* note 231, vol. XV, p. 261, para 99.

237 Oppenheim/Lauterpacht, *supra* note 234, p. 530.

The Hague Rules defined circumstances in which aircraft lose their protection (for the aforementioned reason) very broadly, due to the more rudimentary means of verification and communication existing at the time. They stated in particular that enemy civilian aircraft "are exposed to being fired at" when flying within the jurisdiction of the enemy; in the immediate vicinity of such jurisdiction and outside that of their own country; in the immediate vicinity of the military land and sea operations of the enemy; or even within the jurisdiction of their State, but there only if they do not land at the nearest suitable point when an enemy military aircraft is approaching.^[238] The conditions for neutral civilian aircraft were also formulated very broadly.^[239] From the wording of the rules, it is not clear whether the terms "are exposed to being fired at" refer to a factual risk of aircraft engaged in such behaviour or to a loss of immunity in law. Here too, "the fundamental prohibition of direct attack upon non-combatants" which was "unchallenged" even at that time, leads us to the understanding that the terms could only refer to the factual risk such aircraft take, but not to a license to deliberately attack civilian aircraft identified as such and known not to be engaged in hostile activities. Today, the circumstances that make enemy and neutral civil aircraft lose protection are listed in the most detailed manner, confirmed by several military manuals, in several rules of the San Remo Manual.^[240]

The danger of surprise and the difficulties of identifying civil aircraft furthermore lead the San Remo Manual to prescribe several passive precautions against attacks that must be taken by civil aircraft and corresponding active precautions, i.e. measures of verification and warning which must be taken before attacking aircraft.^[241]

Peculiarities of the air environment also lead to special rules on the interception, visit and search of civil aircraft, which are inspired by those applicable on the sea, but take into account that an aircraft, unlike a ship, cannot be boarded while flying.^[242]

Air-to-air operations may finally endanger civilians and civilian objects on land. Military objectives in the air above land perforce fall down 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

238 See Arts. 33 and 34 of the Hague Rules, *supra* note 224.

239 *Ibid.*, Arts. 30, 35, 50, and 51.

240 See San Remo Manual, *supra* note 219, Rules 53-58, for medical aircraft, civilian airliners and aircraft granted safe conduct, Rules 62 and 63 for civil aircraft, and Rule 70, for neutral civil aircraft. The US Navy Commander's Handbook summarizes those circumstances when it stipulates that enemy civilian aircraft may be attacked and destroyed by military aircraft only when persistently refusing to comply with directions from the intercepting aircraft, when sailing under convoy of enemy military aircraft, when armed, when incorporated into or assisting in any way the enemy's military intelligence system, when acting in any capacity as a military auxiliary to an enemy's armed forces, and when otherwise integrated into the enemy's war-fighting or war-sustaining effort. Neutral civilian aircraft may be treated by a belligerent as enemy military aircraft when engaged in taking a direct part in the hostilities on the side of the enemy, or acting in any capacity as military auxiliary to the enemy's armed forces and as enemy civilian aircraft "when engaged in operating directly under enemy control, orders, charter, employment, or direction, or resisting an attempt to establish identity, including visit and search" (*The Commander's Handbook on the Law of Naval Operations*, NWP 1-14M (Formerly NWP 9) FMFM 1-10 COMDTPUB P5800.7, Naval Warfare Publication, Department of the Navy, Office of the Chief of Naval Operation, paras 7.5.1., 7.5.2. and 8.4., online <http://www.cpf.navy.mil/pages/legal/NWP%201-14/NWP1-14%20COVER.htm>)

241 See San Remo Manual, *supra* note 219, Rules 72-77.

242 *Ibid.*, Rules 125-158.

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. The obligations to choose the appropriate methods and the appropriate target when a choice exists and to verify whether the proportionality principle is respected are particularly relevant. Those planning and deciding an attack upon enemy military aircraft are simply most often unable to foresee where such a moving target will actually be hit and the crew operating an aircraft or a missile has no time to evaluate alternatives and only rarely a sufficient certainty that an alternative attack will actually be successful. This is at least the case in generalized international armed conflicts.

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. [Cf. II.] p. 1591

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, para. 100.] p. 1804

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. p. 2077

Case No. 214, Afghanistan, Operation "Enduring Freedom". p. 2303

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I. THE SPECIFICITIES OF THE AIR ENVIRONMENT

1. The danger of surprise and the difficulty to identify
2. The laws of gravity let all aircraft fall on earth or on sea

II. APPLICABILITY OF THE GENERAL PRINCIPLES

III. APPLICABILITY OF THE GENERAL LAW ON THE PROTECTION OF THE CIVILIAN POPULATION AGAINST EFFECTS OF HOSTILITIES TO AERIAL BOMBARDMENTS AGAINST TARGETS ON LAND

Art. 49 (3) of Protocol I
(See Chapter 9 II. p. 199.)

IV. APPLICABILITY OF THE GENERAL RULES ON THE PROTECTION OF THE CIVILIAN POPULATION AGAINST EFFECTS OF HOSTILITIES TO AIR OPERATIONS WHICH MAY AFFECT THE CIVILIAN POPULATION ON LAND

Art. 49 (3) of Protocol I
(See Chapter 9 II. p. 199.)

V. AIRCRAFT OVER SEA ARE GOVERNED BY THE LAW OF SEA WARFARE

VI. SPECIFIC RULES FOR WARFARE AGAINST OBJECTIVES IN THE AIR

1. Aircraft which may not be attacked

a) The protection of medical aircraft and their identification

Arts. 36 and 37 of Convention I and Arts. 24-31 of Protocol I [Rules 29 and 30 of CIHL]

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras 53 and 54.] p. 994

SUGGESTED READING: CUMMINGS Edward R., "The Juridical Status of Medical Aircraft Under the Conventional Laws of War", in *Military Law Review*, Vol. 66, Fall 1974, pp. 105-141.

DOSWALD-BECK Louise, "The Protection of Medical Aircraft in International Law", in *IYHR*, Vol. 27, 1997, pp. 151-192.

FURTHER READING: EBERLIN Philippe, "The Identification of Medical Aircraft in Periods of Armed Conflict. Identification of Hospital Ships and Ships Protected by the Geneva Conventions of 12 August 1949", in *IRRC*, No. 229 & 231, November-December 1982, 31 pp.

aa) Circumstances making them lose protection

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 53-58.] p. 994

b) The protection of civil and neutral aircraft

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 55 and 56.] p. 994

SUGGESTED READING: ROBERTSON Horace B., "The Status of Civil Aircraft in Armed Conflict", in *IYHR*, Vol. 27, 1997-1998, pp. 113-150.

aa) Circumstances making them lose protection

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 62, 63 and 70.] p. 994

2. Surrender of Military Aircraft?

3. Ruses of War and Perfidy

4. The status of parachutists

Art. 42 of Protocol I

5. Precautionary measures

a) In attacks

Art. 57 (4) of Protocol I

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 74 and 75.] p. 994

b) Against the effects of attacks

Document No. 68, San Remo Manual on International Law Applicable to Armed Conflicts at Sea. [*Cf.* paras. 72, 73, 76 and 77.] p. 994

VII. THE STATUS AND TREATMENT OF VICTIMS ON BOARD AIRCRAFT

Analogous to the status and treatment of war victims at sea, *see supra*, Chapter 10. VII. The Status and Treatment of War Victims at Sea. p. 239.

Chapter 12

THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Introductory Text

From a humanitarian point of view, the same rules should protect victims of international and of non-international armed conflicts. Similar problems arise and the victims 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 the control of the enemy. Attacks are launched against towns and villages, food supplies need to transit through front lines, and also the same weapons are used. Furthermore, a different law for international and for non-international armed conflicts obliges humanitarian actors and victims to qualify the conflict before they can invoke the applicable protective rules. Such qualification is sometimes theoretically difficult and always politically delicate. Sometimes, to qualify a conflict implies that a judgement is made upon questions of *ius 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 and the international law they have made, have never accepted to treat international and non-international armed conflicts equally. Indeed, wars between States have until recently been accepted as a legitimate form of international relations and the use of force between States is still not totally prohibited today. Conversely, the monopoly of the legitimate use of force within its boundaries is inherent in the concept of the modern State, which precludes groups, within a State, from waging armed conflicts 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 for long accepted that soldiers killing enemy soldiers on the battlefield may not be punished for their mere participation: in other words that they have a "right to participate" in the hostilities.^[243]

On the other hand, the law of non-international armed conflicts is more recent. States have for a long time considered such conflicts as their internal affairs governed by their domestic law and no State is ready to accept that its citizens would wage a war against their own government. In other words no government would in advance renounce to punish its own citizens for their participation in the rebellion. Such a renunciation, however, is the essence of the combatant status as prescribed by the law of international armed conflicts. To apply all rules of contemporary International Humanitarian Law (IHL) of international armed conflicts to non-international armed conflicts would be incompatible with the very concept of the contemporary international society made up of sovereign States. Conversely, once the international community will be organized as a world State, all armed conflicts would be "non-international" in nature and, thus, a right for combatants to participate in hostilities independently of the cause for which they fight, as foreseen in the law of international armed conflicts, would be inconceivable.

In recent years, the IHL of non-international armed conflicts is however drawing closer to the IHL of international armed conflicts: through the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda based upon their assessment of customary international law;^[244] in the crimes defined in the Statute of the International Criminal Court;^[245] by States having accepted that both categories of conflicts are covered by recent treaties on weapons and on the protection of cultural objects;^[246] under the growing influence of International Human Rights Law; and according to the outcome of the ICRC Study on customary international humanitarian law.^[247]

Theoretically, one should study, interpret, and apply IHL of international armed conflicts and IHL of non-international armed conflicts as two separate branches of law - the latter being codified mainly in Article 3 common to the Conventions and in Protocol II. Non-international armed conflicts furthermore occur today much more frequently and entail more suffering than international armed conflicts. Thus, it would be normal to study first of all the law of non-international armed conflicts, as being the most important.

243 As recalled in Art. 43 (2) of Protocol I.

244 See in particular **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [A., paras. 96-136.] p. 1804.

245 Compare Art. 8 (2) (a) and (b) with Art. 8. (2) (c) and (e), **Case No. 15**, The International Criminal Court. p. 608.

246 See **Document No. 9**, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts. p. 559, **Document No. 8**, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention). [Cf. Art. 1. 2.] p. 547, **Document No. 10**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560 and **Document No. 3**, Conventions on the Protection of Cultural Property. [Cf. C., Art. 22.] p. 525.

247 See **Case No. 29**, ICRC, Customary International Humanitarian Law. p. 730.

However, because IHL of non-international armed conflicts must provide solutions to similar problems than those arising in international armed conflicts; because it 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, one conveniently begins to study 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 basic principles are common and analogies between these two branches of law are necessary to provide details or to fill logical gaps. Similarly, only by taking the law of international armed conflicts as a starting point can one identify which changes must result, for the protective regime in non-international armed conflicts, from the fundamental legal differences between international and non-international armed conflicts. Finally, from the perspective of the law of international armed conflicts one will notice that there is a grey area not affected by the fundamental differences but where States have refused to provide the same answer in the treaties of IHL. The practitioner in a non-international armed conflict, who is confronted with a question to which the treaty rules applicable to such situations fail to provide an answer, will either look for a rule of customary IHL applicable to non-international armed conflicts or search for the answer applicable in international armed conflicts and then analyze whether the nature of non-international armed conflicts allows application of the same answers in such conflicts. Soldiers are anyway instructed and trained to comply with one set of rules and not with two different sets.

The Study on the customary rules of IHL (See **Case No. 29**, ICRC, Customary International Humanitarian Law. p. 730) recently completed by the International Committee of the Red Cross has confirmed the customary nature of most of the treaty rules applicable in non-international armed conflict (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. Among the latter mention could be made of the rules relating to the use of certain means of warfare, to relief assistance, to the principle of distinction between civilian objects and military objectives or to the prohibition of certain methods of warfare.

To conclude, it should be stressed that even without any provisions detailed out by IHL of international armed conflicts, without any analogy to it, and without any resort to customary law, the fate of the victims of contemporary non-international armed conflicts would be incomparably better than it is presently the case if only the basic black-letter provisions of Article 3 common to the Conventions and of Protocol II were respected.

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I. INTERNATIONAL AND NON-INTERNATIONAL ARMED CONFLICTS

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, paras. 71-76 and 96-98] p. 1804

Quotation The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in common article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its root in these treaty provisions.

[Source: Commission of Experts appointed to investigate violations of International Humanitarian Law in the Former Yugoslavia. UN Doc. S/1994/674, para. 52.]

II. COMPARISON OF THE LEGAL REGIMES FOR INTERNATIONAL AND FOR NON-INTERNATIONAL ARMED CONFLICTS

Case No. 15, The International Criminal Court. [*Cf. A.*, Art. 8.] p. 608
 Document No. 40, Minimum Humanitarian Standards. [*Cf. B.*, paras. 74-77.] p. 823
 Case No. 48, Germany, International Criminal Code. [*Cf. paras. 8-12.*] p. 915
 Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf. A.*, Art. 136 (c).] p. 937
 Case No. 167, UN, UN Forces in Somalia. [*Cf. I. 3. 1.*] p. 1692

SUGGESTED READING: OBRADOVIC Konstantin, "Les règles du droit international humanitaire relatives à la conduite des hostilités en période de conflits armés non internationaux", in *Yearbook of the International Institute of Humanitarian Law* (San Remo), Milano, Giuffrè, 1992, pp. 95-116. SASSÒLI Marco, "Le Droit international humanitaire applicable aux conflits armés non internationaux: Quelques problèmes fondamentaux et le rôle du CICR", in *Revue burkinabè de droit*, No. 17, 1990, pp. 115-143.

1. Fundamental difference: no protected person status

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf. C.*, Appeals Chamber, Merits, paras. 68-171.] p. 1804

SUGGESTED READING: SOLF Waldemar A., "The Status of Combatants in Non international Armed Conflicts Under Domestic Law and Transnational Practice", in *American University Law Review*, Vol. 33/1, 1983, pp. 53-65.

2. Similarities

a) protection of all those who do not or no longer directly participate in hostilities

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122
 Case No. 103, Nigeria, Operational Code of Conduct. p. 1137
 Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357
Case No. 130, ICJ, Nicaragua v. US. [*Cf. para. 255.*] p. 1365
 Case No. 149, UN, Security Council Resolution 688 on Northern Iraq. p. 1571
Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf. B.*, Merits, paras. 572-575 and 615.] p. 1804
 Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf. 2.*] p. 2098
 Case No. 205, Switzerland, The Niyonteze Case. [*Cf. A.*, consid. 9a.; B., Ill. ch. 3, D. 1.] p. 2233
 Case No. 222, India, Press Release, Violence in Kashmir. p. 2356
 Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358
 Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

- who is protected?

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, para. 292.] p. 1467

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., para. 629.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. B., III., ch. 3. D. 1.] p. 2233

- the wounded and sick

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

SUGGESTED READING: SOLF Waldemar A, "Development of the Protection of the Wounded, Sick and Shipwrecked under the Protocols Additional to the 1949 Geneva Conventions", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, Martinus Nijhoff Publishers, 1984, pp. 237-248.

- prohibition of rape and other forms of sexual violence

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 166 and 333-358.] p. 1467

- treatment of detainees

Document No. 21, ICRC, Tracing Service. p. 660

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 298 and 422.] p. 1467

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. F. 2.] p. 2098

Case No. 229, Russian Federation, Chechnya, Operation Samashki. [Cf. 14.] p. 2416

- judicial guarantees

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. F.] p. 2098

b) more absolute prohibition of forced displacements

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 226 and 328.] p. 1467

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 9., 30. and 36.] p. 1732

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 2. A.] p. 2098

SUGGESTED READING: MANGALA Jack M., "Préventions des déplacements forcés de population - possibilités et limites", in *IRRC*, No. 844, December 2001, pp. 1067-1095. PLATTNER Denise, "The Protection of Displaced Persons in Non-International Armed Conflicts", in *IRRC*, No. 291, November-December 1992, 13 pp.

III. THE EXPLICIT RULES OF COMMON ARTICLE 3 AND OF PROTOCOL II

Document No. 40, Minimum Humanitarian Standards. [*Cf.* B., para. 76.] p. 823

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 2. B., 3. C. 1) and 2).] p. 2098

Case No. 207, Colombia, Constitutional Conformity of Protocol II. p. 2266

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

1. Principles under Article 3 common

a) non discrimination

b) humane treatment

Case No. 131, Canada, Ramirez v. Canada. p. 1376

Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* B., paras. 219 and 234-250.] p. 2020

c) judicial guarantees

SUGGESTED READING: PEJIC Jelena, "Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence", in *IRRC*, No. 858, June 2005, pp. 375-391. SAYAPIN Sergey, "The Application of the Fair Trial Guarantees to Alleged Terrorists in Non-International Armed Conflicts", in *Humanitäres Völkerrecht*, Vol. 3, 2004, pp. 152-159.

d) obligation to collect and care for the wounded and sick

2. Additional rules under Protocol II

a) more precise rules on:

aa) fundamental guarantees of humane treatment

Arts. 4 and 5 [Rules 87-96, 103, 118, 119, 121, 125, 128 of CIHL]

bb) judicial guarantees

Art. 6 [Rules 100-102 of CIHL]

cc) wounded, sick and shipwrecked

Arts. 7-8. [Rules 109-111 of CIHL]

b) specific rules on:

aa) protection of children

Art. 4 (3) [Rules 136 and 137 of CIHL]

bb) protection of medical personnel and units, duties of medical personnel and the red cross and red crescent emblems

Arts. 9-12 [Rules 25, 26 and 28-30 of CIHL]

c) rules on the conduct of hostilities

aa) protection of the civilian population against attacks

Art. 13 [Rules 1 and 6 of CIHL]

bb) protection of objects indispensable for the survival of the civilian population

Art. 14 [Rules 53 and 54 of CIHL]

cc) protection of works and installations containing dangerous forces

Art. 15 [Rule 42 of CIHL]

dd) protection of cultural objects

Art. 16 [Rules 38-40 of CIHL]

d) prohibition of forced movements of civilians

Art. 17 [Rule 129 B of CIHL]

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 24, 30, 33 and 36.] p. 1732

e) relief actions

Art. 18 [Rules 55 and 56 of CIHL]

IV. CUSTOMARY LAW OF NON-INTERNATIONAL ARMED CONFLICTS

Case No. 29, ICRC, Customary International Humanitarian Law. p. 730

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 154-167.] p. 1467

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, paras. 96-126.] p. 1804

V. APPLICABILITY OF THE GENERAL PRINCIPLES ON THE CONDUCT OF HOSTILITIES

Case No. 15, The International Criminal Court. [*Cf.* A. The Statute, Art. 8 (2) (e).] p. 608

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., para. 166.] p. 1467

Case No. 163, Inter-American Commission on Human Rights, Tablada. [*Cf.* paras. 182-189.] p. 1670

Case No. 182, ICTY, The Prosecutor v. Rajic, Art. 61 Procedure. [*Cf.* para. 48.] p. 1888

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* paras. 22-24.] p. 2266

SUGGESTED READING: CASSESE Antonio, "The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts", in CASSESE Antonio (ed.), *Current Problems of International Law*, Milan, Giuffrè, 1975, pp. 287-318. HOFFMANN Michael H., *The Customary Law of Non-International Armed Conflict: Evidence from the United States Civil War*, Geneva, ICRC, October 1990, 23 pp. "Declaration on the Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts", in *IRRC*, No. 278, September-October 1990, 5 pp. "Rules of International Humanitarian Law Governing the Conduct of Hostilities in Non-International Armed Conflicts", in *IRRC*, No. 278, September-October 1990, pp. 383-403.

1. Principle of distinction

Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf.* A., Art. 136 (c).] p. 937

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 166 and 240-268.] p. 1467

Case No. 163, Inter-American Commission on Human Rights, Tablada. [*Cf.* para. 177.] p. 1670

Case No. 181, ICTY, The Prosecutor v. Martić, Rule 61 Decision. [*Cf.* para. 11-14 and 28-32.] p. 1880

Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf.* A. and B., paras. 116 and 228.] p. 2020

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* paras. 28-34.] p. 2266

Case No. 228, Germany, Government Reply on Chechnya. p. 2415

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

2. Principle of military necessity

3. Principle of proportionality

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 166 and 260.] p. 1467

4. Right to relief

Document No. 41, UN, Guiding Principles on Internal Displacement. [*Cf.* Principle 25.] p. 850

Case No. 149, UN, Security Council Resolution 688 on Northern Iraq. p. 1571

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 36.] p. 1732

SUGGESTED READING: BINDSCHEDLER-ROBERT Denise, "Actions of Assistance in Non-international Conflicts - art. 18 of Protocol II", in *European Seminar on Humanitarian Law* (Jagellonian University, Krakow, 1979), Warsaw/Geneva, Polish Red Cross, ICRC, Geneva, 1979, pp. 71-85.

FURTHER READING: KWAKWA Edward, "Internal Conflicts in Africa: Is There a Right of Humanitarian Action?", in *African Yearbook of International Law*, 1994, pp. 9-46.

5. Necessity to look into the law of international armed conflicts - and sometimes International Human Rights Law - for the precise meaning of principles

VI. NECESSITY OF ANALOGIES WITH THE LAW OF INTERNATIONAL ARMED CONFLICTS

Introductory Text

First, there are cases where the precise rule resulting from a common principle or from a combination of principles with a provision of the law of non-international armed conflicts or with simple legal logic can be found by analogy from rules which have been laid down in the much more detailed rules of the Conventions and Protocol I for international armed conflicts.^[248]

Second, certain rules and regimes of the law of international armed conflicts have to be applied in non-international armed conflicts to fill gaps in the provisions applicable to it, to make the application of its explicit provisions possible, or to give them a chance to be applied in reality.

Thus, the law of non-international armed conflicts contains no definition of military objectives nor of the civilian population. Such a definition is however necessary to apply the principle of distinction applicable in both fields and the explicit prohibitions to attack the civilian population, individual civilians, and certain civilian objects.^[249] No fundamental difference between the regimes applicable to the two situations prohibits the application of those same definitions.

A striking feature of the law of non-international armed conflicts is that it foresees no combatant status, does not define combatants and does not prescribe specific obligations for them; its provisions do not even use the term "combatant." This is a consequence of the fact that no one has the "right to participate in hostilities" in a non-international armed conflict (a right which is an essential feature of the combatant status) and is in line with the fact that the law of non-international armed conflicts does not protect according to the status of a person but according to his or her actual activities. Nevertheless, if civilians are to be respected in non-international armed conflicts as prescribed by the applicable provisions of International Humanitarian Law, it must be possible for those conducting military operations to distinguish those who fight from those who do not fight, and this is only possible if those who do fight distinguish themselves from those

248 Thus, one may claim that the prohibition of indiscriminate attacks as codified in Art. 51 (5) and the precautionary measure laid down in Art. 57 (2) (b) of Protocol I are necessary consequences of the principle of distinction, and the rules of Conventions I and IV as well as Protocol I concerning who may use, and in which circumstances, the distinctive emblem have to be taken into account when applying Art. 12 of Protocol II on the distinctive emblem.

249 Cf. Arts. 13 and 14 of Protocol II.

who do not fight. Detailed solutions on how this can and must be done are found, *mutatis mutandis*, in the law of international armed conflicts.

A more difficult case concerns the prohibitions or limitations on the use of certain weapons. None of the relevant differences between the two categories of conflict could justify not to apply in non-international armed conflicts prohibitions or restrictions on the use of certain weapons contained in the law of international armed conflicts. Yet, States have traditionally refused to accept proposals explicitly extending such prohibitions to non-international armed conflicts. Fortunately, in recent codification efforts this trend has been reversed.^[250]

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, para. 126.] p. 1804

SUGGESTED READING: CARILLO-SUÁREZ Arturo, "Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict", in *American University International Law Review*, Vol. 15/1, 1999, pp. 1-150.

1. "Combatants" must distinguish themselves from the civilian population

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112

Case No. 104, Nigeria, Pius Nwaoga v. The State. p. 1139

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 35.] p. 1732

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 2. B.] p. 2098

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

2. Respect of International Humanitarian Law must be rewarded

Case No. 69, US, The Prize Cases. p. 1011

Case No. 139, South Africa, Sagarius and Others. p. 1507

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 16.] p. 1732

a) internment, not imprisonment for those captured in arms

b) encouragement of amnesty at the end of the conflict

Art. 6 (5) of Protocol II

SUGGESTED READING: DUGARD John, "Dealing with Crimes of Past Regime. Is Amnesty still an Option?", in *Leiden Journal of International Law*, Vol. 12/4, 1999, pp. 1001-1015. MACDONALD Avril, "Sierra Leone's Uneasy Peace: The Amnesties Granted in the Lomé Peace Agreement and the United Nations' Dilemma", in *Humanitäres Völkerrecht*, Vol. 13/1, 2000, pp. 11-26.

250 Thus the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and other Devices as Amended on May 3, 1996 (Protocol II), Geneva, May 3, 1996, also applies to non-international armed conflicts. (See **Document No. 8**. [Cf. Art. 1 (2).] p. 547.)

- aa) for the mere fact of having taken part in hostilities
- bb) but not for war crimes or other violations

Case No. 141, South Africa, AZAPO v. Republic of South Africa. p. 1522
 Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682
 Case No. 207, Columbia, Constitutional Conformity of Protocol II. [Cf. paras. 41-43.] p. 2266
 Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 3. D.] p. 2362

3. Rules on the use of the emblem

Art. 12 of Protocol II

Case No. 129, Nicaragua, Helicopter Marked with the Emblem. p. 1364
 Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

4. Prohibition of the use of certain weapons

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention). [Cf. Art. 1] p. 547
 Document No. 9, Amendment to Article 1 of the Convention on Certain Conventional Weapons of 1980, in Order to Extend it to Non-International Armed Conflicts. p. 559
 Case No. 29, ICRC, Customary International Humanitarian Law. p. 730
 Document No. 40, Minimum Humanitarian Standards. [Cf. Art. 5 (3).] p. 823
 Case No. 96, ICRC Report on Yemen, 1967. p. 1106
 Case No. 145, UN/ICRC, The Use of Chemical Weapons. p. 1562
 Case No. 163, Inter-American Commission on Human Rights, *Tablada*. [Cf. para. 187.] p. 1670
Case No. 180, ICTY, *The Prosecutor v. Tadic*. [Cf. A., Jurisdiction, paras. 119-124.] p. 1804
 Case No. 181, ICTY, *The Prosecutor v. Martić*, Rule 61 Decision. [Cf. para. 18.] p. 1880

SUGGESTED READING: FISCHER Horst, "Limitation and Prohibition of the Use of Certain Weapons in Non-International Armed Conflicts", in *Yearbook of the International Institute of Humanitarian Law* (San Remo), 1989, pp. 117-180. PLATTNER Denise, "The 1980 Convention on Conventional Weapons and the Applicability of Rules Governing Means of Combat in a Non-International Armed Conflict", in *IRRC*, No. 279, November-December 1990, pp. 551-564. SALINAS BURGOS Hernan, "The Taking of Hostages and International Humanitarian Law", in *IRRC*, No. 270, May-June 1989, pp. 196-216.

5. Limits to analogies

SUGGESTED READING: SOLF Waldemar A., "Problems with the Application of Norms Governing Interstate Armed Conflict to Non-International Armed Conflict", in *Georgia Journal of International and Comparative Law*, Vol. 13, 1983, pp. 323-326.

- no combatant status
- no occupied territories

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 8.] p. 1732

VII. DIFFERENT TYPES OF NON-INTERNATIONAL ARMED CONFLICTS

Case No. 15, The International Criminal Court. [*Cf.* A., Art. 8 (2) (d) and (f).] p. 608

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II. p. 964

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., paras. 74-76.] p. 1467

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A., paras. 601-610 and 622-627.] p. 2171

SUGGESTED READING: ANGSTROM Jan, "Towards a Typology of Internal Armed Conflict: Synthesising a Decade of Conceptual Turmoil", in *Civil Wars*, Vol. 4/3, 2001, pp. 93-116. BOTHE Michael, "Article 3 and Protocol II: Case Studies of Nigeria and El Salvador", in *American University Law Review*, Vol. 31/4, 1982, pp. 899-909. SCHINDLER Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", in *Collected Courses*, Vol. 163, 1979, pp. 153-156.

1. Conflicts to which common Article 3 is applicable

Case No. 93, Hungary, War Crimes Resolution. p. 1091

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* para. 219.] p. 1365

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 23.] p. 1732

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A., paras. 619-621.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [*Cf.* B., III., ch. 3. C.] p. 2233

- lower threshold

Document No. 30, The Seville Agreement. [*Cf.* Art. 5. 2.] p. 750

Case No. 32, ICRC, Disintegration of State Structures. p. 767

Document No. 40, Minimum Humanitarian Standards. p. 823

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357

Case No. 163, Inter-American Commission on Human Rights, Tablada. [*Cf.* paras. 154-56.] p. 1670

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 23.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Merits, paras. 562-568.] p. 1804

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A., paras. 619-621.] p. 2171

Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

2. Conflicts covered by common Article 3 and Article 8 (2) (e) of the Statute of the International Criminal Court

3. Conflicts to which, in addition, Protocol II is applicable

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., Art. 10 and Commentary, para. 9.] p. 805

Document No. 40, Minimum Humanitarian Standards. [*Cf.* B., paras. 78-81.] p. 823

Case No. 59, Belgium and Brazil, Explanations of Vote on Protocol II. p. 964

Case No. 132, Switzerland, Qualification of the Conflict in El Salvador. p. 1383

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 16, 24 and 34-37.] p. 1732

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf.* A. paras. 622-627.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [*Cf.* A., 9 a and B., III., ch. 3., C and D. 2.] p. 2233

Case No. 228, Germany, Government Reply on Chechnya. p. 2415

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

Case No. 230, Russia, Constitutionality of Decrees on Chechnya. p. 2429

SUGGESTED READING: JUNOD Sylvie S., "Additional Protocol II: History and Scope", in *American University Law Review*, Vol. 33/1, 1983, pp. 29-40. LYSAGHT Charles, "The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions of 1949 and Other Human Rights Instruments", in *American University Law Review*, Vol. 33/1, 1983, pp. 9-27.

4. Conflicts to which International Humanitarian Law as a whole is applicable

a) recognition of belligerency by the government

Case No. 69, US, The Prize Cases. p. 1011

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

Case No. 207, Columbia, Constitutional Conformity of Protocol II. [*Cf.* paras. 14 and 15.] p. 2266

b) special agreements among the Parties

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., para. 168.] p. 1467

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 4.] p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. p. 1761

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, para. 73.] p. 1804

Case No. 187, ICTY, The Prosecutor v. Galic. [*Cf.* para. 22.] p. 1986

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 3. B.] p. 2098

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291

Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland. p. 2294

SUGGESTED READING: JAKOVLJEVIC Bosko, "Memorandum of Understanding of 27 November 1991: International Humanitarian Law in the Armed Conflict in Yugoslavia in 1991", in *Yugoslav Review of International Law*, No. 3, 1991, pp. 301-312. JAKOVLJEVIC Bosko, "The Agreement of May 22, 1992, on the Implementation of International Humanitarian Law in the Armed Conflict in Bosnia-Herzegovina", in *Yugoslovenska Revija za Medunarodno Pravo*, No. 2-3, 1992, pp. 212-221. SANDOZ Yves, "Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie", in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490.

c) signification of declarations of intention

Case No. 210, Germany, Government Reply on the Kurdistan Conflict. p. 2291

SUGGESTED READING: PLATTNER Denise, "La portée juridique des déclarations de respect du droit international humanitaire qui émanent de mouvement en lutte dans un conflit armé", in *RBDI*, Vol. 18/1, 1984-1985, pp. 298-320. See documents on <http://www.genevacall.org>.

5. Problems of qualification

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. p. 2309

SUGGESTED READING: GRAY Christine, "Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterization and Consequences", in *BYIL*, Vol. 67, 1996, pp. 155-197. MERON Theodor, "Classification of Armed Conflict in the Former Yugoslavia, *Nicaragua's* Fallout", in *AJIL*, Vol. 92/2, 1998, pp. 236-242. SANDOZ Yves, "Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie", in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490. SASSÒLI Marco, "The Legal Qualification of the Conflicts in the former Yugoslavia: Double Standards or New Horizons in International Humanitarian Law?", in WANG Tiewa and SIENHO Yee (ed.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei*, Routledge, London, 2001, pp. 307-333.

a) traditional internationalized internal conflicts

Case No. 38, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 8.] p. 805

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 219 and 254.] p. 1365

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 9 and 26.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., para. 72 and C., paras. 87-162.] p. 1804

Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [Cf. paras. 11 and 13-31.] p. 1888

Case No. 189, US, Kadic, et al. v. Karadzic. p. 2055

Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. A.] p. 2098

Case No. 222, India, Press Release, Violence in Kashmir. p. 2356

SUGGESTED READING: GASSER Hans-Peter, "Internationalized Non-International Armed Conflicts: Case Studies of Afghanistan, Kampuchea and Lebanon", in *American University Review*, Vol. 33/1, 1983, pp. 145-161. SCHINDLER Dietrich, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", in *Collected Courses*, Vol. 163/2, 1979, pp. 119-163. SCHINDLER Dietrich, *International Humanitarian Law and the Internationalization of Internal Armed Conflict*, San Remo, International Institute of Humanitarian Law, 1981, 15 pp.

b) conflicts of secession

Case No. 69, US, The Prize Cases. p. 1011

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 2. and 34.] p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* A.] p. 1761

c) foreign intervention not directed against governmental forces

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 3. A.] p. 2098

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 1. B. 4.] p. 2362

d) UN peacekeeping and peace-enforcement operations in a non-international armed conflict

Case No. 14, Convention on the Safety of UN Personnel. p. 602

Case No. 167, UN, UN Forces in Somalia. p. 1692

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 3. D.] p. 2098

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 1. B. 3.] p. 2362

SUGGESTED READING: CHO Sihyun, "International Humanitarian Law and United Nations Operations in an Internal Armed Conflict", in *Korean Journal of International and Comparative Law*, Vol. 26, 1998, pp. 85-111. SHRAGA Daphna, "The United Nations as an Actor Bound by International Humanitarian Law", in *International Peacekeeping*, Vol. 5/2, 1998, pp. 64-81.

e) UN operations to restore or maintain law and order

6. Practical difficulties arising out of problems of qualification

a) who is a "protected person"?

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 2. and 9.] p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* A., Art. 4 (1) and B., Art. 2. 3 (2).] p. 1761

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, para. 76.] p. 1804
Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [*Cf.* paras. 8, 34-37.] p. 1888

b) the legal regulation of "ethnic cleansing"

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 8. and 12.] p. 1732
 Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts.
 [*Cf.* A. and B., Art. 2. 3. (4).] p. 1761

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Trial Chamber, Merits, paras. 638-643.] p. 1804

Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others. p. 2071

- International Humanitarian Law and genocide

(*See infra*, Chapter 13. X. 1. e) genocide. p. 309.)

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. A.] p. 2098
 Case No. 205, Switzerland, The Niyonteze Case. [*Cf.* B., III. ch. 1. B.] p. 2233

- International Humanitarian Law and crimes against humanity

(*See infra*, Chapter 13. X. 1. d) crimes against humanity. p. 307.)

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* B., Trial Chamber, Merits, paras. 626-654, and C., Appeals Chamber, para. 282-304.] p. 1804

c) working obligations and forced recruitment

d) what is a war crime?

Case No. 15, The International Criminal Court. [*Cf.* A. Art. 8 (2) (c)-(f).] p. 608
 Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf.* A., Art. 136 (c).] p. 937
 Case No. 93, Hungary, War Crimes Resolution. p. 1091
 Case No. 177, Germany, Government Reply on Rapes in Bosnia. p. 1787
 Case No. 179, UN, Statute of the ICTY. [*Cf.* A., paras. 1-2 and C., Art. 3.] p. 1791
Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., Jurisdiction, paras. 81-83.] p. 1804
 Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063
 Case No. 196, UN, Statute of the ICTR. [*Cf.* Art. 4.] p. 2154

7. The bottom line: common Article 3 to the Conventions

Case No. 32, ICRC, Disintegration of State Structures. p. 767
 Case No. 130, ICJ, Nicaragua v. US. [*Cf.* paras. 218 and 219.] p. 1365
 Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* para. 11.] p. 2266

VIII. WHO IS BOUND BY THE LAW OF NON-INTERNATIONAL ARMED CONFLICTS?

Introductory Text

From the point of view of the law of treaties, Article 3 common to the four Geneva Conventions and Protocol II bind the States party to those treaties. Even those rules of International Humanitarian Law (IHL) of non-international armed conflicts considered customary international law would normally bind only States. This obligation of the States includes a responsibility for all those who can be considered as agents of those States. IHL must however also bind non-State parties in a non-international armed conflict. This includes not only those who fight against the government but also armed groups fighting each other. This is necessary not only because victims must equally be protected from rebel forces but also 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 governmental 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.

One has therefore, first, to consider that when creating through agreement or custom the rules applicable to non-international armed conflicts, which include the provision that those rules be respected by "each Party to the conflict,"^[251] States implicitly confer on 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 to rebels - through the law of non-international armed conflicts - the status of subjects of IHL; otherwise their legislative effort would not have had the desired effect, the *effet utile*. At the same time, States explicitly excluded that the application and applicability of IHL by and to rebels would confer the latter a legal status under rules of international law other than those of IHL.^[252]

Second, IHL of non-international armed conflict binds not only the States Parties but also the non-governmental parties to such a conflict through national legislation. Once the State is bound by IHL, those rules either become part of its internal law or must be put into effect through implementing legislation. This internal law then applies to everyone on the territory of the State. Under this construction, IHL indirectly obliges the rebels: Only if they become the effective government, they would be directly bound by those international rules.

251 Cf. Art. 3 (1) common to the Conventions.

252 Cf. Art. 3 (4) common to the Conventions. (See *infra*, Chapter 12. IX. Consequences of the Existence of a Non-International Armed Conflict for the Legal Status of the Parties. p. 268.)

While IHL of non-international armed conflicts is equally binding for non-State armed groups, the legal mechanisms for its implementation are, however, still mainly geared toward States. Ways might be explored as to how armed groups could be involved into the development, interpretation and operationalization of the law. While an explicit acceptance is not necessary for them to be bound, armed groups should be encouraged to accept international humanitarian law formally, *inter alia* to create a certain sense of ownership. Non-state armed groups could equally be encouraged and assisted to give proper instructions to their members, and to establish internal monitoring systems to ensure that IHL is respected in the activities of the group. The respect of the law should also be rewarded. Possible methods to encourage, monitor and control the respect of those laws by armed groups should be explored. Finally, if violations occur, ways to apply criminal, civil and international responsibility to non-State armed groups, including sanctions, already exist and should be developed. States however are afraid, that any such engagement of armed groups could increase their legitimacy, number and perspectives of success.

The precise range of persons who are addressees of IHL of non-international armed conflicts has been discussed in the jurisprudence of the two *ad hoc* International Criminal Tribunals.^[253] Certainly, not only members of armed forces or groups, but also others mandated to support the war effort of one party to the conflict are bound by IHL. Beyond that, all those acting for such a party, including all public officials as far as the governmental side is concerned, must comply with IHL in their functions. Otherwise judicial guarantees, mainly addressed to judges, rules on medical treatment, equally addressed to ordinary hospital staff and rules on the treatment of detainees, equally addressed to ordinary prison guards could not have their desired effect because the mentioned addressees can 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 an armed conflict. The most delicate case is that of individuals who can not be considered as connected to one party, but nevertheless commit acts of violence contributing to the armed conflict for reasons connected with the conflict. If such individuals are not considered as addressees of IHL, most acts committed in anarchic conflicts would not be covered by IHL nor consequently punishable as violations of IHL.

1. Both parties

Case No. 38, ILC, Draft Articles on State Responsibility. [Cf. A., para. 16 of the Commentary to Art. 10.] p. 805

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A. paras. 172-174.] p. 1467

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B. paras. 430-446.] p. 2171

²⁵³ See in particular **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B., paras. 432-445.] p. 2171.

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [Cf. para. 8.] p. 2266

SUGGESTED READING: HENCKAERTS Jean-Marie, "Binding Armed Opposition Groups through Humanitarian Treaty Law and Customary Law", in *Proceedings of the Bruges Colloquium, Relevance of International Humanitarian Law to Non-State Actors, 25th-26th October 2002*, in *Collegium* No. 27, Spring 2003, pp. 123-138. SASSÒLI Marco, "Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law", *Armed Groups Project*, 2003, online: <http://www.armedgroups.org/index.php?option=content&task=view&id=45>. ZEGVELD Liesbeth, *Accountability of Armed Opposition Groups in International Law*, Cambridge, CUP, 2002, 260 pp.

2. All those belonging to one party

Case No. 189, US, Kadic et al. v. Karadzic. p. 2055

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 2 and 3.] p. 2098

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B., paras. 425-446.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. A., para. 9 and B., III. ch. 3. D.] p. 2233

3. All those affecting persons protected by international humanitarian law by an action linked to the armed conflict

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B., paras. 432-445.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. B., III. ch. 3. D. 2.] p. 2233

IX. CONSEQUENCES OF THE EXISTENCE OF A NON-INTERNATIONAL ARMED CONFLICT FOR THE LEGAL STATUS OF THE PARTIES

Introductory Text

Article 3 (4) common of the Conventions clearly states that the application of this article "shall not affect the legal status of the Parties to the conflict." As any reference to "parties" has been removed from Protocol II, such a clause could not appear in it. However, Protocol II contains a provision clarifying that nothing in it 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 International Humanitarian Law (IHL) - to maintain or re-establish law and order or defend national unity or territorial integrity. The same provision underlines that the Protocol can not be invoked for intervening into an armed conflict.^[254]

The application of IHL to a non-international armed conflict does therefore never internationalize the conflict or confer 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 Article 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, a separate international legal personality to rebels which would hinder the government's ability or authority to overcome them and to punish them - in a trial respecting the judicial guarantees provided for in IHL - for their rebellion. Nor do the rebels by applying 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 can not necessarily be said.

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention). [*Cf.* Art. 1 (6).] p. 547

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., Art. 10 and Commentary, paras. 2 and 9.] p. 805

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., para. 174.] p. 1467

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* A., Art. 14 (2) and B., Introduction.] p. 1761

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* paras. 14-16.] p. 2266

SUGGESTED READING: CASSESE Antonio, "The Status of Rebels under the 1977 Geneva Protocol on Non-international Armed Conflicts", in *ICLQ*, Vol. 30/2, 1981, pp. 416-439. NIYUNGEKO Gérard, "The Implementation of International Humanitarian Law and the Principle of State Sovereignty", in *IRRC*, No. 281, March-April 1991, pp. 105-133.

Chapter 13

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention.
[Cf. G. II. 3.] p. 1303

SUGGESTED READING: DOSWALD-BECK Louise, "Implementation of International Humanitarian Law in Future Wars", in *International Law Studies*, US Naval War College, Vol. 71, 1998, pp. 39-75. DRAPER Gerald I.A.D., "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", in *Collected Courses*, Vol. 164, 1979, pp. 5-54. *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Luxembourg, Office for Official Publications of the European Communities, 1995. SANDOZ Yves, *Implementing International Humanitarian Law*, Geneva, Henry-Dunant Institute, 1995, 28 pp. SANDOZ Yves, "Implementing International Humanitarian Law", in *International Dimensions of Humanitarian Law*, Geneva, Henry-Dunant Institute/UNESCO, 1986, pp. 259-282.

FURTHER READING: KALSHOVEN Frits & SANDOZ Yves (ed.), *Implementation of International Humanitarian Law Research Papers by Participants in the 1986 Session of the Centre for Studies and Research in International Law and International Relations of the Hague Academy of International Law*, Dordrecht, London, Martinus Nijhoff Publishers, 1989, 472 pp. ROBERTS Adam, "The Laws of War: Problems of Implementation in Contemporary Conflicts", in *Law in Humanitarian Crises: How Can International Humanitarian Law Be Made Effective in Armed Conflicts?*, Luxembourg, Office for Official Publications of the European Communities, 1995, pp. 13-82.

I. GENERAL PROBLEMS OF THE IMPLEMENTATION OF INTERNATIONAL LAW AND SPECIFIC PROBLEMS FOR INTERNATIONAL HUMANITARIAN LAW

Introductory Text

The general mechanisms foreseen by international law to ensure its respect and to sanction its violations are even less satisfactory and efficient regarding International Humanitarian Law (IHL) than they are for the implementation of other branches of international law. In armed conflicts, they are inherently insufficient and some of them even counter-productive.

The traditional way to implement the law of the international society made up of sovereign States is typical for a decentralized society and therefore gives the potential or actual State victim of a violation - the injured State - an essential role. This State may be supported by other States, according to their interests, which should include the general interest of every member of that society to have its legal system respected.

This decentralized structure of implementation is particularly inappropriate for IHL applicable to armed conflicts, for the following reasons.

First, the peaceful settlement of disputes arising out of violations of IHL would, at least in international armed conflicts, be astonishing. 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 directly injured by a violation of IHL other than the State violator exists only in international armed conflicts.^[255] In such conflicts the injured State has the most unfriendly relation that one can imagine with the State violator: armed conflict. Consequently, the numerous ways of preventive and reactive influence which make international law normally be respected are lacking for the injured State. In traditional international law, the use of force was the most extreme reaction by the injured State. Today it is basically outlawed except in reaction to a prohibited use of force. In addition, for a State injured by a violation of IHL, the use of force is logically no longer possible as a reaction to a violation of IHL because such a violation can occur only in an armed conflict, namely, where the two States are already using force. The only reaction that would remain at the disposal of the injured State in the traditional structure of law enforcement in the international society would be an additional use of force consisting of a violation of IHL itself. While such reciprocity or fear of such reprisals may contribute to the respect of IHL, they have been largely outlawed because they lead to a vicious circle, a "competition of barbarism," and hurt the innocent, precisely those whom IHL wants to protect.

Third, confronted with an armed conflict between two States, third States may have two reactions. They may take sides for reasons which are either purely political or, if connected to international law, derive from the *ius ad bellum*. They will therefore help the victim of aggression, independently of who violates the *ius in bello*. Other third States may choose not to take sides. As neutrals they can contribute to make IHL respected, but they will always be cautious that their engagement for the respect of IHL will not affect their basic choice not to take sides.

This traditional decentralized method of implementing international law is today supplemented - and tends to be partially superseded - by the more

²⁵⁵ Legally, however, for the purpose of triggering the rules of State responsibility and taking the counter-measures it foresees, every other State party to the treaties of International Humanitarian Law might be considered as injured by its violations. This may be seen as resulting from the specific provision in Art. 1 common to the Conventions and Protocol I. See however the much more limited concept of injured State adopted by the International Law Commission in Art. 42 of the Draft Articles on State Responsibility (See **Case No. 38**, ILC, Draft Articles on State Responsibility, [Cf. A., Arts. 42 and 48.] p. 805).

centralized enforcement mechanisms foreseen by the UN Charter. The UN enforcement mechanisms can be criticized as frail and politicized, but come closest to what one could wish as a law enforcement system of the international community. Apart from the fact that this system is still weak, dominated more by the real power structures than by the rule of law and that it frequently applies double standards, this system is inherently not very appropriate 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. The UN has therefore an obligation to privilege the respect of *ius ad bellum* over the respect of *ius in bello*. It cannot possibly respect the principle of the equality of the belligerents before *ius 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. Similar reservations must be made against the next strongest measure under the UN Charter - economic sanctions - as a measure to ensure the respect of IHL, as they inevitably provoke indiscriminate human suffering.

Given those shortcomings of the general mechanisms of enforcement in its field of application, IHL had to provide many specific mechanisms of its own and adapt general mechanisms to the specific needs of victims of armed conflicts. Very early on, compared with other branches of international law, it had to overcome one of the axioms of the traditional international society and foresee enforcement measures directed against the individuals violating it, and not only against the State responsible for those violations. For this reason, and also in order to take advantage of the relatively much more efficient and organized national law enforcement systems, IHL had to make sure that its rules are known and are integrated into national legislation. It recognized a particular role to an external independent and impartial body, the International Committee of the Red Cross, which had already been behind its codification. IHL adapts the traditional mechanism of good offices through the codification of the Protecting Power system. Finally it clarifies that the obligations provided for by IHL are obligations *erga omnes* by obliging every State Party to ensure its respect by other States party - without specifying what that means.

Those specific mechanisms established by IHL remain however embedded in the general mechanisms. They can only be understood within the general framework as developments or correctives of the general mechanisms. IHL is certainly not a self-contained system.^[256] Parallel to the specific mechanisms, general mechanisms remain available, for instance the methods for the peaceful settlement of disputes and the measures foreseen by the law of State responsibility, except those specifically excluded by IHL,^[257] those incompa-

256 As are, according to the International Court of Justice, the rules on diplomatic and consular relations (*Cf. Case on United States Diplomatic and Consular Staff in Tehran*, Judgment of 24 May 1980, ICJ Reports 1980, pp. 4 ff., paras. 83-87.)

257 Thus, International Humanitarian Law prohibits reprisals against protected persons.

tible with its purpose and aim or those general international law permits only as a reaction to certain kinds of violations.^[258]

However, even the general and the specific mechanisms taken together cannot guarantee a minimum of respect for the individual even in armed conflict. This can only be achieved through education, when everyone understands that even in armed conflicts the enemy is a human being who deserves respect.

II. MEASURES TO BE TAKEN IN PEACETIME

Introductory Text

Just as the military and economic aspects of a possible armed conflict are already prepared in peacetime, so must be the humanitarian aspects, in particular the respect of International Humanitarian Law (IHL). If soldiers - everyone at his or her level and according to his or her responsibilities - are not properly instructed in peacetime, *i.e.*, not only by informing of and explaining the rules but also by integrating them into the normal training and manoeuvres to create automatic reflex actions, the often very detailed rules of IHL for different problems appearing in armed conflicts will never be respected in case of armed conflict. Similarly, the whole population must have a basic understanding of IHL in order to realize that even in armed conflict, certain rules apply independently of who is right and who is wrong, protecting even the worst enemy. Once an armed conflict with all the hate, upon which it is based and which it creates, has broken out, it is often too late to learn this message. Thus, police forces, civil servants, politicians, diplomats, judges, lawyers, journalists, students who will fulfil those tasks in the future, and the public at large who generates public opinion must know the limits to which everyone's actions are submitted in armed conflicts, the rights everyone may claim in armed conflicts, and how international and national news about armed conflicts have to be written, read, and treated from a humanitarian perspective.^[259]

Preparatory measures also include the translation of the instruments of IHL into national languages. Furthermore, if a constitutional system requires rules of international treaties to be transformed by national legislation into the law of the land for those rules to be applicable, such legislation must obviously already be adopted in peacetime.

In every constitutional system, a law of application is moreover necessary to enable the national law enforcement system to apply the many non self-executing rules of IHL. Due to not only the length of every legislative process

²⁵⁸ Thus the use of force is under the UN Charter a lawful reaction, in the form of individual or collective self-defense, only to an armed aggression and not to any other violation of international law.

²⁵⁹ The obligation to disseminate IHL is prescribed in Arts. 47/48/127/144 respectively of the Conventions, Arts. 83 and 87 (2) of Protocol I and Art. 19 of Protocol II.

and the other priorities pressing upon a parliament when a war breaks out but also because courts have to be able to sanction war crimes in foreign conflicts and the misuses of the emblem in peacetime, such legislation must be adopted as soon as the State has become a party to the relevant instrument.^[260]

Finally, certain practical measures must be taken by States for them to be able to respect IHL. Qualified personnel and legal advisors have to be trained in peacetime so as to be operational in wartime.^[261] Combatants and certain other persons need identity cards or tags to be identifiable,^[262] and these can obviously not be produced only when a conflict breaks out. Military objectives have to be separated, as far as possible, from protected objects and persons.^[263] It is evident that, e.g., a hospital cannot be moved away from army barracks or a weapons factory suddenly when an armed conflict breaks out.

Document No. 23, ICRC, Advisory Services on International Humanitarian Law. p. 670

Document No. 26, ICRC, Protection of War Victims. [Cf. 2.2.] p. 702

Case No. 53, Ivory Coast, National Interministerial Commission. p. 949

SUGGESTED READING: BOTHE Michael, MACALISTER-SMITH Peter & KURZIDEM Thomas (ed.), *National Implementation of International Humanitarian Law*, Dordrecht/Boston/London, Martinus Nijhoff Publishers, 1990, 286 pp. DJIBRIL Ly, "La mise en œuvre du droit international humanitaire: les obligations étatiques", in *Études internationales*, Vol. 72/3, 1999, pp. 113-130. KÜNTZIGER Isabelle, "Le droit international humanitaire au plan national: impact et rôle des Commissions nationales", in *IRRC*, No. 846, June 2002, pp. 489-494. PELLANDINI Cristina (ed.), *Committees or other National Bodies for International Humanitarian Law: Report of the Meeting of Experts: Geneva, 23-25 October 1996*, Geneva, ICRC, March 1997, 130 pp.

FURTHER READING: DRAPER Gerald I.A.D., "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1977", in *Collected Courses*, Vol. 164/3, 1979, pp. 1-54. DUTLI Maria Teresa, "Implementation of International Humanitarian Law - National Measures", in *IRRC*, No. 302, September-October 1994, pp. 464-518. FLECK Dieter, "Implementing International Humanitarian Law: Problems and Priorities", in *IRRC*, No. 281, March-April 1991, 13 pp. OFFERMANS Marc, "The Belgian Interdepartmental Commission for Humanitarian Law", in *IRRC*, No. 281, March-April 1991, pp. 154-166. *National Implementation of International Humanitarian Law - 2002-2003 Biennial Report*, Geneva, ICRC, 2004, 40 pp.

1. Dissemination

Arts. 47/48/127/144 respectively of the Conventions; Arts. 83, 87 (2) and 89 of Protocol I; Art. 19 of Protocol II

Document No. 26, ICRC, Protection of War Victims. [Cf. 2. 3.] p. 702

Case No. 32, ICRC, Disintegration of State Structures. p. 767

260 See *infra*, Introductory Text, Chapter 13. II. 4. Legislation for application. p. 277.

261 Cf. Arts. 6 and 82 of Protocol I.

262 Cf. Arts. 16, 17 (1), 27, 40, and 41 of Convention I, Arts. 19, 20, and 42 of Convention II, Arts. 4 (A) (4) and 17 (3) of Convention III, Arts. 20 (3) and 24 (3) of Convention IV and Arts. 18 and 79 (3) of Protocol I.

263 Cf. Art. 19 (2) of Convention I, Art. 18 (5) of Convention IV, and Arts. 12 (4), 56 (5) and 58 (a) and (b) of Protocol I.

SUGGESTED READING: BAERISWYL Edith, "Teaching Young People to Respect Human Dignity - Contribution of the International Red Cross and Red Crescent Movement", in *IRRC*, No. 319, July-August 1997, pp. 357-371. BIGLER Roland, "Disseminating International Humanitarian Law in Colombia: Dissemination is Everyone's Job - A Firsthand Report by an ICRC Delegate", in *IRRC*, No. 319, July-August 1997, pp. 421-432. BOUVIER Antoine, "Diffusing and Teaching International Humanitarian Law", in *Refugee Survey Quarterly*, Vol. 21/3, 2002, pp. 175-180. HARROFF-TAVEL Marion, "Promoting Norms to Limit Violence in Crisis Situations: Challenges, Strategies and Alliances", in *IRRC*, No. 322, March 1998, pp. 5-20.

a) instruction to the armed forces

[Rule 142 of CIHL]

Case No. 91, China, Military Writings of Mao Tse-Tung. p. 1085

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

SUGGESTED READING: HAMPSON Françoise, "Fighting by the Rules: Instructing the Armed Forces in Humanitarian Principles", in *IRRC*, No. 269, March-April 1989, pp. 111-124. MULINEN Frédéric de, "The Law of War and the Armed Forces", in *IRRC*, No. 202, February 1978, pp. 20-45. MULINEN, Frédéric de, *Handbook on the Law of War for Armed Forces*, Geneva, ICRC, 1989, 232 pp.

FURTHER READING: BESSON DE VEZAC Marie-Pierre, "La diffusion du droit international humanitaire au sein des forces armées françaises", in *RDMDG*, Vol. 36/3-4, 1997, pp. 43-72. KLENNER Dietmar, "Training in International Humanitarian Law", in *IRRC*, No. 839, September 2000, pp. 653-662. MULINEN Frédéric de, "Law of War Training within the Armed Forces: Twenty Years of Experience", in *IRRC*, No. 257, March 1987, pp. 168-179. ROBERTS David L., "Training the Armed Forces to Respect International Humanitarian Law: The Perspective of the ICRC Delegate to the Armed and Security Forces in South Asia", in *IRRC*, No. 319, July-August 1997, pp. 433-446. *The Manual of the Law of Armed Conflict*, United Kingdom, Ministry of Defence, Oxford, OUP, 2004, 611 pp.

b) training of police forces

SUGGESTED READING: ROVER Cees de, *To Serve and to Protect*, Geneva, ICRC, 1998, 455 pp.

c) university teaching

(See also *infra*, Part II, Chapter 1. Some Remarks on Teaching International Humanitarian Law. p. 387.)

SUGGESTED READING: DAVID Éric, "Dissemination of International Humanitarian Law at University Level", in *IRRC*, No. 257, March 1987, pp. 155-169. KRAFFT Mathias-Charles, "Le Concours Jean-Pictet 1999 - ou les pièges d'une 'Conférence internationale pour la protection des victimes des conflits armés'", in *IRRC*, No. 838, June 2000, pp. 501-506. LANORD Christophe & DEYRA Michel, "Dissemination in Academic Circles: The Jean Pictet Competition", in *IRRC*, No. 306, May-June 1995, pp. 341-346.

d) dissemination among civil society

[Rule 143 of CIHL]

SUGGESTED READING: FARELL Norman, "Dissemination in Bosnia-Herzegovina: Lessons Learned", in *IRRC*, No. 319, July-August 1997, pp. 409-420.

FURTHER READING: BAERISWYL Edith, "Teaching Young People to Respect Human Dignity - Contribution of the International Red Cross and Red Crescent Movement", in *IRRC*, No. 319, July-August 1997, pp. 357-371. TAWIL Sobhi, "International Humanitarian Law and Basic Education", in *IRRC*, No. 839, September 2000, pp. 581-600.

2. Translation (if necessary)

3. Transformation (if necessary) into domestic legislation

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. p. 924

Case No. 66, UK, Interpreting the Act of Implementation. p. 988

Case No. 94, India, Rev. Mons. Monteiro v. State of Goa. p. 1097

Case No. 114, Israel, Cases Concerning Deportation Orders. p. 1244

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. [*Cf.* paras. 9 and 10.] p. 1357

Case No. 141, South Africa, AZAPO v. Republic of South Africa. [*Cf.* 26. and 27.] p. 1522

Case No. 230, Russia, Constitutionality of Decrees on Chechnya. p. 2429

READING: MEYER Michael A. & ROWE Peter, "The Geneva Conventions (Amendments) Act 1995: A Generally Minimalist Approach", in *ICLQ*, Vol. 45/2, 1996, pp. 476-484.

4. Legislation for application

Introductory Text

In monist constitutional systems (most countries with the exception of those with an English constitutional tradition, Germany and Italy), the rules of International Humanitarian Law (IHL) conventions are immediately applicable by judges and the administration. Specific national legislation of implementation is thus not necessary. In all constitutional systems this is also the case for customary rules. However, this direct application is only possible for "self-executing" provisions of international treaties, i.e. the rules that are sufficiently precise to bring a solution to a given case. For all other rules of International Humanitarian Law, and in dualist constitutional systems, national legislation must be adopted to make the rules of IHL operational.^[264]

Even if one considers the description of the grave breaches in the instruments of IHL to be sufficiently precise, no one can be punished by national courts for such behaviour without national legislation fixing the penalties - otherwise the principle *nulla poena sine lege* would be violated. Furthermore, only national legislation can integrate those rules into the very different traditions of penal law concerning, e.g., the elements of a crime, defences, and inchoate or group criminality. Only national legislation determines which courts, whether military or civil, are competent for which violations and which national prosecutor and judge can effectively enforce the obligation of the State to apply universal jurisdiction over war criminals, to extradite them or to provide mutual assistance in such criminal matters - including to international tribunals.^[265]

IHL prescribes who may use in which circumstances (and which objects may be marked by) the emblem of the red cross or the red crescent in peacetime

²⁶⁴ *Cf.* Art. 80 (1) of Protocol I; Arts. 48/49/128/145 respectively of the Conventions and Art. 84 of Protocol I prescribe that such legislation must be communicated to the other parties.

²⁶⁵ The adoption of national legislation to repress war crimes and to establish universal jurisdiction over them is prescribed by Art. 49 of Convention I, Art. 50 of Convention II, Art. 129 of Convention III, Art. 146 of Convention IV and Art. 85 of Protocol I.

and in wartime with the permission and under the control of the competent authority. Only national legislation can prescribe who is this competent authority and provide the necessary details.^[266]

More generally, where IHL prescribes an obligation for the State to act, only national legislation can clarify who in the State, in a federal State, or within a central administration, has to act. Without such a clarification, the international obligation will remain a dead letter - and will therefore be violated when it becomes applicable. National legislation, therefore, is the cornerstone of application of IHL.

Case No. 48, Germany, International Criminal Code. p. 915

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. p. 924

Case No. 66, UK, Interpreting the Act of Implementation. p. 988

SUGGESTED READING: BERMAN Paul, "The ICRC's Advisory Service on International Humanitarian Law: The Challenge of National Implementation", in *IRRC*, No. 312, May-June 1996, pp. 338-347. CASSESE Antonio & DELMAS-MARTY Mireille (ed.), *Juridictions nationales et crimes internationaux*, Paris, PUF, 2002, 673 pp. FLECK Dieter, "Implementing International Humanitarian Law: Problems and Priorities", in *IRRC*, No. 281, March-April 1991, 13 pp.

FURTHER READING: BOTHE Michael, "The Role of National Law in the Implementation of International Humanitarian Law", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, Martinus Nijhoff Publishers, 1984, pp. 301-312. MEYER Michael A. & ROWE Peter, "The Geneva Conventions (Amendments) Act 1995: A Generally Minimalist Approach", in *ICLQ*, Vol. 45/2, 1996, pp. 476-484. MEYER Michael A. & ROWE Peter, "Ratification by the United Kingdom of the 1977 Protocols Additional to the Geneva Conventions of 1949: Selected Problems of Implementation", in *Netherlands International Law Quarterly*, Vol. 45/4, 1994, pp. 343-363. VAN ELST Richard, "Implementing Universal Jurisdiction over Grave Breaches of the Geneva Conventions", in *Leiden Journal of international Law*, Vol. 15, 2000, pp. 815-854. *National Implementation of International Humanitarian Law - 2002-2003 Biennial Report*, Geneva, ICRC, 2004, 40 pp.

a) self-executing and non self-executing norms of International Humanitarian Law

Case No. 66, UK, Interpreting the Act of Implementation. p. 988

Case No. 94, India, Rev. Mons. Monteiro v. State of Goa. p. 1097

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357

Case No. 134, US, US v. Noriega. [Cf. B. II. C.] p. 1399

Case No. 202, France, Radio Mille Collines. p. 2222

Case No. 220, US, Hamdan v. Rumsfeld. p. 2346

b) particular fields to be covered

- penal sanctions

Arts. 49/50/129/146 respectively of the Conventions

²⁶⁶ Such legislation (See Document No. 22, ICRC, Model Law Concerning the Emblem. p. 665.) is prescribed by Arts. 42, 44, 53 and 54 of Convention I and by Arts. 44 and 45 of Convention II.

Document No. 22, ICRC, Model Law Concerning the Emblem. [*Cf.* Arts. 10-12.] p. 665

Case No. 47, Switzerland, Military Penal Code. p. 912

Case No. 48, Germany, International Criminal Code. p. 915

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. p. 924

Case No. 52, Belgium, Law on Universal Jurisdiction. p. 937

Case No. 54, US, War Crimes Act. p. 952

Case No. 85, US, Trial of Lieutenant General Harukei Isayama and Others. p. 1060

Case No. 90, US, Extradition of Demjanjuk. p. 1078

Case No. 190, France, Javor and Others. p. 2060

- use of the emblem

Arts. 44 and 54 of Convention I [Rule 141 of CIHL]

Document No. 22, ICRC, Model Law Concerning the Emblem. p. 665

Case No. 50, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross". p. 930

Case No. 51, Ghana, National Legislation Concerning the Emblem. p. 934

Case No. 178, UK, Misuse of the Emblem. p. 1788

SUGGESTED READING: BOTHE Michael & JANSSEN Karin, "The Implementation of International Humanitarian Law at the National Level: Issues in the Protection of the Wounded and Sick", in *IRRC*, No. 253, July 1986, pp. 189-199. LAVOYER Jean-Philippe, "National Legislation on the Use and Protection of the Emblem of the Red Cross and Red Crescent", in *IRRC*, No. 313, July-August 1996, pp. 482-485.

- composition of armed forces

5. Training of qualified personnel

Arts. 6 and 82 of Protocol I [Rule 141 of CIHL]

SUGGESTED READING: CAYCI Sadi, "Legal Advisor in the Armed Forces: How to Practice as a Good Legal Advisor", in *RDMDG*, Vol. 38/1-4, 1999, pp. 333-340. DUTLI Maria Teresa, "Implementation of International Humanitarian Law: Activities of Qualified Personnel in Peacetime", in *IRRC*, No. 292, May 1996, 7 pp. FLECK Dieter, "The Employment of Legal Advisors and Teachers of Law in the Armed Forces", in *IRRC*, No. 145, April 1973, pp. 173-180. YBEMA Seerp B., "Between Conscience and Obedience: The role of the Legal Adviser in the Political Decision-Making Process with Regard to Military Operations", in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 711-718.

FURTHER READING: DRAPER Gerald I.A.D., "Role of Legal Advisers in Armed Forces", in *IRRC*, No. 202, January 1978, pp. 6-17.

6. Practical measures

SUGGESTED READING: DUTLI Maria Teresa, "Implementation of International Humanitarian Law: Activities of Qualified Personnel in Peacetime", in *IRRC*, No. 292, May 1996, 7 pp. OFFERMANS Marc, "The Belgian Interdepartmental Commission for Humanitarian Law", in *IRRC*, No. 281, March-April 1991, pp. 154-166. SASSÖLI Marco, "The National Information Bureau in Aid of the Victims of Armed Conflicts", in *IRRC*, No. 256, January 1987, pp. 6-24.

III. RESPECT BY THE PARTIES TO THE CONFLICT

1. Respect

[Rule 139 of CIHL]

2. Supervision of their agents

[Rule 139 of CIHL]

3. Inquiries (spontaneously or following complaints)

Document No. 70, Switzerland Acting as Protecting Power in World War II. p. 1015
 Document No. 74, UK/Germany, Sinking of the Tübingen in the Adriatic. p. 1019

4. Appointment of Protecting Powers

Arts. 8/8/8/9 respectively of the Conventions; Art. 5 of Protocol I

IV. SCRUTINY BY PROTECTING POWERS AND THE ICRC

1. The Protecting Power

Introductory Text

Under international law, a foreigner enjoys diplomatic protection by his or her home country. When such diplomatic protection is not possible due to an absence of diplomatic relations between the country of residence and the home country, the latter may appoint another State - a protecting power - to protect its interests and those of its nationals in the third State. This appointment is only valid if the three States concerned agree. International Humanitarian Law (IHL) has taken advantage of this traditional institution of the law of diplomatic relations,^[267] specifying it and developing it for the purpose of implementing its rules by prescribing that IHL "shall be applied with the co-operation and under the scrutiny of the Protecting Powers."^[268] In an armed conflict such Protecting Powers obviously must be chosen among the neutral States or other States not Parties to the conflict.

More than 80 provisions of the Conventions and Protocol I mention tasks of the Protecting Powers in the following fields: visits to protected persons, need of their consent to certain extraordinary measures concerning protected

²⁶⁷ Now codified in Art. 45 and 46 of the Vienna Convention on Diplomatic Relations of 1961.

²⁶⁸ Cf. Art. 8 common to Conventions I-III and Art. 9 of Convention IV. Art. 5 of Protocol I has developed this system.

persons, need that they are at least informed about certain other measures, supervision of relief missions and evacuations, reception of applications by protected persons, assistance to judicial proceedings against protected persons, transmission of information, documents, and relief goods, and the offering of good offices. Most of these tasks are parallel to those of the ICRC. This duplication is intended, as it should lead to an increased supervision of the respect of IHL.

IHL makes the designation of Protecting Powers an obligation to parties to international armed conflicts.^[269] In practice, the main problem is, however, the designation of such powers. Basically, all three concerned States must agree with the designation. According to the Conventions, if no Protecting Powers can thus be appointed, a detaining or occupying power can ask a third State bilaterally to act as a substitute of a Protecting Power. If even this does not work, the offer of a humanitarian organization such as the ICRC to act as a humanitarian substitute of a Protecting Power shall be accepted. Protocol I has elaborated this appointment procedure.^[270] Nevertheless, in conformity with the co-operation oriented approach needed for the implementation of IHL, no Protecting Power can act efficiently - and a neutral State will anyway be unwilling to act - without the consent of both belligerents.

Although Protocol I clarifies that the designation and acceptance of Protecting Powers do not affect the legal status of the parties or of any territory^[271] and that the maintenance of diplomatic relations is no obstacle to the designation of Protecting Powers,^[272] there have been only five conflicts, out of the numerous armed conflicts since World War II, in which Protecting Powers were designated. Even there, they played a limited role. In an international legal order marked by the idea - or at least the ideal - of collective security, where at least one side of an armed conflict is considered as an outlaw, neutrality becomes a more and more obsolete concept and neutral States willing and likely to be designated as Protecting Powers therefore become more and more rare.

The ICRC, on its side, has no interest to act as a substitute of the Protecting Power, as it can fulfil most of the latter's functions on its own right, without giving the impression of representing only one State and not all victims. For one of the rare functions which IHL confers only upon the Protecting Powers and not also upon the ICRC, that of being notified of and assisting to judicial proceedings against protected persons, the ICRC has managed to be recognized as a *de facto* substitute when there is no Protecting Power.

Document No. 70, Switzerland Acting as Protecting Power in World War II. p. 1015

269 Cf. Art. 5 (1) of Protocol I.

270 Cf. Art. 5 (2)-(4) of Protocol I.

271 Cf. Art. 5 (5) of Protocol I.

272 Cf. Art. 5 (6) of Protocol I.

SUGGESTED READING: COULIBALY Hamidou, "Le rôle des Puissances protectrices au regard du droit diplomatique, du droit de Genève et du droit de La Haye", in KALSHOVEN Frits & SANDOZ Yves (ed.), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, pp. 69-78. DOMINICÉ Christian & PATRNOGIC Jovica, "Les Protocoles additionnels aux Conventions de Genève et le système des puissances protectrices", in *Annales de Droit International Médical*, No. 28, 1979, pp. 24-50. JANNER Antonino, *La Puissance protectrice en droit international, d'après les expériences faites par la Suisse pendant la Seconde Guerre Mondiale*, Basel, Helbing und Lichtenhahn, 1948, 2nd ed., 1972, 79 pp.

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a) the concept of Protecting Powers

Art. 2 (c) of Protocol I

b) the system of appointment of Protecting Powers

Art. 5 (1) and (2) of Protocol I

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036
Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

c) the possible substitute for the Protecting Power

Arts. 10/10/10/11, respectively of the Conventions; Art. 5 (3)-(7) of Protocol I

d) the tasks of the Protecting Power

Arts. 126 (1) of Convention III and 76 and 143 of Convention IV

Arts. 71 (1) and 72 (3) of Convention III

Arts. 65 (2) and 73 (3) of Convention III; Arts. 23 (3), 55 (4), 59 (4) and 61 of Convention IV; Arts. 11 (6) and 70 (3) of Protocol I

Art. 78 of Protocol I

Arts. 78 (2) of Convention III; Arts. 30, 52 and 102 of Convention IV

Arts. 105 (2) of Convention III; Arts. 42, 71, 72, 74 of Convention IV; Art. 45 of Protocol I

Arts. 39 and 98 of Convention IV

Arts. 16 and 48 of Convention I; Arts. 19 and 49 of Convention II; Arts. 23 (3), 62 (1), 63 (3), 66 (1), 68 (1), 69, 75 (1), 77 (1), 120 (1), 122 (3) and 128 of Convention III; Arts. 83 and 137 of Convention IV; Arts. 33, 45 and 60 of Protocol I

Arts. 56 (3), 60 (4), 79 (4), 81 (6), 96 (5), 100 (1), 101, 104 (1) and 107 (1) of Convention III; Arts. 35, 42, 49 (4), 71, 72, 74, 75, 96, 98, 105, 108, 111, 123 (5), 129 and 145 of Convention IV

Art. 11 common to Conventions I, II and III and Art. 12 of Convention IV

Art. 23 of Convention I and 14 of Convention IV

Document No. 70, Switzerland Acting as Protecting Power in World War II. p. 1015
Document No. 74, UK/Germany, Sinking of the Tübingen in the Adriatic. p. 1019

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036
 Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

- aa) visits to protected persons
- bb) reception of applications by protected persons

Document No. 73, British Policy Towards German Shipwrecked. p. 1017

- cc) transmission of information and objects
- dd) assistance in judicial proceedings

Case No. 98, Malaysia, Osman v. Prosecutor. p. 1112
 Case No. 140, South Africa, S. v. Petane. p. 1511

2. The International Committee of the Red Cross (ICRC)

(See *infra*, Chapter 15. The International Committee of the Red Cross (ICRC). p. 355.)

V. THE OBLIGATION TO ENSURE RESPECT (COMMON ARTICLE I)

Introductory Text

Under Article 1 common to the Conventions and Protocol I, States undertake not only to respect (this is the principle "*pacta sunt servanda*"), but also to ensure respect for International Humanitarian Law (IHL). The International Court of Justice has recognized this principle to belong to customary international law and to apply also to the law of non-international armed conflicts.^[273] Under this principle, not only the State directly affected by a violation is concerned and may take measures to stop it, but all other States too not only may, but must take measures.^[274] The obligations under IHL are therefore certainly obligations *erga omnes*.

It is however controversial which measures each State thus entitled and obliged may take under the law of State responsibility. The rules recently adopted on this question by the International Law Commission (ILC), recall that in case of a breach of an obligation owed to the whole international community, all States have the right to demand its cessation and if necessary, guarantees of non repetition, as well as reparation in the interest of the beneficiaries of the obligation breached.^[275] As for counter-measures by these States, the ILC estimates that their lawfulness remains "uncertain",^[276]

273 See **Case No. 130**, ICJ, Nicaragua v. US. [*Cf.* paras. 115, 216, 255, and 256.] p. 1365.

274 **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* A., paras. 158 and 159.] p. 1151.

275 *Cf.* Art. 48 of the Draft Articles on State Responsibility and its commentary: see **Case No. 38**. [*Cf.* A.] p. 805.

276 *Ibid.*, Commentary of Art. 54.

and it simply allows for "lawful" measures against the responsible State, without concluding as to when these measures are lawful.^[277] May each State take individually all measures it would have the right to take as an injured State in case of a "bilateral" violation? May we even consider, under the special rule of Art. 1 common to the Conventions,^[278] each State as injured by each violation of IHL? Or is there a need for co-ordination among the States entitled by Article 1 common? Even Article 89 of Protocol I provides no clear answer when it prescribes that in case of violations States have "to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter".

In our view, under Article 1 common, all measures may be taken which general international law offers to a State injured by a violation of a treaty^[279] to ensure respect of that treaty, as long as they are compatible with general international law (which excludes a use of force *based on* IHL)^[280] and not excluded by IHL (such as reprisals against protected persons).^[281] Even without admitting such countermeasures, it is clear that a State can - and therefore must - react to all breaches of IHL by retortion measures that do not violate its international obligations. No State is obliged to receive representations of another State, to conclude treaties with it, to support a State within an international organisation or to purchase weapons from it. State practice is unfortunately not rich enough to determine the upper limits of how a State may "ensure respect." As for the lower threshold, it is only certain that a State violates Article 1 common if it encourages or assists violations by another State^[282] or dissident forces. The rules on State responsibility for internationally wrongful acts state that a State must not recognise as legal a situation created by a grave breach of an imperative norm such as IHL, nor provide aid or assistance to maintain the situation.^[283] Although absolute indifference also clearly violates the text of the provision, unfortunately it occurs frequently in practice. Considering the number of States addressed by common Article 1, and the number of cases to which it applies, we can say that it is the most frequently violated provision of IHL.

In conclusion, Article 1 common indicates in legal terms the moral idea stated by the *starets* in Dostoyevsky's *Brothers Karamazov* that "every single one of us is [...] responsible for all without exception in this world" that he "is responsible to all men, for all and everything, for all human transgressions -

277 *Ibid.*, Art. 54.

278 *Ibid.*, Art. 55, "*lex specialis*".

279 *Ibid.*, Arts. 28-41.

280 *Ibid.*, Art. 50 (1) (a).

281 *Ibid.*, Art. 50 (1) (c).

282 See **Case No. 130**, ICJ, *Nicaragua v. US*. [*Cf.* paras. 115, 216, 255, and 256.] p. 1365.

283 See **Case No. 38**. [*Cf.* A., Arts. 40 and 41.] p. 805.

both of the world at large and of individuals"^[284] or, in this field: To grant a minimum of humanity to victims of armed conflicts is a common responsibility of all States and of all human beings.

Document No. 26, ICRC, Protection of War Victims. p. 702

Document No. 106, ICRC Appeals on the Near East. [Cf. C., paras. 10-11.] p. 1145

Case No. 118, UN, Resolutions and Conference on the Respect for the Fourth Convention. p. 1303

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 157, US, The Schlesinger Report. p. 1623

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1. Scope

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. para. 158.] p. 1151

2. Aim

3. Obligations of non-belligerents

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., Arts. 16, 40, 41, 48 and 55.] p. 805

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* paras. 116, 255 and 256.] p. 1365

4. Means to be employed

[Rule 144 of CIHL]

Document No. 26, ICRC, Protection of War Victims. [*Cf.* 3. 1. 3.] p. 702

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., Arts. 41 (2), 50 (1) and commentary of Art. 50 as well as Art. 54 and its commentary.] p. 805

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* A., para. 159.] p. 1151

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [*Cf.* I., paras. 4 and 11 and J.] p. 1303

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 25.] p. 1732

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. B. and C. and 3. D.] p. 2098

Case No. 198, Germany, Law on Cooperation with the ICTR [*Cf.* 1. B.] p. 2163

Case No. 228, Germany, Government Reply on Chechnya. p. 2415

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5. Meetings of the States Parties

a) on general problems

Document No. 26, ICRC, Protection of War Victims. p. 702

Document No. 37, First Periodical Meeting, Chairman's Report. p. 800

b) on specific contexts of violations

Document No. 106, ICRC Appeals on the Near East. [*Cf.* C.] p. 1145

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. p. 1303

SUGGESTED READING: FUX Pierre-Yves & ZAMBELLI Mirko, "Mise en œuvre de la Quatrième Convention de Genève dans les territoires palestiniens occupés: historique d'un processus multilatéral (1997-2001)", in *IRRC*, No. 847, September 2002, pp. 661-695.

VI. ROLE OF NATIONAL RED CROSS OR RED CRESCENT SOCIETIES

Introductory Text

The implementation of International Humanitarian Law (IHL) is a key objective of the International Red Cross and Red Crescent Movement. National Societies are particularly well placed to promote implementation within their own countries. The Statutes of the Movement recognize their role in co-operating with their governments to ensure respect for IHL and to protect the red cross and red crescent emblems. National Societies' contact with national authorities and other interested bodies, and, in many cases, their own expertise on national and international law, give them a key part to play in this field.

Action by National Societies

National Societies may take a range of measures contributing to the implementation of IHL. These include:

1. Adherence to IHL Instruments

Discussing with national authorities about adherence to IHL treaties.

2. National Legislation

Making national authorities aware of the need for legislation implementing IHL.

Drafting national legislation and/or commenting on national authorities' draft legislation.

3. Protection of the Emblems

Promoting legislation to protect the emblem.

Monitoring use of the emblem.

4. Dissemination of IHL (in addition to Societies' own dissemination activities)

Reminding national authorities of their obligation to disseminate IHL.

Providing national authorities with advice and materials on dissemination.

5. Legal Advisers in the Armed Forces and Qualified Personnel

Contributing to the training of advisers and personnel.

6. Medical Assistance to Conflict Victims

In times of armed conflicts, whether international or non-international, National Societies can play an important role in the implementation of IHL. As auxiliaries to the military medical services,^[285] National Societies contribute significantly to the care of the wounded and sick.

National Societies of neutral countries^[286] also play a role in this field either when they lend their assistance to a Party to the conflict or when they serve under the auspices of the ICRC.

Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Arts. 4 and 5.] p. 648

Document No. 22, ICRC, Model Law Concerning the Emblem. [*Cf.* Art. 3.] p. 665

Case No. 53, Ivory Coast, National Interministerial Commission. [*Cf.* Arts. 3 and 4.] p. 949

Case No. 67, UK, Labour Party Campaign - Misuse of the Emblem. p. 991

Case No. 95, Cuba, Status of Captured "Guerrillas". p. 1104

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict. p. 1420

Case No. 178, UK, Misuse of the Emblem. p. 1788

SUGGESTED READING: MEYER Michael A., "Public Advocacy - Why the Red Cross and Red Crescent Should Look before it Leaps", in *IRRC*, No. 315, November-December 1996, pp. 614-626. SASSÒLI Marco, "The National Information Bureau in Aid of the Victims of Armed Conflicts", in *IRRC*, No. 256, January 1987, pp. 6-24.

VII. ROLE OF NON-GOVERNMENTAL ORGANIZATIONS (NGOs)

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1. Humanitarian assistance to conflict victims

a) rights and obligations of NGOs under International Humanitarian Law

285 *Cf.* Art. 26 of Convention I and *see* Chapter 7: Protection of the Wounded, Sick and Shipwrecked. p. 161.

286 *Cf.* Art. 27 of Convention I.

Document No. 37, First Periodic Meeting, Chairman's Report. [*Cf.* II. 1.] p. 800

- impartiality of humanitarian action
- access to victims in need

(*See supra*, Chapter 9. IV. International Humanitarian Law and Humanitarian Assistance. p. 226.)

- dilemmas involved
-

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 10.-12., 18. and 20.] p. 1732

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

b) use of the emblem by NGOs

Case No. 178, UK, Misuse of the Emblem. p. 1788

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2. Monitoring, reporting and mobilization of public opinion

Case No. 121, Amnesty International, Breach of the Principle of Distinction. p. 1328

Case No. 153, US/UK, Conduct of the 2003 War in Iraq. p. 1591

Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq. p. 1605

Case No. 193, Federal Republic of Yugoslavia, NATO Intervention. [*Cf.* A.] p. 2077

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. F. 1) and 2. B.] p. 2098

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* C.] p. 2309

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 2. A. and D.] p. 2362

Case No. 229, Russian Federation, Chechnya, Operation Samashki. p. 2416

Case No. 234, The Conflict in Western Sahara. [*Cf.* A. and B.] p. 2454

3. Advocacy for the development of International Humanitarian Law

VIII. THE UNITED NATIONS

Introductory Text

The United Nations' (UN) primary objective, to prevent war, not to regulate the conduct of it, makes International Humanitarian Law (IHL) appear tangential. In fulfilling this objective, the UN Charter permits, *e.g.*, the Security Council to authorize the use of force,^[287] in such situations IHL

applies. The establishment of the *ad hoc* Tribunals for the Former Yugoslavia and Rwanda demonstrates that the UN Security Council, in fact, regards violations of IHL as breaches of or threats to international peace and security.

Under the Charter, the main aim of the UN when confronting an armed conflict should be to stop it and to solve the underlying dispute. To do this, the UN has to take a side, *e.g.*, against the aggressor, which seriously hampers its ability to contribute to the enforcement of IHL and, at least theoretically, to provide humanitarian assistance, as the former has to be enforced independently of any consideration of *ius ad bellum* and the latter has to be provided according to the needs of the victims and independently of the causes of the conflict.

Moreover, the principal judicial organ of the United Nations, the International Court of Justice (ICJ), can be led to interpret IHL. Indeed, the ICJ has dealt with some contentious or advisory cases raising IHL issues. IHL issues have been assessed in the Advisory Opinions on the legality of the threat or use of nuclear weapons and on the legal consequences of the construction of a wall in the occupied Palestinian Territory. The famous *Nicaragua* case also broaches extensively some questions of IHL. Another example is the Judgement in the Arrest Warrant case between the Democratic Republic of Congo and Belgium, which addresses the issue of the range of universal jurisdiction in the prosecution of war criminals.

The UN Charter makes no mention of IHL: UN purposes and principles^[288] are expressed in human rights terms.^[289] Therefore, the UN traditionally refers to IHL as "human rights in armed conflict."^[290] The Geneva Conventions likewise virtually fail to refer to the UN.^[291]

Conceptually, the UN can not be considered a "Party" to a conflict nor a "Power" as understood by the Conventions.^[292] In practice, however, peacekeeping and peace-enforcement operations can involve, with or against the will of the UN, hostilities with the same characteristics and humanitarian problems to be solved by IHL as traditional armed conflicts. Still, many issues remain controversial: whether IHL applies to such operations and, if it does, what degree of intensity of the hostilities triggers the applicability of IHL? When is it the law of international and when the law of non-international armed conflicts which applies? Is the UN or are the contributing States bound?

288 UN Charter, Art. 24 (2).

289 UN Charter, Arts. 1 (3) and 55 (c).

290 UNGA Res. 2444 (XXIII) of 19 Dec. 1968.

291 But *cf.* Art. 89 of Protocol I (concerning cooperation of States Parties with the UN); Arts. 64/63/143/159 respectively of the four Conventions, Art. 101 of Protocol I and Art. 27 of Protocol II (regarding ratification, accession, denunciation, and registration of the Conventions and Protocols).

292 Certain provisions of the Conventions could literally not even apply to or be applied by the UN, *e.g.*, Art. 49 (6) of Convention IV (prohibiting an occupying power to transfer "its own population" into an occupied territory), or Arts. 49/50/129/146 respectively of the four Conventions, and Art. 85 (1) of Protocol I (relating to the repression of grave breaches).

Coinciding with the Conventions' grant of the right to humanitarian assistance during periods of armed conflict,^[293] many UN organizations engaged in humanitarian work, e.g., UNHCR, UNICEF and WHO, try to distance themselves from the political UN maintenance of international peace and security. Those organizations are nevertheless ruled by their Member States, who are not and should not be neutral and impartial in armed conflicts.

Despite those limitations, the unique structure of the UN system provides it the opportunity to play a significant role in implementing IHL - as codifier, executor, and subject of it.

Document No. 26, ICRC, Protection of War Victims. [Cf. 3.1.3.] p. 702

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293 Cf. Art. 142 of Convention IV and Art. 81 of Protocol I.

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1. International Humanitarian Law applicable in situations threatening international peace and security

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540

Case No. 146, UN, Security Council, Sanctions Imposed Upon Iraq. p. 1565

2. Violations of International Humanitarian Law as a threat to international peace and security

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 1. 2.] p. 702

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. para. 160.] p. 1151

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. B.] p. 1467

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 17.] p. 1732

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- including in non-international armed conflicts

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Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. B., C. 1) and 3. D.] p. 2098

3. International Humanitarian Law as human rights in armed conflicts

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a) UN forces as addressees of International Humanitarian Law and protected by International Humanitarian Law

Quotation "The conduct of a State organ does not lose that quality because that conduct is, for example, coordinated by an international organization, or is even authorized by it."

[Source: A/CN.4/507/Add.2, International Law Commission, 52nd session, Geneva, 1 May- 9 June, 10 July - 18 August 2000, Third report on State Responsibility. Presented by M. James Crawford, Special Rapporteur, para. 267, available on <http://www.un.org/law/ilc/sessions/52/52docs.htm>]

(See also Quotation Chapter 14. I. 1. b), p. 343.)

- Case No. 14, UN, Convention on the Safety of UN Personnel. [*Cf.* Arts. 2 (2) and 20 (a).] p. 602
- Case No. 15, The International Criminal Court. [*Cf.* A., Art. 8 (2) (b) (iii) and (e) (iii).] p. 608
- Document No. 42, UN, Guidelines for UN Forces. p. 861**
- Document No. 43, UN, The "Brahimi" Report. p. 866
- Case No. 167, UN, UN Forces in Somalia. p. 1692
- Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696
- Case No. 169, Canada, R. v. Brocklebank. [*Cf.* paras. 62 and 90.] p. 1707
- Case No. 170, Canada, R. v. Boland. p. 1720
- Case No. 171, Canada, R. v. Seward. p. 1725
- Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 6., 19. and 33.] p. 1732
- Case No. 176, Bosnia and Herzegovina, Using Uniforms of Peacekeepers. p. 1785
- Case No. 192, Croatia, Prosecutor v. Rajko Radulovic and Others. p. 2071
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b) UN forces as a mechanism of implementation of International Humanitarian Law

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Document No. 43, UN, The "Brahimi" Report. p. 866

Case No. 167, UN, UN Forces in Somalia. p. 1692

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. B. and 3. D.] p. 2098

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 1. B. 3.) p. 2362

6. The respect of International Humanitarian Law and economic sanctions

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., para. 7 of the commentary to Art. 50.] p. 805

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565

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Document No. 43, UN, The "Brahimi" Report. p. 866

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. [*Cf.* A.] p. 1555

Case No. 146, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 13. and 14.] p. 1732

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. B.] p. 2098

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a) conflict resolution must take sides, humanitarian action must be neutral

b) the necessity to avoid that humanitarian action becomes an alibi

- for intervention
- for non-resolution of the conflict

IX. THE INTERNATIONAL RESPONSIBILITY OF THE STATE FOR VIOLATIONS

Introductory Text

In conformity with the traditional structure of international law, violations are considered to have been committed by States and measures to stop and repress them therefore must be directed against the State responsible for the violation. Such measures can be foreseen in International Humanitarian Law (IHL) itself, in the general international law of State responsibility, or under the United Nations (UN) Charter as the "constitution" of the organized international society.

Before violations can be repressed, they have, of course, to be ascertained. The Conventions provide that an inquiry must be instituted at the request of a Party to the conflict concerning alleged violations.^[294] However, the procedure has to be agreed upon between the Parties. Experience shows that such an agreement is difficult to reach once the alleged violation has occurred - in particular between Parties fighting an armed conflict against each other. Article 90 of Protocol I therefore constitutes an important step forward, as it already institutes an "International Humanitarian Fact-Finding Commission"^[295] and its procedure. This Commission is competent to enquire at the request of one Party into alleged violations of another Party if both Parties agree on the competence of the Commission - *ad hoc* or by virtue of a general declaration.^[296] The Commission has declared its readiness to do the same in non-international armed conflicts if the parties concerned agree. In conformity with the traditional approach of IHL, the basis of the inquiry is an agreement of the parties, and the result will only be made public with their

294 Cf. Arts. 52/53/132/149 respectively of the four Conventions.

295 See Commission's web page: <http://www.ihffc.org>

296 As of June 2005, 68 States Parties have made such a declaration comparable to the optional clause of compulsory jurisdiction under Art. 36 (2) of the Statute of the International Court of Justice.

agreement. This may be one of the reasons why no request for an inquiry has ever been brought before the Commission, although some 70 States have made a general declaration accepting its competence. States have preferred to impose inquiries through the UN system with resulting published reports, but the results have not been much more convincing.

In the event of disputes, all means offered by international law for the peaceful settlement of disputes are available. A conciliation procedure involving the Protecting Powers is foreseen, but needs the agreement of the parties.^[297] The Protecting Power system itself is an institutionalization of good offices. The general problem is, however, that a peaceful settlement of disputes on IHL between parties who prove by their participation in an armed conflict to have been unable to settle peacefully their disputes concerning *ius ad bellum* would be astonishing and only rarely succeeds. Therefore, the use of coercive measures which can only be taken through the UN system seems more promising, but risks mixing *ius ad bellum* and *ius in bello*. Such a mix-up is natural for the UN, as its main role is to make *ius ad bellum* be respected, but it is dangerous for the autonomy, neutrality, and impartiality required in the application of IHL.

As a reaction to a violation, not only the injured State, which is directly a victim of the violation, but - under Article 1 common and the general rules on State responsibility^[298] - every State may and has to take the countermeasures offered by international law to a State injured by its violation. Those measures themselves must conform to IHL and to the UN Charter^[299] and must be taken in co-operation with the UN as the frail embryo of a centralized international law enforcement system.^[300] Co-operation between all States, however, does not mean that no reaction to violations is possible in the absence of consensus.

Concerning the different rules of the law of State responsibility IHL recalls the general obligation to pay compensation,^[301] but prescribes some changes to the general rules on State responsibility (or makes clear that certain of its exceptions apply in this branch): It foresees strict responsibility of a State for all acts committed by members of its armed forces;^[302] it prohibits reprisals against protected persons and goods and the civilian population^[303] - reciprocity in the application of treaties of IHL being already excluded by the general rules; and it makes clear that, as the rules of IHL are mostly *ius cogens*, neither may States agree to waive the rights of protected persons^[304] nor may the latter renounce their rights.^[305] Finally, as IHL is a law made for

297 Cf. Art. 11 common to Conventions I-III and Art. 12 of Convention IV.

298 See for nuances above, Chapter 13. V. The Obligation to Ensure Respect (Common Article I), p. 283, with references to the Draft Articles on State Responsibility, adopted by the International Law Commission, see **Case No. 38**, ILC, Draft Articles on State Responsibility. p. 805.

299 See above notes 280 and 281.

300 Cf. Art. 89 of Protocol I, which is analogous to Art. 56 of the UN Charter.

301 Cf. Art. 3 of the Hague Convention IV and Art. 91 of Protocol I.

302 Cf. Art. 3 of the Hague Convention IV and Art. 91 of Protocol I.

303 Cf. Arts. 46/47/13 (3)/33 (3) respectively of the four Conventions; Arts. 20, 51 (6), 52 (1), 53 (c), 54 (4), 55 (2) and 56 (4) of Protocol I.

304 Cf. Art. 6 of Conventions I-III and Art. 7 of Convention IV.

305 Cf. Art. 7 of Conventions I-III and Art. 8 of Convention IV.

armed conflicts which are by definition emergency situations, it excludes the defence of necessity for violations,^[306] except where explicitly stated otherwise in some of its rules.^[307]

Document No. 26, ICRC, Protection of War Victims. [Cf. 4.] p. 702

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1. Assessment of violations

Case No. 143, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. p. 1540

a) inquiry procedures

Arts. 52/53/132/143 common to the Conventions

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 25.] p. 1732
Case No. 221, UN, Request for an Investigation on War Crimes. p. 2354

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b) the International Fact-Finding Commission

(See <http://www.ihffc.org>)

Art. 90 of Protocol I

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [Cf. D., II. 3.] p. 1303
Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 7.] p. 1732

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³⁰⁶ Cf. **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 25 (2) (a) and para. 19 of the commentary of Art. 25.] p. 805.
³⁰⁷ Cf., e.g., Art. 33 (2) of Convention I, Arts. 49 (2) and (5), 53, 55 (3), and 108 (2) of Convention IV and Art. 54 (5) of Protocol I.

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a) co-operation among the States Parties

Art. 89 of Protocol I

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 41 (1), 48 and 54.] p. 805

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf. 17.*] p. 1732

b) compensation

Art. 3 of Hague Convention IV and Art. 91 of Protocol I [Rule 150 of CIHL]

Document No. 26, ICRC, Protection of War Victims. [*Cf. 4. 3.*] p. 702

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 28-33.] p. 805

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A. para. 152.*] p. 1151

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A., paras. 593-600.*] p. 1467

Case No. 152, UN Compensation Commission, Recommendations. p. 1588

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c) applicability of the general rules on State responsibility

[Rule 149 of CIHL]

Case No. 38, ILC, Draft Articles on State Responsibility. p. 805

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, paras. 149-153.] p. 1151

Case No. 127, ECHR, Cyprus v. Turkey. p. 1341

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf. A.*, Art. 14 (1).] p. 1761

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aa) but strict responsibility for armed forces

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 7 and commentary, and B.] p. 805

Case No. 222, India, Press Release, Violence in Kashmir. p. 2356

bb) but no defence of necessity

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 25 (2) (a), 26 and commentary of Art. 25.] p. 805

Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf. A.*, Art. 136 (g).] p. 937

Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022

Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp et al. [*Cf. Section 4. (iii).*] p. 1030

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, para. 140.] p. 1151

Case No. 188, ICTY, The Prosecutor v. Strugar. [*Cf. B.*, paras. 280 and 295.] p. 2020

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cc) but self-defence is not a circumstance precluding wrongfulness

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 21, 26 and para. 3 of the commentary of Art. 21.] p. 805

Document No. 57, France, Accession to Protocol I. [*Cf. B.*, para. 11.] p. 958

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, paras. 138-139.] p. 1151

Case No. 184, ICTY, The Prosecutor v. Kupreskic et al. [*Cf. paras. 511-520.*] p. 1911

dd) but no reciprocity

[Rule 140 of CIHL]

Quotation Article 60. Termination or suspension of the operation of a treaty as a consequence of its breach

[...]

2. A material breach of a multilateral treaty by one of the parties entitles:

- a) the other parties by unanimous agreement to suspend the operation of the treaty in whole or in part or to terminate it either:
 - (i) in the relations between themselves and the defaulting State; or
 - (ii) as between all the parties;
- b) a party specially affected by the breach to invoke it as a ground for suspending the operation of the treaty in whole or in part in the relations between itself and the defaulting State;
- c) any party other than the defaulting State to invoke the breach as a ground for suspending the operation of the treaty in whole or in part with respect to itself if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty.

3. A material breach of a treaty, for the purposes of this article, consists in:

- a) a repudiation of the treaty not sanctioned by the present Convention; or
- b) the violation of a provision essential to the accomplishment of the object or purpose of the treaty.

[...]

5. Paragraphs 1 to 3 do not apply to provisions relating to the protection of the human person contained in treaties of a humanitarian character, in particular

to provisions prohibiting any form of reprisals against persons protected by such treaties.

[Source: *Vienna Convention on the Law of Treaties*, U.K.T.S. 58 (1980), Cmnd. 7964.]

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 49-51.] p. 805

Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036

Document No. 106, ICRC Appeals on the Near East. [*Cf. B.*] p. 1145

Case No. 181, ICTY, Prosecutor v. Martić, Rule 61 Decision. [*Cf. para. 9.*] p. 1880

Case No. 184, ICTY, The Prosecutor v. Kupreskić et al. [*Cf. paras. 517-520.*] p. 1911

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf. para. 9.*] p. 2266

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ee) admissibility of reprisals

[Rules 145-147 of CIHL]

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 49, 50 and 51 and para. 8 of the commentary of Art. 50.] p. 805

Document No. 63, Switzerland, Prohibition of the Use of Chemical Weapons. [*Cf. 2.*] p. 976

Case No. 65, UK, Reservations to Additional Protocol I. p. 985

Case No. 184, ICTY, The Prosecutor v. Kupreskić et al. [*Cf. paras. 517-520.*] p. 1911

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- no reprisals against protected persons

Arts. 46/47/13 (3)/33 (3) respectively of the four Conventions and Art. 20 of Protocol I [Rules 146 and 147 of CIHL]

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on May 3, 1996 (Protocol II to the 1980 Convention). [*Cf. Art. 4 (7)*] p. 547

Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf. A.*, Art. 136 (g).] p. 937

Case No. 61, US, President Rejects Protocol I. p. 971

Case No. 65, UK, Reservations to Additional Protocol I. p. 985

Document No. 72, Germany/UK, Shackling of Prisoners of War. p. 1017
 Case No. 113, Israel, Cheikh Obeid *et al.* v. Ministry of Security. p. 1237

- no reprisals against the civilian population

(See *supra*, Chapter 9. II. 5. d) attacks against the civilian population (or civilian objects) by way of reprisals. p. 208.)

Arts. 51 (6), 52 (1), 53 (c), 54 (4), 55 (2) and 56 (4) of Protocol I

- conditions for reprisals where they are admissible:

[Rule 145 of CIHL]

Case No. 65, UK, Reservations to Additional Protocol I. p. 985

- aimed at compelling the enemy to cease violations
- necessity
- proportionality
- preceded by a formal warning
- decided at the highest level

ff) IHL obligations are *erga omnes* obligations

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A., paras. 155-157.] p. 1151

X. VIOLATIONS BY INDIVIDUALS

Introductory Text

Under its traditional structure international law prescribes certain rules of behaviour for States, and it is up to every State to decide upon practical measures or penal or administrative legislation to ensure that individuals under its jurisdiction comply with those rules - indeed in the end, 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. International Humanitarian Law (IHL) is one of the first branches of international law which contained such 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.^[308] 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.^[309] IHL moreover contains

308 Cf. Arts. 50/51/130/147 respectively of the four Conventions and Arts. 11(4), 85 and 86 of Protocol I.

309 Cf. Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 (1) of Protocol I.

provisions on the legal qualification of an individual's failure to act and on group criminality, such as the responsibility of commanders.^[310]

While normally a State has criminal jurisdiction only over acts committed on its territory or by its nationals, IHL confers on all States universal jurisdiction over grave breaches. Moreover it not only permits, but even requires all States to prosecute war criminals, regardless of their nationality, the nationality of the victim, and where the crime was committed. For this reason too, national legislation is necessary.

Unfortunately, a number of States have not adopted the necessary legislation and many belligerents allow - or even order - their subordinates to violate IHL, with complete impunity. The efforts to set up international criminal courts are therefore understandable. As we will see, they have met with success.

According to the text of the Conventions and of the Protocols, the concept of grave breaches does not apply in non-international armed conflicts. There is however a growing tendency in international instruments,^[311] judicial decisions,^[312] and in the doctrine to count serious violations of IHL of non-international armed conflicts under the larger concept of war crimes, to which a similar regime would apply under customary international law as that applicable under the Conventions and Protocol I to grave breaches.

The regular prosecution of war crimes would have an important preventive effect, deterring violations and clarifying even for those who think in categories of national law that IHL is law. It would also have a stigmatizing effect, and it would individualize guilt and repression, thus avoiding the vicious circle of collective responsibility and of atrocities and counter-atrocities against innocent people. Criminal prosecution places responsibility and punishment at the level of the individual. It shows that the abominable crimes of the twentieth century were not committed by nations but by individuals. By contrast, as long as the responsibility was attributed to States and nations, each violation carried the seed of the next war. That is the civilizing and peace-seeking mission of international criminal law favouring the implementation of IHL.

The spectacular rise of international criminal law in recent years, a rise given substance by the creation of international criminal courts in particular, constitutes an invaluable contribution to the credibility of IHL and to its effective implementation. However, it needs to be said that it would be wrong and dangerous to see IHL solely from the perspective of criminal law. IHL must be applied above all during conflicts - by the belligerents, third States and humanitarian organisations - to protect the victims. As is the case

310 Cf. Arts. 86 and 87 of Protocol I.

311 See, e.g., **Case No. 179**, UN, Statute of the ICTY, p. 1791, Art. 3 as interpreted by the Tribunal in **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [Cf. A., Jurisdiction.] p. 1804 and see also **Case No. 196**, UN, Statute of the ICTR. [Cf. Art. 4.] p. 2154, and **Case No. 15**, The International Criminal Court. [Cf. A., The Statute, Art. 8 (2) (c) and (e).] p. 608.

312 See *infra*, cases referred to under Chapter 13. XI. 6. Repression of individual breaches of IHL. p. 334, in particular **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [Cf. A., Jurisdiction.] p. 1804.

for national law, *ex post* criminal prosecution of violations is crucial to implementation but is also an admission of failure. It should not discourage the fundamental work of endeavouring to prevent violations and to protect the victims by means other than criminal law. As for national law, action under criminal law can be only one of the ways of upholding the social order and common interest.

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- Document No. 26, ICRC, Protection of War Victims. [*Cf.* 4.] p. 702
 Case No. 79, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036
 Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696
 Case No. 169, Canada, R. v. Brocklebank. p. 1707
 Case No. 170, Canada, R. v. Boland. p. 1720
 Case No. 171, Canada, R. v. Seward. p. 1725
 Case No. 189, US, Kadic et al. v. Karadzic. p. 2055
 Case No. 205, Switzerland, The Niyonteze Case. p. 2233
 Case No. 206, ICJ, Democratic Republic of Congo v. Belgium. p. 2257
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1. Definition of crimes

a) the concept of grave breaches of International Humanitarian Law and the concept of war crimes

Arts. 50 /51/130/147 respectively of the four Conventions and Arts. 11 (4), 85 and 86 of Protocol I [Rule 151 and 156 of CIHL]

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- Case No. 15, The International Criminal Court. [*Cf.* A., Art. 8.] p. 608
 Case No. 48, Germany, International Criminal Code. [*Cf.* paras. 8-12.] p. 915
 Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [*Cf.* Section 4.] p. 924

- Case No. 51, Ghana, National Legislation Concerning the Emblem. p. 934
 Case No. 54, US, War Crimes Act. p. 952
 Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* p. 1030
 Case No. 88, Netherlands, *In re Pilz*. p. 1069
 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 17, 27 and 32.] p. 1732
 Case No. 179, UN, Statute of the ICTY. [*Cf.* B. and C., Arts. 2 and 3.] p. 1791
Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., paras. 79-84.] p. 1804
 Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [*Cf.* para. 8.] p. 1888
Case No. 185, ICTY, The Prosecutor v. Blaskic. [*Cf.* A., paras. 151-158.] p. 1936
 Case No. 222, India, Press Release, Violence in Kashmir. p. 2356
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b) the extension of the concept of grave breaches to non-international armed conflicts?

- Case No. 48, Germany, International Criminal Code. [*Cf.* paras. 8-12.] p. 915
 Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf.* A., Art. 136 (c).] p. 937
 Case No. 54, US, War Crimes Act. p. 952
 Case No. 93, Hungary, War Crimes Resolution. [*Cf.* V. 4. (b).] p. 1091
 Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357
 Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 32.] p. 1732
 Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* A., paras. 79-83.] p. 1804
 Case No. 203, France, Dupaquier, *et al.* v. Munyeshyaka. p. 2223
 Case No. 206, ICJ, Democratic Republic of Congo v. Belgium. p. 2257
 Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. [*Cf.* B., para. 12.] p. 2297
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c) the repression of violations of International Humanitarian Law which are not grave breaches

- Case No. 47, Switzerland, Military Penal Code. p. 912
 Case No. 48, Germany, International Criminal Code. [*Cf.* paras. 8-12.] p. 915

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [*Cf.* Section 4 (4).] p. 924

Case No. 54, US, War Crimes Act. p. 952

Case No. 179, UN, Statute of the ICTY. [*Cf.* B. and C., Art. 3.] p. 1791

Case No. 185, ICTY, The Prosecutor v. Blaskic. [*Cf.* A., paras. 179-187.] p. 1936

Case No. 187, ICTY, The Prosecutor v. Galic. [*Cf.* paras. 16-31.] p. 1986

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. F.] p. 2098

Case No. 196, UN, Statute of the ICTR. [*Cf.* A. Art. 4.] p. 2154

Case No. 204, Switzerland, X. v. Federal Office of Police. p. 2225

Case No. 205, Switzerland, The Niyonteze Case. [*Cf.* A., consid. 3; B., III., ch. 1. B.] p. 2233

d) crimes against humanity

Introductory Text

Compared with war crimes or common crimes, the specific feature of crimes against humanity is that they are committed systematically, in accordance with an agreed plan, by a State or an organized group. Perpetrators of this type of crime are aware that the acts that they are committing are part of a general policy of attacking a civilian population. It is therefore a particularly serious crime, especially because it can claim a large number of victims.

The concept of crimes against humanity evolved in the course of the twentieth century. The Charter of the International Military Tribunal of 8 August 1945 enabled punishment of those who had committed particularly odious crimes during the Second World War in that it defined them as "crimes against humanity".

This crime was subsequently recognized as customary law and universally applicable. Moreover, the concept of crimes against humanity no longer has to be associated with the existence of an armed conflict.^[313] Finally, the concept of crimes against humanity has also developed in terms of the acts which it makes criminal offences by including, in particular, apartheid^[314] and sexual violence.^[315]

The legal definition of crimes against humanity, as they are understood today, can be found in the Statute of the International Criminal Court (ICC).

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":^[316] 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

313 See, in particular, **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* C., para. 249.] p. 1804.

314 See International Convention on the Suppression and Punishment of Apartheid, 30 November 1973, Article 1; available at <http://www.unhchr.ch/intlinst.htm>

315 See Article 7 (1) (g) of the Statute of the International Criminal Court (ICC), see **Case No. 15**. p. 608.

316 See Article 7 (1) of the ICC Statute, see **Case No. 15**. p. 608.

great suffering or serious injury to the body or to mental or physical health. As for genocide, it may be understood as a particularly serious crime against humanity (*see below*, p. 309).

This definition allows us to understand the particular nature of crimes against humanity as compared with war crimes: they may be committed at any time and target the civilian population, regardless of nationality or bonds of allegiance. The *mens rea* also contributes to the specific nature of those crimes: the perpetrator of the crime must be aware that it is linked to a widespread or systematic attack directed against the civilian population.

This is not the place to review all of the above-mentioned acts. For the definition of all those acts, the reader may refer to the ICC Statute. However, the crime of persecution deserves particular attention to the extent that it is, by definition, relatively close to the crime of genocide. Indeed, it is the only crime against humanity that requires a specifically discriminatory intention. As a crime against humanity, persecution must be committed "on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court".^[317] It differs from genocide in that the latter requires an intention to eliminate the group and that group can only be racial, national, ethnic or religious.

Case No. 48, Germany, International Criminal Code. [*Cf.* para. 7.] p. 915

Case No. 93, Hungary, War Crimes Resolution. p. 1091

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 30.] p. 1732

Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf.* B., paras. 618-654 and C., paras. 238-304.] p. 1804

Case No. 184, ICTY, The Prosecutor v. Kupreskic et al. [*Cf.* paras. 567-636.] p. 1911

Case No. 185, ICTY, The Prosecutor v. Blaskic. [*Cf.* A., paras. 66-72 and B., paras. 94-128.] p. 1936

Case No. 186, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. p. 1974

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [*Cf.* 2.] p. 2362

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317 See Article 7 (1) (h) of the ICC Statute, see **Case No. 15**. p. 608.

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e) genocide

Introductory Text

Coined by Raphaël Lemkin in the early 1940s, the term "genocide" is derived from the word *genos*, meaning "race" in Greek, and the Latin verb *caedere*, meaning "to kill". Confronted with the barbarity of the first half of the twentieth century, a neologism had to emerge to describe situations in which one group of individuals decides to utterly annihilate another group.

To define genocide from a legal perspective, it is best to take as one's source the Convention on the prevention and punishment of the crime of genocide,^[318] which entered into force in 1951 and is today part of customary international law. The definition given in Articles II and III of that Convention has been taken over as it stands in the Statutes of the International Criminal Courts.^[319] The explanations given below are therefore broadly based on the case law of those courts.

The fact that international law has once again been 'one war late' may be lamented. However, can it be blamed for failing to foresee what will remain the "ultimate crime", the "gravest violation of human rights that it is possible to commit"?^[320]

By virtue of its scale, the crime of genocide goes beyond the strict framework of international humanitarian law, and it is not actually essential that an armed conflict exist for an act of genocide to be committed. It is nonetheless

318 The text of the Convention is available on <http://www.unhcr.ch/html/instit.htm>

319 See **Case No. 179**, UN, Statute of the ICTY. [*Cf.* A., Art. 4.] p. 1791, and **Case No. 196**, UN, Statute of the ICTR. [*Cf.* Art 2.] p. 2154. See also **Case No. 15**, The International Criminal Court. [*Cf.* A., Art. 6 and 25.] p. 608.

320 United Nations, E/CN.4/Sub.2/1985/6, 2 July 1985, paragraph 14: "Revised and updated version of the Study on the question of the prevention and repression of the crime of genocide", generally referred to as the "Whitaker Report".

important to define genocide in a work such as this since most such acts are committed in conflict situations.

The definition of genocide includes a list of acts, i.e. "killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; forcibly transferring children of the group to another group". However, committing one of these acts is not enough for it to be called genocide.

The specific nature of the crime of genocide lies in the specific intention (*dolus specialis*) behind its perpetration. The acts committed may, in fact, be 'straightforward' killings, acts of torture, rape or crimes against humanity, for example, but their distinctive feature is that the specific intention of the perpetrators of these acts is not to kill or ill-treat one or more individuals but to annihilate the group to which those individuals belong. It is thus that intention which distinguishes genocide from murder or crimes against humanity.

The specific character of the crime of genocide does not therefore lie in nature of the act itself but in the thinking (*mens rea*) behind its perpetration. That thinking is the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such". The different elements that go together to make up this definition deserve to be clarified in greater depth.

The intention cannot be easily identified. It may be deduced from the words or the general behaviour of the perpetrator (for example, insults directed at a particular group); the systematic and methodical manner in which the crimes were committed; the fact that the choice of the victims excluded members of other groups; the premeditated planning of the crimes, etc. Thus, when killing someone (for example), the person committing genocide does not desire the death of that individual in particular but rather the destruction of the group "as such" to which that person belongs.

Moreover, the intention of the perpetrator of the crime does not necessarily have to be to destroy the whole of the group - the intention to destroy it "in part" is sufficient for what he does to be called genocide. Here again, it is not easy to determine what is meant by the "intent to destroy in part". As things stand with regard to case law interpretations of the definition of genocide, we can state that the intent to destroy must be aimed at a substantial part of the targeted group, that it must be a significant part of the group in terms of quantity or quality. It follows that the expression "in part" also implies that genocide may be carried out within a defined geographical area such as a city.

Finally, how the "group" targeted by those committing genocide is determined is also an essential element of the definition. In the current state of customary international law, the categories referred to in the definition must be considered exhaustive. Political, economic or other groups of people

that may be considered to be 'distinct' from the rest of the population cannot be the target of genocide from a legal viewpoint. This is because groups other than "national, racial, ethnical or religious" have been considered 'unstable' or 'fluctuating'. It is true that the composition of the groups referred to in the definition of genocide is not easily determined in every case and that adherence to a political or economic group is probably even more difficult to establish.

Objective and subjective criteria may be used to identify the four groups targeted in the definition. For example, adherence to a religious group may be identifiable through objective factors such as the holding of services. Membership of other groups can mostly be identified in a more subjective manner by virtue of the stigmatization of those groups by "others", in particular those committing genocide.

It is important to stress that certain types of conduct related to the direct perpetration of acts of genocide are also deemed to be criminal. These are: conspiracy to commit genocide; direct and public incitement to commit genocide; attempted genocide; and complicity in genocide. Thus, for example, an individual may be sentenced for "conspiracy to commit genocide" or for "direct and public incitement to commit genocide" even if no act of genocide has been committed by himself or others. These are distinctive crimes which do not require the incitement or conspiracy to be followed by an actual effect. The implication of these acts is that it is the specific intention of those involved in the incitement or the conspiracy to destroy in whole or in part a group as such. By contrast, complicity in genocide - which may be characterized by giving instructions or by providing the means, aid or assistance to commit genocide - may not be deemed criminal unless the main crime has been committed. The accomplice did not necessarily have to have been motivated by the specific intent to commit genocide. He had to be - or should have been - aware of it.

Anyone reading these lines will probably be shocked to note the extent to which, coldly and mechanically, the law manages to apply concepts and definitions that may appear to have little to do with the atrocity of genocide itself. However, this is necessary to achieving the objectives targeted by the above-mentioned Convention, i.e. preventing the crime and universally repressing instances of it without making any concessions. The Convention, which is recognized as having customary force^[321] and whose obligations are *erga omnes* in nature, requires all States to punish the crime of genocide. It is indeed essential for the law to be an uncompromising - fair and differentiated - instrument for repressing ordinary crimes, war crimes, crimes against humanity and the crime of genocide. The seriousness of the crime of genocide is such that a precise definition and universal repression were required. That is why the legal concept exists that takes the liberty of putting into words what nonetheless remains absolutely unspeakable.

321 See, in particular, **Case No. 200**, ICTY, *The Prosecutor v. Jean-Paul Akayesu*. [Cf. A., para. 495.] p. 2171.

- Case No. 48, Germany, International Criminal Code. [Cf. para. 7.] p. 915
 Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 640-642.] p. 1467
 Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. A.] p. 2098
Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A. paras. 492-523.] p. 2171
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2. Participation in war crimes

a) participation, complicity and instigation

Case No. 15, The International Criminal Court. [*Cf. A.*, Art. 25.] p. 608
 Case No. 52, Belgium, Law on Universal Jurisdiction. [*Cf. A.*, Art. 136 (e) and (f).] p. 937
 Document No. 80, US Military Tribunal at Nuremberg, *US v. Wilhelm List*. [*Cf. 4.*] p. 1043
Case No. 131, Canada, Ramirez v. Canada. [*Cf. para. 16.*] p. 1376
Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 538-551.] p. 1467
Case No. 166, Canada, Sivakumar v. Canada. p. 1685
 Case No. 169, Canada, *R. v. Brocklebank*. [*Cf. paras. 5, 8-10, 52, 53 and 56.*] p. 1707
 Case No. 170, Canada, *R. v. Boland*. p. 1720
 Case No. 171, Canada, *R. v. Seward*. p. 1725
 Case No. 179, UN, Statute of the ICTY. [*Cf. C.*, Art. 7.] p. 1791
Case No. 180, ICTY, The Prosecutor v. Tadic. [*Cf. C.*, paras. 178-233.] p. 1804
 Case No. 187, ICTY, *The Prosecutor v. Galic*. [*Cf. paras. 168-169 and 609-749.*] p. 1986
 Case No. 188, ICTY, *The Prosecutor v. Strugar*. [*Cf. B.*, paras. 334-346.] p. 2020
 Case No. 192, Croatia, *Prosecutor v. Rajko Radulovic and Others*. p. 2071
 Case No. 205, Switzerland, *The Niyonteze Case*. p. 2233

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b) command responsibility

Arts. 86 (2) and 87 (3) of Protocol I [Rules 152 and 153 of CIHL]

Case No. 15, The International Criminal Court. [*Cf. A. Art. 28.*] p. 608
 Case No. 48, Germany, International Criminal Code. [*Cf. paras. 4 and 13.*] p. 915

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [Cf. Section 5.] p. 924

Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List. [Cf. 3. (x) and 4.] p. 1043

Document No. 82, The Tokyo War Crimes Trial. p. 1051

Case No. 86, US, *In re Yamashita*. p. 1063

Case No. 166, Canada, Sivakumar v. Canada. p. 1685

Case No. 170, Canada, R. v. Boland. p. 1720

Case No. 171, Canada, R. v. Seward. p. 1725

Case No. 179, UN, Statute of the ICTY. [Cf. C., Art. 7.] p. 1791

Case No. 182, ICTY, The Prosecutor v. Rajic, Rule 61 Decision. [Cf. paras. 58-61.] p. 1888

Case No. 187, ICTY, The Prosecutor v. Galic. [Cf. paras. 173-177.] p. 1986

Case No. 188, ICTY, The Prosecutor v. Strugar. [Cf. B., paras. 361-444.] p. 2020

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. B.] p. 2171

Case No. 205, Switzerland, The Niyonteze Case. [Cf. B., ll., ch. 5.] p. 2233

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3. Defences

Introductory Text

International criminal law, as it has developed to date, allows an individual accused of a crime to draw on every legal and *de facto* means available to present a full and complete defence. However, as international criminal justice has developed, certain defences have sometimes been completely ruled out and sometimes simply restricted.

For example, contrary to what is applied at the national level in most States, justifying an act by virtue of the fact that it was prescribed by the law of the land is something that has no application in international criminal law. And it should be recalled that the Nuremberg Tribunal deemed criminal the programme of euthanasia legally established under the Nazi regime in the *Nacht und Nebel* decree. Nor does the official position of the accused - even if he acted as head of State or government - deprive him from responsibility or constitute grounds for reducing the punishment.^[322] By the same token, international criminal law holds that the fact that a crime has been committed by a subordinate does not exonerate his superiors if they knew or had reasons to know that the subordinate was committing or was going to commit a crime and did not try to prevent him from doing so. This rule was not set out in the Charter of the Nuremberg Tribunal. However, it was subsequently reflected in various post-World War II decisions.^[323] We should note that a commander incurs criminal responsibility for failing to act only if there is actually a legal obligation to act. The duty of commanders vis-à-vis their subordinates is stipulated in Article 87 of Protocol I, whereas Article 86 stipulates the criminal responsibility of commanders who have failed to fulfil their duty.^[324]

The acceptability of a defence based on superior orders seems less clear. This defence consists of arguing that the accused was obeying orders issued by a government or a superior. Historically, some have considered it a valid defence while others have considered it to be an attenuating circumstance, or both. The Charter of the Nuremberg Tribunal explicitly ruled it out as a valid defence but allowed it to be a mitigating circumstance.^[325] However, the Nuremberg Tribunal refused to enforce that rule and to take account of superior orders when deciding the sentence. More recently, the decisions regarding Eichmann^[326] and Barbie^[327] confirmed the rule. Until quite

322 Agreement for the prosecution and punishment of the major war criminals of the European Axis, Article 7, available at <http://www.icrc.org/ihl>; Charter of the International Military Tribunal for the Far East, reproduced at <http://www.yale.edu/lawweb/avalon/imttech.htm>; Statute of the ICTY (Case No. 179, p. 1791), Art. 7 (2); Statute of the ICTR (Case No. 196, p. 2154), Art. 6 (2); ICC Statute (Case No. 15, p. 608), Art. 27.

323 See, in particular, Case No. 86, US, *In re Yamashita*, p. 1063; Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List, p. 1043; Document No. 82, The Tokyo War Crimes Trial, p. 1051.

324 See also Art. 7 of the Statute of the ICTY, Art. 6 of the Statute of the ICTR and Art. 28 of the ICC Statute, referred to *supra*, note 322.

325 See Article 8 of the Charter of the Nuremberg Tribunal, available on <http://www.icrc.org/ihl>

326 A.G. Israel v. Eichmann, in *ILR*, Vol. 36, 1968, p. 18.

327 Barbie, 8 July 1983, *Journal du Droit International*, 1983, p. 791; that decision was confirmed by the Court of Appeal: Barbie, 6 October 1983, in *AGDIP*, 1984, p. 507.

recently, the fact that orders were given by a hierarchical superior was therefore systematically ruled out as a defence. The *Allied Control Council Law No. 10* (Article II. 4 [b]), the *Statute of the International Military Tribunal in Tokyo* (Article 6), the *United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (Article 2 [3]), the various versions of the *Draft Code of Crimes against Peace and the Security of Humanity* (Article 5) and, more recently, the *Statutes of the International Criminal Tribunal for Rwanda* (ICTR, Article 6 (3)) and of the *International Criminal Tribunal for the former Yugoslavia* (ICTY, Article 7 (4)) demonstrate this. The adoption of the *Statute of the International Criminal Court* (ICC) has perhaps changed matters. The Statute allows a defendant to cite superior orders in his defence on three conditions: that the subordinate was under a legal obligation to obey the order, that he did not know that the order was unlawful and that the order was not obviously unlawful.^[328] *A priori* that restriction suggests that a defence of this kind will not easily pass the acceptability test. What is more, the ICC Statute limits the presentation of such a defence all the more since an order to commit genocide or a crime against humanity is obviously unlawful.^[329]

The ICC Statute allows other defences: mental defect, illness,^[330] a state of intoxication depriving the person of the ability to appreciate the criminal nature of his conduct,^[331] a state of distress,^[332] and irresistible duress.^[333]

A defence based on duress has frequently been associated with a defence citing superior orders. However, a defence based on duress has its own definition and consequently an independent application. In fact, the difference is to be found in particular at the level of whether or not a moral choice was available. A soldier who is ordered to set off a bomb in a hospital is not morally obliged to carry out the order and can decide whether to respect it or not. By contrast, if the soldier in question carries out the order to avoid being exposed to a direct threat to his life or other serious consequences, this is a case of duress. Although the ICTY decided by three votes to two that the duress-based defence was not grounds for exoneration in the case of crimes against humanity or war crimes,^[334] the ICC Statute stipulates that duress may justify freeing the individual from his criminal responsibility.^[335] Thus, when the actual will of an individual is worn down or destroyed completely by a situation, this will be deemed a case of irresistible duress and thus grounds for lifting criminal responsibility.

328 See Art. 33 (1) see **Case No. 15**, p. 608.

329 See Art. 33 (2) see **Case No. 15**, p. 608.

330 See Art. 31 (1) (a), **Case No. 15**, p. 608.

331 See Art. 31 (1) (b), **Case No. 15**, p. 608.

332 See Art. 31 (1) (c), **Case No. 15**, p. 608. See also "Atelier sur l'article 31, par. 1 c) du Statut de la Cour pénale internationale, coordonné par Eric David", in *ABDI*, 2000-02, pp. 335-488.

333 See Art. 31 (1) (d), **Case No. 15**, p. 608.

334 See ICTY, *Prosecutor v. Drazen Erdemovic*, (IT-96-22-T), Judgement of the Appeals Chamber of 7 October 1997, para. 19, available on <http://www.un.org/icty/cases/jugemindex-e.htm>

335 See Art. 31 (3), **Case No. 15**, p. 608.

Finally, it should be pointed out that the ICC Statute places self-defence among the valid grounds for release from criminal responsibility. That defence must obviously meet certain criteria: the person must have used force with the intention of defending himself or to defend another person against an imminent and unlawful use of force and that defending force must be proportionate to the degree of danger. As regards war crimes, the Statute indicates that this applies to defending not only persons but also items essential to survival or essential to the accomplishment of a military mission. The provision fortunately stipulates that, to use this defence, it is not sufficient for an operation to be carried out as self-defence in the sense of *ius ad bellum*. Even given this restriction, it is difficult to imagine the circumstances in which that defence could actually be advanced to justify a war crime (and even less how it could justify genocide or a crime against humanity). Indeed, using force against a person who illegally resorts to force is not even prohibited under international humanitarian law. If the person is a civilian, he or she will cease to enjoy protection against attacks,^[336] and if the person is a combatant violating International Humanitarian Law, even a civilian can resist that person in order to defend himself without it being deemed to be unlawful involvement in hostilities. In neither case is the act prohibited by international humanitarian law, and there is thus no need to invoke self-defence to justify it.

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [*Cf.* Sections 11-14.] p. 924

Case No. 184, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf.* paras. 511-520.] p. 1911

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a) self-defence?

Case No. 15, The International Criminal Court. [*Cf.* A., Art. 31 (1) (c).] p. 608

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf.* A., para. 3 of the commentary of Art. 21.] p. 805

SUGGESTED READING: GALAND Renaud & DELOOZ François, "L'article 31, par. 1 c) du Statut de la Cour pénale internationale: une remise en cause des acquis du droit international humanitaire?", in *IRRC*, No. 842, June 2001, pp. 533-538.

b) superior orders?

[Rules 154 and 155 of CIHL]

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- Case No. 15, The International Criminal Court. [Cf. A., Art. 33.] p. 608
 Case No. 48, Germany, International Criminal Code. [Cf. para. 3.] p. 915
 Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [Cf. Section 14.] p. 924
 Case No. 52, Belgium, Law on Universal Jurisdiction. [Cf. A., Art. 136 (g) (2).] p. 937
 Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022
 Document No. 80, US Military Tribunal at Nuremberg, US v. Wilhelm List. [Cf. 3. (ii)] p. 1043
 Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122
Case No. 101, US, US v. William L. Calley, Jr. p. 1129
 Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696
 Case No. 169, Canada, R. v. Brocklebank. [Cf. paras. 5, 11 and 96-101.] p. 1707
 Case No. 179, UN, Statute of the ICTY. [Cf. C., Art. 7 (4).] p. 1791
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c) defence of necessity?

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- Case No. 15, The International Criminal Court. [Cf. A. Art. 31 (1) (c) and (d).] p. 608
 Case No. 52, Belgium, Law on Universal Jurisdiction. [Cf. A., Art. 136 (g) (1).] p. 937
 Case No. 75, British Military Court at Hamburg, The Peleus Trial. p. 1022
 Case No. 78, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* [Cf. 4. (vii)] p. 1030
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4. The prosecution of war crimes

a) the universal obligation to repress grave breaches

Arts. 49/50/129/146 respectively of the four Conventions and Art. 85 (1) of Protocol I [Rules 157 and 158 of CIHL]

Case No. 47, Switzerland, Military Penal Code. p. 912

Case No. 48, Germany, International Criminal Code. p. 915

Case No. 49, Canada, Crimes Against Humanity and War Crimes Act. [Cf. Sections 6-8.] p. 924

Case No. 52, Belgium, Law on Universal Jurisdiction. [Cf. B., Arts. 10.1 (a) and 12 (a) and C.] p. 937

Case No. 54, US, War Crimes Act. p. 952

Case No. 90, US, Extradition of Demjanjuk. p. 1078

Case No. 131, Canada, Ramirez v. Canada. [Cf. para. 11.] p. 1376

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A. paras. 613-615.] p. 1467

Case No. 166, Canada, Sivakumar v. Canada. p. 1685

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 17.] p. 1732

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of the Hostilities. p. 1778

Case No. 190, France, Javor and Others. p. 2060

Case No. 191, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063

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aa) relation to amnesty

[Rule 159 of CIHL]

Case No. 105, Bangladesh/India/Pakistan, 1974 Agreement. [*Cf.* Arts. 13-15.] p. 1142

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. [*Cf.* para. 12.] p. 1357

Case No. 141, South Africa, AZAPO v. Republic of South Africa. p. 1522

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf.* 1. F. 1).] p. 2098

Case No. 207, Columbia, Constitutional Conformity of Protocol II. [*Cf.* paras. 41-43.] p. 2266

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bb) no statutory limitations

[Rule 160 of CIHL]

Case No. 15, The International Criminal Court. [*Cf.* A., Art. 29.] p. 608

Case No. 48, Germany, International Criminal Code. [*Cf.* para. 5.] p. 915

Case No. 93, Hungary, War Crimes Resolution. p. 1091

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. [*Cf.* para. 12.] p. 1357

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cc) link with international immunities

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Case No. 225, Sierra Leone, Special Court Ruling on Immunity for Taylor. p. 2388

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remarques sur une affaire au point de collision entre les deux couches du droit international", in *RGDIP*, No. 4, October-December 2002, pp. 789-818.

b) mutual assistance in criminal matters

Art. 88 of Protocol I [Rule 161 of CIHL]

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Case No. 199, Luxembourg, Law on Cooperation with the International Criminal Courts. p. 2165

Case No. 204, Switzerland, X. v. Federal Office of Police. p. 2225

c) judicial guarantees for all those accused of war crimes

Arts. 49 (4), 50 (4), 129 (4) and 146 (4), common to the Conventions and Arts. 105-108 of Convention III

Case No. 15, The International Criminal Court. [*Cf. A.*, Arts. 20, 22-25, and 30-32.] p. 608

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. p. 1357

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 159, Iraq, Occupation and Peacebuilding. p. 1645

Case No. 179, UN, Statute of the ICTY. [*Cf. C.*, Art. 21.] p. 1791

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf. 1. F.*] p. 2098

Case No. 204, Switzerland, X. v. Federal Office of Police. p. 2225

5. The international criminal courts

Introductory Text

Prosecution of war crimes is required by International Humanitarian Law (IHL) and 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 different armed conflicts in the former Yugoslavia, with their range of systematic atrocities, brought about a radical change in that respect. The international community felt duty-bound to respond. It set up the International Criminal Tribunal for the former Yugoslavia (ICTY) through the sole emergency procedure known to current international law: a Security Council resolution.^[337] Once the ICTY had been set up, the double standard would have been too obvious if a similar tribunal, the International Criminal Tribunal for Rwanda (ICTR), had not been set up following the armed conflict and the genocide that took hundreds of thousands of lives in that country.^[338] There is certainly room for doubt about the way in which those *ad hoc* international criminal tribunals were set up. However, if one had tried to establish them according to the traditional method of constituting new international institutions - by means of a convention - they would still not exist even today. And without those *ad hoc*

337 See **Case No. 179**, UN, Statute of the ICTY. p. 1791.

338 See **Case No. 196**, UN, Statute of the ICTR. p. 2154.

refers a situation to the ICC by means of a resolution adopted in application of Chapter VII of the Charter.^[349] Conversely, the Security Council may also ask, through such a resolution, that no inquiry be opened and proceedings be deferred for a renewable period of 12 months.^[350] In a final provision, which we consider regrettable, the Statute stipulates that a State which becomes party to it may declare that, for a period of seven years from the entry into force of the text, it does not accept the Court's jurisdiction with respect to war crimes when it is alleged that those crimes have been committed on its territory or by its nationals.^[351] Thus, even the international crimes most firmly established in current treaty law may evade the authority of the ICC for seven years.

Only the prosecutor, who is elected by the States Parties, may refer a specific case to the Court. Situations may be referred to the Prosecutor by any State Party and by the Security Council, but the Prosecutor may also open inquiries on its own initiative.^[352] In the latter case, the prosecutor must, however, present a request for authorization to the preliminary Chamber. If the Chamber decides to authorize the opening of an inquiry, or if a State has referred a matter to the prosecutor and he intends to conduct the inquiry, the prosecutor must notify all the States Parties as well as the other States concerned. If one of those States informs the prosecutor that proceedings concerning the matter in question are already under way at the national level, the prosecutor must place the proceedings under the authority of the State concerned, unless the preliminary Chamber of the ICC authorizes him to continue the inquiry himself. There may be serious doubts about whether, on the one hand, that procedure contributes to the efficacy of the prosecutions and, on the other, whether it means that the right of the accused to have his case heard within a reasonable time can be respected. However, it does reflect the States' fears of any jurisdiction which might judge the conduct of their agents independently of their wishes.

One of the outstanding features of the ICC Statute is that it codifies - for the first time in a treaty whose framers intended it to be universal - the general part of international criminal law.^[353] It succeeds in bringing together the general principles of criminal law existing in the different legal systems in the world and those deriving from the instruments of international human rights law.

In the traditional view of international law, even when certain individual acts had been declared international crimes, the obligation or the right to prosecute the perpetrators used to remain the task of one, several or all the States. The State was thus a vital intermediary between the rule of international law and the individual who had violated that law. It was only

349 See the first case of application in **Case 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. B., UN Security Council Resolution 1593 (2005).] p. 1467.

350 See **Case No. 15**, The International Criminal Court. [Cf. A., Art. 16, and D.] p. 608.

351 *Ibid.*, A., Art. 124.

352 *Ibid.*, Arts. 13-15.

353 *Ibid.*, Arts. 22-33.

with the establishment of international criminal courts that this veil has been lifted and the responsibility of the individual before international law and the international community became visible. These courts are therefore the most obvious manifestations of that new layer of international law - which superimposes itself on traditional international law governing the coexistence of and cooperation between States, but without replacing it - the internal law of the international community, comprising more than six billion human beings. Compared with the typical response to violations from the traditional layer - sanctions - criminal trials have obvious advantages: they are governed by law and do not depend on good intentions from the States; they are set in train in a regular, formalized procedure which is the same for everyone; they are not subject to veto and are influenced far less by political considerations than Security Council resolutions, the only body of the international society empowered to decree sanctions; they are directed against the guilty individuals and do not affect innocent individuals, as military or economic sanctions inevitably do.

Despite everything noted above, internal jurisdictions will retain a key role in the prosecution of war crimes - even when the ICC functions effectively and is empowered to deal with every situation in which international crimes are committed. First, that role will be quantitative as international justice will never be able to cope with the hundreds of thousands of crimes which, unfortunately, blemish every major conflict. It will be able only to select a few specific, symbolic cases in order to put a stop to the impunity. All the rest must be dealt with by the national systems. Moreover, a policy of international criminal law and defence of international society implemented by the international judicial bodies alone would run counter to the principle of subsidiarity and would require disproportionate funds. The role of national justice will also be qualitative, however. Just as in each country the rule of law and its credibility depend on the quality, the independence and the effectiveness of the courts of first instance, international justice will continue to depend on national courts. Without them, the international courts will at most function as a fig leaf when it comes to war criminals. For those reasons the existence of international courts should under no circumstances discourage the States, their prosecutors and their courts from fulfilling their obligations with regard to war crimes.

In conclusion, war crimes and the obligation to prosecute them already existed before international courts were set up. However, those courts constitute an institution for the implementation of the existing rules and have therefore ensured that those rules become reality. As in so many other areas, setting up an institution, and paying its staff, for the sole purpose of dealing with a problem is an important step toward finding a solution, but not sufficient in itself. Until recently, international criminal courts existed for only two of the many situations requiring them. Those two *ad hoc* courts represented a vital initial step. Once the ICC Statute has been universally accepted, other steps will follow. The very credibility of international justice depends on this because justice which is not the same for everyone is not justice.

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a) the establishment of *ad hoc* tribunals

Case No. 199, Luxembourg, Law on Cooperation with the International Criminal Courts.
p. 2165

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

Document No. 19, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal. p. 645

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 17 and 32.] p. 1732

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778

Case No. 179, UN, Statute of the ICTY. p. 1791

Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A., Jurisdiction, paras. 11-58 and B., Merits, paras. 239-241, 540-553.] p. 1804

- Case No. 181, ICTY, The Prosecutor v. Martić, Rule 61 Decision. [Cf. para. 3.] p. 1880
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 Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. [Cf. A.] p. 1900
 Case No. 184, ICTY, The Prosecutor v. Kupreskić *et al.*, p. 1911
 Case No. 185, ICTY, The Prosecutor v. Blaskić. p. 1936
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bb) the International Criminal Tribunal for Rwanda (ICTR)

- Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. E.] p. 2098
Case No. 196, UN, Statute of the ICTR. p. 2154
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- cc) hybrid tribunals
 - the Special Court for Sierra Leone

[See online <http://www.sc-sl.org>]

The United Nations, in agreement with the Government of Sierra Leone, created this Court in 2000. Its objective is to try the most important war criminals of the conflict in Sierra Leone since 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 International Humanitarian Law.

Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 3. A. Statute.] p. 2362

Case No. 225, Sierra Leone, Special Court Ruling on Immunity for Taylor. p. 2388

Case No. 226, Sierra Leone, Special Court Ruling on the Recruitment of Children. p. 2397

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XI. IMPLEMENTATION IN TIME OF NON-INTERNATIONAL ARMED CONFLICT

Introductory Text

Only two specific mechanisms of implementation are provided for by the treaty rules of International Humanitarian Law (IHL) applicable in non-international armed conflicts: (i) the obligation to disseminate IHL "as widely

as possible"^[354] and (ii) the right of the ICRC to offer its services.^[355] The first mechanism has the same meaning as in international armed conflicts. The second means that in such conflicts the ICRC has no *right* to undertake its usual activities in the fields of scrutiny, protection, and assistance; it may only *offer these services* to each party to the conflict and then initiate them with each party that has accepted such an offer. This right of initiative clearly implies that such an offer is never an interference into the internal affairs of the State concerned, nor is the undertaking of ICRC activities with a party accepting such an offer an unlawful intervention. Furthermore, such an offer - as any other measure of implementation of IHL of non-international armed conflicts - cannot grant any legal status to any party to a conflict.^[356]

Even though they are not specifically prescribed by IHL of non-international armed conflicts, if the *preparatory measures* that IHL of international armed conflicts directs to be taken already in peacetime are actually taken, they will also have a beneficial influence on the respect of IHL of non-international armed conflicts. For instance, building hospitals away from possible military objectives, properly restricting the use of the red cross or red crescent emblem, and instructing combatants to wear identity tags will necessarily have the same effects in international and non-international armed conflicts. In practice, armed forces train their members in peacetime in view of international armed conflicts. If such training is properly accomplished, all soldiers will have the same reflexes in a non-international armed conflict. Indeed, at the lower levels of the military hierarchy, the rules of behaviour are exactly the same.

Within their national legislation, some States have explicitly laid down that the same rules of IHL apply in both kinds of conflicts. Other States prescribe specific rules for non-international armed conflicts. Where penal legislation on war crimes is existent, it is often limited to violations of IHL of international armed conflicts, while legislation on the use of the emblem usually covers both. As a minimum requirement, States with a legal system in which international treaties are not part of the law of the land have to adopt legislation to transform the rules of IHL of non-international armed conflicts into national law in order to make it binding on individuals, including rebels. Furthermore, for the same purpose, all States must adopt legislation of application for the presumably rather few rules of Article 3 common to the Conventions and of Protocol II, which they consider not to be self-executing. Indeed, States have the international responsibility to ensure that individuals under their jurisdiction respect the basic rules of behaviour laid down in those rules.

Since the International Court of Justice has decided that the principle laid down in Article 1 common to the Conventions and Protocol I also applies to

354 Cf. Art. 19 of Protocol II.

355 Cf. Art. 3 (2) common to the four Conventions.

356 Cf. Art. 3 (4) common to the four Conventions.

non-international armed conflicts,^[357] third States have the right and the obligation to ensure that not only governmental forces in a State confronted with a non-international armed conflict, but also non-governmental and anti-governmental forces, respect IHL of non-international armed conflicts.

The repression of violations of IHL of non-international armed conflicts is neither expressly prescribed in Article 3 common to the Conventions nor in Protocol II. It is, however, one of the traditional means available to a State for ensuring compliance with its corresponding international obligations. Punishment will often, but not always, be possible under the ordinary rules of penal law. However, the principle of universal jurisdiction will not necessarily operate without specific legislation.

The establishment of universal jurisdiction and the criminalization of serious violations not falling under ordinary penal law is, however, achieved when national legislation assimilates both violations of the law of international armed conflicts and of the law of non-international armed conflicts. Otherwise, repression under a regime similar to that applicable to grave breaches of the law of international armed conflicts can be accomplished by several legal constructions. First, some authors and States claim that - contrary to their textual and systematic interpretation - the detailed provisions on grave breaches provided for by the Conventions also apply to violations of the law of non-international armed conflicts. Second, recent developments such as the reactions of the international community to violations of IHL of non-international armed conflicts in the Former Yugoslavia and Rwanda and the Statute of an International Criminal Court, lead most authors, judicial decisions, and - implicitly - the statutes of both international *ad hoc* tribunals, to consider that customary international law criminalizes serious violations of IHL of non-international armed conflicts. Such an understanding means a permission, if not an obligation, to apply the principle of universal jurisdiction. Third, a violation of IHL of non-international armed conflicts may often be simultaneously an act criminalized by other rules of customary or conventional international law, such as crimes against humanity, genocide, torture, or terrorism.

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357 See Case No. 130, ICJ, Nicaragua v. US, [*Cf. para. 255.*] p. 1365.

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1. Dissemination

Art. 19 of Protocol I [Rules 142 and 143 of CIHL]

Case No. 32, ICRC, Disintegration of State Structures. p. 767
 Case No. 91, China, Military Writings of Mao Tse-Tung. p. 1085
 Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

2. Other preventive measures

[Rules 139, 140 and 141 of CIHL]

3. The obligation of third States to ensure respect

[Rule 144 of CIHL]

Case No. 130, ICJ, Nicaragua v. US. [Cf. paras. 220 and 255.] p. 1365

Case No. 228, Germany, Government Reply on Chechnya. p. 2415

4. The right of initiative of the ICRC

Art. 3 (2) common to the Conventions

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., para. 550.] p. 1467
 Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682
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a) meaning

Document No. 41, Guiding Principles on Internal Displacement. [Cf. Principle 25.] p. 850

b) addressees: both the government and insurgents

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c) ICRC activities

(See *infra*, Chapter 15. II. 1. In armed conflicts. p. 370.)

5. International responsibility of the State and of the insurgent movement

Case No. 38, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 10 and its commentary.] p. 805

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6. Repression of individual breaches of IHL

(*See also supra*, Chapter, 13. X. 1. b) the extension of the concept of grave breaches to non-international armed conflicts. p. 306.)

[Rules 151-155 of CIHL]

Document No. 8, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention). [*Cf. Art. 14 (2).*] p. 547

Case No. 15, The International Criminal Court. [*Cf. A.*, Art. 8 (2) (c) and (e).] p. 608

Case No. 47, Switzerland, Military Penal Code. [*Cf. Art. 108.*] p. 912

Case No. 48, Germany, International Criminal Code. [*Cf. paras. 8-12.*] p. 915

Case No. 54, US, War Crimes Act. p. 952

Case No. 93, Hungary, War Crimes Resolution. p. 1091

Case No. 99, Belgium, Public Prosecutor v. G.W. p. 1122

Case No. 128, Chile, Prosecution of Osvaldo Romo Mena. [*Cf. para. 12.*] p. 1357

Case No. 131, Canada, Ramirez v. Canada. p. 1376

Case No. 141, South Africa, AZAPO v. Republic of South Africa. [*Cf. 30. and 31.*] p. 1522

Case No. 166, Canada, Sivakumar v. Canada. p. 1685

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf. A.*, Art. 11 (2) and B., Art. 5 (2).] p. 1761

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Case No. 185, ICTY, The Prosecutor v. Blaskic. [*Cf. A.*, paras. 179-187.] p. 1936

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Case No. 205, Switzerland, The Niyonteze Case. p. 2233

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7. Other mechanisms foreseen for international armed conflicts

XII. FACTORS CONTRIBUTING TO VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Introductory Text

First it is a distinctive feature of social rules that - contrary to the laws of physics - they can be violated and are actually violated.

Second, violations of International Humanitarian Law (IHL) mostly consist of violence - committed in situations already marked by violence: armed conflicts. This is not the place to explain the reasons for violence. Anyway much seems still unexplained in this field. It suffices to mention here that violence seems to be inherent in the human condition and results from various complex factors both objective (historical, cultural, educational and economic) and subjective. However, violence is never inevitable even when all factors leading to violence exist. No one is immune from violating IHL, but no one in any one situation will necessarily violate IHL. In addition, violence is contagious and may render further violence banal. Armed conflicts are marked by plenty of instances of legal and illegal violence which can and do contaminate those who do not yet use it.

Third, armed conflicts are situations where the primary international legal and social regime - peace - is overruled, in other words *ius ad bellum* has been violated. It is not astonishing that human beings, having experienced the failure of the primary international legal regime, will not necessarily respect the subsidiary regime applicable to such a situation of failure, namely IHL. The lack

of respect of international rules regulating *ius ad bellum* and more so *ius in bello* will be reflected in situations of armed conflict and in the behaviour of every human being. Another aspect of this is that an armed conflict is for every human being, even for the best-trained soldiers, an exceptional experience. Usually prohibited acts become commonplace. Human beings are killed and property destroyed, with the approval of society. In such circumstances it is also easy to violate other rules of human behaviour - committing acts which remain prohibited even in armed conflicts by IHL.

Fourth, many of those fighting in and suffering from armed conflicts are continuously exposed to death, injury, fear, hate, cries, cadavers, dirt, cold, heat, hunger, thirst, exhaustion, weariness, physical tension, uncertainty, arbitrariness and lack of love. In other words, they are deprived of nearly everything which makes human life civilized; they live continuously in a kind of folly in which traditional references do not exist anymore. Is it astonishing under these circumstances that they commit inhumane and uncivilized acts?

Fifth, modern weapons make it possible for human beings to be killed from a great distance, without singling them out as individuals or even seeing them. Moreover, those weapons are launched according to a 'division of labour' which waters down responsibility. Those two factors end up damping certain ethical reflexes. To take one example only, it is unlikely that the pilots who bombed Coventry, Dresden or Hiroshima would have slit the throats or poured petrol over tens of thousands of women and children. However, it should be noted that the recent genocidal conflicts have shown that as soon as inter-ethnic hatred has been triggered, good fathers are capable of raping, slitting the throats of and hacking to pieces their neighbours while looking them straight in the eyes.

Sixth, most of those fighting in contemporary armed conflicts have lived, before the conflict, in an environment of injustice and denial of the most fundamental civil and political as well as social, economic, and cultural rights. This environment often contributed to the outbreak of the conflict. Is it astonishing that a person raised without a proper education, in an atmosphere of street violence, organized crime, misery, racism, perhaps in one of the ever-growing megalopolises where all social structures have collapsed, will violate IHL once he or she is given a weapon and told to fight against an "enemy"?

Seventh, the public at large and those who are likely to be actors in armed conflicts are often not taught and trained in IHL. While one may object that its basic moral principles are self-evident, the detailed rules are not always self-explanatory. In particular it is not obvious that basic moral principles also apply precisely in an armed conflict, where most other rules of social behaviour are suspended, and where fighters are trained to do the opposite: to kill and destroy.

Eighth, knowledge of the rules of IHL is a necessary but not a sufficient condition to ensure their respect. They also have to be accepted. It has to be understood that they are the law accepted by States. It has to be understood that the numerous justifications for violating IHL that may be put forward, for instance, "state of necessity," "self-defence," the "sense of having suffered an injustice,"

"strategic interests," the desire to spare friendly forces, or any aim, however noble, cannot be and are not accepted as reasons justifying violations of IHL.

Furthermore, one has to stress that the rules of IHL can be and are often respected. Scepticism is the first step towards the worst atrocities. Indeed, if we want the public at large to respect these rules, it must become as politically incorrect to be sceptical about IHL as it fortunately has become politically incorrect to be sceptical about the fact that genders and races are equal.

Ninth, while the respect of IHL is impossible without a minimum of discipline and organization, it is also impossible in a climate of blind obedience which is so frequent in regular armies and in armed groups who identify their cause with a leader. Indoctrination creates a situation in which "the cause" becomes more important than any (other) human value.

Tenth, despite the explanations of sociologists and international lawyers, our societies are still profoundly impregnated by the idea that rules are only valid if their violations are punished. The widespread, nearly generalized impunity met by violations of IHL therefore has a terribly corrupting effect, including on those accepting the rules, who are left with the impression that they are the only ones who comply with them.

Eleventh, there will be violations of IHL as long as there are cultures, ideologies, and ideas excluding others, characterizing them as less human because of their nationality, race, ethnic group, religion, culture or economic condition.

Taking these factors into account, one should rather be astonished that, as the ten thousands of prisoners visited every year by the ICRC so proves, countless fighters respect their surrendering enemies even after their comrades, wives, and children have been killed by those belonging to the same side as those who surrendered. Similarly surprising are the facts that countless fighters, police officials, and investigators do not resort to torture although they assume that those in their hands must know when an attack will happen, that countless oppressed do not plant indiscriminate bombs although those ruling deny them the most fundamental civil, political, social and economic rights, and that countless leaders do not fight with all means although they fear to lose the war or their power and are convinced that they fight for a just cause.

Only those who experience armed conflicts through their television sets can think that war inevitably entails violations of the laws of war. Those who actually live through wars know that wars are fought by human beings who inherently have the choice to be humane.

Document No. 26, ICRC, Protection of War Victims. [*Cf.* 2.] p. 702

Case No. 32, ICRC, Disintegration of State Structures. [*Cf.* II.] p. 767

Document No. 36, First Periodic Meeting, Chairman's Report. [*Cf.* II. 2.] p. 789

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. [*Cf.* G. II. 1.] p. 1303

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XIII. NON-LEGAL FACTORS CONTRIBUTING TO RESPECT FOR INTERNATIONAL HUMANITARIAN LAW

Introductory Text

As with all law, if International Humanitarian Law (IHL) is respected, it is not mainly because of the efficiency of the legal mechanisms foreseen to ensure its respect but because of non-legal factors. In that regard, routine is an important factor contributing to respect. Indeed, once soldiers or civil servants are aware of a regulation and know that their superiors want them to respect this rule, they will apply and respect it without further discussion, especially if they have understood that it is possible to respect that rule. For this reason, an appropriate and meaningful dissemination of the rule is very important. In all human societies there is a positive predisposition in favour of respecting the law. In most cases if individuals understand that the rules of IHL are the law applicable in armed conflicts accepted by States and the international community, and not simply some philanthropic wishes of professional do-gooders, they will respect them.

The respect of IHL also largely corresponds to military interest. A unit respecting IHL is a disciplined troop, while a unit looting and raping lacks military value. In addition, respect of IHL is a question of military efficiency. Attacks on civilians constitute not only war crimes but also a waste of ammunition needed for attacking military objectives. Many rules of IHL on the conduct of hostilities simply implement the tactical principles of economy and proportionality of means.

In a global information society, international and national public opinion increasingly contribute to the respect - but unfortunately sometimes also to violations - of IHL. Belligerents need the sympathy of international and national public opinions as much as they need ammunition supplies. In non-international armed conflicts the battle for the hearts of the people is even one of the main issues. Nothing is more efficient to lose public opinion's support than television pictures of atrocities which may unfortunately also be the result of manipulations. Free access to the truth by the media may be hindered or manipulated by belligerents: for instance,

atrocities of the enemy may be fabricated. Some belligerents have even bombed their own population to provoke outside intervention against the enemy. Humanitarian assistance increasingly becomes an excuse not to initiate political solutions. Suffering populations are held hostage to achieve political objectives. Manipulated or not, some media incite hatred and atrocities by dehumanizing members of specific ethnic groups, depriving them of humanitarian protection; fanatic populations demonstrate against humanitarian assistance being brought to "enemy" populations. Even a freely elected parliament may enact legislation depriving "enemies" or "terrorists" of fundamental judicial guarantees or condone torture against them for reasons of national security.

The respect for many rules of IHL corresponds to cultural, ethic, and religious imperatives of most societies. All religions contain rules on the respect of the earth's or God's creatures; many holy books contain specific prohibitions applicable in wartime.^[358] One does not have to study the Geneva Conventions and Protocols to know that it is prohibited to kill children and to rape women. When the ICRC studies various local and regional traditions, including poetry and proverbs to anchor its dissemination efforts in the culture of the addressees, it always finds principles and detailed rules of behaviour which parallel those of IHL.

Whereas (negative) reciprocity is not a legal argument to discontinue respect of IHL, whatever violations the enemy commits, positive reciprocity certainly plays an important role as a non-legal factor in encouraging belligerents to respect IHL. A soldier, an armed group, or a State will also respect IHL in order to incite the enemy to respect it. However, even in case a State or a soldier doubts whether the enemy will obey IHL, the other reasons for respecting IHL will not disappear.

Finally, the only rational aim of all armed conflicts is peace.^[359] At the conclusion of an armed conflict there remain territorial, political, and economic issues to be solved. However, a return to peace proves much easier if it is not also necessary to overcome the hatred between peoples that violations of IHL invariably create and most certainly exacerbate.

Case No. 91, China, Military Writings of Mao Tse-Tung. p. 1085

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

SUGGESTED READING: IGNATIEFF Michael, *Warrior's Honour: Ethic War and the Modern Conscience*, New York, Metropolitan Books, 1997, 207 pp. MUNOZ ROJAS Daniel & FRESARD Jean-Jacques, "The Roots of Behaviour in War: Understanding and Preventing International Humanitarian Law Violations", in *IRRC*, No. 853, March 2004, pp. 189-206.

358 See *supra*, Chapter 3. Historical Development of International Humanitarian Law, Quotations 1-5. p. 124.

359 If the aim of some fighters is not to win the war, but to "earn" their life (through pillage) by perpetuating the war, this logic no longer works and the respect of IHL is therefore particularly difficult to achieve.

1. Routine

2. Military interest

a) discipline

Case No. 91, China, Military Writings of Mao Tse-Tung. p. 1085

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

SUGGESTED READING: VERHAEGEN Jacques, "Le refus d'obéissance aux ordres manifestement criminels", in *IRRC*, No. 845, March 2002, pp. 35-50.

b) military efficiency

c) tactical principles of economy and proportionality of means

3. Public opinion

Document No. 26, ICRC, Protection of War Victims. [*Cf.* 2. 3. 3.] p. 702

Case No. 91, China, Military Writings of Mao Tse-Tung. p. 1085

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

Case No. 150, US/UK, Report on the Conduct of the Persian Gulf War. p. 1573

Case No. 229, Russian Federation, Chechnya, Operation Samashki. [*Cf.* 7.] p. 2416

SUGGESTED READING: GUTMAN Roy W., "Spotlight on Violations of International Humanitarian Law: The Role of the Media", in *IRRC*, No. 325, December 1998, pp. 667-675. SANDOZ Yves, "Is There a 'droit d'ingérence' in the Sphere of Information? The Right to Information from the Standpoint of International Humanitarian Law", in *IRRC*, No. 325, December 1998, pp. 633-642.

FURTHER READING: BOEGLI Urs, "A Few Thoughts on the Relationship between Humanitarian Agencies and the Media", in *IRRC*, No. 325, December 1998, pp. 627-631. MINEAR Larry, SCOTT Colin & WEISS Thomas G., *The News Media, Civil War and Humanitarian Action*, London, Boulder, 1996, 123 pp.

4. Ethical and religious factors

(*See supra*, Chapter 1. III. International Humanitarian Law and Cultural Relativism. p. 85.)

5. Positive reciprocity

6. Return to peace

Case No. 103, Nigeria, Operational Code of Conduct. p. 1137

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. p. 1303

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [*Cf.* para. 21.] p. 2266

Chapter 14

INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

Introductory Text

International Humanitarian Law (IHL) developed as law of international armed conflicts and was therefore necessarily international law in the traditional sense, an objective legal order governing inter-State relations. Its main objective was always to protect individuals, but that protection was not expressed in the form of subjective rights of the victims but was a consequence of the rules of behaviour for States and (through them) of individuals.

Human Rights have been only recently protected by international law and are still today seen as a matter mainly governed by national law (though not of exclusively domestic concern). They were always seen and formulated as subjective rights of the individual (and, more recently, of groups) against the State - mainly their own State.

Both branches of international law are today largely codified. IHL is however codified in a largely coherent international system of binding universal instruments of which the more recent or specific ones clarify their relationship with the older or more general ones. International Human Rights Law, conversely, is codified in an impressive number of instruments: universal and regional, binding or exhortatory, concerning the whole subject, its implementation only, specific rights or their implementation only. They emerge, develop, are implemented, and die in a relatively natural, uncoordinated way.

Because of the philosophical axiom driving them, they apply to everyone everywhere and as they are concerned with all aspects of human life, human rights have a much greater impact on public opinion and international politics than IHL, being applicable only in armed conflicts, a situation to be avoided. IHL is therefore increasingly influenced by human rights-like thinking.

SUGGESTED READING: APRAXINE Pierre, "Observations sur la distinction et la complémentarité entre droit international humanitaire et droits de l'homme", in *Revue Régionale de Droit*, Vol. 91, pp. 111-121. DOSWALD-BECK Louise & VITÉ Sylvain, "International Humanitarian Law and Human Rights Law", in *IRRC*, No. 293, March-April 1993, pp. 94-119. EL KOUHENE Mohamed, *Les garanties fondamentales de la personne en droit humanitaire en droit de l'homme*, Dordrecht, Martinus Nijhoff Publishers, 1986. HADDEN Tom & HARVEY Colin, "The Law of Internal Crisis and Conflict", in *IRRC*, No. 833, March 1999, pp. 119-134. HAMPSON Françoise, "Human Rights and Humanitarian Law in Internal Conflicts", in MEYER Michael A. (ed), *Armed Conflict and the New Law*, London, The British Institute of International and Comparative Law, vol II, 1993, pp. 53-82. HEINTZE Hans-Joachim, "On the Relationship between Human Rights Law Protection and International Humanitarian Law", in *IRRC*, No. 856, December 2004, pp. 789-814. KHANNA S.K., *War and Human Rights*, New Delhi, Dominant Publ., 1999, 336 pp. KOLB Robert, "The Relationship between International Humanitarian Law and Human Rights Law: a Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", in *IRRC*, No. 324, September 1998, pp. 409-419. MERON Theodor, "The Humanization of International Humanitarian Law", in *AJIL*, Vol. 94/2, 2000, pp. 239-278. PROVOST René, *International Human Rights and Humanitarian Law*, Cambridge University Press, Cambridge, 2002, 332 pp. SCHINDLER Dietrich, "The International Committee of the Red Cross and Human Rights", in *IRRC*, No. 208, January 1979, pp. 3-14. TAVERNIER Paul & HEYNS Christof (dir.), *Recueil juridique des droits de l'Homme en Afrique*, Brussels, Bruylant, 2002, 1336 pp. WATKIN Kenneth, "Controlling the Use of Force: A Role for Human Rights Norms in Contemporary Armed Conflict", in *AJIL*, Vol. 3/3, 2004, pp. 99-113.

FURTHER READING: CALOGEROPOULOS-STRATIS Aristidis S., *Droit humanitaire et droits de l'homme. La protection de la personne en période de conflit armé*, Geneva, I.U.H.E.I., 1980, 257 pp. EIDE Asbjorn, "The Laws of War and Human Rights - Differences and Convergences", in *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, Geneva, ICRC, The Hague, Martinus Nijhoff Publishers, 1984, pp. 675-698. TOMUSCHAT Christian, "The Application of Human Rights Law to Insurgent Movements", in *Crisis Management and Humanitarian Protection: Festschrift für Dieter Fleck*, Berlin, Berliner Wissenschafts-Verlag, 2004, pp. 573-591.

I. FIELDS OF APPLICATION

Case No. 127, ECHR, Cyprus v. Turkey. p. 1341

Case No. 163, Inter-American Commission on Human Rights, Tablada. [Cf. paras. 158 and 159.] p. 1670

Case No. 207, Colombia, Constitutional Conformity of Protocol II. [Cf. paras. 11 and 12.] p. 2266

1. Material fields of application: complementarity

Introductory Text

International Humanitarian Law 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 tensions.

- a) **International Humanitarian Law is applicable in armed conflicts**
- b) **Human Rights apply at all times**

Quotation**General Comment No. 31 [80]****The Nature of the General Legal Obligation Imposed on States Parties to the Covenant. Adopted on 29 March 2004 (2187th meeting)**

[...]

10. States Parties are required by article 2, paragraph 1 [of the International Covenant on Civil and Political Rights], to respect and to ensure the Covenant rights to all persons who may be within their territory and to all persons subject to their jurisdiction. This means that a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party. As indicated in General Comment 15 adopted at the twenty-seventh session (1986), the enjoyment of Covenant rights is not limited to citizens of States Parties but must also be available to all individuals, regardless of nationality or statelessness, such as asylum seekers, refugees, migrant workers and other persons, who may find themselves in the territory or subject to the jurisdiction of the State Party. This principle also applies to those within the power or effective control of the forces of a State Party acting outside its territory, regardless of the circumstances in which such power or effective control was obtained, such as forces constituting a national contingent of a State Party assigned to an international peace-keeping or peace-enforcement operation.
11. As implied in [...] General Comment No. 29 on States of Emergencies, adopted on 24 July 2001, reproduced in Annual Report for 2001, A/56/40, Annex VI, paragraph 3, the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.

[Source: General Comment No. 31 [80] Nature of the General Legal Obligation Imposed on States Parties to the Covenant: 26/05/2004. Human Rights Committee. Eightieth session (CCPR/C/74/CRP.4/Rev.6.), online: www.unhchr.ch/tbs/doc.nsf]

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, paras. 101-106 and 127-130.] p. 1151

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, para. 143.] p. 1467

- but derogations possible in situations threatening the life of the nation

Document No. 40, Minimum Humanitarian Standards. [*Cf. B.*, paras. 50-57.] p. 823

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 149-153.] p. 1467

- no derogations from the "hard core"
- police operations remain at all times governed by the specific International Human Rights Law standards applicable to police operations against civilians, which may never be conducted like hostilities against combatants

Case No. 117, Israel, The Rafah Case. [*Cf.* paras. 54-58.] p. 1289

Case No. 155, Iraq, Use of Force by US Forces in Occupied Iraq. p. 1605

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358

c) gap in situations of internal disturbances and tensions

(For a definition of internal disturbances and tensions, *see supra* footnote 32. p. 110.)

Case No. 32, ICRC, Disintegration of State Structures. p. 767

Document No. 40, Minimum Humanitarian Standards. p. 823

Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358

SUGGESTED READING: EIDE Asbjorn, ROSAS Allan & MERON Theodor, "Combating Lawlessness in Gray Zones Through Minimum Humanitarian Standards", in *AJIL*, Vol. 89/1, 1995, pp. 215-223. GASSER Hans-Peter, "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct", in *IRRC*, No. 262, January-February 1988, pp. 33-58. MERON Theodor, "Draft Model Declaration on Internal Strife", in *IRRC*, No. 262, January-February 1988, pp. 59-104. MERON Theodor, *Human Rights in Internal Strife: Their International Protection*, Cambridge, Grotius, 1987, 349 pp. MERON Theodor, "Towards a Humanitarian Declaration on Internal Strife", in *AJIL*, Vol. 78/4, 1984, pp. 859-868. MOMTAZ Djamchid, "The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife", in *IRRC*, No. 324, September 1998, pp. 455-462. VIGNY Jean-Daniel, "Standards fondamentaux d'humanité: quel avenir?", in *IRRC*, No. 840, December 2000, pp. 917-939.

FURTHER READING: GASSER Hans-Peter, "New Draft Declaration on Minimum Humanitarian Standards" in *IRRC*, No. 282, May-June 1991, pp. 328-329.

2. Protected persons

Introductory Text

While it is an important rule of International Human Rights Law that all human beings equally benefit from these rights, the traditional approach of International Humanitarian Law (IHL), consistent with its development as inter-State law, aims mainly at protecting enemies. IHL therefore defines a category of "protected persons," consisting basically of enemy nationals, who enjoy its full protection. Nevertheless, victims of armed conflicts who are not "protected persons" do not completely lack protection. In conformity with and under the influence of International Human Rights Law, they benefit from a growing number of protective rules, which, however, never offer the full protection foreseen for "protected persons."

Case No. 194, ECHR, Bankovic and Others v. Belgium and 16 other States. p. 2093

a) International Humanitarian Law: concept of protected persons

(See *supra*, Chapter 2. III. 2. a) passive personal scope of application: who is protected? p. 115.)

b) International Human Rights Law: all human beings

Case No. 194, ECHR, *Bankovic and Others v. Belgium and 16 other States*. p. 2093

- who are under the jurisdiction of a State

Case No. 194, ECHR, *Bankovic and Others v. Belgium and 16 other States*. p. 2093

3. Relations affected**Introductory Text**

International Human Rights Law provides (or recognizes) rights of the individual (or groups) against the State (or, arguably, other authorities). The provisions of International Humanitarian Law (IHL), too, protect individuals against the (traditionally enemy) State or other belligerent authorities. IHL, however, also corresponds to the traditional structure of international law in that it governs (often by the very same provisions) relations between States. In addition, it prescribes rules of behaviour for individuals (who must be punished if they violate them) for the benefit of other individuals.

Case No. 32, ICRC, *Disintegration of State Structures*. p. 767

a) International Humanitarian Law

- Individual - State
- State - State
- Individual - Individual

b) International Human Rights Law

- Individual - State

Document No. 40, *Minimum Humanitarian Standards*. [*Cf. B.*, paras. 59-64.] p. 823
Case No. 194, ECHR, *Bankovic and Others v. Belgium and 16 other States*. p. 2093

4. Applicability of International Human Rights Law to occupied territories

Case No. 107, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*. [*Cf. A.*, paras. 107-112.] p. 1151

II. PROTECTED RIGHTS

Introductory Text

If one translates the protective rules of International Humanitarian Law (IHL) into rights and compares these rights with the ones provided by International Human Rights Law, it becomes apparent that IHL protects, in armed conflicts, only some Human Rights,^[360] which:

- a) are particularly endangered by armed conflicts;^[361] and
- b) are not, as such, incompatible with the very nature of armed conflicts.^[362]

These few rights are protected by much more detailed regulations. These regulations by IHL are much more adapted to the specific problems arising in armed conflicts than the comprehensive guarantees formulated in International Human Rights Law.^[363] In addition, IHL regulates some problems which are vital for the protection of victims of armed conflicts, but which International Human Rights Law fails to address, even implicitly.^[364]

IHL protects civil and political rights,^[365] economic, social, and cultural rights,^[366] as well as collective or group rights.^[367] Indeed, from the very beginning of its codification, IHL has never made the artificial distinction between civil and political rights and economic, social and cultural rights or between rights imposing a positive obligation on the State and those rights requiring the State to abstain from a certain behaviour.^[368] In both fields IHL foresees legal obligations. For instance, in armed conflicts, there is no meaningful protection without the provision of humanitarian assistance to those in need. Conversely, there can be no humanitarian assistance without a simultaneous concern for protecting those assisted against abuses and against violence and danger, which may even stem from the assistance provided.

360 Thus, for example, Art. 41 of Protocol I protects the right to life of enemies *hors de combat*, Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories, Art. 56 of Protocol I protects the right to a healthy environment.

361 Thus, *e.g.*, since an armed conflict more strongly affects the war victims' physical integrity than their freedom of opinion, it is logical that International Humanitarian Law contains more rules on the former than on the latter.

362 The right of a people to peace, *e.g.*, is by definition violated when that people is affected by an armed conflict. The right to self-determination is one of the (lawful) reasons for armed conflict. International Humanitarian Law, therefore, can not protect either of these rights.

363 Thus, *e.g.*, the very detailed precautionary measures to be taken in attack, according to Art. 57 of Protocol I, constitute a translation of the right to life and physical integrity of civilians into detailed rules of behaviour for those who conduct hostilities which could affect the civilians. Note, however, that International Human Rights Law provides conversely more details on, *e.g.*, "the judicial guarantees which are recognized as indispensable by civilized peoples" foreseen in Art. 3 common to the Conventions.

364 Thus, Art. 44 (1)-(3) of Protocol I on combatant status deals with the question who may use force, an issue not addressed by International Human Rights Law, but which is crucial for the protection of civilians.

365 Thus, *e.g.*, Art. 41 of Protocol I protects the right to life of enemies *hors de combat*.

366 Thus, *e.g.*, Art. 56 of Convention IV protects the right to health of inhabitants of occupied territories.

367 Thus, *e.g.*, Art. 56 of Protocol I protects the right to a healthy environment.

368 Thus, the very idea of Henry Dunant codified in the First Geneva Convention of 1864 is to prescribe an international obligation that the wounded and sick shall not only be respected but also, and in particular, be collected and cared for.

SUGGESTED READING: JUNOD Sylvie S., "Human Rights and Protocol II", in *IRRC*, No. 236, September 1983, pp. 246-254.

1. Rights protected by both branches

a) but details provided by International Humanitarian Law are more adapted to armed conflicts

Document No. 40, Minimum Humanitarian Standards. [*Cf. B.*, para. 66.] p. 823

Case No. 46, ICJ, Nuclear Weapons Advisory Opinion. [*Cf. para. 25.*] p. 896

Case No. 127, ECHR, Cyprus v. Turkey. p. 1341

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. [*Cf. paras. 38-44.*] p. 1387

- right to life

Case No. 163, Inter-American Commission on Human Rights, Tablada. [*Cf. para. 161.*] p. 1670

Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358

- prohibition of inhumane and degrading treatment
- right to health
- right to food
- right to individual freedom (in international armed conflicts)

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. [*Cf. paras. 42 and 52-59.*] p. 1387

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 158, Iraq, Medical Ethics in Detention. p. 1639

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf. E.*] p. 2309

b) but International Human Rights Law gives more details

- judicial guarantees
- use of firearms by law enforcement officials

Document No. 106, ICRC Appeals on the Near East. [*Cf. C.*, para. 8.] p. 1145

Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696

- medical ethics

Case No. 158, Iraq, Medical Ethics in Detention. p. 1639

- definition of torture

2. Rules of International Humanitarian Law not covered by International Human Rights Law

3. Human Rights outside the scope of International Humanitarian Law

Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. paras. 128-134.] p. 1151

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 403-413.] p. 1467

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

III. IMPLEMENTATION

Introductory Text

While the purpose of both International Humanitarian Law (IHL) and of International Human Rights Law is to obtain the respect of the individual, each of these branches of law have their own implementation mechanisms tailored to respond to the typical situations for which they were created. Violations of IHL typically occur on the battlefield. They can only be addressed by immediate reaction. International Human Rights Law is more often violated through judicial, administrative, and legislative decisions or inaction against which appeal and review procedures prove appropriate and meaningful. In the implementation of IHL, *redress* to the victims is central, and therefore a confidential, co-operative, and pragmatic approach is often more appropriate. In contrast, the victims of traditional violations of International Human Rights Law want their rights to be reaffirmed, and therefore as soon as they spot violations seek their public condemnation. A more legalistic and dogmatic approach is therefore necessary in implementing International Human Rights Law and such an approach corresponds to the logic of Human Rights, since those rights historically represent a challenge to the "sovereign", while the respect of IHL can be considered as a treatment conceded by the "sovereign".

Some would say that to implement IHL one has to have the mentality of a good Samaritan and to implement International Human Rights Law one has to have the mentality of a judge. In practice, IHL has traditionally been implemented through permanent, preventive, and corrective scrutiny in the field, whereas International Human Rights Law has traditionally been implemented through *a posteriori* control, on demand, in a quasi-judicial procedure.

Interestingly, today the different bodies implementing International Human Rights Law in situations of gross and widespread human rights violations in the field act in a similar way to that traditionally adopted by the International

Committee of the Red Cross (ICRC) for the implementation of IHL. United Nations (UN) Human Rights monitors are deployed in critical regions and will visit prisons similarly to ICRC delegates, and special rapporteurs of the UN Human Rights Commission travel to critical areas. On the other hand, IHL is more and more often implemented by international tribunals, necessarily *a posteriori* and in a judicial procedure.

Certain convergences are inherent to International Human Rights instruments. Most human rights, except the most fundamental ones belonging to "the hard core," may be derogated from in states of emergency, to the extent required by the exigencies of the situation, and if this derogation is consistent with other international obligations of the derogating State.^[369] IHL contains some of those other international obligations. Therefore, when confronted in times of armed conflict with derogations as such admissible under Human Rights instruments, the implementing bodies of International Human Rights Law must check whether those measures are compatible with IHL. If they are not, they also violate International Human Rights Law.

Similarly, International Human Rights Law considers the right to life as non-derogable, even in time of armed conflict. There is however, in some instruments an explicit - and in others an implicit - exception for "lawful acts of war."^[370] IHL declares what is lawful in war. When confronted with State-sponsored killings in time of armed conflict, human rights courts, commissions, or NGOs must therefore check whether such actions are consistent with IHL before they can know whether those actions violate International Human Rights Law.

Conversely, the main international body implementing IHL, the ICRC, has for a long time been engaged in activities in times of internal violence similar to those it performs in international armed conflicts. During such internal violence situations IHL does not apply. Traditionally implicitly and today more and more explicitly - but maintaining its pragmatic, co-operative, and victim-oriented approach - the ICRC must therefore refer to human rights instruments in search of applicable international standards.

Finally, as far as teaching, training, and dissemination of the two branches are concerned, soldiers must know Human Rights Law. Indeed, more and more soldiers are deployed in peacetime for police operations to which Human Rights Law applies. Police forces have to know both branches and their relationship. Students will not understand new developments in IHL, in particular the important "Human Rights-like" rules of the law of non-international armed conflicts, without understanding the philosophy and interpretations of International Human Rights Law. Conversely, one would have an incomplete view of the protection international law can offer to the individual if one studied only Human Rights Law without understanding the

369 Cf. Art. 4 (1) of the 1966 Covenant on Civil and Political Rights, Art. 15 (1) of the European Convention on Human Rights, and Art. 27 (1) of the American Convention on Human Rights.

370 Cf. explicitly Art. 15 (2) of the European Convention on Human Rights. Other instruments only prohibit "arbitrary" deprivation of life.

principles and fundamentally different starting point of IHL, namely the rules providing for protection of the individual in the most dangerous situations: armed conflicts.

SUGGESTED READING: ABI-SAAB Georges, "Droits de l'Homme et juridictions pénales internationales. Convergence et tensions", in *Mélanges en l'honneur de Nicolas Valticos*, Paris, Pedone, 1999, pp. 245-253. SASSÒLI Marco, "Mise en œuvre du droit international humanitaire et du droit international des droits de l'homme: une comparaison", in *ASDI*, Vol. 43, 1987, pp. 24-61. WEISSBRODT David & HICKS Peggy, "Implementation of Human Rights and Humanitarian Law in Situations of Armed Conflicts", in *IRRC*, No. 293, March-April 1993, pp. 120-138.

FURTHER READING: PROVOST René, "Reciprocity in Human Rights and Humanitarian Law", in *BYIL*, Vol. 65, 1995, pp. 383-454. WIERUSZEWSKI Roman, "Application of International Humanitarian Law and Human Rights Law: Individual Complaints", in KALSHOVEN Frits & SANDOZ Yves (ed.), *Implementation of International Humanitarian Law*, Dordrecht, Martinus Nijhoff Publishers, 1989, pp. 441-458.

1. Difference

Case No. 32, ICRC, Disintegration of State Structures. p. 767

a) due to the specificities of armed conflicts

b) in the approach: charity vs. justice?

Quotation

[T]he ICRC abstains from making public pronouncements about specific acts committed in violation of law and humanity and attributed to belligerents. It is obvious that insofar as it set itself up as a judge, the ICRC would be abandoning the neutrality it has voluntarily assumed. Furthermore, in the quest for a result which would most of the time be illusory, demonstrations of this sort would compromise the charitable activity which the ICRC is in a position to carry out. One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.

[Source: Pictet, J., *The Fundamental Principles of the Red Cross. Proclaimed by the Twentieth International Conference of the Red Cross, Vienna, 1965*, Geneva, Henry Dunant Institute, 1979, pp. 59-60.]

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

c) in action

aa) traditionally

- International Humanitarian Law: permanent, preventive and corrective control on the field
- Human Rights: *a posteriori* control, on demand, in a quasi-judicial procedure

Case No. 223, India, People's Union for Civil Liberties v. Union of India. p. 2358

- bb) contemporary tendency of Human Rights bodies to adopt an International Humanitarian Law-like approach

Case No. 195, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. C. 1) and D. 1,] p. 2098

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. E.] p. 2309

2. Convergence

a) implementation of International Humanitarian Law by Human Rights mechanisms

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. p. 1387

Case No. 163, Inter-American Commission on Human Rights, Tablada. [Cf. paras. 158-171.] p. 1670

Case No. 208, Inter-American Court of Human Rights, The Las Palmeras Case. p. 2281

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. E.] p. 2309

SUGGESTED READING: HAMPSON Françoise, "Using International Human Rights Machinery to Enforce the International Law of Armed Conflicts", in *RDMDG*, Vol. 31, 1992, pp. 117-127. MARTIN Fanny, "Le droit international humanitaire devant les organes de contrôle des droits de l'homme", in *Droits Fondamentaux*, No. 1, July-December 2001, <http://www.droits-fondamentaux.org>. MARTIN Fanny, "Application du droit international humanitaire par la Cour interaméricaine des droits de l'homme", in *IRRC*, No. 844, December 2001, pp. 1037-1066. REIDY Aisling, "The Approach of the European Commission and Court of Human Rights to International Humanitarian Law", in *IRRC*, No. 324, September 1998, pp. 513-529.

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- aa) through clauses in Human Rights treaties

Case No. 194, ECHR, Bankovic and Others v. Belgium and 16 other States. p. 2093

- exception to the right to life
- reference in derogation clauses

Quotation
31/08/2001.

General Comment No. 29: States of Emergency (article 4),

[...]

9. Furthermore, article 4, paragraph 1, requires that no measure derogating from the provisions of the Covenant may be inconsistent with the State party's

other obligations under international law, particularly the rules of international humanitarian law. Article 4 of the Covenant cannot be read as justification for derogation from the Covenant if such derogation would entail a breach of the State's other international obligations, whether based on treaty or general international law. This is reflected also in article 5, paragraph 2, of the Covenant according to which there shall be no restriction upon or derogation from any fundamental rights recognized in other instruments on the pretext that the Covenant does not recognize such rights or that it recognizes them to a lesser extent.

10. Although it is not the function of the Human Rights Committee to review the conduct of a State party under other treaties, in exercising its functions under the Covenant the Committee has the competence to take a State party's other international obligations into account when it considers whether the Covenant allows the State party to derogate from specific provisions of the Covenant. Therefore, when invoking article 4, paragraph 1, or when reporting under article 40 on the legal framework related to emergencies, States parties should present information on their other international obligations relevant for the protection of the rights in question, in particular those obligations that are applicable in times of emergency. In this respect, States parties should duly take into account the developments within international law as to human rights standards applicable in emergency situations.

[Source: International Covenant on Civil and Political Rights, Document CCPR/C/21/Rev.1/Add.11, of 31 August 2001, General Comment no. 29, States of Emergency (article 4), online: www.unhcr.ch/tbs/doc.ns?doc=29]

Case No. 163, Inter-American Commission on Human Rights, *Tablada*. [Cf. paras. 168-170.] p. 1670

Case No. 208, Inter-American Court of Human Rights, *The Las Palmeras Case*. p. 2281

- the prohibition of "arbitrary" detention

Case No. 133, Inter-American Commission on Human Rights, *Coard v. US*. p. 1387

- bb) indirectly, through the implementation of International Human Rights Law

Case No. 127, ECHR, *Cyprus v. Turkey*. p. 1341

Case No. 208, Inter-American Court of Human Rights, *The Las Palmeras Case*. p. 2281

b) implementation of Human Rights by the ICRC

SUGGESTED READING: FORSYTHE David P., "Choices More Ethical than Legal: The International Committee of the Red Cross and Human Rights", in *Ethics & International Affairs*, Vol. 7, 1993, pp. 131-151. SCHINDLER Dietrich, "The International Committee of the Red Cross and Human Rights", in *IRRC*, No. 208, January 1979, pp. 3-14.

FURTHER READING: GASSER Hans-Peter, "A Measure of Humanity in Internal Disturbances and Tensions: Proposal for a Code of Conduct", in *IRRC*, No. 262, January-February 1988, pp. 33-58. SOMMARUGA Cornelio, "Humanitarian Law and Human Rights in the Legal Arsenal of the ICRC", in *Human Rights and Humanitarian Law*, The Hague, Martinus Nijhoff Publishers, 1997, pp. 125-133.

- in armed conflicts
- outside armed conflicts

3. Co-operation between ICRC and Human Rights bodies

a) dissemination

Document No. 26, ICRC, Protection of War Victims. [*Cf.* 2. 3. 1.] p. 702

b) thought

Document No. 40, Minimum Humanitarian Standards. [*Cf.* B., para. 99.] p. 823

c) operations

Chapter 15

THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC)

Introductory Text

The history of the International Committee of the Red Cross (ICRC) began on a battlefield at Solferino on 24 June 1859. Henry Dunant, a businessman from Geneva then aged 31, had travelled to northern Italy where the French Emperor Napoleon III was leading his forces against Austrian troops.

Arriving in Solferino as the battle raged, he was about to witness a spectacle which would change the whole direction of his life: a frenzy of carnage which in a single day left 40,000 soldiers dead or wounded and abandoned to their fate.

So overwhelmed was Dunant by this sight that he set about improvising first aid with the women of neighbouring villages. Dunant returned to Geneva a few days later but remained haunted by the memory of this experience and in 1862 published *A Memory of Solferino*, a powerful work in which he recalled with vivid realism all the horrors of the battle. However, he was not content simply to express outrage and indignation. Inspired by the action he had taken with the inhabitants of the villages of Solferino and Castiglione to succour wounded soldiers of all sides - French, Italian, and Austrian - without distinction, he launched a momentous proposal: that in all countries societies be formed to tend the wounded in wartime; and that an international treaty be adopted to recognize the immunity and neutrality of the medical personnel bringing aid to the wounded under the protection of a single emblem, which was later designated as the Swiss flag with its colours reversed: the red cross on white ground.

The book proved an immense success and Dunant travelled throughout Europe to win over the continent's rulers to his cause. On 17 February 1863, with the support of four prominent citizens of Geneva - two physicians, Louis Appia and Théodore Maunoir, a lawyer, Gustave Moynier, and a soldier, General Guillaume-Henri Dufour - he founded the International Committee for Relief to the Wounded, which a few years later was to become the ICRC. At the request of the Committee, the Swiss federal government

convened a Diplomatic Conference which, on 22 August 1864, adopted the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, signed by 12 States.^[371] This marked the birth of modern, codified International Humanitarian Law (IHL), the legal basis for the action of the ICRC; the principles of neutrality and impartiality which have always guided that action were laid down and the mandate of the institution was internationally recognized.

I. Structure, Statute, and Mandates of the ICRC

Since its foundation in 1863, the ICRC has grown and developed to an extraordinary extent.

Its *legal status* remains very particular: although under Swiss law it is an ordinary society composed entirely of Swiss citizens, it has nonetheless been given certain tasks and therefore been granted certain powers by the international community. To this extent, the ICRC has become a subject of public international law.

Its mono-national governing body coupled with its international activities give it a very special status, quite different from that of an international organization or the usual type of non-governmental organization.

In one sentence one can say that the ICRC is *national* by its structure and composition and *international* by its activities and staff.

The *legal bases of its work* are equally complex.

First there are its *treaty-based or "conventional"* activities, that is, those expressly entrusted to it by the Geneva Conventions and their Additional Protocols.

Then there are the Statutes of the International Red Cross and Red Crescent Movement. These Statutes have been adopted by International Conferences of the Red Cross and Red Crescent, composed of representatives of all National Societies of the Red Cross and the Red Crescent, their International Federation, as well as representatives of all States party to the Geneva Conventions. They also provide some legal bases for the ICRC's so called "*extra-conventional activities*."

The distinction between the legal bases of ICRC action provided by the Conventions and those deriving from the Movement's Statutes is important in legal terms. In practical terms, however, it is not essential because the ICRC generally offers its services without specifying the legal basis for its offer, in order to avoid having to make a judgement as to the type of conflict involved (*i.e.*, international armed conflict, non-international armed conflict, or internal tensions).

371 See *supra*, Chapter 3. Historical Development of International Humanitarian Law, Introductory Text. p. 121.

II. Tasks of the ICRC under the Geneva Conventions and their Additional Protocols

In situations of *international armed conflicts*, the Conventions and Protocol I assign to the ICRC both a general task and specific activities.

a) General task

To serve as a neutral intermediary between parties to conflicts, in order to bring protection and assistance to the victims of war.

b) Specific tasks

To visit and interview without witness prisoners of war and protected civilians, in particular when they are interned or detained;^[372]

To provide relief to protected civilians, prisoners of war and to the population of occupied territories;^[373]

To search for missing persons and trace for prisoners of war and civilians and forward their family messages;^[374]

To offer its good offices to facilitate the creation of hospital and safety zones;^[375]

To function as a substitute for Protecting Powers or as a quasi-substitute;^[376]

In the event of *non-international armed conflicts*, Article 3 common to the four Geneva Conventions of 1949 provides that the ICRC may "offer its services to the Parties to the conflict."

III. Extra Conventional Tasks of the ICRC

The Statutes of the International Red Cross and Red Crescent Movement assign the ICRC the role of *guardian of the Conventions*; moreover, and this is an essential provision, Article 5.3 provides that: "*the ICRC may take any humanitarian initiative which comes within its role as a specifically neutral and independent institution and intermediate, and may consider any question requiring examination by such an institution.*"

Most of the ICRC's activities today are carried out on the basis of this very comprehensive right of initiative.

372 Cf. Art. 126 of Convention III and Art. 143 of Convention IV.

373 Cf. Arts. 73 and 125 of Convention III, Arts. 59, 61 and 142 of Convention IV.

374 Cf. Art. 123 of Convention III, Art. 140 of Convention IV and Art. 33 of Protocol I.

375 Cf. Art. 23 of Convention I and Art. 14 of Convention IV.

376 Cf. Arts. 9/9/9/10 respectively of the four Conventions.

IV. The Different Types of Activities of the ICRC

1. Protection in war and situations of internal violence

In its activities to protect people in situations of armed conflict or violence, the ICRC's mission is to obtain full respect for the letter and spirit of IHL in armed conflicts and for analogous basic rules of humane treatment even in situations where IHL does not apply. It seeks to:

- minimize the dangers to which people are exposed;
- prevent and put a stop to the abuses to which they are subjected;
- draw attention to their rights and make their voices heard;
- bring them assistance.

The ICRC does this by remaining close to the victims of conflict and violence and by maintaining a confidential dialogue with both State and non-State authorities.

The first formal step taken by the ICRC when a conflict breaks out is to remind the authorities of their responsibilities and obligations towards the civilian population, prisoners and wounded and sick combatants, giving priority to respect for their physical integrity and dignity. After carrying out independent surveys, the ICRC puts forward recommendations to the authorities for tangible measures - preventive and corrective - to improve their situation.

At the same time, the ICRC takes action of its own accord to respond to the most urgent needs, notably through:

- delivery of relief assistance;
- evacuation and/or transfer of endangered persons;
- restoring and preserving family links and tracing missing persons.

It also undertakes programmes with a longer-term, structural perspective, involving technical and material cooperation with prison authorities.

a) Protection of civilians

Civilians often endure horrific ordeals in today's conflicts, sometimes as direct targets. Massacres, hostage-taking, sexual violence, harassment, expulsion, forced transfer and looting, and the deliberate denial of access to water, food and health care, are some of the practices which spread terror and suffering among civilians.

Security conditions permitting, the ICRC maintains a constant presence in areas where civilians are particularly at risk. Its delegates keep up a regular dialogue with all arms carriers, whether they are members of the armed forces, rebel groups, police forces, paramilitary forces or other groups taking part in the fighting.

b) Displaced by conflict

Armed conflict often results in large-scale displacements of civilians, both across international borders and within the frontiers of affected countries. In most cases, these people have had to leave behind all but a few of their worldly possessions. They are obliged to travel long distances, often on foot, to seek safe refuge away from the fighting. Families are dispersed, children lose contact with their parents in the chaos of flight, elderly relatives too weak to undertake such an arduous journey are left behind to fend for themselves. Refugees and internally displaced people lose their livelihoods and means of generating their own income. They are therefore dependent, at least in the first instance, on the goodwill of their hosts and on humanitarian agencies for their survival.

When people are displaced within their country's borders as a result of an armed conflict, they form part of the affected civilian population. As such, they are protected by humanitarian law and benefit from ICRC protection and assistance programmes.

Indeed, given the extremely precarious situation in which many internally displaced people find themselves, they form a large percentage of the beneficiaries of ICRC activities. Where the national authorities are unable to do so, the ICRC steps in to provide for the most urgent needs of displaced people. In doing so, however, it keeps in mind that the resources of host communities may have been stretched to the limit to accommodate the new arrivals, thereby rendering them vulnerable too, and that those who are left behind may also face extreme hardship and danger. It is with reference to this, the bigger picture, that the ICRC determines the beneficiaries of its assistance programmes. Vulnerability, rather than belonging to a particular category, is the deciding factor.

People who have fled across international borders are considered refugees and benefit from protection and assistance from the Office of the United Nations High Commissioner for Refugees (UNHCR). In such cases, the ICRC acts only at a subsidiary level, particularly where refugees are protected by IHL or when its presence is required as a specifically neutral and independent intermediary (during attacks on refugee camps, for example). It also provides Red Cross message services to enable refugees to re-establish contact with family members from whom they have become separated as a result of a conflict.

c) Protection of detainees

In international armed conflicts, the Geneva Conventions recognize the right of ICRC delegates to visit prisoners of war and protected civilians deprived of their liberty, including civilian internees. Preventing them from carrying out their mission would amount to a violation of IHL. In non-international armed conflicts and situations of internal violence, Article 3 common to the Conventions and the Statutes of the Movement, respectively, authorize the

ICRC to offer its services to visit detainees, and many governments accept its proposal to do so.

The ICRC works to:

- prevent or put an end to disappearances and summary executions, torture and ill-treatment;
- restore family links where they have been disrupted;
- improve conditions of detention when necessary and in accordance with the applicable law.

It does so by carrying out visits to places of detention. On the basis of its findings, it makes confidential approaches to the authorities and, if necessary, provides material or medical assistance to the detainees.

During visits, ICRC delegates conduct private interviews with each detainee. They note down the detainees' details, so that their cases can be followed right up to the time of their release; the detainees describe any humanitarian problems they may face.

While refraining from taking a position as to the reasons for their arrest or capture, the ICRC tries to ensure that detainees benefit from the judicial guarantees to which they are entitled under IHL.

Before beginning visits to places of detention, the ICRC first submits to the authorities a set of standard conditions. Delegates must be allowed to:

- see all detainees falling within the ICRC's mandate and have access to all places where they are held;
- interview detainees of their choice without witnesses;
- draw up, during the visits, lists of detainees within the ICRC's mandate or receive from the authorities such lists which the delegates may verify and, if necessary, complete;
- repeat visits to detainees of their choice as frequently as they may feel necessary;
- restore family links;
- provide urgent material and medical assistance as required.

d) Restoring family links

The ICRC's Central Tracing Agency works to re-establish family links in all situations of armed conflict or internal violence. Each year, hundreds of thousands of new cases of people being sought by their relatives are opened, whether they concern displaced people, refugees, detainees or missing persons. Those who are located are given the opportunity to send and receive Red Cross messages and/or are put in contact with their families thanks to the worldwide network supported by the ICRC and comprising the more than 180 National Red Cross and Red Crescent Societies.

In international armed conflicts, the ICRC's Central Tracing Agency fulfils the task assigned to it under IHL of gathering, processing and passing on information on protected persons, notably prisoners of war and civilian internees. For detainees and their families, receiving news of their loved ones

is always of huge importance. In a wide range of contexts, the ICRC has given prisoners of war, protected civilians, security detainees and sometimes even common-law detainees the opportunity to communicate with their relatives.

Preservation of the family unit is a universal right guaranteed by law. The ICRC does everything possible to reunite people separated by conflict, by establishing their whereabouts and reuniting them with their families. Special attention is given to particularly vulnerable groups, such as unaccompanied children or elderly people. Sometimes, a travel document provided by the ICRC is the only means for a destitute person without identity papers to join his or her family settled in a third country or to return to his or her country of origin.

The growing number of refugees and asylum seekers has meant that the ICRC is called upon more and more often to issue travel documents for people who have received authorization to settle in a host country.

e) Missing persons

Even after the guns have fallen silent, war continues to haunt the families of missing persons. Are they still alive? Are they injured or imprisoned? Families have the right to know. IHL obliges all parties to a conflict to provide answers to these questions. The ICRC assists in this process, by collecting information on missing persons or by putting mechanisms in place together with the authorities with the aim of clarifying the fate of missing persons and informing their families.

2. Assistance for conflict victims

Modern-day humanitarian emergencies are characterized by outbreaks of extreme violence frequently directed against civilians. These often coincide with or are the indirect cause of other crises such as famines, epidemics and economic upheaval. The combined effects may put the civilian population in extreme peril, their coping mechanisms stretched to the limit, and in dire need of assistance. The primary aim of ICRC assistance is, therefore, to protect victims' lives and health, to ease their plight and to ensure that the consequences of conflict - disease, injury, hunger or exposure to the elements - do not jeopardize their future. While emergency assistance saves lives and mitigates the worst effects of conflict, the ICRC tries always to keep sight of the ultimate aim of restoring people's ability to provide for themselves. Assistance may take a variety of forms, depending on the region and the nature of the crisis. It may include the provision of food and/or medicine, but usually builds on the capacity to deliver essential services, such as the construction or repair of water supply systems or medical facilities and the training of primary health care staff, surgeons and orthopaedic technicians. In certain conflicts, unlawful tactics may be used by either side, such as blockades on food and other essential goods, obstruction of water supplies and deliberate destruction of crops and infrastructure. In such cases, before providing assistance, the ICRC attempts to prevent or bring an end to the violations by drawing the parties' attention to their responsibilities under IHL.

Before beginning any assistance programme, the ICRC makes a careful assessment of what each group needs in the context of its own environment, so that the aid is appropriate. In addition, the ICRC makes sure that supplies are distributed in compliance with the principles of humanity, impartiality and neutrality.

a) Economic security

Economic security means that a household is self-sufficient and can meet its own basic economic needs. In a conflict or crisis, in which displacement, theft, looting and the destruction of property and infrastructure are commonplace, households may no longer be able to provide for themselves, thereby becoming dependent on outside aid.

In its approach to assistance in the context of an armed conflict, the ICRC focuses on the dynamics of household economics and is concerned with both the means of production to cover all the basic economic needs of a household and the provision of resources to meet those needs. Although some needs are more important than others - food and water, for instance, are vital - there is too often a tendency to forget, in crisis situations, that human beings need more than just food to live on. The ICRC therefore takes into account all of a household's basic economic needs, such as housing, clothing, cooking utensils and fuel.

In the past, emergency aid and development programmes were regarded as distinct and separate spheres, requiring a different kind of response. There is now increasing acceptance of the interrelation between the two, leading to a broader approach to humanitarian assistance. Thus, when economic rehabilitation activities are undertaken, a link is created with development programmes allowing for a smooth transition from the emergency to the development phases. Development agencies must then take up the baton, investing resources and manpower so as to reduce the structural vulnerabilities that can encourage the outbreak of crises.

b) Water and habitat

The ICRC's water and habitat programmes aim to:

- ensure that victims of armed conflict have water for drinking and domestic use;
- protect the population from environmental hazards caused by the collapse of water and habitat systems.

Habitat is a term which designates not merely the boundaries of the home, but its relationship with the wider environment and the people who live in it.

c) Health services

The aim of ICRC health programmes is to ensure that the victims of conflict have access to essential preventive and curative health care of a universally accepted standard. As a direct effect of conflict, people can be killed, injured

or displaced, medical structures destroyed and supply lines disrupted. At the height of a conflict, the number of people who are wounded, fall prey to infectious disease or are affected by malnutrition can reach epidemic proportions and quickly outstrip the capacities of existing local health services. Meanwhile, as an indirect consequence of conflict, the destruction of health facilities, shortages of qualified staff and lack of medical supplies can mean that the more common health problems go unattended and basic health services such as antenatal care, vaccination programmes and elective surgery fall by the wayside. Therefore, while rapid assistance is needed to attend to the most urgent needs, support for the existing health system is essential to ensure that normal health services are restored or maintained.

aa) War surgery

The ICRC's long experience in treating war casualties has given it considerable expertise in this field. ICRC surgeons train expatriate medical staff who have volunteered to work for the organization and are new to the specific skills and techniques required in the field. They also teach local doctors these skills to enable them to take over and continue to treat the wounded once the ICRC teams have left.

bb) Health in prisons

ICRC medical staff always accompany delegates on their visits to places of detention in order to assess the inmates' health and detect any consequences of ill-treatment, whether physical or psychological. The doctors and nurses who conduct these visits are well versed in the specific problems of prison health, such as hygiene, epidemiology, nutritional needs and vitamin deficiencies. They identify priority public health problems in prisons that need to be controlled. When the risk of a health problem in prison is so great that the response capacity of the penitentiary health service is overwhelmed, the ICRC implements vector control programmes to address such problems as tuberculosis, HIV/AIDS and vitamin deficiencies. Addressing health problems of prison inmates also requires the training and knowledge necessary to make proper medical assessments as to whether detainees have been the victims of torture or other forms of cruel, inhuman and degrading treatment.

cc) Orthopaedic programmes

Injuries inflicted by anti-personnel mines or other explosive weapons can lead to amputation, severe disability and psychological trauma. Such war casualties require specialist surgery and post-operative care in the first instance and rehabilitation and psychological support in the longer term. Not all countries have the means to provide the specialized care and social benefits required by the wardisabled. The ICRC has set up some 30 prosthetic/orthotic workshops around the world which produce artificial limbs, crutches and wheelchairs to help amputees regain some measure of mobility and, in many cases, economic independence as well. Care is taken

to use appropriate materials and to train local staff to produce spare parts and new appliances. When peace returns, fully equipped and staffed workshops can be handed over to local health authorities.

3. Preventive action

(See also Chapter 13. II. Measures to be taken in peacetime, p. 274 and 13. V. The obligation to ensure respect (common Article 1), p. 283.)

a) Development and interpretation of IHL

The evolution of the nature of armed conflicts demands the study and development of International Humanitarian Law (IHL). Since its foundation, the ICRC has constantly tried to improve the protection of war victims through the adoption of new rules of IHL. To this end, ICRC's legal experts constantly work on the identification of areas where developments are needed and possible.

Through its Advisory Services on IHL, the ICRC strives to convince the States Parties to adopt national measures of implementation that will facilitate - if not guarantee - the respect of the rules regulating, for example, the use of the emblem or the obligation to repress grave breaches or war crimes.

The ICRC also contributes to the interpretation of the rules of IHL. The *Commentaries* to the treaties of IHL or the recently published study on Customary IHL (see **Case No. 29**, p. 730) are only examples of such contributions.

b) Limiting means and methods of warfare

The ICRC is also very much involved in the debate on the compatibility of certain weapons (existing or not yet introduced on the battlefield) with existing principles of IHL.

Two specific aspects must be examined from the humanitarian perspective: Are the weapons discriminate enough? and Do they cause superfluous injuries or unnecessary suffering? Both questions have played a central role in the campaign on the total ban of antipersonnel landmines, which culminated with the adoption of the "Ottawa Treaty" (see **Document No. 10**, p. 560).

c) Dissemination

The Geneva Conventions require States to disseminate knowledge of the rules of IHL in peacetime for two obvious reasons: legal provisions are ineffective unless known to those for whom they are intended; and the field of application of these rules - armed conflict - makes it inconceivable that they should be taught at the last minute.

Dissemination of the rules of IHL is primarily the responsibility of the States party to the Geneva Conventions, but the ICRC often has to take over this task. It has therefore developed a global approach to dissemination, focusing on the main target groups i.e. armed and security forces, other weapon bearers, political leaders and opinion makers. In order to train the future

decision makers, numerous dissemination programs target the youth, students and their teachers. The ICRC has also developed teaching methods tailored to different cultures and situations: traditional seminars, audio-visual presentations, CD-ROM, theatre, and comics books illustrating the principal rules of IHL distributed on a large scale, to name but a few examples.

Case No. 39, UN, ICRC Granted Observer Status. [Cf. B.] p. 820

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I. THE INSTITUTION

1. The ICRC within the International Red Cross and Red Crescent Movement

(See the Red Cross and Red Crescent Movement website: <http://www.redcross.int>)

Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. p. 648

Document No. 30, The Seville Agreement. p. 750

SUGGESTED READING: HAUG Hans, *Humanity for all: The International Red Cross and Red Crescent Movement*, Geneva/Bern/Stuttgart/Vienna, Henry-Dunant Institute/Paul Haupt Publishers, 1993, 682 pp.

FURTHER READING: PERRUCHOUD Richard, "Resolutions of International Red Cross Conferences and their Implementation by the National Societies", in *IRRC*, No. 227, 1982, pp. 88-96.

a) National Red Cross and Red Crescent Societies

(The list of the National Societies' websites is available on <http://www.ifrc.org>)

Introductory Text

Originally created for service in time of armed conflicts, as auxiliaries to the military medical services, National Red Cross and Red Crescent Societies today carry out a wide range of activities in both war and peace situations.^[377]

The sum of 182 National Societies' activities are as diversified as the countries they serve. Their wartime role as support to armed forces medical units remains essential but now represents just one of many aspects of their work.

Other National Societies' activities include setting up and managing hospitals; training medical personnel; organising blood donor clinics; assisting the handicapped, the elderly and the needy; providing ambulance services as well as road, sea and mountain rescue services. Additionally, many National Societies are also responsible for emergency relief in case of man-made or natural disasters (technological catastrophes, floods, earthquakes, tidal waves etc.).

More recently, many national Societies have also considerably increased their involvement in new areas: relief to refugees and displaced persons; assistance to victims of epidemics (HIV/AIDS); and dissemination and implementation of International Humanitarian Law.

National Societies must fulfil strict conditions in order to achieve recognition by the ICRC and thus become member of the International Red Cross and Red Crescent Movement.^[378] In particular, they must be recognized by their own Government as voluntary aid societies, be constituted on the territory of a State party to the Geneva Conventions, use one of the recognised emblems and respect the Fundamental Principles of the Red Cross and Red Crescent Movement.

Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Art. 4.] p. 648

SUGGESTED READING: LANORD Christophe, "The Legal Status of National Red Cross and Red Crescent Societies", in *IRRC*, No. 840, December 2000, pp. 1053-1077. LANORD

³⁷⁷ See Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Art. 3.] p. 648.

³⁷⁸ See *ibid* Art. 4: Conditions for recognition of National Societies.

Christophe, *Le statut juridique des sociétés nationales de la Croix-Rouge et du Croissant-Rouge*, Geneva, Thoiras, Éditions de la Chapelle, 1999, 545 pp.

b) the International Federation of Red Cross and Red Crescent Societies

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- humanity
- impartiality
- neutrality
- independence
- voluntary service
- unity
- universality

Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Preamble.] p. 648
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2. Legal status of the ICRC

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3. Independence

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4. Traditionally mono-national governing body and international action

5. Humanity

Case No. 130, ICJ, Nicaragua v. US. [*Cf.* para. 242.] p. 1365

6. Neutrality and impartiality

Quotation On the general level, the idea of neutrality pre-supposes two elements: an attitude of abstention and the existence of persons or groups who oppose one another. Although neutrality defines the attitude of the Red Cross towards belligerents and ideologies, it never determines its behaviour towards the human beings who suffer because, in the first place, the wounded do not fight one another. And, above all, the essential characteristic of the Red Cross is to act and not to remain passive.

Neutrality and impartiality have often been confused with one another because both imply the existence of groups or theories in opposition and because both call for a certain degree of reserve. The two ideas are nevertheless very different, for the neutral man refuses to make a judgment whereas the one who is impartial judges a situation in accordance with pre-established rules.

Neutrality demands real self-control; it is indeed a form of discipline we impose upon ourselves, a brake applied to the impulsive urges of our feelings. A man who follows this arduous path will discover that it is rare in a controversy to find that one party is completely right and the other completely wrong. He will sense the futility of the reasons commonly invokes to launch one nation into war against another. In this respect, it is reasonable to say that neutrality constitutes a first step towards peace.

While neutrality, like impartiality, is often misunderstood and rejected, this happens because there are so many who want to be both judge and party, without recourse to any universally valid criterion. Each side believes, rather naively, that his cause is the only just one; that refusal to join it is an offence against truth and justice.

[Source: Pictet, J.S., *Red Cross Principles*, Geneva, International Committee of the Red Cross, 1979, pp. 52-53.]

Document No. 26, ICRC, Protection of War Victims. [*Cf.* 3. 3.] p. 702

Case No. 33, ICRC's Approach to Contemporary Security Challenges. p. 777

Case No. 67, UK, Labour Party Campaign-Misuse of the Emblem. p. 991

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 145, UN/ICRC, The Use of Chemical Weapons. p. 1562

Case No. 172, Case Study, The Conflicts in the Former Yugoslavia. [*Cf.* 14., 21. and 22.] p. 1732

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1. In armed conflicts

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. p. 1761

Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. [Cf. A.] p. 1900

a) visits to detained persons - interviews without witnesses

Document No. 19, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal. p. 645

Case No. 113, Israel, Cheikh Obeid *et al.* v. Ministry of Security. p. 1237

Case No. 133, Inter-American Commission on Human Rights, Coard v. US. [Cf. 30-32.] p. 1387

Case No. 135, Ethiopia/Somalia, Prisoners of War of the Ogaden Conflict. p. 1420

Case No. 136, Eritrea/Ethiopia, Partial Award on POWs. [A., paras. 28, 29, 45, 55-62, 81 and 84; B., paras. 100, 150-163.] p. 1423

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. p. 1555

Case No. 157, US, The Schlesinger Report. p. 1623

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 12. and 21.] p. 1732

Document No. 209, ICRC, Visits to Detainees: Interviews Without Witnesses. [Cf. B.] p. 2288

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. A. and B.] p. 2309

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b) protection of the civilian population

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c) supply of relief

Document No. 30, The Seville Agreement. [Cf. Art. 6. 1.] p. 750

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d) medical assistance

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Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

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e) tracing service

Document No. 21, ICRC, Tracing Service. p. 660

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 127, ECHR, Cyprus v. Turkey. [*Cf.* Opinion of Judge Fuad.] p. 1341

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 22.] p. 1732

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f) the relevance of ICRC practice for the development of customary International Humanitarian Law

Quotation "[...] a number of Governments have suggested that the phrase "the international community as a whole" [...] should read "the international community of States as a whole". [...] The Special Rapporteur does not agree that any change is necessary in what has become a well-accepted phrase. States remain central to the process of international lawmaking and law-applying, and it is axiomatic that every State is as such a member of the international community. But the international community includes entities in addition to States: for example, the European Union, the International Committee of the Red Cross, the United Nations itself."

[Source: A/CN.4/517, United Nations General Assembly, 2 April 2001, International Law Commission, 53rd session, Geneva, 23 April-1 June and 2 July-10 August 2001, Fourth Report on State Responsibility, presented by M. James Crawford, Special Rapporteur, p. 15, available on <http://www.un.org/law/ilc/sessions/53/53docs.htm>]

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- visits (with interviews without witnesses) of detainees who are held in connection with the situation

Document No. 21, ICRC, Tracing Service. [Cf. 4.] p. 660

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 1.] p. 1732

Document No. 209, ICRC, Visits to Detainees: Interviews without Witnesses. [Cf. B.] p. 2288

3. World-wide

a) Advisory Services on International Humanitarian Law

Document No. 23, ICRC, Advisory Services on International Humanitarian Law. p. 670

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b) dissemination

Document No. 26, ICRC, Protection of War Victims. [Cf. 2. 3.] p. 702

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c) humanitarian diplomacy

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 2.] p. 702

Case No. 33, ICRC's Approach to Contemporary Security Challenges. p. 777

Case No. 118, UN, Resolutions and Conference on the Respect of the Fourth Convention. p. 1303

4. The role of the ICRC in the *continuum* between pre-conflict and post-conflict situations

Document No. 30, The Seville Agreement. [Cf. Preamble, para. 3, Arts. 5.3.1. and 5.5.] p. 750

Case No. 234, The Conflict in Western Sahara. [Cf. C.] p. 2454

- ICRC's residual responsibility towards persons it has assisted during a conflict

5. Co-operation between the ICRC and National Societies

Document No. 30, The Seville Agreement. [Cf. Arts. 5-9.] p. 750

6. Co-operation with other humanitarian organizations

Document No. 26, ICRC, Protection of War Victims. [Cf. 3. 2.] p. 702

Case No. 33, ICRC's Approach to Contemporary Security Challenges. p. 777

SUGGESTED READING: MUNTARBHORN Vitit, "Protection and Assistance for Refugees in Armed Conflicts and Internal Disturbances: Reflections on the Mandates of the International Red Cross and Red Crescent Movement and the Office of the United Nations High Commissioner for Refugees", in *IRRC*, No. 265, July-August 1988, pp. 351-366.

7. Co-operation with political organizations

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Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Art. 5.] p. 648

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 31.] p. 1732

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1. In international armed conflicts

a) right to visit protected persons (prisoners of war and protected civilians)

Art. 126 (5) of Convention III; Art. 143 (5) of Convention IV

Case No. 113, Israel, Cheikh Obeid *et al.* v. Ministry of Security. p. 1237

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* A. and B.] p. 2309

b) right of initiative

Arts. 9/9/9/10 common to the Conventions; Art. 81 (1) of Protocol I

Case No. 174, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771

c) the Central Tracing Agency

Art. 16 (2) of Convention I; Art. 123 of Convention III; Art. 140 of Convention IV; Art. 33 (3) of Protocol I

Document No. 21, ICRC, Tracing Service. p. 660

Case No. 144, Iran/Iraq, 70,000 Prisoners of War Repatriated. p. 1555

Case No. 175, Bosnia and Herzegovina, Release of Prisoners of War and Tracing Missing Persons After the End of Hostilities. p. 1778

d) "substitute of the Protecting Power"

Arts. 10 (3)/10 (3)/10 (3)/11 (3) common to the Conventions; Art. 5 (4) of Protocol I

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2. In non-international armed conflicts: the right of initiative provided for in Article 3 common to the Conventions

(See also *supra*, Chapter 13. XI. 4. The right of initiative of the ICRC. p. 333.)

Case No. 138, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf.* A., para. 550.] p. 1467

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 211, Afghanistan, Soviet Prisoners Transferred to Switzerland. p. 2294

Case No. 229, Russian Federation, Chechnya, Operation Samashki. [*Cf.* 10.] p. 2416

a) meaning

b) addressees

3. In other situations where a neutral humanitarian intermediary is needed: the right of initiative provided for in the Statutes of the Movement

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Document No. 20, Statutes of the International Red Cross and Red Crescent Movement. [*Cf.* Art. 5 (3).] p. 648

Document No. 164, ICRC, Request to Visit Gravesites in the Falklands/Malvinas. p. 1681

IV. IMPORTANCE OF INTERNATIONAL HUMANITARIAN LAW IN ICRC OPERATIONS

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Comité international de la Croix-Rouge en temps de guerre, Zürich, Orell Füssli, 1943, 34 pp.
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1. The ICRC and the legal qualification of the situation

a) competence of the ICRC to qualify armed conflicts

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 2. and 9.] p. 1732
 Case No. 107, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* A., para. 97.] p. 1151

b) practical importance to qualify a conflict

c) difficulties for the ICRC to qualify a conflict

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf.* 2. and 9.] p. 1732

aa) objective difficulties

- establishment of the facts
- the ever-developing law

bb) political difficulties

- the ICRC seen as warmonger
- the ICRC taking position on facts relevant for *ius ad bellum* (the origin of the conflict)

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts. [*Cf.* A.] p. 1761

- divergence from the appreciation of the international community

cc) difficulties for its operational access

- dd) advantages and shortcomings of a pragmatic approach

2. Reference to International Humanitarian Law in different functions of the ICRC as the guardian of International Humanitarian Law

Case No. 25, The Environment and International Humanitarian Law. [*Cf.* D.] p. 680
 Document No. 106, ICRC's Appeals on the Near East. p. 1145

SUGGESTED READING: SANDOZ Yves, "L'appel du Comité international de la Croix-Rouge dans le cadre du conflit entre l'Irak et l'Iran", in *AFDI*, Vol. 29, 1983, pp. 161-173. SANDOZ Yves, "Réflexions sur la mise en œuvre du droit international humanitaire et sur le rôle du Comité international de la Croix-Rouge en ex-Yougoslavie", in *Revue Suisse de Droit International et de Droit Européen*, No. 4, 1993, pp. 461-490. SANDOZ Yves, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, Geneva, ICRC, 1998, 32 pp. SASSÒLI Marco, "La contribution du Comité international de la Croix-Rouge à la formation et à l'application des normes internationales", in BETTATI Mario & DUPUY Pierre-Marie (ed.), *Les O.N.G. et le droit international*, Paris, Éditions Economica, 1986, pp. 93-102. "Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or Other Fundamental Rules Protecting Persons in Situations of Violence", in *IRRC*, No. 858, July 2005, pp. 393-400.

FURTHER READING: GASSER Hans-Peter, "Persuading States to Accept Humanitarian Treaties", in *IRRC*, No. 320, September-October 1997, pp. 529-538. GASSER Hans-Peter, "Universal Acceptance of International Humanitarian Law - Promotional Activities of the ICRC", in *IRRC*, No. 809, September-October 1994, pp. 491-505. "Conflict between Iraq and Iran: ICRC Appeal", in *IRRC*, No. 235, July 1983, pp. 220-222. "Conflict between Iran and Iraq: Second Appeal", in *IRRC*, No. 239, March 1984, pp. 113-115.

a) defending International Humanitarian Law

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf.* B.] p. 2309

b) developing International Humanitarian Law

Document No. 10, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. [*Cf.* Preamble para. 8.] p. 560

c) animating reflection on International Humanitarian Law

d) promoting accession to International Humanitarian Law

e) disseminating International Humanitarian Law

f) implementing International Humanitarian Law

- monitoring respect by others
- implementing International Humanitarian Law through its own activities

g) mobilizing against violations of International Humanitarian Law

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

3. Reference to International Humanitarian Law in ICRC operations

a) dissemination

b) preventive appeal for the respect of International Humanitarian Law

Document No. 106, ICRC's Appeals on the Near East. p. 1145

- c) **argument for ICRC access to conflict victims**
- d) **argument in negotiations on the behaviour of belligerents**
- e) **request for inquiry into and repression of individual violations**

Case No. 215, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners. p. 2308

- f) **condemnation of violations**
 - bilateral
 - public
- g) **reference in negotiations with third States and the international community**
 - requests for support to the ICRC
 - appeals under Article 1 common to the Conventions

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 142, ICRC, Iran/Iraq, Memoranda. p. 1529

4. Importance of International Humanitarian Law when no explicit reference is made to it

- a) **reference to the contents of a rule without reference to its source**

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

- b) **presentation of facts and questions**
- c) **International Humanitarian Law as political pressure in the background**

V. ICRC'S APPROACH

SUGGESTED READING: BONARD Paul, *Modes of Action Used by Humanitarian Players: Criteria for Operational Complementarity*, Geneva, ICRC, September 1998, 65 pp. HUBER Max, *La pensée et l'action de la Croix-Rouge*, Geneva, ICRC, 1954, 376 pp. MAURICE Frédéric, "Humanitarian Ambition", in *IRRC*, No. 289, July-August 1992, pp. 363-372. TAUXE Jean-Daniel, "Faire mieux accepter le Comité international de la Croix-Rouge sur le terrain", in *IRRC*, No. 833, March 1999, pp. 55-61.

1. Confidentiality, not publicity

(See also *infra* quotation 3 under 3. Access to victims, not investigation of violations. p. 384.)

Quotation Action taken by the ICRC in the event of violations of International Humanitarian Law or of other fundamental rules protecting persons in situations of violence

[...]

Action taken by the ICRC on its own initiative

1 General rule

The ICRC takes all appropriate steps to put an end to violations of international humanitarian law or of other fundamental rules protecting the persons in situations of violence, or to prevent the occurrence of such violations. These steps are taken at various levels and through various modes of action, according to the nature and the extent of the violations.

[...]

2 Principle [sic] mode of action: bilateral and confidential representations

Bilateral confidential representations to the parties to a conflict remain the ICRC's preferred mode of action.

This guideline refers to the ICRC's principle [sic] mode of action - in all circumstances, the ICRC will turn first to bilateral and confidential dialogue with all parties to an armed conflict or with all those directly involved in any other situation of violence. The ICRC thus confidentially approaches the representatives of the party (or parties) concerned, at the level directly responsible for the violation or, depending on the case or the type of violation, at various levels of the authority.

As confidentiality is a key factor in obtaining the best possible access to the victims of armed conflicts and other situations of violence, whether current or future, the aim of confidential representations is to convince the parties responsible for unlawful conduct to change their behaviour and uphold their obligations. The primary effect of such representations is often to reinforce awareness of the problems pointed out by the ICRC, to urge the parties to shoulder their responsibilities and to prompt the authorities to take account of the problems and to react accordingly. Years of experience have shown that confidentiality enables candid talks to take place with the authorities in an atmosphere of trust that is geared to finding solutions and avoids the risk of politicization associated with public debate.

Conversely, the ICRC seeks to ensure that the confidential nature of its representations, in particular its reports on visits to places of detention, will also be respected by the addressees of these representations. The ICRC thus stresses in each report that the contents are strictly confidential and are intended only for the authorities to whom the report is addressed. Neither the entire report nor any part of it may be divulged to a third party or to the public.

3 Subsidiary modes of action

The ICRC's confidentiality is not, however, unconditional. It is linked to a commitment made by the authorities to take account of the ICRC's

recommendations aimed at putting an end to and/or preventing any recurrence of the violations it notes. The purpose and the justification of the ICRC's confidentiality thus rest on the quality of the dialogue that the ICRC maintains with the authorities and on the humanitarian impact that its bilateral confidential representations can have.

In the event that its representations do not have the desired impact, the ICRC reserves the right to have recourse to other modes of action, in keeping with the guidelines set out below. Those other modes of action are subsidiary to its preferred method and will only be used if the ICRC is unable to improve the situation in humanitarian terms and bring about greater respect for the law through bilateral confidential representations. In such cases, the ICRC will strive to resume its preferred mode of action as often and as soon as possible.

3.1 Humanitarian mobilization

The ICRC may also share its concerns about violations of international humanitarian law with governments of third countries, with international or regional organizations, or with persons that are in a position to support its representations to influence the behaviour of parties to a conflict. However, the ICRC only takes such steps when it has every reason to believe that the third parties approached will respect the confidential nature of its representations to them.

No matter how much effort the ICRC puts into its bilateral confidential representations, they do not always lead to greater respect for the law or an improvement in the situation of the affected persons. In such cases, the ICRC may decide to approach a third party discreetly, in the interest of the persons affected by the violation.

The ICRC chooses such third parties carefully, bearing in mind their ability to exercise a positive humanitarian influence, particularly when they are close to the authorities concerned or they are paid heed by them.

This humanitarian mobilization is directed primarily at States, which can play a key role in improving respect for the rules of international humanitarian law. That particular role is recognized by Article 1 common to the four Geneva Conventions and by Article 1 of Additional Protocol I, through which States undertake to "respect and to ensure respect" for the Conventions and the Protocol in all circumstances.

States are thus obliged by law to refrain from encouraging a party to the conflict to commit a violation of international humanitarian law and from providing concrete assistance, enabling or facilitating such violation. Moreover, it is generally recognized that common Article 1 requires States that are not party to an armed conflict to strive to ensure respect for the law by taking every possible measure to put an end to violations of the law by a party to a conflict, in particular by using their influence on that party.

When the ICRC seeks the support of third States on the basis of common Article 1, it does not give an opinion on the measures that those States may take. Other than third States, whose mobilization rests on formal legal foundations, the ICRC may also mobilize international or regional organizations, non-State entities

or even individuals if it considers that they are in a position to improve the fate of the affected persons.

In order to ensure such mobilization, the ICRC may decide - if necessary and only to the extent strictly necessary - to share confidential information with those third parties.

3.2 Public declaration on the quality of the bilateral confidential dialogue

The ICRC may publicly express its concern about the quality of its bilateral confidential dialogue with a party to a conflict, or about the quality of the response given to its recommendations regarding a specific humanitarian problem.

Once again, this mode of action - a public one this time - is aimed at strengthening the impact of the ICRC's bilateral and confidential dialogue with a party to a conflict when that dialogue is not having the desired results on the issues raised in the ICRC's representations.

The ICRC resorts to issuing a public declaration when it hopes that this will prompt a party to a conflict to improve the substance of its dialogue with the ICRC and take account of its recommendations. It also does so in order to ensure that its silence is not wrongly interpreted as a sign that the situation is satisfactory in humanitarian terms or as tacit approval, which would be detrimental to the ICRC's credibility and its preferred mode of action, namely bilateral confidential representations.

This type of public declaration only concerns problems regarding working procedures and the quality of the bilateral dialogue. Although the problem may be mentioned in general terms, the ICRC will refrain from defining it from a legal point of view or describing in detail the difficulties or their humanitarian consequences. It will also refrain from giving details about the content of its recommendations, those being elements that remain confidential.

3.3 Public condemnation

The ICRC reserves the right to issue a public condemnation of specific violations of international humanitarian law providing the following conditions are met:

- (1) the violations are major and repeated or likely to be repeated;
- (2) delegates have witnessed the violations with their own eyes, or the existence and extent of those violations have been established on the basis of reliable and verifiable sources;
- (3) bilateral confidential representations and, when attempted, humanitarian mobilization efforts have failed to put an end to the violations;
- (4) such publicity is in the interest of the persons or populations affected or threatened.

Public condemnation means a public statement by the ICRC to the effect that acts which can be attributed to a party to a conflict - whether or not they are known to the public - constitute a violation of international humanitarian law.

The ICRC only takes recourse to this measure when it has exhausted every other reasonable means, including, where appropriate, through third parties, of influencing the party responsible for a violation, at the most relevant levels, and where these means have not produced the desired result or where it is clear that the violation is part of a deliberate policy adopted by the party concerned. It is also the case when the authorities concerned are inaccessible and when the ICRC is convinced that public pressure is the only means of improving the situation in humanitarian terms.

Such a measure is nevertheless exceptional and may be issued only if all of the four above-mentioned conditions have been met.

In considering "the interest of the persons or populations affected or threatened," the ICRC must take account not only of their short-term interests but also of their long-term interests and of the fact that its responsibility is greater when it witnesses particularly serious events of which the public is unaware.

[Source: "Action by the International Committee of the Red Cross in the Event of Violations of International Humanitarian Law or of other Fundamental Rules Protecting Persons in Situations of Violence", in *IRRC*, No. 858, June 2005, pp. 393-400, footnotes omitted; online: <http://www.icrc.org/eng/review>]

Case No. 96, ICRC Report on Yemen, 1967. p. 1106

Case No.136, Eritrea/Ethiopia, Partial Award on POWs. [*Cf. A.* paras. 45-48.] p. 1423

Case No. 183, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900

Case No. 215, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners. p. 2308

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf. B.* and *D.*] p. 2309

SUGGESTED READING: COSTAS TRASCASAS Milena, "El Comité internacional de la Cruz Roja y la regla de la confidencialidad como garantía funcional de su actuación: reflexiones al hilo de la decisión del Tribunal internacional para la antigua Yugoslavia de 27 julio de 1999", in *Revista Española de Derecho Militar*, Vol. 76, July-December 2000, pp. 31-68. JEANNET Stéphane, "Testimony of ICRC Delegates before the International Criminal Court", in *IRRC*, No. 840, December 2000, pp. 993-1000. JEANNET Stéphane, "Recognition of the ICRC's Long-Standing Rule of Confidentiality: An Important Decision by the International Criminal Tribunal for the former Yugoslavia", in *IRRC*, No. 838, June 2000, pp. 403-425. RONA Gabor, "The ICRC Privilege not to Testify: Confidentiality in Action", in *IRRC*, No. 845, March 2002, pp. 207-219. SANNA Silvia, "La testimonianza dei delegati del Comitato internazionale della Croce Rossa davanti ai tribunali penali internazionali", in *Rivista di diritto internazionale*, Vol. 84/2, 2001, pp. 394-419. "Action by the International Committee of the Red Cross in the Event of Breaches of International Humanitarian Law", in *IRRC*, No. 222, March 1981, 8 pp.

- reports on visits to the authorities
- cases in which the ICRC goes public

Case No. 122, ICRC/Lebanon, Sabra and Chatila. p. 1333

Case No. 123, ICRC/South Lebanon, Closure of Insar Camp. p. 1335

Case No. 124, Lebanon, Helicopters Attack on Ambulances. p. 1336

Case No. 142, ICRC, Iran/Iraq, Memoranda. [*Cf. A.*, Appeal.] p. 1529

Case No. 145, UN/ICRC, The Use of Chemical Weapons. [*Cf. B.*] p. 1562

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [*Cf. 21.*] p. 1732

Document No. 209, ICRC, Visits to Detainees: Interviews without Witnesses. [*Cf. A.*] p. 2288

2. Co-operation, not confrontation

Case No. 165, Sri Lanka, Jaffna Hospital Zone. p. 1682

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 21.] p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts.

[Cf. B., Art. 5.] p. 1761

3. Access to victims, not investigation of violations

Quotation 1 Here again, measures contrary to the laws of warfare must, like war itself, be considered by the International Committee primarily in the sense of *existing facts*, just as the doctor to whom the sick and wounded are brought turns his attention first to the injury or disease, without going into the human guilt which may be its cause. The Red Cross, above all a work of aid, must first strive to bring *relief* to these victims of war, as to all others.

[Source: *Report of the International Committee of the Red Cross on its Activities During the Second World War (September 1, 1939 - June 30, 1947)*, Geneva, vol. 1, 1948, pp. 22-23.]

Quotation 2 [...] [T]he International Red Cross Committee has no intention whatsoever of sitting in judgment. It is not a court of justice and, besides, it has not itself the means of ascertaining the facts, which alone would enable it to give a verdict. [...] It has a different part to play: it is a humanitarian institution.

[Source: Huber, M., *The Red Cross: Principles and Problems*, Geneva, ICRC, *Sine Data*, pp. 73 and 74.]

Quotation 3 [A]s a general rule, the ICRC abstains from making public pronouncements about specific acts committed in violation of law and humanity and attributed to belligerents. [...] [I]n the quest for a result which would most of the time be illusory, demonstrations of this sort would compromise the charitable activity which the ICRC is in a position to carry out. One cannot be at one and the same time the champion of justice and of charity. One must choose, and the ICRC has long since chosen to be a defender of charity.

[Source: Pictet, J.S., *Red Cross Principles*, Geneva, International Committee of the Red Cross, 1979, pp. 59 and 60.]

Case No. 172, Case Study, Armed Conflicts in the Former Yugoslavia. [Cf. 5. and 7.] p. 1732

Case No. 173, Former Yugoslavia, Special Agreements Between the Parties to the Conflicts.

[Cf. A., Arts. 11 and 12; B., Arts. 2.6 and 5.2.] p. 1761

Case No. 212, Afghanistan, Separate Hospital Treatment for Men and Women. p. 2297

Case No. 215, Afghanistan, ICRC Position on Alleged Ill-Treatment of Prisoners. p. 2308

Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. B.] p. 2309

SUGGESTED READING: SASSÒLI Marco, "The Victim-Oriented Approach of International Humanitarian Law and of the International Committee of the Red Cross (ICRC)", in BASSIOUNI M. Cherif, *International protection of victims*, 7 Nouvelles Études Pénales (1988), Toulouse, Erès, 1988, pp. 147-180.

PART II

POSSIBLE TEACHING OUTLINES

Chapter 1

SOME REMARKS ON TEACHING INTERNATIONAL HUMANITARIAN LAW

I. WHY TEACHING INTERNATIONAL HUMANITARIAN LAW?

At the outset, teachers themselves must be convinced to teach International Humanitarian Law (IHL)! However, students must also understand the reasons why they should study it. They will only make the necessary effort if they understand its utility and how it relates to their aspirations, ideals and experience.

a) To stimulate legal thinking

In the contemporary world, national laws are changing rapidly. Lawyers must remain flexible within a given legal system and aware of the different legal systems in order to identify the different solutions at their disposal. The purpose of studying law is not to memorize the ever-changing solutions of positive legislation that can be found in databases and books. The primary aim is to learn a specific method of reasoning, in order to learn, to choose and develop arguments appropriately and to adopt a certain culture. To teach, explain, and discuss the solutions of positive law is largely a methodological exercise whose aim is to familiarize the student with this specific culture. Just as future computer scientists, economists, philosophers, and journalists study Latin, classical Arabic, or Sanskrit, future business lawyers can study IHL. It is the reasoning mechanisms obtained through learning that they will use later, rather than the exact rules governing the conduct of hostilities, for example.

Not all fields of law offer similarly fruitful "playgrounds" for this purpose. IHL contains principles, such as the distinctions between *ius ad bellum* and *ius in bello* or civilians and combatants, which are ideal to train legal reasoning. It is only by taking these principles as a starting point that the detailed rules can be understood and applied. In addition, these principles will not appear as pure theory. They have to be taken into account in order to understand and discuss

solutions to humanitarian problems mentioned in the daily news. Admittedly, other regimes such as the treatment of prisoners of war under the detailed rules of Convention III allow less legal reasoning and arguments and are less conducive to understand the interplay of principles and rules. They simply constitute positive law regulating a very important humanitarian problem.

b) To promote "justice" in armed conflicts

Law is, however, not only a method of reasoning, a technique that can justify and refute any solution. It also has to do with justice. It governs human beings. The specificity of human beings is that they have a moral choice. Unlike Nature, human society sets forth the boundaries and the limits of what is perceived as good and bad. Law not only tries to prescribe the most efficient solutions, which have the best chances to be respected, and are the most adapted to reality. Law also tries to serve the interests of human beings and the progress of their society, to show direction. Furthermore, law tries to protect those who are weaker from those who are mightier, while it would be more efficient, realistic, and enforceable to serve the interests of those who hold power. The lawyer who does not understand this aspect of law will perhaps be a good craftsman, but he or she will not be a jurist and will not serve society.

How can this aspect of law be better understood than by studying IHL, the branch applicable to the most inhumane, lawless, anarchic, and archaic form of human activity, namely war? Where can the position of law in the fascinating interplay between the categories of *Sollen* (that which should be) and *Sein* (that which is) be better observed than by studying, as this book suggests, how does law protect in war?

Even those who understand IHL can choose to violate it. Therefore teaching IHL is always, even at universities, not only a question of training but also one of education. This aspect implies specific challenges for those teaching it as for those studying it.

c) Because it is at the vanishing point and at a cross-roads of international law

To study international law allows a more thorough understanding of the nature of domestic law. For instance, it enables one to overcome preconceived ideas based on a superficial observation of domestic law which seems to receive its character from compulsory adjudication by tribunals and enforcement by the police. When studying traditional international law one observes how law can work in a relatively unorganized society, where the subjects are the authors, the addressees and the main organs of application of its rules.

IHL, being at the vanishing point and at the crossroads of international law, allows one to understand this reality, where it undergoes its extreme test, namely in armed conflicts. As explained above, IHL shows typically the relativity of traditional rules of international law and the modern tendencies to go beyond this relativity. One of the syllabus provided below shows that nearly every aspect that could be treated in a general course of international law could be explained and discussed with examples of the rules, the phenomena, and the problems of IHL.

d) *Because all students need to know the basic tenets of International Humanitarian Law*

International law in general, and IHL in particular should, however, not only be taught because they allow the training of legal thinking and understanding of legal mechanisms. They also deserve to be studied because of their contents. IHL enables students to understand, as lawyers, a world - and particularly news reports about a world - which is marked by armed conflicts. Even those who have the chance to live in countries which are presently not affected by armed conflicts and who do not wish to deal with international affairs, will nevertheless be confronted - as citizens, lawyers, and human beings - with asylum-seekers from conflict areas. If they lack the basic reflexes of IHL, they will be like dentists who want to extract a tooth without basic knowledge of blood circulation, infection, and physiology.

e) *Because some students will need International Humanitarian Law for their future jobs*

Last, but not least, the obvious must be recalled. At the time of their basic university training, students do not yet know what will be their future career.

For a certain number of them IHL will be part of their professional training. For instance, future officers of the armed forces will have to learn how to conduct hostilities, treat civilians, and run a prisoner-of-war camp in conformity with IHL, if they want to do their job properly and save the State from serious international problems. One of the cases presented in this book shows the Defence Secretary of the most powerful country having to answer technical questions on IHL as he could not - or did not want to - refer them to his experts (See **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base [Cf. D. United States of America, Press Conference of Donald H. Rumsfeld] p. 2309)

For many students, IHL will be an essential tool to accomplish their mission and protect the efficiency and image of their armed forces in their own country and in regard to the international community. If they do not understand and respect it, they run the risk of facing criminal charges.^[1]

In addition, future diplomats will have to understand the mechanisms for the implementation of IHL and the consequences of the distinction between *ius ad bellum* and *ius in bello*, if they want to advise their government on how to vote in international fora, how to react to violations, how to fight terrorism, how to implement a development aid policy, or how to plead before the International Court of Justice. Staff of humanitarian organizations will need the best arguments under IHL when calling for respect for victims of armed conflicts, trying to have access to them, and implementing an impartial distribution of relief. Finally, attorneys, prosecutors, and judges need a thorough understanding of IHL when

¹ According to Article 32 (2) of the Statute of the International Criminal Court (See **Case No. 15**, The International Criminal Court, p. 608), let us recall that an error of law in regard to whether a given behaviour is a war crime is not cause for exoneration of criminal responsibility.

defending, accusing, or judging alleged war criminals or when confronted with a trademark case involving the use or abuse of the red cross or red crescent emblem.

It is obvious that not all of the categories of persons mentioned can have access at university to a course on all the rules of IHL, which they will need to know in their future career. It is, however, there that they will need to realize that IHL exists, attain the basic understandings, understand the place of IHL in international law and in their own legal system, and learn where to find solutions - in international instruments, in books, and on the Internet.

II. HOW TO TEACH INTERNATIONAL HUMANITARIAN LAW?

N.B.: Most of this advice may not be needed, as experienced teachers will use this Manual. Such teachers therefore know how to teach, they know their target audience and its mentality and last but not least, they know the strengths and weaknesses of their teaching style. Some of our advice may be rejected either because it is not adapted to the country, the culture, or the individuals they have to instruct or because it is not adapted to the personality of the teacher. Indeed, a teacher can only teach content in which he or she believes by methods he or she believes to be efficient. The personal commitment and conviction of the teacher is crucial for the success of education.

However, we do propose, for those who would like to use them, course outlines that can be adapted to the teacher's preferences and the needs of his audience. These "instructions" can be modified to fit the national circumstances, applicable legislation, and even the specific culture of the armed forces. The course outlines, far from being rigid instructions, must be adapted to circumstances in order to permit effective learning.

1. Some generalities on learning and teaching

a) How do we learn?

The aim of teaching is the promotion of learning. Individuals learn when they want to learn, when they know how to learn and when they are able to learn. Wanting to learn, or motivation, is perhaps the most important factor.

It cannot be the objective of a course on IHL to teach participants how to learn. However, it is conceivable that by applying and varying new methods, the students' methods of learning will be enriched.

Learning - and therefore teaching - would be a much easier task if it were clear what makes students understand a subject; then a teacher would know exactly which method to use. However, reality is quite different. In effect, learning strategies vary from one individual to another, and, in general, no one knows which learning strategy should be privileged. Teachers must therefore use more than one method to transmit knowledge. The process of learning is complex and

many elements must be considered. Apart from the physiological factors which we will not deal with here, the cognitive and affective dimensions of learning must be considered.

As for the cognitive dimension, as an average, human beings retain only 10% of what they read, 20% of what they hear, 30% of what they see, 50% of what they hear and see simultaneously, 80% of what they say and 90% of what they say and do. This is a strong argument in favour of using interactive methods.

Clearly, numbers reflect an average. Some individuals receive information better while viewing and reading it, others while hearing and speaking, and others while putting into practice what they have learned. Teachers should therefore try to vary teaching methods to give each of these categories a chance to apply their preferred form of learning. Similarly, according to their learning strategy, students may be stronger or weaker in certain evaluation modalities. Ideally, the latter should therefore be varied and provide students with an opportunity to speak, write, draw, or even to act.

Learners may also be categorized according to the way they process information. Some have a more analytical approach, proceeding step-by-step, using a process of inductive logic, perceiving information in an abstract manner. Others have a global approach, processing all information simultaneously, using deductive and intuitive processes and perceiving information in a concrete manner. Teachers should take these categories of learners into account and vary teaching and evaluation methods. Global learners will appreciate knowing at the beginning of a lesson what it is all about (e.g. the learning objectives) and to be able to apply the principles being taught through the use of pertinent examples. Global learners have greater difficulties understanding what is important in the course of a speech. Analytical learners will function better if a detailed outline is provided at the beginning of the course. For them, a case study is an occasion to repeat and to apply what they have learned, while for global learners it is often the opener permitting them to learn the rules that have been abstract up to that point. Assessment through tests usually demands analytical ability. To give global learners an equal chance, the evaluation should also contain some open questions, giving them an opportunity to explain their reasoning.

The affective dimension for its part, refers to *stimuli*, to the ability to engage with the subject, and necessarily to an integration of the subject within a system of values.

Certainly, the best *stimulus* is success. Do we not say that success breeds success? The more opportunities a student has to obtain the impression through conversations, group work and examinations that he or she is successful in learning, the more he or she will learn.

The principal motivation to learn is curiosity. Participants should therefore be confronted with questions to which they do not yet know the answers. Second, people are motivated to work if the content of their task is demanding and provides variety. Third, using appropriate teaching methods not only enhances the efficiency of learning, but also helps to motivate students. Fourth, people learn if they feel that if they apply what they are taught, their actions are capable

of benefiting humanity. As for this last point, we hope that the preceding pages have convinced even the most sceptical of the need to teach IHL in order for its principles to be more widely accepted and applied.

A teacher can use the affective dimension by recognizing the value of previous experiences of participants, by applying concepts (even if presented in a lecture) to participants' daily life, by relating the subjects to concerns and values of the learners and by encouraging the expression of emotion. However, this is only possible if the teacher knows his or her "target audience".

"If you want to teach mathematics to Isabelle, the most important thing to know is Isabelle herself."^[2] A teacher confronted with an audience of 20 or 120 persons obviously cannot teach to each of them by the method most appropriate for that individual. For this reason it is appropriate to apply a variety of methods and to ensure that participants involve themselves actively in learning, i.e., that they take their education into their own hands. This, in turn, implies that the teacher has the responsibility to motivate them. To motivate them, he or she has to know them: their culture, their ideals, their aspirations, their frustrations. Once these details are known, the teacher will have a better understanding of his students. A different atmosphere will be established, giving way to a more familiar environment, which will encourage learning.

A group is not necessarily homogenous. Therefore, the teacher will need to adapt his language to be understood by all his students. Therefore, he will have to introduce a scale of values that can cover other sets of values. If the teacher wants to ask questions to the group, these must be open and each answer considered as reasonable.

To fully exploit the affective dimension, one may attract the learner's interest for a subject before dealing with it. This may be done by relating the subject to the experience of participants or by making them discover the subject through the presentation of a case study. If a case is studied first, the lecture can provide answers to the questions participants already asked themselves. This will considerably increase the chance that they retain those answers compared with the traditional situation where they obtain answers to questions they never asked. The same objective can be reached when training professionals who already have field experience or reasonable knowledge of the subject by first encouraging the audience to ask questions on the subject and to develop themes according to those questions.

In any case, learners should always be able to first discover their needs for themselves. In addition, the teacher has to treat the learners as partners in the teaching-learning process, which necessarily implies that they be informed before they learn precisely what they will learn and how they will learn it. Learners should be encouraged to share their experiences related to the subject. What is new should be grounded in what participants know. They should be encouraged to try it out (e.g., to have a first successful experience in dealing with a case study), to give their feedback, and the teacher should reciprocate by providing feedback to their comments.

Emphasizing the most important points facilitates learning. Students will retain the points more easily if they are reinforced by practical examples. The Latin proverb is "repetitio est mater studiorum" (that repetition is the mother of studies). One should not hesitate to repeat the most important points, during a lesson, at the end of a lesson and at the end of a course. One way to repeat the most important points, which also deals with the fact that students forget what they have learned from one lesson to the next one, is to begin some lessons with a question and answer session on the main points of preceding lessons. Such questioning should not be presented as a test but should rather be brief and fun.

From the preceding considerations, it follows that to educate an audience efficiently on IHL it is at least as important to apply the appropriate teaching methods as to learn about IHL. We have, however, also seen that there is no single appropriate method. Different people learn in different ways.

b) The advantages of interactive teaching methods

As seen above, a variety in methods gives life to a lesson and can revive flagging interest. By varying methods, the teacher also avoids the favouring of participants with particular learning styles.

Learning is an active response to information. And its practical application is an even more active response to the acquisition of this knowledge.

It is an illusion to think that learning occurs purely and simply by the fact that a student sits and listens to the teacher. In fact, if the course objectives could be achieved in this manner, the course itself would be useless. The student can take an active part in the learning process, during or after the course, for example by revising the material. Learning becomes even more effective when participants must become active due to certain methods. This would be the case, for example, if they had to solve case studies or participate in group discussions. Also, simply providing time for questions may constitute an easy and effective interactive method since it can serve as an opportunity to review the material, to take the pulse of the level of understanding of the group, to ask new questions, to maintain interest and to receive feedback.

All teaching requires a minimum level of interaction. There must be interaction between the teacher and the student going in both directions. The teacher must communicate his or her comments to the student, but the student must also be able to express his or her views to the teacher. Both parties can thus find out whether their performance meets the expectations of the other. Students worry about whether they have correctly understood what they have been taught in the same way that teachers worry about the comprehension of the material they are teaching. If the student body is mostly comprised of adults, the teacher will also want some indication whether the students will apply what they have learned.

Therefore, a teacher cannot limit himself or herself to allow communication to travel one way only. He or she must be able to monitor and refine the participant's interpretations, ideally, while they are made. This may be done by asking the audience whether they understood, by encouraging questions during or after a lecture, or by adding an evaluation session to the course.

Some teachers may fear losing control of their students if they use interactive methods. The students may fear losing the security that traditional methods of teaching provide. It is nonetheless important to recall that the objective of a course is not to ensure security but rather to encourage a change in behaviour. The teacher will no longer have control over the students when those students will have to put into practice the principles they have been taught...

Some may object that interactive methods are time consuming. It is true that a teacher can "emit" less information per time unit using interactive methods than in a lecture. The aim of teaching is however not that the teacher "emits" information, but that the learners "receive" information. One of the few uncontroversial truths in education sciences is that learners receive, understand and incorporate more information through interactive methods.

c) Using case studies

One of the methods allowing for effective learning is that of case studies. This book offers a vast number of cases taken from the reality of armed conflicts, followed by questions to be considered from the point of view of IHL. These cases can be used for all teaching methods.

Case studies, while enabling the participants to play an active role, hold students' attention, since the facts studied are drawn from reality. They show that learning is a process and enrich the teacher/student relationship. Also, this method develops critical thinking and allows students to become accustomed to accepting diverse opinions. All learning is acquired and integrated into one's long-term memory more easily when it can be linked to daily life.

Usually, a young graduate coming out of university possesses the most up-to-date theoretical knowledge. But he or she lacks experience - the accumulation of knowledge and skills through solving real life problems. An experienced professional can identify the essential and solution-relevant aspects of a real life situation, understand its structure, and keep his or her affective and subjective approaches as distinct as possible from his or her understanding of the facts. Dealing with case studies during his or her academic career can give a graduate some simulated real life experience.

Cases relate law to practice, thus giving it content and actuality. When training lawyers, it is very important to establish a link between practice and theory by using concrete examples that illustrate the significance and the true meaning of the concepts being taught. The role of the teacher is to suggest appropriate readings for the students, and it falls to the students to make the required effort. The fact that theories provoke many controversies cannot be hidden from participants. The manner in which precedents were decided cannot be contested but only be criticized. The last step in a case study often consists of an attempt at conceptualization of the case into general rules for future cases. To do this, the teacher may give a lesson in which the participants are free to draw their own conclusions, much as a professional would do if confronted with a concrete case at work. In any case, even if only some basic concepts are retained from a case, they will have a greater impact on the behaviour of participants than subtle/sophisticated and theoretically more solid rules that were simply heard, read, or memorized.

Theoretically, a subject can be taught exclusively through case studies, without any lectures (and this is how the case system was first applied in about 1914 at Harvard Business School). Due to time constraints and in an effort to vary teaching methods, most teachers will, however, use case studies mainly to educate participants to solve real life situations according to the principles they studied through other methods.

This book suggests many case studies. The teacher can of course elaborate his own case studies, choosing them in accordance with his own pedagogical objectives and drawing them from reality.

d) Group work

Another interactive method is group work. Today work has become more collaborative. In order to be able to *work* in a group, students will be better prepared if they have *learned* in groups. Group work also takes advantage of the dynamics of a group, using conformism within the group, social recognition and group success as motivations for learning.

Due to time limitations, group work generally cannot be used to learn new knowledge, but it serves to apply, through case studies and discussions, general principles to particular circumstances. Some consider that the method of teaching through case studies can only be applied by group work. Group work also serves to repeat acquired knowledge. A discussion of the moral dilemmas involved in the practical application of IHL which is often only practicable in groups, may introduce group members to ways of looking at the problem they would never have thought about. Arguments and counter arguments can be more freely expressed and weighed in a small group than in the plenary, and many more participants get an opportunity to express themselves or even to explain a rule, which is the best way to learn it.

Teachers must act as animators of the group, ensuring that every member of the group has equal opportunity to express his or her opinions. The teacher should reformulate opinions expressed by participants, be directive on the form of the discussion, but not take any position on the merits.

It is possible to start teaching a given subject with group work. This will then be followed by a systematic synthesis by the teacher putting the practical solutions found by the groups into a theoretical framework.

One of the ways to work in groups is through role-play. It has the disadvantage of focussing attention on the persons and not on the problem and its dynamics. It has, however, the advantage of obliging participants to be active. Paradoxically it is also easier for a participant to defend a position which is not his own than to play the role of someone (*e.g.* a commander) doing what the course participants do not really consider to be the appropriate behaviour.

e) How to make lectures more effective?

If only because of the number of participants in a course, it is impossible to completely abandon *ex cathedra* presentations in order to transmit new knowledge. It is useful to indicate at the outset the objective of the lecture, its outline, as well as the two or three most important things that should be retained.

The contents of the lecture should be simple and clear and the language used should be adapted to the audience. Key terms of the lesson should be several times accompanied by explanations and synonyms from common language. It is preferable to give on each subject more information than what the public can retain. However it is also important not to treat more subjects than the audience really should retain. A lecture should end with only one conclusion. Examples and even case studies can be used in a lecture to render it more vivid and relevant for practice. It is very important not to speak longer than announced and not to read from a text. Even within a lecture, variety can be introduced by supporting some parts with visual aids.

f) The importance of checking the results

Evaluation measures the effect of the efforts of the teacher and permits him or her to improve and refine teaching methods and contents. Evaluation also monitors and measures the progress of participants. Ideally, the evaluation is not done at the end of the course. Otherwise, the teacher has no opportunity to clarify any misunderstandings or to adapt the course at least in its last part to the specific learning needs of participants.

Tests should not mainly aim at pure knowledge but at understanding. One of the easiest ways of finding out what the participants understood is to ask them to explain it in their words or to apply it to real life situations. Finally, a test should measure the performance expected by both the teacher and the student. This way each one can express their expectations towards the course. This method will facilitate achieving the group's objectives and at the same time avoid that the course is only aimed at the teacher's priorities.

2. Teaching International Humanitarian Law - with this book

a) To link theory and practice

Teaching IHL, as with all legal instruction, consists, on the one hand, of relating concepts and theory to practice, thus giving the rules content, topicality, and relevance, and, on the other hand, of relating practice to concepts and theory, thus giving practice a meaning and a sense of direction for future application.

Whether these two operations are separate ones and with which one to start, is controversial. Every teacher has his or her own approach and every student his or her way of learning. As seen above, education specialists recommend a diversification of teaching methods, to render education more varied and therefore provide for the different learning methods of the students.

In studying international law, and in particular IHL, the study and discussion of practice must, however, play a central role for at least four reasons. First, it is easier to memorize and understand a concept if one can relate it - or even apply it - to real life events. Second, in an international society, where States are not only the subjects of international law, but also its legislators and have a central role in its adjudication and enforcement process, practice not only illustrates rules: it also forms the rules. Third, it is only by discussing actual contemporary practice that one can overcome the popular preconception that international law

and in particular, IHL does not work. Fourth, one of the main messages to be retained by students is precisely that IHL is relevant when it is applicable and offers realistic solutions for humanitarian problems arising in contemporary armed conflicts.

One way to implement such a practice-oriented approach would be to teach IHL as suggested in Part III^[3] by going exclusively through recent conflicts in the former Yugoslavia, the Great Lakes Region or West Africa. The various cases referring to Afghanistan and Iraq^[4] can also be combined to form a case study. Without wanting to be pessimistic, we fear that at the time this book will start to be distributed, a new conflict will illustrate the functions, strengths and weaknesses of IHL.

The different concepts and regimes of IHL will therefore be examined not in their logical order, but as the problems appeared historically in that conflict. Such a way of teaching - which is possible *ex cathedra*, in exercises or seminars - is naturally particularly appropriate for political scientists or those who have a policy-oriented theory of international law.

b) Different methodologies may be used

Whatever the local academic traditions, the willingness and ability of students to prepare lessons seriously, the time available, and the number of students, a practice-oriented approach can in every case be realized. First in an *ex cathedra* lecture by introducing the subject with an example, by illustrating the subject with examples, by explaining one or several cases taken from this book. Ideally the students would have to prepare the cases before each lesson. Second, such a lecture can be enriched by asking some of the questions suggested in this book - ideally prepared by the students individually or in groups. In this case, all students can prepare the same case or different cases (*e.g.* on the same subject). Third, the cases contained in this book can be used as real case studies to be discussed by the students, whether playing different real-life roles, taking different conceptual approaches, or choosing freely among the possible answers that can be given to each question. Cases suggested in this book can also be given for a written essay, of four, forty, or even hundred pages (if all the questions are answered and put into their theoretical framework).

c) Choice of outlines: according to the subjects and the duration

In legal studies, depending on the *curricula* prescribed, the time available, and the preferences of the teacher, IHL can be taught, as shown by the outlines suggested as a separate course, or as a separate chapter in the general course of international law, or in several special courses of international law. The principles, rules, and institutions of IHL can however also illustrate many fundamental questions and problems of international law - including the basic question of whether and how it is law.

3 Cf. **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia, p. 1732; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region, p. 2098 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea, p. 2362.

4 Cf. XXXIII. Afghanistan, p. 2303 and XXIV. Third Gulf War, p. 1591.

d) Less is sometimes better

In any case, it is preferable to discuss thoroughly one or a few basic concepts making sure that they are properly assimilated, than to fly over the detailed rules that students will necessarily forget very quickly. This also corresponds to the pedagogical objectives: emphasising the important notions to remember while adding extra information that does not necessarily have to be remembered.

e) "Prior to sowing the field it has to be harrowed"

Motivation is a crucial element for the success of teaching. Students who do not understand the necessity of IHL or who believe that in any case it cannot be respected in armed conflicts will not study it properly. This is an extra reason to rapidly approach the practical side of IHL and its implementation. This means that succinct reminders of basic truths of international law are necessary. Whatever approach one chooses and with whatever method it is implemented, it seems that before students are willing and able to assimilate the detailed rules and regimes of IHL, they should discuss and understand how international law is law, how it differs from domestic law, how it interacts with the contemporary international society, and how law matters in war. Only then, will they understand - and will their faith in international law survive - the apparent discrepancy between the humanitarian rules they study and the inhumane reality they see in the newspapers, the television, or on a field assignment as soldier or humanitarian worker. For the victims too, those who know the rules but have come to the conclusion that they do not work, are perhaps more dangerous than those who do not know them, because it is easier to overcome ignorance than cynicism.

From this point of view the tradition of studying the implementation of IHL as one of the last chapters of a course on this branch seems questionable.

Making the link with the general problems of international law aims to preserve faith in IHL and therefore the student's motivation. It also corresponds to pedagogical observations according to which a new subject is better understood and remembered when associated with previous knowledge. This also means a renewed and a more detailed examination of what was taught in the course on public international law.

Even for university students, intellectual understanding of the rules is not an aim in itself. The objective of the IHL course should also be to teach the respect of the rules by students in their future careers. For this reason, it is necessary to link them to the reality of armed conflicts and to show that the rules can be and often are respected. Finally, it is essential that participants understand the military and political utility of respecting these rules and why they are violated.

Experience shows that respect of the taught rules will more easily be obtained if the students have the impression that they decided autonomously to respect them. The teacher can at best hope to convince them. Sceptical remarks and questions should be treated with the greatest possible respect even if they are not "humanitarian". Everyone's objections must be listened to and discussed.

Ideally, replies to such objections and moral criticism of positions neglecting the interest of war victims will be expressed by other students rather than the teacher.

f) The basic messages

Apart from transmitting an understanding that IHL is a reality in contemporary conflicts, the following can be considered to be among the most important messages to be received by the students:

- An understanding of the implementation mechanisms of IHL;
- The relationship between IHL and International Human Rights Law;
- The distinction between *ius ad bellum* and *ius in bello*; and
- The necessity to distinguish from a legal point of view different categories of conflicts and of persons to which different regimes apply under IHL. It is these different categories, which make IHL a relatively complicated and typically legal matter, although its principles are obvious and straightforward to understand.

The last two messages, in particular, are not only very important for the understanding of IHL and the protection of war victims but also illustrate the fundamentals of contemporary international law and are ideal playgrounds to train legal thinking necessary in all fields of law.

Chapter 2

COURSES ON INTERNATIONAL HUMANITARIAN LAW

I. A TWENTY-LESSON COURSE

1. **First lesson:** *A protective regime and its contemporary relevance: protection of civilians, of protected civilians and of protected civilians in occupied territories*

To sensitize students to the real situations and regulatory needs involved, one could start this lesson first with the fictitious story of a child in an armed conflict living in a village which comes under bombardment by "the enemy", the latter then taking control over the village, ill-treating the mother, and the whole family finally being forced to flee to another region still under control of the forces formerly controlling the village.

Second, the protection problems manifested in this example can be analysed and the similarities and differences of the answers provided by IHL of international and IHL of non-international armed conflict can be described.

Third, a Case such as **Case No. 147**, UN, Detention of Foreigners. p. 1569, can be used to wrap the subject up.

2. **Second lesson:** *A protective regime and its contemporary relevance: prisoners of war and fighters captured in a non-international armed conflict*

To sensitize students to the real situations and regulatory needs involved, one could start this lesson first with the fictitious story of two friends who come to the conclusion that their ethnic group can only survive in its traditional settling area if they take up weapons. One is joining an organized armed group and receives a uniform, the other fights on his own, mainly by killing soldiers of the enemy group. Both meet again after having been captured by the enemy, are interrogated about their crimes and face a trial before a "popular court".

Second, the protection problems manifested in this example can be analysed and the similarities and differences of the answers provided by IHL of international and IHL of non-international armed conflict can be described, both for the uniformed and the non-uniformed fighters.

Third, a Case such as **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. p. 2309, can be used to wrap the subject up.

(For lessons 3-17, similar fiction examples can be construed than those we have suggested for Lessons 1 and 2. The conceptual problems involved can then be discussed and a case from this book can finally be used to wrap-up the subject.)

3. **Third lesson:** *A protective regime and its contemporary relevance illustrated by means of a case study: protection of the wounded, sick and shipwrecked and use of the emblem.*
4. **Fourth Lesson:** *A protective regime and its contemporary relevance illustrated by means of a case study: The protection of the civilian population against the effects of hostilities.*
(Illustrated by **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. [Cf. B.] p. 2077.)
5. **Fifth lesson:** *A protective regime and its contemporary relevance illustrated by means of a case study: Means and methods of warfare.*
(Illustrated by **Case No. 214**, Afghanistan, Operation "Enduring Freedom". p. 2303.)
6. **Sixth lesson:** *A protective regime and its contemporary relevance illustrated by means of a case study: Humanitarian assistance and access to victims.*
(Illustrated by **Case No. 130**, ICJ, Nicaragua v. US. p. 1365, or **Case No. 149**, UN, Security Council Resolution 688 on Northern Iraq. p. 1571.)
7. **Seventh lesson:** *A protective regime and its contemporary relevance illustrated by means of a case study: Art. 3 common in a conflict where structures of authority have collapsed.*
(Illustrated by **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3.] p. 2098 or **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. p. 2362.)
8. **Eighth lesson:** *Historical development and sources*
(Illustrated by **Case No. 29**, ICRC, Customary International Humanitarian Law. p. 730)
 - Concept and philosophy
 - Historical development and sources of contemporary IHL
 - Contemporary efforts and future direction in the development of IHL
9. **Ninth Lesson:** *The Laws of War in contemporary international law and in the contemporary international community: ius ad bellum and ius in bello under the UN Charter. Reminder of the nature of international law.*
10. **Tenth lesson:** *Different types of armed conflicts*
(Illustrated by **Case No. 180**, ICTY, The Prosecutor v. Tadic. p. 1804)
 - The concept of armed conflict
 - The distinction between international and non-international armed conflict: reasons, relativity and comparison of the two regimes
 - Contemporary problems of qualification
 - Practical consequences of problems of qualification

11. **Eleventh lesson:** *The law of naval warfare*
12. **Twelfth lesson:** *The law of non-international armed conflict*
(Illustrated by **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. p. 1467)
13. **Thirteenth lesson:** *Implementation of IHL: the law*
 - The need for national measures of implementation in peacetime
 - Dissemination, its means and its effectiveness
 - The example of the (need for) national legislation on the protection of the emblem of the red cross and the red crescent in the country where the course is held
 - The obligation to ensure respect
 - Reaction to violations by States
 - The concept of war crimes and the universal obligation to repress them
14. **Fourteenth lesson:** *Implementation of IHL: the actors*
 - Monitoring and control by the Protecting Power and the ICRC
 - The International Fact-Finding Commission
 - Humanitarian IGOs, NGOs and the ICRC: co-ordination and competition
 - The role of the UN Security Council: conflict resolution and humanitarian action
 - The prosecution of war crimes by national courts, by *ad hoc* tribunals and by the International Criminal Court
15. **Fifteenth Lesson:** *The ICRC*
(Illustrated by **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900 and **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. A. and B.] p. 2309.)
16. **Sixteenth lesson:** *IHL and Human Rights*
(Illustrated by **Case No. 133**, Inter-American Commission on Human Rights, Coard v. US. p. 1387)
 - Cultural relativity vs. Universality of IHL and Human Rights
 - Comparison of the fields of application
 - Comparison of the Protected Rights
 - Implementation:
 - Actors
 - Distinct but complementary means
 - IHL in the work of the UN Human Rights Commission
 - The ICRC and Human Rights
17. **Seventeenth lesson:** *Refugees and displaced persons in IHL*
18. **Eighteenth - Twentieth lesson:** *Study of a contemporary armed conflict - or of current news from armed conflict areas - from an IHL perspective*

II. AN EIGHT-LESSON COURSE

1. **First lesson:** *A protective regime and its contemporary relevance illustrated by means of a given conflict*

either:

- Protection of civilians, of protected civilians and of protected civilians in occupied territories

or: - Prisoners of war and fighters captured in a non-international armed conflict

or: - Protection of the wounded, sick and shipwrecked and use of the emblem

or: - Refugees and displaced persons

or: - Art. 3 common in a conflict where structures of authority have collapsed

2. **Second lesson:** *The laws of war in contemporary international law and in the contemporary international community*

- Nature and existence of international law
- *Ius ad bellum* and *ius in bello* under the UN Charter
- The complementary character of IHL and International Human Rights Law

3. **Third lesson:** *Historical development and sources*

- Concept and philosophy
- Historical development and sources of contemporary IHL
- Contemporary efforts and future direction in the development of IHL
 - How to ban the use of anti-personal land mines: methods, ICRC role, public opinion, military and economic interests.

4. **Fourth lesson:** *The distinction between civilians and combatants: a necessary prerequisite for the respect of IHL impossible in contemporary armed conflicts?*

5. **Fifth lesson:** *Conduct of hostilities*

- The protection of the civilian population against effects of hostilities
- Means and methods of warfare
- Humanitarian assistance

6. **Sixth lesson:** *Different types of armed conflicts*

- The concept of armed conflict
- The distinction between international and non-international armed conflict: reasons, relativity and comparison of the two regimes
- Contemporary problems of qualification
- Practical consequences of problems of qualification

7. **Seventh lesson:** *Implementation of IHL: the law*

- The need for national measures of implementation in peacetime
 - The example of the (need for) national legislation on the protection of the emblem of the red cross and the red crescent in the country where the course is held
- The obligation to ensure respect
- Reaction to violations by States
- The concept of war crimes and the universal obligation to repress them

8. **Eighth lesson:** *Implementation of IHL: the actors*

- Preventive measures, monitoring and control by the ICRC: Possibilities and limits inherent in the status and the approach of that institution

- Humanitarian IGOs, NGOs and the ICRC: co-ordination and competition
- The role of the UN Security Council: conflict resolution and humanitarian action
- The prosecution of war crimes by national courts, by *ad hoc* tribunals and by the International Criminal Court

III. A FOUR-LESSON COURSE

1. **First Lesson:** *Principles of IHL and their relevance for contemporary armed conflicts*
 - Concept and Philosophy of IHL
 - The distinction between civilians and combatants: a necessary prerequisite for the respect of IHL impossible in contemporary armed conflicts?
2. **Second lesson:** *The Laws of War in contemporary international law and in the contemporary international community*
 - Nature and existence of international law
 - Sources of IHL
 - *Ius ad bellum* and *Ius in bello* under the UN Charter
 - The complementary character of IHL and International Human Rights Law
3. **Third lesson:** *Different types of armed conflicts*
 - The concept of armed conflict
 - The distinction between international and non-international armed conflict: reasons, relativity and comparison of the two regimes
 - Contemporary problems of qualification
 - Practical consequences of problems of qualification
4. **Fourth lesson:** *Implementation of IHL*
 - The need for national measures of implementation in peacetime
 - The example of the (need for) national legislation on the protection of the emblem of the red cross and the red crescent in the country where the course is held
 - Monitoring and control by the ICRC: Possibilities and limits inherent in the status and the approach of that institution
 - The role of the UN: conflict resolution and humanitarian action
 - The prosecution of war crimes by national courts, by *ad hoc* tribunals and by the International Criminal Court

IV. A TWO-LESSON COURSE

1. **First Lesson:** *IHL and armed conflict in contemporary international law and in the contemporary international community*
 - Short mention of the basic idea and sources of IHL
 - *Ius ad bellum* and *Ius in bello* under the UN Charter
 - The concept of armed conflict and the distinction between international and non-international armed conflict: its relevance and irrelevance in contemporary conflicts
2. **Second lesson:** *Implementation of IHL*
 - The need for national measures of implementation in peacetime

- The example of the (need for) national legislation on the protection of the emblem of the red cross and the red crescent in the country where the course is held
- Monitoring and control by the ICRC: Possibilities and limits inherent in the status and the approach of that institution
- The role of the UN: conflict resolution and humanitarian action
- The prosecution of war crimes by national courts, by *ad hoc* tribunals and by the International Criminal Court

V. A STUDY OF ONE ARMED CONFLICT

1. **Case Study: The conflicts in the Former Yugoslavia**

(See **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732.)

2. **Case Study: Genocide, Refugees and Armed Conflicts in the Great Lakes Region in Africa**

(See **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. p. 2098.)

3. **Case Study: Armed Conflicts in Sierra Leone, Liberia and Guinea**

(See **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. p. 2362)

4. **Theoretical course and study of an armed conflict**

The teacher presents the basics during the first four class meetings and implementation during the final two meetings. In six meetings students will present their solutions to practical issues relating to humanitarian law that arose during the conflicts in the Former Yugoslavia (See **Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732), which the teacher will subsequently comment upon and put into perspective. The oral presentation (10 minutes maximum per person) will count for 20% of each person's grade, while the written presentation (of 5-10 pages) due one week after the oral will count for 30%.

A final written exam (at which students will be allowed to consult the Geneva Conventions and their Additional Protocols) will count for the remaining 50% of each person's grade. The exam will consist of 12 questions on subjects discussed in class meetings, four questions testing theoretical knowledge, four essay-type questions, and four fictional cases (similar to the practical cases discussed in the course, but shorter) to be resolved.

It is imperative that students read the theoretical part of the introductory texts (Part I) before each class meeting and the practical part of the passages of the case study devoted to a given meeting's topic.

PROGRAMME

[Hereunder we give reference in brackets to the relevant chapters of Part I]

Meeting No. 1:

- Presentation of the course and subject-matter
- Choice of format for the course
- Presentation of the method of assessment
- Beginning of teacher's introduction

- Existence of international law
- Notion, objectives and problems of IHL (Ch. 1.)
- IHL, a branch of public international law (Ch. 2. I.)

Meeting No. 2:

- IHL, a branch of public international law
- Fundamental distinction between *ius ad bellum* (the legality of resorting to force) and *ius in bello* (humanitarian rules to be respected in Warfare) (Ch. 2. II.)
- IHL: a branch of international law governing the conduct of States and individuals (Ch. 2. III.)
- Historical development of IHL (Ch. 3.)
- Sources of contemporary IHL (Ch. 4.)

Meeting No. 3:

- Fundamental distinction between civilians et combatants (Ch. 5.)
- Combatants and prisoners of war (Ch. 6.)
- Protection of the wounded, sick and shipwrecked (Ch. 7.)

Meeting No. 4:

- Protection of civilians (Ch. 8.)
- Conduct of hostilities (Ch. 9.)
- Law of non-international armed conflict (Ch. 12.)

Meeting No. 5:

Discussion of points 1-7 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p.1732) (conflict breaks out; the conflict in Croatia)

Meeting No. 6:

Discussion of points 8-13 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p.1732) (the repatriation of prisoners between Croatia and Yugoslavia; the conflict in Bosnia; "ethnic cleansing"; the prisoners; the siege of Sarajevo)

Meeting No. 7:

Discussion of points 14-18 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p.1732) (security zones; the conflict between Croats and Muslims; the enclave of Bihac; establishment of the International Criminal Tribunal for the Former Yugoslavia (ICTY); prisoner exchanges)

Meeting No. 8:

Discussion of points 19-22 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p.1732) (NATO airstrikes in Bosnia; the Srebrenica massacre; the Dayton Agreement; missing people)

Meeting No. 9:

Discussion of points 23-29 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732) (Kosovo, NATO airstrikes against the Federal Republic of Yugoslavia)

Meeting No. 10:

Discussion of points 30-37 of the case study on the Former Yugoslavia (**Case No. 172**, Case Study, Armed Conflicts in the Former Yugoslavia. p. 1732) (the expulsion of Albanians from Kosovo; Kosovo under international administration; Presevo; the Former Yugoslav Republic of Macedonia)

Meeting No. 11:

Implementation of IHL (Ch. 13.)

Meeting No. 12:

- IHL and Human Rights Law (Ch. 14.)
- The International Committee of the Red Cross (ICRC) (Ch. 15.)
- Review, and evaluation of the material and course

Final written exam

VI. POSSIBLE PROGRAMME FOR SEMINARS ON INTERNATIONAL HUMANITARIAN LAW FOR POST-GRADUATE LAW STUDENTS

A. SEMINAR CENTRED ON PENAL ASPECTS

(14 three-hour meetings)

1. Programme**Meeting No. 1:**

- Introduction of participants to each other
- Presentation of the course
- Introduction to IHL, 1st part:
 - Definition, ambition and limitations
 - IHL as a branch of international law
 - Field of application

Meeting No. 2:

- Allocation of presentations, discussions and analyses
- Introduction to IHL, 2nd part:
 - Background history
 - Sources
 - Distinction between civilians and combatants
 - Combatants and prisoners of war
 - The wounded, sick and shipwrecked
 - Protection of civilians

Meeting No. 3:

- Introduction to IHL, 3rd part:
 - Conduct of hostilities
 - Non-international armed conflicts
 - Implementation

Meeting No. 4: Tadic decision, jurisdiction (Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. A.] p. 1804)

One student presents the decision and three others discuss it using questions given at the end of the Case.

Meeting No. 5: Tadic decision, merits (Case No. 180, ICTY, The Prosecutor v. Tadic. [Cf. B. and C.] p. 1804)

One student presents the decision and three others discuss it using questions given at the end of the Case.

Meeting No. 6: Intervention of the United States in Afghanistan (Case No. 214, Afghanistan, Operation "Enduring Freedom". p.2303 and Case No. 216, Cuba, Detainees Transferred to Guantánamo Naval Base. p. 2309)

One student presents each Case and two others discuss it using questions given at the end of the Case.

Meeting No. 7: The *ad hoc* international criminal tribunals

Two students present the Statutes of the ICTY (**Case No. 179**, UN, Statute of the ICTY. p. 1791) and of the ICTR (**Case No. 196**, UN, Statute of the ICTR. p. 2154) and two others discuss them using questions given at the end of the Case.

Meeting No. 8: The International Criminal Court (ICC)

One student presents the Statute of the ICC (**Case No. 15**, The International Criminal Court. p. 608) and three others discuss it using questions given at the end of the Case.

Meeting No. 9: Niyonteze decision (Case No. 205, Switzerland, The Niyonteze Case. p. 2233) and the Democratic Republic of the Congo v. Belgium decision of the ICJ (Case No. 206, ICJ, Democratic Republic of Congo v. Belgium. p. 2257)

One student presents each Case and two others discuss it using questions given at the end of the Case.

Meeting No. 10: The Military Prosecutor v. Kassem decision of the Military Court at Ramallah (Case No. 109, Israel, Military Prosecutor v. Kassem and Others. p. 1212) and the Ajuri decision of the Israeli High Court of Justice (Case No. 115, Israel, Ajuri v. IDF Commander. p. 1263)

One student presents each Case and two others discuss it using questions given at the end of the Case.

Meeting No. 11: Belgian paratroopers before the Military Court at Brussels (Case No. 168, Belgium, Belgian Soldiers in Somalia. p. 1696)

One student presents each Case and two others discuss it using questions given at the end of the Case:

Meeting No. 12: Canadian paratroopers before the Court Martial Appeal Court of Canada (Case No. 169, Canada, R. v. Brocklebank. p. 1707)

One student presents the decisions and three others discuss them using questions given at the end of the Case.

Meeting No. 13: United Nations Peace Forces and IHL

Two students make adversarial presentations, one for and the other against the applicability of IHL; plenary discussion.

Meeting No. 14: Evaluation of the course and of IHL in the contemporary world

All participants discuss:

- The criminalization of armed conflicts
- Failed States
- Conflicts involving "ethnic cleansing"
- The conduct of hostilities against a postmodern society
- Arms proliferation and armed conflict
- Pitfalls for humanitarian organizations

2. Mode of assessment

50% for oral performance, 50% for written papers of about 15 pages on theoretical subjects.

3. Proposed research topics (relating to the material covered in the seminar):

1. Is the ICTY a regularly constituted court?
2. The ICTY Statute and the non-retroactivity of penal law
3. Mandatory universal jurisdiction and permissive universal jurisdiction as regards offences against IHL
4. Offences against IHL in non-international armed conflict and their repression
5. Classifying the legal nature of conflicts in the Former Yugoslavia under IHL
6. The notion of protected person in IHL
7. The notion and prosecution of crimes against humanity in customary international law and in accordance with the ICTY Statute
8. Attributing a violation of IHL to a State
9. Attributing crimes committed by the rebels to a State supporting rebels with a view to establishing the international responsibility of this State and to classifying the legal nature of the conflict under IHL
10. A combatant's responsibility for crimes committed by other combatants
11. The role of the Security Council in the ICC Statute
12. The ICTY, ICTR and ICC Statutes: development of IHL or implementation mechanism?
13. Peace-making and repression of war crimes

14. Application of the Protocols additional to the Geneva Conventions by the ICTY and the ICC
15. Who are the addressees of IHL of non-international armed conflict?
16. The Fourth Geneva Convention's applicability to the territories occupied by Israel
17. Torture: absolutely prohibited by international law?
18. The obligation to prosecute or extradite in IHL
19. IHL applicable to United Nations forces
20. IHL applicable to international forces intervening to stop an internal conflict
21. IHL applicable to multinational forces engaged in an international armed conflict
22. Applicability of IHL to UNOSOM forces
23. Applicability of IHL and international human rights law to the use of firearms
24. Precautions in military attacks and in police operations
25. Superior orders and command responsibility under IHL
26. Implementation of IHL under your country's national legislation
27. The responsibility of detaining States and individuals with regard to the treatment of prisoners under IHL

B. SEMINAR CENTRED ON THE SUBSTANTIVE RULES OF INTERNATIONAL HUMANITARIAN LAW

1. Programme

[Hereunder we give reference in brackets to the relevant chapters of Part I]

Meeting No. 1:

- Introduction of participants to each other
- Presentation of the course and subject-matter
- Discussion of the method of assessment
- Teacher's introduction, 1st part:
 - Notion, objectives and problems of IHL (Ch. 1.)
 - IHL, branch of public international law (Ch. 2. I.)
 - Fundamental distinction between *ius ad bellum* (the legality of resorting to force) and *ius in bello* (humanitarian rules applicable in the event of war) (Ch. 2. II.)
 - IHL: a branch of international law governing the conduct of States and individuals (Ch. 2. III.)

Meeting No. 2:

- Allocation of presentations, discussions and analyses
- Teacher's introduction, 2nd part:
 - Fundamental distinction between civilians and combatants (Ch. 5.)
 - International and non-international armed conflict (Ch. 12.)

Meeting No. 3: Teacher's introduction, 3rd part:

- Implementation of IHL (Ch. 13.)

- IHL and human rights (Ch. 14.)
- The ICRC (Ch. 15.)

Meeting No. 4: *The Tadic case* (jurisdiction and merits) of the International Criminal Tribunal for the Former Yugoslavia (ICTY) (**Case No. 180**, ICTY, *The Prosecutor v. Tadic*. p. 1804)

- *Presentation 1:*
 - The legality of establishing the ICTY
 - IHL applicable to non-international armed conflicts
 - Criminalization of violations of IHL applicable to non-international armed conflicts
- *Presentation 2:*
 - Classifying the legal nature of armed conflicts in the Former Yugoslavia
 - Notion of protected person
 - A combatant's criminal responsibility for violations committed by another combatant
- *Summary* by the teacher on classifying the legal nature of armed conflicts

Meeting No. 5: *Conflicts in the Former Yugoslavia I*

- *Presentation 3:* The conflict in Croatia: Points 2, 4 and 8 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732)
- *Presentation 4:* The siege of Sarajevo and exchanges of prisoners: Points 13 and 18 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732)
- *Summary* by the teacher on humanitarian assistance (Ch. 9 IV.)

Meeting No. 6: *Conflicts in the Former Yugoslavia II*

- *Presentation 5:* Blue helmets and missing persons: Points 19 and 22 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732)
- *Presentation 6:* Kosovo and the NATO intervention: Points 23, 24, 26, and 29 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732)
- *Summary* by the teacher on IHL's applicability to United Nations forces

Meeting No. 7: *Conflicts in the Former Yugoslavia III*

- *Presentation 7:* The NATO air strikes: Points 27 and 28 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732); see also **Case No. 193**, Federal Republic of Yugoslavia, *NATO Intervention*. p. 2077 and **Case No. 194**, ECHR, *Bankovic and Others v. Belgium and 16 other States*. p. 2093)
- *Presentation 8:* Kosovo under international administration, Presevo and the Former Yugoslav republic of Macedonia: Points 33-36 of the Case study (**Case No. 172**, Case Study, *Armed Conflicts in the Former Yugoslavia*. p. 1732)

- *Summary* by the teacher on protecting the civilian population against the effects of hostilities (Ch. 9 II.)

Meeting No. 8: *The Middle East conflict I*

- *Presentation 9*: The applicability of the Third and Fourth Geneva Conventions to the territories occupied by Israel
 - Israel's position on the applicability of the Fourth Geneva Convention to the Palestinian territories (**Case No. 108**, Israel, Applicability of the Convention to Occupied Territories. p. 1208)
 - Israeli Military Court at Ramallah, Decision in *Prosecutor v. Omar Mahmud Kassem and Others* (**Case No. 109**, Israel, Military Prosecutor v. Kassem and Others. p. 1212)
- *Presentation 10*: Rulings of Israel's High Court of Justice on the legality of settlements and of house demolitions
 - *Ayub v. Ministry of Defence* (**Case No. 110**, Israel, Ayub v. Minister of Defence. p. 1218)
 - *Sakhwil and Others v. Commander of the Judea and Samaria region* (**Case No. 111**, Israel, House Demolitions in the Occupied Palestinian Territory. p. 1223)
- *Summary* by the teacher on the Fourth Geneva Convention's applicability to the occupied territories (Ch. 8. IV.)

Meeting No. 9: *Humanitarian diplomacy*

- Discussion with an invited dignitary active in civil society, government or international service, or the army
- Discussion on the role of third States and the United Nations in implementing IHL

Meeting No. 10: *The Middle East conflict II*

- *Presentation 11*: Rulings of Israel's High Court of Justice on deportations and on ICRC visits to administrative detainees or hostages
 - *Sheikh Obeid and Others v. Ministry of Security* (**Case No. 113**, Israel, Cheikh Obeid *et al* v. Ministry of Security. p. 1237)
 - Judgment on deportation cases (**Case No. 114**, Israel, Cases Concerning Deportation Orders. p. 1244)
- *Presentation 12*: The taking of Jenin: massacre or military operation?
 - Report of the United Nations Secretary-General on Jenin, Document A/ES-10/186, available at <http://www.un.org/peace/jenin>
 - Israel's High Court of Justice, decision in *Barakeh and Others v. Minister of Defence* (**Case No. 116**, Israel, Evacuation of Bodies in Jenin. p. 1284)
- *Summary* by the teacher on the protection of civilians in the power of the enemy (Ch. 8.)

Meeting No. 11: *The conflict in Sierra Leone, Liberia and Guinea (Case No. 224, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea, p. 2362)*

- *Presentation 13*: Rules of IHL applicable to the multitude of actors

- *Presentation 14*: Violations of IHL
- *Summary* by the teacher on the protection of the wounded, sick and shipwrecked (Ch. 7.)

Meeting No. 12: The war in Afghanistan and the detainees in Guantánamo

- *Presentation 15*: The conduct of hostilities in Afghanistan (**Case No. 214**, Afghanistan, Operation "Enduring Freedom". p. 2303)
- *Presentation 16*: The detainees in Guantánamo and in the United States (**Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. p. 2309 and **Case No. 219**, US, Trial of John Philip Walker Lindh. p. 2342)
- *Summary* by the teacher on the status and treatment of prisoners of war (Ch. 6.)

Meeting No. 13: The conflict in Cyprus and the Canadian soldiers in Somalia

- *Presentation 17*: The decision of the European Court of Human Rights in *Cyprus v. Turkey* (**Case No. 127**, ECHR, Cyprus v. Turkey. p. 1341)
- *Presentation 18*: Canadian paratroopers tried for the torture of a Somalian by the Court Martial Appeal Court of Canada (**Case No. 169**, Canada, R. v. Brocklebank. p. 1707 to **Case No. 171**, Canada, R. v. Seward. p. 1725)
- *Summary* by the teacher on the differences between police operations and military operations
- *Evaluation* of the course

2. Proposed method of assessment

- a) 30%: a 20-minute oral presentation on the legal aspects of a case. (In the present work, each case is followed by a "Discussion" consisting of questions suggested by the teacher, which should be used to discuss the case from the standpoint of IHL. It is neither necessary nor desirable, however, to answer these questions one by one or to treat them in order. The questions are given to make it easier for students to recognize the legal problems involved in each case. In their oral presentation they must identify and address the main problems of IHL in the case they are dealing with. They should not address problems that have already been identified and handled by other participants in previous oral presentations. They should expect, however, that all numbered questions in the discussion may be raised in class (if necessary, by the teacher) following their presentation.)
- b) 20%: responses to questions on the case presented and asked by the participants and the teacher after the presentation (which may concern all questions in the "Discussion" of the case chosen).
- c) 50%: a research paper (the main legal problem of the case chosen for the oral presentation cannot be chosen as the research topic).

3. List of proposed research topics

1. The absolute distinction between *ius ad bellum* and *ius in bello* - necessary or outmoded?
2. Mandatory and permissive universal jurisdiction as regards offences against IHL

3. Enforcement of IHL in non-international armed conflict
4. Classifying the legal nature of conflicts under IHL
5. IHL applicable to the "war on terrorism"
6. The notion of protected person in IHL
7. Attributing a violation of IHL to a State
8. Attributing crimes committed by the rebels to a State supporting rebels with a view to establishing the international responsibility of this State and to specifying the legal nature of the conflict under IHL
9. A combatant's responsibility for crimes committed by other combatants
10. The role of the Security Council in the ICC Statute
11. The Statutes of the international criminal tribunals: development of IHL or implementation mechanism?
12. Advantages and disadvantages for implementing IHL of the establishment of the international criminal tribunals
13. Peace-making and repression of war crimes
14. Application of the Additional Protocols to the Geneva Conventions by the ICTY and the ICC
15. Who are the addressees of IHL of non-international armed conflict?
16. The Fourth Geneva Convention's applicability to the occupied and autonomous Palestinian territories
17. IHL applicable to United Nations forces
18. IHL applicable to a NATO military intervention
19. The status and treatment of captured combatants not recognized as prisoners of war
20. Applicability of IHL and international human rights law to the use of firearms
21. Implementation of IHL under your country's national legislation
22. The responsibility of detaining States and individuals with regard to the treatment of prisoners under IHL
23. End of applicability of IHL.

VII. YEAR-LONG INTERDISCIPLINARY SEMINAR ON WAR IN THE CONTEMPORARY WORLD

(Seminar offered to students preparing masters degrees in international law and in international relations at the **Université du Québec à Montréal** (<http://www.uqam.ca>), Canada, during the 2001-02 academic year by Professors † **Thierry Hentsch** of the Political Science Department and **Marco Sassòli** of the Law Department.)

1. DESCRIPTION OF THE SEMINAR

The objective of this seminar is to produce supervised research on a current problem relating to the new international reality. This work will give the student the opportunity to demonstrate his or her understanding of the international dimension of political problems, his or her ability to master the relevant sources and the research methods that are suitable to the study of the chosen problem, and his or her ability to analyse the problem's challenges in a critical manner. The content and the subjects will be chosen by the teachers concerned. The work will involve research, writing, presentation and discussion with the group of a major research project on the seminar topic.

Subject and purpose of the seminar: War in the contemporary world

War will be discussed as a particular phenomenon in today's world, as it has been emerging and taking shape for over a decade, following the collapse of the Communist bloc in Eastern Europe. The seminar will focus on the philosophical, political and legal aspects of war in today's world, while putting it into a historical perspective so as facilitate understanding of its evolution in recent years. Among the topics covered will be the following: the issue of the legitimacy of the war's ends (*ius ad bellum*), the context in which it is carried out (*ius in bello*), the political and legal problems relating to humanitarian work, the increasing difficulty of distinguishing between civilians and military personnel, the problems resulting from occupation of enemy territory, the issue of sanctions and punitive action.

The first part of the seminar will be devoted to lectures by teaching faculty on the general issues referred to above. These talks will be given in a long-term historical perspective and may use examples from periods prior to 1989. They will also examine recent or current conflicts, mainly in the Middle East and in the Balkans. Students will be more specifically urged to prepare and present talks, from mid-term onwards, on the main concepts relating to the field of study of war and on post-Cold War conflicts (see list below).

2. PROGRAMME FOR THE FIRST SEMESTER

Meeting No. 1

Presentation of the seminar

Philosophy and anthropology of war

Violence and the specific nature of war

Meeting No. 2

War and international relations

- Long-term historical perspective, from Antiquity to the Renaissance
- The Westphalian system and its evolution, from 1648 to today

Meeting No. 3

War and humanitarian policy

- Birth of the humanitarian movement
- Problems of humanitarian policy
- Historical examples of humanitarian dilemmas

Meeting No. 4

War and international law

- The distinction between *ius ad bellum* (the lawfulness or unlawfulness of war) and *ius in bello* (rules to comply with in war)
- The prohibition on the use of force in contemporary international law and exceptions to it
- Introduction to IHL

Meeting No. 5

Specific problems of IHL

- The distinction between international armed conflict and non-international armed conflict
- The distinction between civilians and combatants
- Implementation of IHL: third States, ICRC, United Nations, non-governmental organizations, criminal justice

Meeting No. 6

Students' talks on subjects relating to the factors contributing to armed conflict, the role of international law in the management of armed conflict, and non-international armed conflict

Meeting No. 7

Students' talks on subjects relating to the distinction between *ius ad bellum* and *ius in bello*

Meeting No. 8

Students' talks on subjects relating to the distinction between civilians and combatants

Meeting No. 9

Students' talks on subjects relating to humanitarian work

Meeting No. 10

Introduction to the conflicts in the Eastern Mediterranean

Meeting No. 11

Introduction to the conflicts in the Former Yugoslavia

Meeting No. 12

Students' talks on subjects relating to the conflicts in the Eastern Mediterranean

Meeting No. 13

Students' talks on subjects relating to the conflicts in the Former Yugoslavia

Proposed method of assessment for the first term

- Presentation and discussion of the chosen research topic: (50%)
- Paper of two pages maximum presenting ideas on the chosen research topic, to be distributed **one week before** the presentation: (20%)
- Discussion, as "devil's advocate," of written ideas presented by another student: (30%)

3. EXAMPLES OF RESEARCH TOPICS**a. Conceptual problems**

1. Anthropological, sociological, political and economic factors contributing to the outbreak of armed conflict
2. The role of international law in the international community's management of armed conflict
3. The influence of the prohibition on the use of force on international relations since 1945
4. The limits of self-defence in international law
5. Usefulness and limits of international military interventions to restore peace
6. Usefulness and limits of international military interventions to deliver humanitarian aid and protect the civilian population
7. Does the distinction between international armed conflict and non-international armed conflict still correspond to reality?
8. The lower threshold of war: an exploration of the boundaries between crime and armed conflict
9. The lower threshold of war: an exploration of the boundaries between political violence and armed conflict
10. The distinction between *ius ad bellum* and *ius in bello* in contemporary conflicts
11. The distinction between *ius ad bellum* and *ius in bello* in non-international armed conflicts
12. The equality of the belligerents before IHL in the age of just wars, international police action and humanitarian intervention
13. The equality of the belligerents before IHL: an outmoded principle in the age of the criminalization of belligerents?

14. The philosophical and ideological origins of the distinction between civilians and combatants
15. The distinction between civilians and combatants in identity-related and resource wars
16. The distinction between civilians and combatants in international interventions against regimes considered criminal
17. Can the distinction between civilians and combatants be maintained in the face of "zero-casualty" military operations?
18. Factors determining compliance or lack of compliance with IHL
19. Humanitarian activities as an alibi for intervening in armed conflict
20. Humanitarian activities as an alibi for failing to resolve armed conflict
21. Humanitarian activities in the absence of States and authorities
22. Implementation of IHL by humanitarian organizations in the absence of a State
23. Humanitarian activities carried out under armed forces leadership
24. Neutrality and impartiality of humanitarian activities in "unstructured" conflicts
25. Neutrality and impartiality of humanitarian activities in view of the criminalization of belligerents

b. Concrete situations

aa. The Middle East

1. The Arab-Israeli conflict: the last international conflict in a "unipolar" world?
2. The status of Palestine and Palestinians in international law
3. The role of international law in the management and resolution of the conflict in the Near East
4. The territories occupied by Israel: strengths and weaknesses of the Fourth Geneva Convention
5. Applicability of the Fourth Geneva Convention to the autonomous Palestinian territories
6. Role of Israeli settlements in the occupied territories in resolving the conflict
7. Role of humanitarian activities in the Israeli-Palestinian conflict
8. Role of the ICRC in the Israeli-Palestinian conflict
9. Role of the United States of America in the Israeli-Palestinian conflict
10. The Gulf War: an application of the United Nations system for restoring peace?

bb. The Former Yugoslavia

1. Conflicts in the Former Yugoslavia: end of the distinction between international armed conflict and non-international armed conflict?

2. Compliance and non-compliance with *ius ad bellum* at the outbreak of armed conflict in the Former Yugoslavia
3. Impact of third States and the United Nations on the management and resolution of conflicts in the Former Yugoslavia
4. Management and prolongation of the conflicts in the Former Yugoslavia by humanitarian entities
5. Impact of war crimes and of their repression on the management and resolution of conflicts in the Former Yugoslavia
6. Conflict in the Former Yugoslavia: the end of the illusion of the same international law for all?
7. Contribution of the ICTY to peace-making
8. Prospects for a withdrawal of international forces from Bosnia-Herzegovina
9. Prospects for a withdrawal of international forces from Kosovo
10. Rules of international law determining the future status of Kosovo

4. PROGRAMME FOR THE SECOND SEMESTER

Each student gives a talk on a theoretical subject relating to the topic of his draft article. The talk is followed by a discussion involving all participants and by teachers' comments.

Meeting No. 1:

Lecture on humanitarian activities (by the political sciences teacher) and their legal basis (by the international law teacher)

Meeting No. 2:

- **Student's talk:** The concept of international security
- **Student's talk:** The realist conception of war

Meeting No. 3:

- **Student's talk:** The principle of State sovereignty
- **Student's talk:** The concept of defence

Meeting No. 4:

- **Student's talk:** Universalism v. particularism
- **Student's talk:** Holism v. individualism
- **Student's talk:** Interventionism v. isolationism

Meeting No. 5:

- **Student's talk:** The perception of the military through the history of ideas (beginning with Machiavelli)

Meeting No. 6:

- **Student's talk:** International law as a geostrategic tool (in a particular spatiotemporal framework)

- **Student's talk:** The prohibition on the use of armed force, and exceptions allowed under the United Nations Charter

Meeting No. 7:

- **Student's talk:** International legal rules governing humanitarian crisis situations
- **Student's talk:** The concept of humanitarian assistance

Meeting No. 8:

- **Student's talk:** The concept of distinction between civilians and military personnel
- **Student's talk:** The definition of the aims of war

Meeting No. 9:

- **Student's talk:** Neo-Gramscian analysis of peace-keeping in an intra-State war
- **Student's talk:** The concepts of "unstructured conflict" and "failed State"

Meeting No. 10:

- **Student's talk:** The strategic interests of the United States of America in the Near East
- **Student's talk:** Resistance and terrorism

Meeting No. 11:

- **Student's talk:** Justice in the face of war (theory of the liberal school)
- **Student's talk:** The Rome Statute of the ICC

Meeting No. 12:

- **Student's talk:** Historical background of the international community's policy on recognizing nation-States

Meeting No. 13:

- **Student's talk:** The concept of humanitarian intervention

Meeting No. 14: Evaluation of the course and of war in the contemporary world**Proposed mode of assessment**

1. A 30-45 minute talk on a theoretical subject chosen by the student (in agreement with the teachers) that is one of the theoretical bases of the research topic treated in the draft article. Assessment criteria: understanding of the issues from the standpoint of political science and/or law, coherence, clarity, incorporation of both disciplines' approaches, form. Due date: the day of the presentation. Weighting: 40%.
2. Writing of a publishable draft article of 15-30 pages on the chosen research topic, to be revised in accordance with the teachers' suggestions. Assessment criteria: understanding of the issues from the standpoint of political science and law, choice of problems to be treated, presentation (language, structure, quotations) in conformity with the requirements of a scientific publication, conciseness, originality, exhaustiveness. Weighting: 60%.

Chapter 3

STUDY OF INTERNATIONAL HUMANITARIAN LAW PROBLEMS IN A GENERAL COURSE OF INTERNATIONAL LAW

INTRODUCTORY REMARK

As mentioned in the remarks on Teaching IHL introducing this Part of the book, nearly every aspect of international law can be explained, discussed and understood with examples taken from IHL. Furthermore, many cases and documents contained in this book discuss or exemplify problems of branches of international law other than IHL. To facilitate the use of this book for these purposes, including by internationalists not specially interested in IHL, we provide hereafter under each heading references to pertinent passages of parts I and III of this book.

I. THE NATURE OF INTERNATIONAL LAW

A. THE SCIENCE OF INTERNATIONAL LAW

1. A normative science

- a. Difference between *Sollen* and *Sein*
- b. Pretensions and advantages of the general and abstract rule
- c. Behaviour, discourse and hypocrisy

[See **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. C. and D.] p. 2309]

2. Realism and idealism

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic [Cf. A., para. 58], p. 1804 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [Cf. paras. 517- 534.] p. 1911.]

3. Diversity of cultures and values

[See **Case No. 212**, Afghanistan, Separate Hospital Treatment for Men and Women. [Cf. A.] p. 2297.]

4. Dogmatic or practical approach

5. Anglo-Saxon and Romano-Germanic approach

6. Lawyer's roles

- a. Normative
- b. Practitioner
- c. Legal science specialist

B. REALITY AND SPECIFIC CHARACTER OF INTERNATIONAL LAW

1. Existence

[See Chapter 2. I. IHL: at the vanishing point of international law, introductory text. p. 89; Chapter 2. I. 1. Is international law law? *Quotations*. p. 92; **Case No. 79**, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036; **Case No. 143**, Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law. [Cf. C. and D.] p. 1540; **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. D.] p. 2309.]

- IHL, the crucial test of international law

[See Chapter 1. II. The Possibility of Legal Regulation of Warfare, Introductory Text. p. 83 and Chapter 2. II. Fundamental Distinction between *ius ad Bellum* (Legality of the Use of Force) and *ius in Bello* (Humanitarian Rules to be Respected in Warfare), Introductory Text. p. 102.]

2. Respect

[See Chapter 13. XII. Factors contributing to violations of IHL, introductory text, p. 335 and Chapter 13. XIII. Non-legal factors contributing to respect for IHL. p. 338.]

3. Decentralisation and relativism: comparison between the implementation of international law and that of municipal law

- a. Creation: absence of a distinct, permanent or centralised legislator
- b. Application: absence of an ordinary tribunal that can be unilaterally seized
- c. Execution: no central executive power

4. Self-application and its consequences

- a. Difficulty to establish violations
- b. Need for clear rules

5. Adaptation and stability

[See **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. C. and D.] p. 2309.]

6. Expansion

- a. Horizontal
- b. Vertical

7. *Lex lata* and *lex ferenda*

C. THE TWO LAYERS OF CONTEMPORARY INTERNATIONAL LAW

1. The law of the society of States

- a. Contents:
 - i. The law necessary for the coexistence of States
 - ii. The growing field of the law of cooperation between States
- b. Characteristics:
 - i. Relativism
 - ii. Dominant role of consent

iii. Decentralised reaction to violations

[See **Case No. 184**, ICTY, *The Prosecutor v. Kupreskic et al.* [Cf. para. 530.] p. 1911.]

2. The law of the international community composed of six billion human beings

a. International organisation and international organisations

b. Piercing the corporative veil of the State

i. The individual protected by international law (even from his own State)

[See Chapter 2. III. 5. The types of relations governed by IHL, p. 118.]

ii. The individual as addressee of international criminal law

[See Chapter 13. X Violations by Individuals, p. 303; **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [Cf. A., paras. 58, 128-136.] p. 1804.]

c. A hierarchy of rules

[See **Case No. 184**, ICTY, *The Prosecutor v. Kupreskic et al.* [Cf. paras. 519-520.] p. 1911.]

i. *Ius cogens*

ii. *Erga omnes* obligations

d. The international community

i. Concept

ii. Use of the notion

iii. As a subject of international law?

D. THE MAIN CHARACTERISTICS OF INTERNATIONAL LAW

1. The Westphalian system, its universalisation and its obsolescence

2. The central role of the State - human finality

- Application of IHL by and in failed States

[See **Case No. 32**, ICRC, *Disintegration of State Structures*. [Cf. II. 2.] p. 767 and **Document No. 37**, First Periodic Meeting, Chairman's Report. [Cf. II. 2.] p. 800.]

3. Decentralised system - a tendency towards institutionalisation

II. SOURCES OF INTERNATIONAL LAW

- Codification and development of IHL in multilateral treaties

[See Chapter 4. I. Treaties, p. 131.]

- The process of elaboration of the 1977 Protocols

- The strife to ban the use of antipersonnel land mines

1. Customary international law

- Difficulties to assess practice and *opinio iuris* in IHL

[See Chapter 4. II. Customary law, Introductory text, p. 134 and *Quotations*; see also **Case No. 140**, *South Africa, S. v. Petane*, p. 1511; **Case No. 114**, *Israel, Cases Concerning Deportation Orders*. [Cf. 4-7.] p. 1244, **Case No. 29**, ICRC, *Customary International Humanitarian Law*, p. 730 and **Case No. 226**, *Sierra Leone, Special Court Ruling on the Recruitment of Children*, p. 2397.]

a. The two classical elements

[See **Case No. 184**, ICTY, *The Prosecutor v. Kupreskic et al.* p. 1911.]

i. The material element: practice

- Behaviour that constitutes practice

- The practice of belligerents

[See **Case No. 130**, ICJ, Nicaragua v. US. [*Cf.* para. 186.] p. 1365 and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., para. 99.] p. 1804.]

- The practice of non-belligerents

- Relevance of ICRC practice

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., paras. 99 and 109.] p. 1804.]

- How many States?

- For how long?

- States specifically concerned

- ii. The psychological element: the *opinio juris*

- Nature: opinion or commitment

- Possible manifestations

[See **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf.* paras. 527-534 and 540.] p. 1911.]

- iii. The two elements are inseparable

- b. The persistent objector

- c. The codification of international law

[See Chapter 3. Historical development of IHL. p. 121 and Chapter 4. I. Treaties. p. 131.]

- d. The influence of treaties on customary law

[See, Chapter 4. II. 2. IHL treaties and customary IHL, Quotation. p. 137 and *see also* **Case No. 130**, ICJ, Nicaragua v. US. [*Cf.* paras. 174-178, 181, 185, and 218.] p. 1365, **Case No. 140**, South Africa, S. v. Petane. p. 1511, **Case No. 114**, Israel, Cases Concerning Deportation Orders. [*Cf.* 4-7.] p. 1244 and **Case No. 60**, Sweden, Report of the Swedish International Humanitarian Law Committee. [*Cf.* 3. 2. 2.] p. 966.]

2. General principles of law

[See **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf.* B., para. 36-85.] p. 1151.]

3. General principles of international law

[See Chapter 4. III. Fundamental Principles of IHL, Introductory Text. p. 138 and **Case No. 130**, ICJ, Nicaragua v. US. [*Cf.* paras. 215 and 218.] p. 1365.]

- Elementary considerations of humanity

- The Martens clause

[See **Case No. 130**, ICJ, Nicaragua v. US. [*Cf.* para. 218.] p. 1365, **Case No. 207**, Colombia, Constitutional Conformity of Protocol II. [*Cf.* para. 22.] p. 2266 and **Document No. 40**, Minimum Humanitarian Standards. [*Cf.* B., paras. 84 and 85.] p. 823.]

4. The tendency towards a "general international law"

5. Equity

6. Unilateral acts

- Establishment of a non-defended locality

7. Subsidiary sources

- a. Jurisprudence

[See **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf.* paras. 537-541.] p. 1911.]

- b. Writings of publicists

8. "Soft law"

- a. Resolutions of international organisations

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf.* A., paras. 110-112.] p. 1804.]

- Resolutions of the International Conference of the Red Cross and Red Crescent
- b. Non-binding agreements

9. Hierarchy of norms: *ius cogens*

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, art. 40.] p. 805; **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. [*Cf. para. 79.*] p. 896 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf. para. 520.*] p. 1911.]

III. THE SUBJECTS OF INTERNATIONAL LAW

A. STATES

1. Definition

- a. Components
 - i. Population
 - ii. Territory
 - iii. Government
- b. State sovereignty
- c. Recognition

2. State jurisdiction

- a. Territorial jurisdiction
 - i. Exclusions that result
 - ii. Obligations that are derived
 - iii. Defining and delimitating the State territory
- b. Personal jurisdiction
 - i. Nationality of individuals
 - ii. Nationality of corporations
 - iii. The nationality of certain properties
- c. State continuity
 - i. Change of government
[See **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [*Cf. C.*] p. 2309.]
 - ii. Recognition of governments
 - iii. Insurrectional movements
- d. State succession

B. INTERNATIONAL ORGANISATIONS

1. Contractual conception and institutional conception

2. Creation

3. Structure

4. Legal Status

5. Powers

C. OTHER SUBJECTS OF INTERNATIONAL LAW

1. Individuals

- Rights and obligations of individuals according to IHL

[See Chapter 2. III. 5. c) Individual-Individual. p. 120 and Chapter 13. X. Violations by individuals. p. 303.]

2. Companies

3. Insurgents

- Functional legal personality of parties to non-international armed conflicts

[See Chapter 12. VIII. Who is Bound by the Law of Non-International Armed Conflicts?, Introductory text. p. 266 and IX. Consequences of the Existence of a Non-International Armed Conflict for the Legal Status of the Parties, Introductory Text. p. 268 and see also **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., art. 10.] p. 805; **Case No. 207**, Colombia, Constitutional Conformity of Protocol II. [Cf. para. 8.] p. 2266 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., para. 174.] p. 1467.]

4. The Holy See

5. The International Committee of the Red Cross

- Legal status of the Red Cross and Red Crescent Movement
- Legal status of the ICRC

[See Chapter 15. II. 1. f) The relevance of ICRC practice for the development of customary International Law. Quotation. p. 372; see also **Case No. 39**, UN, ICRC Granted Observer Status. p. 820; **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900 and **Document No. 18**, Agreement Between the ICRC and Switzerland. p. 640.]

IV. THE UNITED NATIONS

1. Objectives and principles

2. Legal nature

3. Members

4. The main organs, their system and their jurisdiction

- a. General Assembly
- b. Security Council
- c. Economic and Social Council
- d. Trusteeship Council
- e. International Court of Justice

5. Settlement of disputes

6. Collective security and peacekeeping

- a. Security Council enforcement measures
 - Applicability of IHL

[See **Document No. 42**, UN, Guidelines for UN Forces. p. 861, **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696 and **Case No. 14**, Convention on the Safety of UN Personnel. p. 602.]

- Means of implementation of IHL

[See **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. D.] p. 2098, **Case No. 174**, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771.]

i. The prosecution of war crimes as peace enforcement

[See **Case No. 161**, Iraq, The End of Occupation. p. 1664; **Case No. 196**, UN, Statute of the ICTR. p. 2154 and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 28-39.] p. 1804]

ii. Peacekeeping and peace enforcement operations

[See **Document No. 42**, UN, Guidelines for UN Forces. p. 861; **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. p. 2098 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. p. 2362.]

iii. Applicability of IHL

b. Economic sanctions and IHL

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., art. 50, para. 7.] p. 805.]

7. Specialised agencies

V. FUNDAMENTAL RIGHTS AND OBLIGATIONS OF STATES

- The principle of non intervention

[See **Case No. 130**, ICJ, Nicaragua v. US. [Cf. paras. 207, 219, and 254.] p. 1365.]

- IHL applicable to foreign intervention in non-international armed conflicts

- International co-operation in situations of serious violations of IHL

[See **Case No. 118**, UN, Resolutions and Conference on the Respect of the Fourth Convention. p. 1303, **Document No. 26**, ICRC, Protection of War Victims. [Cf. 3. 1. 3.] p. 702 and **Document No. 37**, First Periodic Meeting, Chairman's Report. p. 800.]

- The right to self-determination

[See **Case No. 58**, United Kingdom and Australia, Applicability of Protocol I. p. 962, **Case No. 61**, US, President Rejects Protocol I. p. 971, **Case No. 139**, South Africa, Sagarius and Others. p. 1507, **Case No. 140**, South Africa, S. v. Petane. p. 1511, **Case No. 232**, The Netherlands, Public Prosecutor v. Folkerts. p. 2450; **Case No. 235**, US, US v. Marilyn Buck. p. 2463 and **Case No. 234**, The Conflict in Western Sahara. p. 2454.]

- IHL applicable to national liberation wars

VI. INTERNATIONAL LAW AND MUNICIPAL LAW

[See Chapter 2. III. 5. b) State-State, IHL in the law of treaties, Introductory text. p. 118.]

1. Role of municipal law for international law

2. Position of international law in municipal law

a. Monism and dualism

b. Direct application or necessity to transform

- Transformation or direct application of IHL treaties

[See **Case No. 114**, Israel, Cases Concerning Deportation Orders. [Cf. 4 and 5.] p. 1244.]

c. Self-executing rules and rules that need legislation for application

[See Chapter 13. II. Measures to be taken in Peacetime, Introductory text. p. 274 and II. 4. Legislation for application, Introductory text. p. 277.]

3. The dualist system (Canada, United Kingdom)

- a. Treaties are not directly applicable
 - i. Become domestic law through transformation

[See **Case No. 49**, Canada, Crimes Against Humanity and War Crimes Act. p. 924; **Case No. 66**, UK, Interpreting the Act of Implementation. p. 988 and **Case No. 94**, India, Rev. Mons. Monteiro v. State of Goa. p. 1097.]

- ii. Assist in interpreting domestic law
- b. Customary law is part of municipal law.

4. The monist system (United States, France, Switzerland)

- a. Self-executing treaties and customary law are part of municipal law
 - Self-executing and non self-executing norms of IHL treaties

[See **Case No. 134**, US, US v. Noriega. [Cf. B. II. C.] p. 1399; **Case No. 128**, Chile, Prosecution of Osvaldo Romo Mena. p. 1357 and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A. consid. 9 a).] p. 2233.]

- b. Other conventional rules need implementing legislation
 - Need for national legislation on war crimes

[See **Case No. 47**, Switzerland, Military Penal Code. p. 912; **Case No. 48**, Germany, International Criminal Code. p. 915; **Case No. 50**, Cameroon, Law on the Protection of the Emblem and the Name "Red Cross". p. 930; **Case No. 51**, Ghana, National Legislation Concerning the Emblem. p. 934; **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 54**, US, War Crimes Act. p. 952 and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. 2 and 4.] p. 2233.]

- c. The hierarchy of international law in municipal law

5. International law in a Federal State

- a. Federal States as subjects of international law?
- b. Right of federal authorities to conclude treaties on matters of domestic jurisdiction of the federated States?
- c. Right to adopt legislation of transformation or implementation?
- d. Responsibility of the Federal State for the federated States?

VII. THE LAW OF TREATIES

1. Conclusion

- a. International jurisdiction and internal jurisdiction
- b. Procedure of conclusion
 - i. Simplified form and formal form
 - ii. Initialling - authentication - signature - ratification - accession
 - iii. Entry into force
- c. Invalid consent
- d. Reservations
- e. Role of the depository
- f. Registration and publication

2. Interpretation of treaties

[See **Case No. 114**, Israel, Cases Concerning Deportation Orders. p. 1244 and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 71-93 and C., paras. 282-304.] p. 1804.]

- a. The text as starting point
- b. In its context and in the light of its object and purpose

- c. Subsequent practice and the remainder of international law
- d. Supplementary recourse to preparatory work

3. Termination and suspension

- a. By consent of the parties
- b. Non-execution
 - No termination or suspension of the operation of an IHL treaty as a consequence of its breach

[See Chapter 13. IX. 2. c) dd) applicability of the general rules on State responsibility - but no reciprocity. p. 301.]
- c. Fundamental change of circumstances
- d. *ius cogens*

4. Treaties between States and international organisations

- Status agreements concluded by the ICRC
- [See **Document No. 18**, Agreement Between the ICRC and Switzerland. p. 640.]

VIII. THE LAW OF DIPLOMATIC RELATIONS

- The Protecting Powers
- [See Chapter 13. IV.1. The Protecting Power. Introductory text. p. 280.]
- The legal status of ICRC delegations and of ICRC delegates
- [See **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900.]
- Diplomatic immunity and prosecution of war crimes
- [See **Case No. 15**, The International Criminal Court. [Cf. Arts. 27 and 98.] p.608; **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. p.2257 and **Case No. 225**, Sierra Leone, Special Court Ruling on Immunity for Taylor. p. 2388.]

IX. STATE JURISDICTION AND ITS DELIMITATION

1. Jurisdiction

- a. Territorial jurisdiction
- b. Jurisdiction of the flag
- c. Active personal jurisdiction
- d. Passive personal jurisdiction?
- e. Jurisdiction of the public power
- f. Jurisdiction of protection
- g. Universal jurisdiction
 - The universal obligation to repress grave breaches

[See Chapter 13. X. 2. Violations by individuals, Introductory text. p. 303; see also **Case No. 191**, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063; **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. B., III. 1. c).] p. 2233 and **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. [Cf. paras. 15 and 45; separate opinion Bula-Bula and dissenting opinion van den Wyngaert, paras. 54 and 59.] p. 2257]
- h. Delegated jurisdiction

2. Fields of application of municipal law

3. Jurisdiction for implementation

4. Immunities

- a. Of the State
- b. Of State organs
 - Immunities under international law and prosecution for war crimes

[See **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium, p. 2257 and **Case No. 225**, Sierra Leone, Special Court Ruling on Immunity for Taylor,] p. 2388.]

X. THE LAW OF THE SEA

[See Chapter 10. The Law of Naval Warfare. p. 231.]

- Applicability of the Law of the Sea Convention in times of armed conflict
- Hostilities in different zones of the Sea
- Innocent and transit passage through neutral waters

XI. THE INTERNATIONAL PROTECTION OF THE INDIVIDUAL

- The historical development of IHL

[See, Chapter 3. Historical Development of IHL. p. 121.]

- The protected person status in IHL

[See, Chapter 2. III. 2. Personal scope of application, Introductory Text. p. 114 and Chapter 14. I. 2. Protected persons. p. 344; see also **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., para. 81; B., paras. 580-608 and C., paras. 163-169.] p. 1804 and **Case No. 185**, ICTY, The Prosecutor v. Blaskic. [Cf. A., para. 127.] p. 1936.]

- Comparison of the status of war victims under IHL and International Human Rights Law

[See, Chapter 14. IHL and International Human Rights Law, Introductory text. p. 341, Chapter 14. I. 1. Material fields of application: complementary, Introductory Text. p. 342, Chapter 14. I. 3. Relations affected, Introductory Text. p. 345, Chapter 14. II. Protected Rights, Introductory text. p. 346 and Chapter 14. III. Implementation, Introductory Text. p. 348; see also **Case No. 194**, ECHR, Bankovic and Others v. Belgium and 16 other States. p. 2093; **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [A., paras. 101-134 p. 1151]; **Case No. 138** Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 149-153, 403-413 p. 1467].]

- The role of Human Rights organs in the implementation of IHL

[See, Chapter 14. III. Implementation, Introductory Text. p. 348; see also **Case No. 12**, The Issue of Mercenaries. [Cf. C.] p. 575; **Case No. 127**, ECHR, Cyprus v. Turkey. p. 1341; **Case No. 133**, Inter-American Commission on Human Rights, Coard v. US. p. 1387; **Case No. 163**, Inter-American Commission on Human Rights, Tablada. [Cf. paras. 157-170.] p. 1670; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. A. 2) and 3. B.1.)] p. 2098; **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. E.] p. 2309 and **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [A.] p. 1151]

XII. STATE RESPONSIBILITY

[See Chapter 13. X. Violations by Individuals, Introductory Text. p. 303; see also **Case No. 38**, ILC, Draft Articles on State Responsibility. p. 805 and **Case No. 163**, Inter-American Commission on Human Rights, Tablada. p. 1670.]

1. Primary and secondary rules

2. Attribution of an unlawful act to a State

- a. Responsibility of a State for "its" acts - how may a State act?
- b. Responsibility of a State for its organs

- i. Members of armed forces as State organs
- ii. Strict responsibility for violations of the laws of war by members of the armed forces?

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 7 and B., para. 26.] p. 805.]

c. Responsibility for *de facto* organs

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 8.] p. 805; **Case No. 130**, ICJ, *Nicaragua v. US*. [*Cf. para. 115.*] p. 1365; **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [*Cf. C.*, paras. 98-145.] p. 1804 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 123-125.] p. 1467.]

d. Responsibility for individuals acting in the absence of official authorities

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 9.] p. 805.]

e. Responsibility for acts by insurgents

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 10.] p. 805.]

- i. Responsibility for violations of IHL by parties to a non-international armed conflict
- f. Responsibility for acts acknowledged and adopted by the State
- g. Responsibility for a lack of due diligence with respect to private actors

3. Responsibility for private damages: specific conditions of diplomatic protection

4. Evaluation of the wrongfulness of the act and nature of the violated obligation

5. Degrees of responsibility: the concept of State crime

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Chapter III and Arts. 40 and 41.] p. 805.]

6. Circumstances precluding wrongfulness

a. Consent

b. Self-defence

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 21.] p. 805 and **Case No. 107**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*. [*Cf. A.*, paras. 138-139.] p. 1151.]

c. Behaviour rendered necessary by a peremptory norm

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 26.] p. 805.]

d. Countermeasures to a wrongful act

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Arts. 49 and 50.] p. 805; **Case No. 65**, UK, *Reservations to Additional Protocol I*. p. 985 and **Case No. 184**, ICTY, *The Prosecutor v. Kupreskic et al.* [*Cf. paras. 527-536.*] p. 1911.]

e. *Force majeure*

f. Distress

g. Necessity

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 25.] p. 805; **Case No. 78**, US Military Tribunal at Nuremberg, *US v. Alfred Krupp et al.* [*Cf. Sect. 4 (iii).*] p. 1030 and **Case No. 107**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*. [*Cf. A.*, para. 140.] p. 1151.]

7. Consequences of responsibility for the concerned State

a. Reparations for violations of *ius ad bellum* and of *ius in bello*

[See **Document No. 26**, ICRC, *Protection of War Victims*. p. 702; **Case No. 152**, UN Compensation Commission, *Recommendations*. p. 1588 and **Case No. 107**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*. [*Cf. A.*, paras. 147-153.] p. 1151.]

8. Implementation of responsibility

[See Chapter 13. V. The Obligation to Ensure Respect (common Article 1), Introductory text. p. 283 and Chapter 13. X. Violations by Individuals. Introductory Text. p. 303, **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 593-600.] p. 1467.]

- a. How to invoke international responsibility?
- b. The notion of injured State
- c. Loss of the right to invoke international responsibility
- d. Plurality of injured States
- e. Victim States other than the injured State
 - i. The concept of injured state in case of violations of IHL
[See, Chapter 13. V. The Obligation to Ensure Respect (Common Article 1), Introductory Text. p. 283.]
- f. Countermeasures
 - i. The prohibition of reprisals in IHL
[See **Document No. 57**, France, Accession to Protocol I. [Cf. B.] p.958; **Case No. 65**, UK, Reservations to Additional Protocol I. p. 985 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [Cf. paras. 527-536.] p. 1911.]
 - ii. Economic sanctions and IHL
[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 50, para. 7.] p. 805.]

XIII. INTERNATIONAL ECONOMIC LAW

- Economic sanctions and IHL

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 50, para. 7.] p. 805 and **Case No. 146**, UN Security Council, Sanctions Imposed Upon Iraq. p. 1565.]

XIV. PROTECTION OF THE ENVIRONMENT

[See **Case No. 25**, The Environment and International Humanitarian Law. p. 680 and **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. [Cf. paras. 27-33.] p. 896.]

- Protection of the environment in times of armed conflict
- Continued validity of environment protection treaties in case of armed conflict

XV. THE PEACEFUL SETTLEMENT OF DISPUTES

[See, Chapter 13. I. General Problems of the Implementation of International Law and Specific Problems for IHL, Introductory text. p. 271 and Chapter 13. IX. The International Responsibility of the State for Violations, Introductory Text. p. 296.]

1. General obligation to settle disputes peacefully
2. Tensions with the tendency to obtain self-justice
3. Liberty of choice as to the method of settlement
4. Role of the UN organs
5. Framework

- a. Negotiations
- b. Consultations
- c. Good offices
 - i. The role of the Protecting Power

[See Chapter 13. IV. 1. The Protecting Power, Introductory Text. p. 280; see also **Case No. 79**, US Military Tribunal at Nuremberg, The Ministries Case. p. 1036 and **Document No. 70**, Switzerland Acting as Protecting Power in World War II. p. 1015.]

- ii. The role of the ICRC and its right of initiative
- d. Enquiry
 - i. Enquiry procedures provided for by IHL
 - ii. The International Fact-Finding Commission
- e. Mediation
- f. Conciliation
 - i. Conciliation procedures and the role of the Protecting Power
- g. Judicial settlement
 - i. Arbitration
 - ii. Submission to international tribunals

6. The International Court of Justice

- a. Structure
- b. Practical importance
- c. Only States have the capacity to act in justice
- d. Bases of jurisdiction
 - i. Special Agreement
 - ii. Treaty
 - iii. Declaration accepting mandatory jurisdiction (the optional clause on mandatory jurisdiction)
- e. Material jurisdiction
 - i. Legal disputes
 - ii. Interested third States
 - iii. Parallel procedures before the Security Council
- f. Advisory opinions
- g. Procedure

XVI. THE USE OF FORCE

1. Historical development

2. State perspective: the ban on the use of force and its exceptions

- a. Self-defence

[See **Case No. 46**, ICJ, Nuclear Weapons Advisory Opinion. [Cf. paras. 94-97.] p. 896 and **Document No. 57**, France, Accession to Protocol I. [Cf. A.] p. 958.]

 - i. As a reaction to armed aggression
 - ii. Subsidiary to collective security measures
 - iii. Preventive self-defence?
 - iv. Self-defence against non-State actors?

[See **Case No. 236**, US, The September 11 2001 Attacks. p. 2470 and **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A., para. 139.] p. 1151.]
 - v. Collective self-defence
- b. Use of force decided or authorised by the Security Council

[See **Case No. 174**, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993. p. 1771 and **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. B. and C.] p. 2098.]
- c. Wars of National Liberation
- d. Armed intervention with the State's consent

[See **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 3. A.] p. 2098 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 1. B. 4.].] p. 2362.]

e. Armed humanitarian intervention?

[See **Case No. 149**, UN, Security Council Resolution 688 on Northern Iraq, p. 1571; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. C. and 3. D.] p. 2098 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 1. B. 4.] p. 2362.]

f. Armed reprisals?

3. *Ius ad bellum* and *Ius in bello*

[See, Chapter 2. II. Fundamental Distinction between *Ius ad Bellum* (Legality of the Use of Force) and *Ius in Bello* (Humanitarian Rules to be Respected in Warfare), Introductory Text, p. 102; see also **Document No. 80**, US Military Tribunal at Nuremberg, US v. Wilhelm List, p. 1043, **Case No. 77**, US Military Tribunal at Nuremberg, The Justice Trial, p. 1029, **Case No. 58**, United Kingdom and Australia, Applicability of Protocol I, p. 962, **Case No. 134**, US, US v. Noriega. [Cf. A., II. A.] p. 1399 and **Case No. 108**, Israel, Applicability of the Convention to Occupied Territories, p. 1208.]

4. The perspective of the United Nations Charter

a. Maintenance of peace and international security by the Security Council

i. The concept of a threat to peace and international security

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A. para. 30.] p. 1804.]

ii. Possible Security Council enforcement measures

- Non-military sanctions
- Creation of a criminal tribunal

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 35-39.] p. 1804.]

- Economic sanctions

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 50, para. 7.] p. 805.]

- Military sanctions

[See **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. B.] p. 1467.]

b. Subsidiary role of the General Assembly

[See **Case No. 118**, UN, Resolutions and Conference on the Respect of the Fourth Convention. [Cf. B.] p. 1303.]

c. Peacekeeping operations

[See **Document No. 43**, UN, The "Brahimi" Report, p. 866.]

i. Applicability of IHL

[See **Case No. 14**, Convention on the Safety of UN Personnel, p. 602; **Document No. 42**, UN, Guidelines for UN Forces, p. 861, **Document No. 43**, UN, The "Brahimi" Report. [Cf. para. 41.] p. 866; **Case No. 168**, Belgium, Belgian Soldiers in Somalia, p. 1696; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. C. 2.)] p. 2098 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 1. B. 2); 1 B. 3) and 2. B.] p. 2362.]

ii. A means of implementation of IHL?

[See **Case No. 174**, Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993, p. 1771; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1. B.; 1. C. 1) and 3. D.] p. 2098.]

5. Principles applicable to the legal use of force

- a. Proportionality
- b. Necessity
- c. Respect of IHL

[See Chapter 2. II. Fundamental Distinction between *Ius ad Bellum* (Legality of the Use of Force) and *Ius in Bello* (Humanitarian Rules to be Respected in Warfare), p. 102.]

6. Absence of a ban on non-international armed conflicts

XVII. THE LAW OF DISARMAMENT

[See **Document No. 10**, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Ottawa, September 18, 1997. p. 560; **Document No. 13**, Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, Paris, January 13, 1993. p. 592 and **Document No. 35**, ICRC, Biotechnology, Weapons and Humanity. p. 850.]

XVIII. THE LAW OF NEUTRALITY

- The development of the concept of neutrality from the 1949 Geneva Conventions to the 1977 Additional Protocols
- Humanitarian assistance by neutral States:
 - Providing relief
 - Transit
 - Internment of prisoners of war in neutral countries
[See **Case No. 211**, Afghanistan, Soviet Prisoners Transferred to Switzerland. p. 2294.]
- Naval warfare:
 - Innocent and transit passage through neutral waters
 - Neutral shipping in sea warfare

Chapter 4

STUDY OF INTERNATIONAL HUMANITARIAN LAW IN SPECIAL (INTERNATIONAL) LAW COURSES

[Hereunder, we give reference, as an indication and not exhaustively, to pertinent passages of Parts I and III of this book.]

I. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN AN INTERNATIONAL ORGANIZATIONS COURSE

1. Generalities

- a) Legal personality
 - Legal status of the ICRC
[see Chapter 15.I.2. The legal status of the ICRC. p. 368.]
 - The application of IHL to UN forces
[see Chapter 13.VIII.5.a) U.N. forces as addressees of IHL and protected by IHL. p. 293, **Case No. 136**, Eritrea/Ethiopia, Partial Award on POWs. [*Cf. A.*, paras. 45-48.] p. 1423.]
- b) Privileges and immunities
 - Privileges and immunities of the ICRC inherent in its mandate in IHL
[see **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900.]
 - Privileges and immunities of the ICRC provided for in status agreements
 - Privileges and immunities of the ICRC provided for in its headquarters agreement with Switzerland
[see **Document No. 18**, Agreement Between the ICRC and Switzerland. p. 640.]
- c) Treaty-making power
 - Status agreements and operational agreements concluded by the ICRC
[see **Document No. 18**, Agreement Between the ICRC and Switzerland. p. 640 and **Document No. 19**, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal. p. 645.]

2. The United Nations system

- Security Council enforcement measures:
 - Applicability of IHL
 - Means of implementation of IHL
 - The prosecution of war crimes as peace enforcement
[see **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [Cf. A., para. 39.] p. 1804 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. B.] p. 1467.]
- Peacekeeping operations
[see **Document No. 43**, UN, The "Brahimi" Report. p. 866.]
 - Applicability of IHL
[see Chapter 13.VIII.5.a) UN forces as addressees of IHL and protected by IHL. p. 293.]
- ICRC's observer status in the UN General Assembly
[see **Case No. 39**, UN, ICRC Granted Observer Status. p. 820.]
- The role of the UN General Assembly in the development of IHL
- The concept of *in situ* protection of UNHCR and implementation of IHL
- Reference to IHL in resolutions of the UN Human Rights Commission
- Special Rapporteurs of the UN Human Rights Commission on IHL subjects
- UN Human Rights Monitors and IHL

3. The International Conference of the Red Cross and the Red Crescent

- Its legal nature
- Legal nature of its resolutions

4. The International Red Cross and Red Crescent Movement

- Status and role of National Red Cross and Red Crescent Societies in IHL

5. The International Committee of the Red Cross

[see Chapter 15. The International Committee of the Red Cross. p. 355.]

- Its position and function in the International Red Cross and Red Crescent Movement
- Its legal status
- Its principles
- Its traditionally mononational character
- Its role in the development of IHL
- Its mandate under IHL
 - In international armed conflicts
 - In non-international armed conflicts
- Activities and approach
- Importance of IHL in the ICRC's operational practice

6. The International Federation of Red Cross and Red Crescent Societies

II. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN A HUMAN RIGHTS COURSE

1. Historical development

- The development of IHL as a first form of protection of the individual in international law
- The changing structure of the protective regimes of IHL: from interstate relations to protection of the individual against the State and armed groups

[See Chapter 2.III.2.a) Passive personal scope of application: who is protected?, p. 115 and Chapter 14.II.1.a) But details provided by IHL are more adapted to armed conflicts. p. 347.]

2. Sources

- IHL as protection of (some) human rights in armed conflicts
[See Chapter 14.II.1.a) But details provided by IHL are more adapted to armed conflicts. p. 347.]
- (Human Rights-like) Fundamental guarantees of IHL for persons not benefiting from more favourable guarantees under IHL

3. Universalism and cultural relativism

- Law v. rights in IHL and Human Rights
- Universality of humanitarian values
[See Chapter 1.III. IHL and cultural relativism. p. 85.]
- IHL covering rights of all "three generations" of Human Rights

4. Protected rights

- a) Right to life
 - Reference to IHL through the exception for lawful acts of war
[See Chapter 14.III. Implementation, Introductory text. p. 348; see also **Case No. 127**, ECHR, *Cyprus v. Turkey*. p. 1341.]
- b) Prohibition on inhumane and degrading treatment
 - No justification by a state of necessity of the State even in armed conflicts
- c) Right to personal freedom
[See **Case No. 133**, Inter-American Commission on Human Rights, *Coard v. US*. [Cf. paras. 42, 45-59.] p. 1387 and **Case No. 216**, Cuba, *Detainees Transferred to Guantánamo Naval Base*. [Cf. F.] p. 2309.]
 - Justification for the internment of prisoners of war
[See **Case No. 216**, Cuba, *Detainees Transferred to Guantánamo Naval Base*. [Cf. E.] p. 2309 and **Case No. 220**, US, *Hamdan v. Rumsfeld*. p. 2346.]
 - Administrative detention of civilians in IHL
[See **Case No. 113**, Israel, *Cheikh Obeid et al v. Ministry of Security*. p. 1237; **Case No. 133**, Inter-American Commission on Human Rights, *Coard v. US*. [Cf. paras. 52-59.] p. 1387 and **Case No. 142**, ICRC, *Iran/Iraq Memoranda*. p. 1529.]
- d) Judicial guarantees
 - Is an international tribunal "established by law"?
[See **Case No. 180**, ICTY, *The Prosecutor v. Tadic*. [Cf. A., paras. 41-48.] p. 1804.]
- e) Economic, social and cultural rights
[See **Case No. 107**, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*. [Cf. A., paras. 130-134.] p. 1151.]

- Extent of protection in armed conflicts by IHL (health, work, education, ...)
 - Interdependence and indivisibility of protection and assistance in armed conflicts
- f) Collective rights
- Right to a healthy environment: protection of the environment in armed conflict
 - Right to self-determination: qualification of national liberation wars in IHL and its consequences
 - Right to peace: distinction between *ius ad bellum* and *ius in bello*

5. Possible derogation

[See **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., para. 127.] p. 1467.]

- The hard core common to Human Rights and IHL
[See **Case No. 133**, Inter-American Commission on Human Rights, *Coard v. US*. [Cf. para. 39.] p. 1387.]
- IHL expanding the non derogable rights in armed conflicts
[See **Case No. 163**, Inter-American Commission on Human Rights, *Tablada*. [Cf. paras. 168-170.] p. 1670.]
- Gaps in situations of internal strife and tension and attempts to fill it: Minimum Humanitarian Standards
[See **Document No. 40**, Minimum Humanitarian Standards. p. 823.]
- The requirement that derogations must be consistent with other obligations under international law as a reference to IHL in armed conflicts
[See **Case No. 163**, Inter-American Commission on Human Rights, *Tablada*. [Cf. paras. 168-170.] p. 1670 and **Case No. 216**, Cuba, *Detainees Transferred to Guantánamo Naval Base*. [Cf. E.] p. 2309.]

6. Mechanisms for implementation

- a) Non-treaty based
- Reference to IHL in resolutions of the UN Human Rights Commission, reports of country specific or thematic Special Rapporteurs, the Inter-American Commission for Human Rights, OSCE mechanisms
[See **Case No. 12**, *The Issue of Mercenaries*. [Cf. C.] p. 575; **Case No. 195**, *Case Study, Armed Conflicts in the Great Lakes Region*. [Cf. 3.A.2) and 3.B.1),] p. 2098 and **Case No. 216**, Cuba, *Detainees Transferred to Guantánamo Naval Base*. [Cf. E.] p. 2309.]
 - Special Rapporteurs of the UN Human Rights Commission on IHL topics
 - UN or OSCE Human Rights Monitors and IHL
[See **Case No. 195**, *Case Study, Armed Conflicts in the Great Lakes Region*. [Cf. 3.D.)] p. 2098.]
- b) Treaty based
- IHL in the discussions and decisions of the UN Human Rights Committee (incl. on individual communications from States Party to the Optional Protocol), the UN Committee against Torture, the European Court on Human Rights, the European Committee against Torture, the American Commission on Human Rights and the African Commission on Human and Peoples' Rights
[See **Case No. 127**, ECHR, *Cyprus v. Turkey*. p. 1341 and **Case No. 133**, Inter-American Commission on Human Rights, *Coard v. US*. p. 1387.]

- Co-ordination between the ICRC and the European Committee against Torture in and outside armed conflicts

c) NGOs

- Reference to IHL and/or Human Rights by NGOs in armed conflicts

[See **Case No. 121**, Amnesty International, Breach of the Principle of Distinction. p. 1328; **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. [Cf. A.] p. 2077; **Case No. 195**, Case Study, Armed Conflicts In the Great Lakes Region. [Cf. 2.B.] p. 2098; **Case No. 216**, Cuba, Detainees Transferred to Guantánamo Naval Base. [Cf. C.] p. 2309; **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 2.A.] p. 2362; **Case No. 229**, Russian Federation, Chechnya, Operation Samashki. p. 2416 and **Case No. 234**, The Conflict in Western Sahara. [Cf. A.] p. 2454.]

d) ICRC

- The ICRC and Human Rights in and outside armed conflicts

7. States as protectors and enforcers of Human Rights

a) States, protectors of the rights of persons under their jurisdiction

[See **Case No. 194**, ECHR, Bankovic and Others v. Belgium and 16 other States. p. 2093 and **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [Cf. A. paras. 107-112.] p. 1151.]

b) International Human Rights Law within States' legal orders

- National legislation of implementation of IHL

[See **Case No. 47**, Switzerland, Military Penal Code. p.912. to **Case No. 54**, US, War Crimes Act. p. 952.]

- Judicial enforcement of IHL by domestic courts

[See **Case No. 66**, UK, Interpreting the Act of Implementation. p. 988; **Case No. 67**, UK, Labour Party Campaign - Misuse of the Emblem. p. 991; **Case No. 83**, US, *Ex Parte Quirin et al.* p. 1053 to **Case No. 89**, Singapore, Bataafsche Petroleum v. The War Damage Commission. p. 1071; **Case No. 93**, Hungary, War Crimes Resolution. p. 1091; **Case No. 94**, India, Rev. Mons. Monteiro v. State of Goa. p. 1097; **Case No. 97**, Malaysia, Public Prosecutor v. Oie Hee Koi. p. 1109. to **Case No. 99**, Belgium, Public Prosecutor v. G.W. p. 1122; **Case No. 101**, US, US v. William L. Calley, Jr. p. 1129; **Case No. 104**, Nigeria, Pius Nwaoga v. The State. p. 1139; **Case No. 109**, Israel, Military Prosecutor v. Kassem and Others. p. 1212. to **Case No. 114**, Israel, Cases Concerning Deportation Orders. p. 1244; **Case No. 128**, Chile, Prosecution of Osvaldo Romo Mena. p. 1357; **Case No. 131**, Canada, Ramirez v. Canada. p. 1376; **Case No. 134**, US, US v. Noriega. p. 1399; **Case No. 139**, South Africa, Sagarius and Others. p. 1507 to **Case No. 141**, South Africa, AZAPO v. Republic of South Africa. p. 1522; **Case No. 166**, Canada, Sivakumar v. Canada. p. 1685; **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696; **Case No. 169**, Canada, R. v. Brocklebank. p. 1707; **Case No. 189**, US, Kadic et al. v. Karadzic. p. 2055 to **Case No. 191**, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063; **Case No. 202**, France, Radio Mille Collines. p. 2222; **Case No. 203**, France, Dupaquier, *et al.* v. Munyeshyaka. p. 2223; **Case No. 205**, Switzerland, The Niyonteze Case. p. 2233. **Case No. 223**, India, People's Union for Civil Liberties v. Union of India. p. 2358; **Case No. 232**, The Netherlands, Public Prosecutor v. Folkerts. p. 2450 **Case No. 235**, US, US v. Marilyn Buck. p. 2463.]

- Application of IHL by and in failed States

c) Enforcement by States against violator States

- IHL and humanitarian intervention
- IHL and economic sanctions

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [Cf. A., Art. 50, para. 7.] p. 805.]

- The obligation to ensure respect for IHL

[See Chapter 13.V. The obligation to ensure respect (common Article 1). Introductory text. p. 283.]

- IHL conditions for humanitarian assistance

[See Chapter 9.IV. IHL and humanitarian assistance. Introductory text. p. 226.]

III. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN A CRIMINAL LAW COURSE

1. Compulsory jurisdiction over and criminalization of war crimes

2. War crimes in national penal law

[See **Case No. 47**, Switzerland, Military Penal Code. p. 912; **Case No. 48**, Germany, International Criminal Code. p. 915; **Case No. 49**, Canada, Crimes Against Humanity and War Crimes Act. p. 924; **Case No. 51**, Ghana, National Legislation Concerning the Emblem. p. 934; **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 54**, US, War Crimes Act. p. 952 and **Case No. 205**, Switzerland, The Niyonteze Case. p. 2233.]

3. Elements of a crime

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 30.] p. 608.]

a) Subjective elements - *mens rea*

- Negligence

[See **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696; **Case No. 169**, Canada, R. v. Brocklebank. [*Cf. paras. 18-66.*] p. 1707. and **Case No. 171**, Canada, R. v. Seward. p. 1725.]

- Intent and negligence in case of indiscriminate attacks

- Recklessness

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. C.*, paras. 220 and 228.] p. 1804. and **Case No. 185**, ICTY, The Prosecutor v. Blaskic. [*Cf. A.*, paras. 152 and 179.] p. 1936.]

- Mistake of law in case of violations of IHL

- Motives

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. C.*, paras. 268 and 269.] p. 1804.]

b) Objective elements - *actus reus*

- Causing death or serious injury as a necessary result of battlefield crimes

- War crimes by failure to act

[See **Case No. 169**, Canada, R. v. Brocklebank. [*Cf. paras. 18-66.*] p. 1707 and **Case No. 188**, ICTY, The Prosecutor v. Strugar. [*Cf. B.*, paras. 334-347.] p. 2020.]

4. Non-responsibility or mitigated responsibility

a) Objective causes

- The defence of superior order against war crimes prosecution

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 33.] p. 608; **Document No. 80**, US Military Tribunal at Nuremberg, US v. Wilhelm List. p. 1043; **Case No. 99**, Belgium, Public Prosecutor v. G.W. p. 1122; **Case No. 101**, US, US v. William L. Calley, Jr. p. 1129; **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696; **Case No. 169**, Canada, R. v. Brocklebank. p. 1707 and **Case No. 207**, Colombia, Constitutional Conformity of Protocol II. [*Cf. paras. 36-40.*] p. 2266.]

- The defences of coercion (duress), necessity, self defence against war crimes prosecution?

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 31 (1) (c), (d).] p. 608; **Case No. 75**, British Military Court at Hamburg, The Peleus Trial. p. 1022. and **Case No. 78**, US Military Tribunal at Nuremberg, US v. Alfred Krupp *et al.* [*Cf. (4) (iii) and (vii).*] p. 1030.]

- Defence of lawful acts of hostility in wartime

[See **Case No. 98**, Malaysia, Osman v. Prosecutor. p. 1112; **Case No. 109**, Israel, Military Prosecutor v. Kassam and Others. p. 1212; **Case No. 232**, The Netherlands, Public Prosecutor v. Folkerts. p. 2450 and **Case No. 235**, US, US v. Marilyn Buck. p. 2463.]

b) Subjective causes

- The accused was a minor at the time of the crime

- Psychic disorders

- Duress
[See **Case No. 131**, Canada, Ramirez v. Canada. p. 1376.]
- Prohibition of criminal liability for escapes of prisoners of war and civil internees

5. Inchoate and group criminality

a) Vicarious liability

b) Liability for conspiracy to commit war crimes

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 25.] p. 608; **Case No. 131**, Canada, Ramirez v. Canada. p. 1376; **Case No. 166**, Canada, Sivakumar v. Canada. p. 1685; **Case No. 169**, Canada, R. v. Brocklebank. p. 1707; **Case No. 170**, Canada, R. v. Boland. p. 1720; **Case No. 171**, Canada, R. v. Seward. p. 1725; **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 532-562.] p. 1467 and **Case No. 187**, ICTY, The Prosecutor v. Galic. [*Cf. paras. 168-169.*] p. 1986.]

- The responsibility of commanders for war crimes committed by subordinates if they knew or had information which should have enabled them to conclude

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 28.] p. 608; **Document No. 80**, US Military Tribunal at Nuremberg, US v. Wilhelm List. [*Cf. 3.(x).*] p. 1043; **Document No. 82**, The Tokyo War Crimes Trial. p. 1051; **Case No. 86**, US, *In re Yamashita*. p. 1063; **Case No. 166**, Canada, Sivakumar v. Canada. p. 1685; **Case No. 171**, Canada, R. v. Seward. p. 1725; **Case No. 205**, Switzerland, The Niyonteze Case. p. 2233; **Case No. 187**, ICTY, The Prosecutor v. Galic. [*Cf. paras. 561-562.*] p. 1986 and **Case No. 188**, ICTY, The Prosecutor v. Strugar. [*Cf. B.*, paras. 173-177.] p. 2020.]

- Responsibility for the aid or assistance given to the main author of the violation
- Responsibility for incitement to commit a crime or ordering to commit a crime

[See **Case No. 205**, Switzerland, The Niyonteze Case. p. 2233; **Case No. 187**, ICTY, The Prosecutor v. Galic. [*Cf. paras. 609-749.*] p. 1986. and **Case No. 188**, ICTY, The Prosecutor v. Strugar. [*Cf. B.*, paras. 334-346.] p. 2020.]

c) Agreement to commit a crime

d) Common criminal purpose

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. C.*, paras. 178-233.] p. 1804 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. p. 1467.]

6. Specific crimes

[See **Case No. 185**, ICTY, The Prosecutor v. Blaskic. p. 1936.]

- Genocide

[See **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [paras. 640-642.] p. 1467.; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [*Cf. 1.A.1*] p. 2098; **Case No. 200**, ICTR, The Prosecutor v. Jean-Paul Akayesu. [*Cf. A.*, paras. 492-523.] p. 2171 and **Case No. 205**, Switzerland, The Niyonteze Case. [*Cf. B.*, III. B.] p. 2233.]

- Crimes against humanity

[See **Case No. 93**, Hungary, War Crimes Resolution. p. 1091; **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. B.*, paras. 618-654 and C., paras. 238-304.] p. 1804; **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf. paras. 567-636.*] p. 1911; **Case No. 185**, ICTY, The Prosecutor v. Blaskic. [*Cf. A.*, paras. 66-71.] p. 1936 and **Case No. 186**, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. [*Cf. paras. 116-131.*] p. 1974.]

- War crimes in non-international armed conflicts

[See **Case No. 15**, The International Criminal Court. [*Cf. A.*, Art. 8 (2) (c)-(f).] p. 608; **Case No. 93**, Hungary, War Crimes Resolution. p. 1091; **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. A.*, paras. 128-136.] p. 1804 and **Case No. 205**, Switzerland, The Niyonteze Case. [*Cf. A.*, consid. 3 and B., III.1.B.] p. 2233; **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 161-163.] p. 1467.]

- Grave breaches of IHL

[See **Case No. 180**, ICTY, *The Prosecutor v. Tadic*, [Cf. A., paras. 79-84.] p. 1804 and **Case No. 185**, ICTY, *The Prosecutor v. Blaskic*, [Cf. A., paras. 151-158.] p. 1936.]

- Other violations of IHL applicable to international armed conflict

[See **Case No. 185**, ICTY, *The Prosecutor v. Blaskic*, [Cf. A., paras. 179-187.] p. 1936 and **Case No. 205**, Switzerland, *The Niyonteze Case*, [Cf. B., III.1.B.] p. 2233.]

- Misuse of the red cross or red crescent emblem in peacetime

[See **Case No. 67**, UK, *Labour Party Campaign - Misuse of the Emblem*, p. 991 and **Case No. 178**, UK, *Misuse of the Emblem*, p. 1788.]

7. Multiple convictions for the same conduct

[See **Case No. 186**, ICTY, *The Prosecutor v. Kunarac, Kovac and Vukovic*, [Cf. paras. 175-186.] p. 1974; **Case No. 187**, ICTY, *The Prosecutor v. Galic*, [Cf. paras. 158-163.] p. 1986. and **Case No. 188**, ICTY, *The Prosecutor v. Strugar*, [Cf. B., paras. 447-455.] p. 2020.]

8. Punishment

- Provisions of IHL on the treatment of detainees
- Limitations on the death penalty contained in IHL
- Escape is not an aggravating circumstance for prisoners of war and civil internees
- Certain crimes in an occupied territory are liable only of simple imprisonment or internment
- Determining the sentence

[See **Case No. 170**, Canada, *R. v. Boland*, p. 1720; **Case No. 171**, Canada, *R. v. Seward*, p. 1725 and **Case No. 205**, Switzerland, *The Niyonteze Case*, [Cf. A., consid. 13 and B., III. 4. B.] p. 2233.]

IV. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN AN INTERNATIONAL CRIMINAL LAW COURSE

1. The fundamental importance of international criminal law

- Preventive and stigmatizing effect of the repression of war crimes and importance of the individualization and guilt

2. History

- Development of the concept of war crimes in IHL
- Development of the penal provisions of the 1949 Geneva Conventions and the 1977 Additional Protocols
- The Statute of the International Criminal Court

[See **Case No. 15**, *The International Criminal Court*, p. 608.]

3. Sources - Attempts of codification

- The penal provisions of IHL and the Draft code of crimes against the peace and security of mankind
- Article 8 of the Statute of the International Criminal Court

[See **Case No. 15**, *The International Criminal Court*, p. 608.]

4. International crimes

- Genocide

[See **Case No. 138**, Sudan, *Report of the UN Commission of Enquiry on Darfur*, [Cf. A., paras. 640-642.] p. 1467; **Case No. 195**, *Case Study, Armed Conflicts in the Great Lakes Region*, [Cf. 1.A.1.] p. 2098;

Case No. 200, ICTR, The Prosecutor v. Jean-Paul Akayesu. [Cf. A., paras. 492-523.] p. 2171. and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. B., III. B.] p. 2233.]

- Crimes against humanity

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. B., paras. 618-304.] p. 1804; **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [Cf. paras. 567-636.] p. 1911; **Case No. 185**, ICTY, The Prosecutor v. Blaskic. [Cf. A., paras. 66-71.] p. 1936 and **Case No. 186**, ICTY, The Prosecutor v. Kunarac, Kovac and Vukovic. [Cf. paras. 116-131.] p. 1974.]

- The concept of grave breaches of IHL and the concept of war crimes

- The repression of violations of IHL not qualified as grave breaches

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 128-136.] p. 1804.]

- War crimes in non-international armed conflicts

[See **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A., consid. 3 and B., III.1.B.] p. 2233 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 161-163.] p. 1467.]

- The extension of the concept of grave breaches to non-international armed conflicts

[See **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A., consid. 3 and B., III.1.B.] p. 2233.]

- The different systems used to criminalize international crimes in domestic law

[See **Case No. 47**, Switzerland, Military Penal Code. p. 912; **Case No. 48**, Germany, International Criminal Code. p. 915; **Case No. 49**, Canada, Crimes Against Humanity and War Crimes Act. p. 924; **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 54**, US, War Crimes Act. p. 952; and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A., consid. 3 and B., III.1.B.] p. 2233]

5. Jurisdiction

a) Compulsory universal jurisdiction over grave breaches of IHL

[See Chapter 13.X. Violations by Individuals. p. 303; See also **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 190**, France, Javor and Others. p. 2060; **Case No. 204**, Switzerland, X. v. Federal Office of Police. p. 2225; **Case No. 202**, France, Radio Mille Collines. p. 2222; **Case No. 203**, France, Dupaquier, *et al.* v. Munyeshyaka. p. 2223; **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. B., III.1.c.)] p. 2233 **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. [Cf. paras. 15 and 45; separate opinion Guillaume. para. 17; separate opinion Rezek; separate opinion Bula-Bula and dissenting opinion van den Wyngaert. paras. 54 and 59.] p. 2257 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [A., paras. 613-615.] p. 1467.]

b) Extraterritorial jurisdiction over crimes committed abroad and criminals currently under foreign jurisdiction in IHL

[See **Case No. 134**, US, US v. Noriega. p. 1399 and **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. [Cf. Individual opinions of Judge Guillaume and dissenting opinion of Judge van den Wyngaert. paras. 54 and 59.] p. 2257.]

c) Diplomatic and governmental immunity against war crimes prosecution

[See **Case No. 15**, The International Criminal Court. [Cf. A., Arts. 27 and 98.] p. 608; **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. p. 2257 and **Case No. 225**, Sierra Leone, Special Court Ruling on Immunity for Taylor. p. 2388.]

6. Mutual assistance in criminal matters

[See **Case No. 199**, Luxembourg, Law on Cooperation with the International Criminal Courts. p.2165.]

- Discussion of Art. 88 of Protocol I

7. Extradition

[See **Case No. 134**, US, US v. Noriega. p. 1399; **Case No. 204**, Switzerland, X. v. Federal Office of Police. p. 2225 and **Case No. 206**, ICJ, Democratic Republic of Congo v. Belgium. p. 2257.]

- The principle *aut dedere aut judicare* in case of grave breaches of IHL
- Extradition and transfer to international tribunals

8. National prosecution for international crimes

[See **Case No. 47**, Switzerland, Military Penal Code. p. 912; **Case No. 48**, Germany, International Criminal Code. p. 915; **Case No. 49**, Canada, Crimes Against Humanity and War Crimes Act. p. 924; **Case No. 51**, Ghana, National Legislation Concerning the Emblem. p. 934; **Case No. 52**, Belgium, Law on Universal Jurisdiction. p. 937; **Case No. 54**, US, War Crimes Act. p. 952; **Case No. 128**, Chile, Prosecution of Osvaldo Romo Mena. p. 1357; **Case No. 134**, US, US v. Noriega. p. 1399; **Case No. 168**, Belgium, Belgian Soldiers in Somalia. p. 1696; **Case No. 169**, Canada, R. v. Brocklebank. p. 1707; **Case No. 170**, Canada, R. v. Boland. p. 1720; **Case No. 171**, Canada, R. v. Seward. p. 1725; **Case No. 189**, US, Kadic et al. v. Karadzic. p. 2055; **Case No. 190**, France, Javor and Others. p. 2060; **Case No. 191**, Switzerland, Military Tribunal of Division 1, Acquittal of G. p. 2063; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1.F.] p. 2098; **Case No. 202**, France, Radio Mille Collines. p. 2222; **Case No. 203**, France, Dupaquier, et al. v. Munyeshyaka. p. 2223; **Case No. 204**, Switzerland, X. v. Federal Office of Police. p. 2225 and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A. consid. 3 and B., III.1.B.] p. 2233.]

- Need for national legislation for implementation of IHL
- Jurisdiction and criminalization based exclusively on international law?
- Practical difficulties for third States to prosecute war crimes
- State criminality before national judicial systems

9. The establishment of ad hoc International Criminal Tribunals for the Former Yugoslavia and Rwanda

[See **Case No. 179**, UN, Statute of the ICTY. p. 1791; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1.E.] p. 2098 and **Case No. 196**, UN, Statute of the ICTR. p. 2154.]

- Relationship between the provisions on their jurisdiction in their statutes and IHL

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 86-143.] p. 1804.]

- No mention of grave breaches to Additional Protocol I in the Former Yugoslavia Statute, but reference to violations of the laws or customs of war
- The concept of serious violations of Article 3 common and of Protocol II in the Rwanda Statute
- Co-operation between the ICRC and the *ad hoc* International Criminal Tribunals

[See **Document No. 19**, Agreement Between the ICRC and the ICTY Concerning Persons Awaiting Trials Before the Tribunal. p. 645 and **Case No. 183**, ICTY/ICC, Confidentiality and Testimony of ICRC Personnel. p. 1900.]

10. The International Criminal Court

[See **Case No. 15**, The International Criminal Court. p. 608.]

- ICC jurisdiction
 - The principle of complementarity
 - *Ratione temporis, ratione personae and ratione loci* jurisdictions
- Differences from *ad hoc* Tribunals (Security Council Resolution v. Treaty)
- Initiation of legal proceedings before the ICC
 - The independence of the prosecutor of the ICC
 - The Security Council's role

[See **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [Cf. A., paras. 608-609 and B.] p. 1467.]

- Crimes committed during international or non-international armed conflicts under ICC jurisdiction
- Exclusion of criminal responsibility under article 31 (1) (c)

11. Hybrid Tribunals

[See **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 3.] p. 2362.]

12. Tensions between repression of crimes and reconciliation

[See **Case No. 128**, Chile, Prosecution of Osvaldo Romo Mena. [Cf. para. 12.] p. 1357; **Case No. 141**, South Africa, AZAPO v. Republic of South Africa. p. 1522; **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1.F. 1.)] p. 2098; **Case No. 207**, Colombia, Constitutional Conformity of Protocol II. [Cf. paras. 41-43.] p. 2266 and **Case No. 224**, Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea. [Cf. 3.] p. 2362.]

V. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN AN INTERNATIONAL REFUGEE LAW COURSE

- The refugee in IHL
- The displaced person in IHL
 - Requests for a specific instrument
- Armed conflicts in International Refugee Law
- Personal fields of application
 - Persons fleeing within their own country an armed conflict: protected by IHL
 - Persons fleeing into a third country because of an armed conflict
 - Protected by the OAU Convention, the 1984 Cartagena Declaration and UN General Assembly resolutions
 - Protected by IHL if
 - The third country is the adverse party in an international armed conflict
 - The third country is affected by another armed conflict
 - Voluntary repatriation
 - [See **Case No. 195**, Case Study, Armed Conflicts in the Great Lakes Region. [Cf. 1.B.] p. 2098.]
 - Persons fleeing persecution
 - Protected by IHL if the third country is affected by an armed conflict
 - "Protected persons" if the third country is subsequently affected by an international armed conflict, even if they are nationals of the occupying power or of a State having normal diplomatic representation in the third State
 - Loss of refugee status if they have committed war crimes
 - [See **Case No. 131**, Canada, Ramirez v. Canada. p. 1376; **Case No. 166**, Canada, Sivakumar v. Canada. p. 1685 and **Case No. 205**, Switzerland, The Niyonteze Case. [Cf. A.10.a.)] p. 2233.]
- The principle of *non refoulement* in IHL
- Implementation
 - Principal responsibility of UNHCR
 - ICRC role
 - Under IHL
 - Under its statutory right of initiative
 - Role of National Red Cross or Red Crescent Societies
 - As auxiliaries of their authorities
 - As implementing agencies of UNHCR
 - Under the general direction of the ICRC
 - Co-ordinated by their International Federation

VI. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN A COURSE ON THE HISTORY OF INTERNATIONAL LAW

- Law and religion in different cultural traditions
 - Humanitarian rules in a community not yet made up by States
 - The regulation of armed conflicts within and between medieval empires by "national", "international" and natural law
 - Pre-colonial African customary law
 - Islamic rules of warfare: international, national or religious rules
 - Grotius, Vitoria, Suarez, de Vattel and the concept of just war
 - Vitoria and de las Casas and the conquest of the new world
 - IHL in modern international law
 - The concept of international armed conflict after the peace of Westphalia
 - IHL and the absolutist State
 - IHL in the revolutionary wars
 - IHL as part of the European public law of the 19th century
 - The European origin of modern IHL
 - Hegemony and equality of States
 - IHL applicable to interventions
 - IHL applicable in wars with non European States and peoples
 - IHL applicable in colonial wars
 - The historical development of IHL as an indicator for the changing structure of contemporary international law
 - Codification
 - Universalization
 - Reasons and gradual overcoming of the distinction between international armed conflicts and non-international armed conflicts
- [See **Case No. 180**, ICTY, The Prosecutor v. Tadic. [Cf. A., paras. 96-120.] p. 1804.]
- Multilateralization
 - Growing importance of non-state actors
 - Individuals
 - Peoples
 - Insurgents
 - Institutionalization
 - The UN Charter as the constitution of the international community
 - IHL in the post-Cold War world
 - Tendencies to blur the distinction between *ius ad bellum* and *ius in bello*
 - Tendencies to overcome the distinction between international and non-international armed conflicts

[See **Case No. 180**, ICTY, The Prosecutor v. Tadic. p. 1804.]

- International law after 11 September 2001: a hegemonic international law?

[See **Case No. 216**, Cuba, Detainees Transferred to the Guantánamo Naval Base. [*Cf. C. and D.*] p. 2309 and **Case No. 236**, US, The September 11 2001 Attacks. p. 2470.]

VII. POSSIBLE INTERNATIONAL HUMANITARIAN LAW ELEMENTS IN A COURSE ON STATE RESPONSIBILITY

I. INTRODUCTION

- State responsibility towards non-State actors

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 28, Commentary, para. 3.*] p. 805.]

- International responsibility of non-State actors

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 10, Commentary, para. 16.*] p. 805.]

II. PRIMARY AND SECONDARY RULES

III. RESPONSIBILITY FOR AN INTERNATIONALLY WRONGFUL ACT AND FOR INJURIOUS CONSEQUENCES OF ACTS THAT ARE NOT PROHIBITED

IV. SUBSIDIARITY OF THE GENERAL RULES

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 55.*] p. 805.]

V. ATTRIBUTION OF AN UNLAWFUL ACT TO A STATE

- State responsibility for its armed forces

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 28, Commentary, para. 3.*] p. 805.]

- The case of an organ overstepping its power

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 7, Commentary, para. 4 and B.*] p. 805.]

- The organ must have acted as such

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 7, Commentary, para. 4 and B.*] p. 805.]

- Responsibility for *de facto* organs

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 8.*] p. 805; **Case No. 130**, ICJ, Nicaragua v. US. [*Cf. para. 115.*] p. 1365 and **Case No. 180**, ICTY, The Prosecutor v. Tadic. [*Cf. C., paras. 98-145.*] p. 1804.]

- Responsibility for individuals acting in the absence of official authorities

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 9.*] p. 805.]

- Responsibility for acts committed by insurgents who become government

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A., Art. 10.*] p. 805.]

VI. RESPONSIBILITY FOR DAMAGES TO PRIVATE INDIVIDUALS: SPECIFIC CONDITIONS OF DIPLOMATIC PROTECTION

VII. OBJECTIVE RESPONSIBILITY OR RESPONSIBILITY FOR FAULT?

VIII. NECESSITY OF DAMAGES?

IX. PLURALITY OF THOSE RESPONSIBLE

- In the case of aiding or assisting

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 16.] p. 805.]

X. DECIDING ON THE UNLAWFULNESS OF AN ACT AND THE NATURE OF THE OBLIGATION VIOLATED

XI. DEGREES OF RESPONSIBILITY

A. The concept of State Crime

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Chapter III, Commentary, para. 6.] p. 805.]

B. Serious breaches of obligations under peremptory norms

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Chapter III, and Arts. 40-41.] p. 805 and **Case No. 184**, ICTY, *The Prosecutor v. Kupreskic et al.* [*Cf. paras. 519 and 520.*] p. 1911.]

C. Consequences of serious breaches under peremptory norms

- Rights and obligations of third States

[See Chapter 13.V The obligation to ensure respect (common Article 1). Introductory text. p. 283; Chapter 13.IX. The international responsibility of the State for violations. Introductory text. p. 296; See also **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 41.] p. 805; **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A. paras. 157-159.*] p. 1151.]

- Obligation not to assist the concerned State

[See **Case No. 118**, UN, Resolution and Conference on the Respect of the Fourth Convention. [*Cf. F.*, para. 3.] p. 1303]

XII. CIRCUMSTANCES PRECLUDING WRONGFULNESS

- Self-defence

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 21.] p. 805; **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, paras. 138-139.] p. 1151.]

- Existence of an armed attack

[See **Case No. 236**, US, The September 11 2001 Attacks. p. 2470.]

- Necessity

[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 25.] p. 805 and **Case No. 78**, US Military Tribunal at Nuremberg, *US v. Alfried Krupp et al.* [*Cf. Section 4 (viii).*] p. 1030 and **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A. para. 140.*] p. 1151.]

XIII. CONSEQUENCES OF RESPONSIBILITY FOR THE RESPONSIBLE STATE

- Reparation

[See Chapter 13.IX.2.b) Compensation. p. 299; See also **Case No. 152**, UN Compensation Commission, Recommendations. p. 1588; **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A. para. 152.*] p. 1151 and **Case No. 138**, Sudan, Report of the UN Commission of Enquiry on Darfur. [*Cf. A.*, paras. 593-605.] p. 1467.]

XIV. IMPLEMENTATION OF RESPONSIBILITY

- Entitlement to invoke responsibility
 - Who is injured?
[See Chapter 13.IX. The international responsibility of the State for violations. Introductory text. p. 296.]
 - *Erga omnes* obligations
[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 48.] p. 805 and **Case No. 107**, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory. [*Cf. A.*, paras. 155 and 157.] p. 1151.]
- Countermeasures
 - Notion
[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 49.] p. 805; **Document No. 57**, France, Accession to Protocol I. [*Cf. B.*] p. 958 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf. para. 535.*] p. 1911.]
 - Conditions of legality
 - Countermeasures must aim to re-establish the respect of primary or secondary rules and must stop when they are respected
[See **Case No. 65**, UK, Reservations to Additional Protocol I. p. 985.]
 - Obligations not affected by countermeasures
[See Chapter 13.IX.2.c) dd) but no reciprocity. p. 301; See also **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 50.] p. 805; **Case No. 65**, UK, Reservations to Additional Protocol I. p. 985 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf. paras. 527-536.*] p. 1911.]
 - Proportionality
[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 51.] p. 805; **Case No. 65**, UK, Reservations to Additional Protocol I. p. 985 and **Case No. 184**, ICTY, The Prosecutor v. Kupreskic *et al.* [*Cf. para. 535.*] p. 1911.]
 - Countermeasures by third States in the collective interest?
[See **Case No. 38**, ILC, Draft Articles on State Responsibility. [*Cf. A.*, Art. 54.] p. 805.]

XV. STATE RESPONSIBILITY IN THE ERA OF GLOBALISATION

Chapter 5

TEACHING OF INTERNATIONAL HUMANITARIAN LAW IN JOURNALISM FACULTIES*

[See **Case No. 24**, Protection of Journalists, p. 672.]

Lesson 1: *Origin and Development of IHL*

- The origin and history of IHL.
- H. Dunant's role.
- Development of IHL and the Red Cross Movement before 1949.

Lesson 2:

- Basic provisions of IHL.

Lesson 3:

- The Geneva Conventions of 1949 and their Additional Protocols of 1977.

Lesson 4:

- Changes in IHL which took place after 1949.
- Evolution of armed conflicts in the 20th century.

Lesson 5: *IHL and the protection of victims of armed conflicts*

- Correlation between the provisions of IHL and International Human Rights Law.

Lesson 6:

- Provisions concerning the civilian population in IHL.
 - a. The protection of women and children.
 - b. The protection of refugees and displaced persons.

* This outline is based upon a course given at the State University in Moscow. Special thanks should be addressed to Andrey Raskin, Senior Lecturer at the Faculty of Journalism, Moscow Lomonosov State University and Stéphane Hankins, ICRC Delegate.

- Humanitarian assistance to the civilian population in situations of armed conflict.

Lesson 7:

- Provisions concerning prisoners of war in IHL.
- Rendering humanitarian assistance to prisoners of war and the wounded and sick.

Lesson 8:

- Protection of the wounded, sick and shipwrecked.
- Status of medical personnel in zones of armed conflicts.

Lesson 9: *The implication of IHL on the work of journalists in the zone of armed conflicts*

- Consequences of violations of IHL.
- Collective responsibility of States for the respect for the rules of IHL.
- The activities of the International Criminal Tribunals for the Former Yugoslavia and Rwanda and perspective of the International Criminal Court.

Lesson 10:

- The activities of the International Committee of the Red Cross (ICRC).

Lesson 11: *The work of journalists in the zone of armed conflict*

- Preparing journalists for missions in the zones of armed conflict.
- Journalists' identity cards, clothes, symbols, identification signs.

Lesson 12:

- Determining the status of journalists in zones of armed conflict.
- The procedure of accreditation in the zones of armed conflict.
- Movement in the zones of armed conflict.
- The use of armoured vests and other means of protection.

Lesson 13:

- Journalists' behaviour during bombardment or shelling.
- Journalists' behaviour in an inhabited locality during hostilities.
- Journalists' behaviour on the open ground during hostilities.
- Journalists' behaviour if arrested or captured.

Lesson 14:

- The problem of access to the sources of information:
 - secret information, confidential information.
- The use of the means of communication and ways of transmitting information to the editorial office.
- The main international institutions present in the zones of armed conflict and ways of establishing contact with them.

Lesson 15: *Role of the national media in an armed conflict*

- Role of propaganda as a means to exacerbate tensions between communities.
 - Means to promote the ideology of the government.

- World War II.
- Means to exacerbate hatred between ethnic groups.
 - In the Former Yugoslavia.
 - [See **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention. p. 2077.]
 - In Rwanda.
 - [See **Case No. 201**, ICTR, The Media Case. p. 2194 and **Case No. 202**, France, Radio Mille Collines. p. 2222.]

Lesson 16:

- Role of the media to promote IHL.
 - Dissemination:
 - Role of the ICRC in promoting the basic tenets of IHL.
 - Use of the Radio, Television, Newspaper.
 - Mobilize public opinion:
 - Against violations.
 - In favour of international assistance efforts.
 - Promote Justice:
 - Means to arrest people who have perpetrated war crimes.

Lesson 17: *Mass media coverage of armed conflicts and humanitarian issues*

- Ways and methods of covering armed conflicts in mass media.
- Coverage of the problems of the civilian population in the zone of armed conflicts, of refugees and displaced persons, prisoners of war, of humanitarian assistance, of the use of prohibited weapons...

Lesson 18:

- The role and responsibility of mass media when covering international and non-international armed conflicts.
- The problems of freedom of the press and journalistic ethics in the zone of armed conflicts.

Lesson 19: *Television and armed conflict*

- The role of television in covering armed conflicts and humanitarian issues in the second half of the 20th century.
- Legal regulations and norms of ethics.
- Vietnam: "the first TV-war".
- The CNN TV-company and its experience in covering armed conflicts.
- The second Gulf War (1999) and the role of the media.
- Kosovo: an armed conflict "live".
- Afghanistan: CNN v. Al-Jazeera.

Lesson 20: *Journalism and armed conflicts: main problems on the eve of the 21st century*

- The use of computer and television technologies in the coverage of armed conflicts.
- The impact of journalism on the evolution of armed conflict.
- Co-operation between journalists and representatives of non-governmental humanitarian organisations in the zones of armed conflicts.
- Journalism and espionage.

Chapter 6

EXAMPLES OF COURSE OUTLINES USED BY UNIVERSITY TEACHERS

I. INTERNATIONAL HUMANITARIAN LAW, TOPICAL SYLLABUS DEVELOPPED BY PROF. GETACHEW ASSEFA, DEAN, FACULTY OF LAW, ETHIOPIAN CIVIL SERVICE COLLEGE, JANUARY 2002

[Ethiopian Civil Service College: <http://www.ethcsc.org>]

I. DEFINITION, HISTORY AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW (IHL)

- 1. Definition and Scope of application of IHL**
- 2. Development of IHL**
- 3. Fundamental Rules of IHL**

II. RULES OF PROTECTION APPLICABLE IN ARMED CONFLICTS PROVIDED BY IHL

- 1. Protection for the wounded, the sick and the shipwrecked**
 - a. The Concept of protected persons
 - b. Medical personnel and religious personnel
 - c. Medical establishments, units and transports
 - d. The distinctive emblem
- 2. Combatant status, protection of prisoners of war**
 - a. The principle of internment
 - b. Status of combatant and prisoners of war
 - c. Treatment of Prisoners of War
 - d. Reparation and Exchange
 - e. Spies and Mercenaries
 - f. Disciplinary measures and penal sanctions against prisoners of war
 - g. Political indoctrination of prisoners of war

3. Protection of civilians

- a. General rules of protection of civilians
- b. Rules protecting civilians under the adverse party
- c. Treatment of a civilian internee
- d. Specific rules applicable in occupied territory

4. Protection of the civilian population against the effects of hostilities/means and methods of warfare

- a. Distinction between civilians and combatants
- b. Means and Methods of Warfare: the ethic of restraint
- c. Military objectives and protected objects
- d. Precautionary measures
- e. Prohibited attacks
- f. Some related issues
 - The principles of distinction in guerilla warfare
 - Excessive collateral damages
 - Ethnic cleansing

5. Rules applicable to non-international armed conflicts

- a. Application of Common Article 3 and Additional Protocol II of the Geneva Conventions
- b. Fundamental prohibitions
- c. Protection against the effects of hostilities
- d. Special rules protecting the persons deprived of their freedom
- e. Obligation to put an end to violations
- f. War crimes in non-international armed conflicts
- g. Judicial guarantees in penal prosecutions

III. IMPLEMENTATION OF IHL AND THE ROLE OF THE ICRC

1. Measures for respect

- a. Obligation to respect and ensure respect
- b. Measures taken in peacetime: dissemination, legal advice to armed forces, practical measures (making communication to other contracting parties)
- c. Importance of legislation of application
- d. Implementation in a given conflict: respect by belligerents, the role of the ICRC, the International Fact-Finding Commission

2. Measures of repression/national implementation

- a. System provided by the 1949 Geneva Conventions
- b. "Grave breaches" and War crimes
- c. 'Superior order' as a defense
- d. National legislation for repression
- e. Related issues

- State responsibility
- Interference with humanitarian assistance
- IHL provisions in Ethiopian laws

3. The role of the ICRC in the enforcement of IHL

- a. Treaty based and statutory mandate of the ICRC
- b. Specificities of ICRC activities in armed conflicts
- c. The role of national society in armed conflicts

IV. IHL AND HUMAN RIGHTS

- 1. Cultural relativity vs. universality of IHL and human rights**
- 2. Comparison of the fields of application**
- 3. Comparison of the protected rights**

V. REFUGEES AND DISPLACED PERSONS IN IHL

- 1. Status of refugees**
- 2. Protection**

VI. CONTEMPORARY ARMED CONFLICTS AND IHL

- 1. News from armed conflict areas**
- 2. Application of IHL in the conflicts**

II. INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW, BY PROFESSOR ERIC DAVID, UNIVERSITÉ LIBRE DE BRUXELLES (BELGIUM)

[Université libre de Bruxelles: <http://www.ulb.ac.be>]

I. PRINCIPLES OF STRUCTURE

A. External structure

1. Law that is law

"[...] and to introduce into the philosophy of war itself a principle of moderation would be an absurdity." (Clausewitz).

War is a relation between human beings, therefore it can be codified. There are many methods to enforce respect of this law.

2. Law that is part of international law

- Sources: Conventions and customs.
- Methodology of international law: relativity.

3. Both simple and complicated

- Simple: a case of logic and morality.

- "Martens" Clause.
- "Humanitarian reflexes".
- The worst breaches are always breaches of fundamental rules.
- Complicated.
 - Four Geneva Conventions of 1949 and two Additional Protocols of 1977.
 - Hague Conventions of 1907 and Protocol of 1999.
 - London Declaration of 1909.
 - Hague Project of 1923.
 - Geneva Protocol of 1925.
 - United Nations Conventions of 1980.
 - Paris Convention of 1993.
 - Oslo-Ottawa Convention of 1997.
 - ICC Statute of 1998.
 - Secretary General's 1999 guidelines.
 - Additional Protocol to the Convention on the Rights of the Child of 2000.
 - General international law, internal law.

B. Internal Structures

1. A law indifferent to the legitimacy of the causes pursued

- Equality of the belligerents.

2. A varying geometry

- All of the law of Armed Conflicts --> international armed conflicts.
 - Interstate conflicts.
 - Wars of national liberation.
 - Non-international armed conflicts --> recognition of belligerency.
 - Non-international armed conflict --> foreign intervention.
- Part of the law of armed conflicts --> non-international armed conflicts.
 - Art.3 common to the Four Geneva Conventions of 1949.
 - Art.19 Hague Convention of 1954 and Protocol II of 1999.
 - Additional Protocol II of 1977.
 - Protocol II (as modified in 1996) of the 1980 Convention.
 - Art.8 (2) (c) - (f) of the ICC Statute of 1998.
- Its application as from the start of the hostilities.
 - Minimal armed intervention --> international armed conflicts.
 - High level of armed intervention --> non-international armed conflicts.

3. Multiple addressees

- States: Parties? Reservations?
- International Organisations --> international practice.
- National liberation movements.
 - Geneva Conventions of 1949.
 - Additional Protocol I.
 - United Nations Convention of 1980.
- Intra-State collectivities.

- Geneva Conventions of 1949.
- Provisions applicable in internal armed conflicts.
- Individuals.
- Individuals - organs.
- Individuals - private persons if law is *directly applicable*.

II. PRINCIPLES OF SUBSTANCE

A. General Principles

1. Antagonistical necessities

- Necessities of war.
 - Law of armed conflicts.
- Necessities of humanity.
 - Necessity limited to the cases foreseen by the law of armed conflicts.

2. Victims' well-being

- In case of doubt, the interests of the victim have primacy.
- The right of armed conflicts rests less on interstate exchange than on a unilateral engagement towards the victim.

3. A law that is separate from the law of amiable relations

- Law of amiable relations (*ius ad* or *contra bellum*) / law of armed conflicts (*ius in bello*).
- When *ius contra bellum* is violated, the *ius in bello* applies, but this does not mean that the *ius contra bellum* is no longer applicable.

4. A law that does not exclude the rules relative to human rights

- Human rights applicable in times of war and peace.
- Law of war applicable only in times of war.

B. Hague law (law of armed conflicts)

1. You may not attack everyone

- Principles of discrimination as to human beings: attacks are limited to combatants.

2. You may not attack everything

- Principle of discrimination as to objects: attacks are limited to military objectives.

3. You may not use all means

- Principle of limitation and proportionality.
- Ban or limitation on the use of some weapons (causing 'superfluous' injury: gas, biological weapons, poison, mines, incendiary weapons, nuclear...).
- Ban on certain methods of combat (non-justified destruction, indiscriminate attack, perfidy).

C. Principles of the Geneva Law (international humanitarian law)

1. Persons in the power of the enemy must be treated humanely and without discrimination

- Right and obligation to collect and care for the wounded, sick and shipwrecked.
- Obligation to treat prisoners of war and civilian internees with humanity (principles of inviolability, non-discrimination, safeguard and protection).

2. To fight (in international armed conflicts) in keeping with the law of armed conflicts and IHL is not a crime

- Status of prisoner of war for captured combatants.
- Release and repatriation of prisoners of war at the end of hostilities.

3. Persons in the hands of the enemy cannot renounce their rights

- Interrogation of prisoners of war.

4. Occupied territory (in international armed conflict) remains foreign territory

- Occupation does not allow annexation.
- The occupant must respect the laws of the occupied State as far as this is possible (principle of normality).

5. Violating the laws and customs of war engages the international responsibility of the perpetrator

- Established responsibility in international law.
- Individual criminal responsibility.

CONCLUSION

“Do not cause your enemy more harm than war renders necessary.”
(Jean Pictet)

III. INTERNATIONAL HUMANITARIAN LAW, BY PROFESSOR MICHEL DEYRA, UNIVERSITY OF AUVERGNE (FRANCE)

[Université d'Auvergne: <http://www.u-clermont1.fr>]

GENERAL INTRODUCTION

- *Ius ad bellum, ius in bello, ius contra bellum, ius post bellum.*
- Causes and classification of conflicts.
- International protection of human dignity: international human rights law, IHL, international refugee law.
- IHL: history, characteristics, instruments.

CHAPTER 1: PRINCIPLES OF IHL

SECTION 1: HUMANITARIAN REASONING

1. *The lesser of two evils*

- A. The premises of war.
- B. Consequences.

2. *Guarantees of application*

- A. Extended field of application: rejection of the *si omnes* clause, common Article 3, non-derogable rights, protecting powers, special agreements, neutral States obligations.
- B. Mechanisms of guarantee: common Article 1, protecting power, the role of the ICRC and of the UN, investigation mechanisms.

SECTION 2: PRINCIPLES OF THE RED CROSS

1. *Humanity: the "essential" principle*

- A. Normality. *e.g.*: prisoners of war, maintaining education.
- B. Protection. *e.g.*: protection of civilians in occupied territory.

2. *Other principles*

- A. Impartiality: outlawing objective discrimination; proportionality; outlawing subjective discrimination.
- B. Neutrality: military, ideological, confessional; protection of the emblem.
- C. The organisational principles: independence, voluntary service, unity (unicity, multitude, generality of the action), universality.

SECTION 3: SCOPE OF APPLICATION

1. *Material scope of application*

- A. International armed conflict.
- B. Wars of national liberation.
- C. Internationalised non-international conflicts. (ICJ, 1986, Case of Military Activities in Nicaragua)
- D. Non-international armed conflicts: common Article 3 and Protocol II.
- E. Internal disturbances. (Turku Declaration 1990)
- F. Times of Peace: marking, positioning of military objectives, rules governing the use of the emblem, creation of national offices of information, dissemination of IHL, development of criminal laws, development of new weapons.

2. *Personal scope of application*

- A. States.
- B. International organisations *e.g.*: UN.
- C. National liberation movements.
- D. Insurgents.
- E. Individuals.

CHAPTER 2: THE RULES OF IHL

INTRODUCTION: COMMON ARTICLE 3

SECTION 1: THE RULES RELATING TO THE CONDUCT OF HOSTILITIES

1. *The ratione personae limitations*

- A. The obligations of the attacker: ban on attacking civilians and persons taking no active part in the hostilities.
- B. The obligations of the attacked.

2. *The ratione materiae limitations*

- A. The prohibition of attacks on civilian objects: cultural objects and places of worship (Hague Convention of 1954), objects indispensable for the survival of civilian population (Prohibition on the use of famine and illegality of burnt earth policies), the organizations for civilian defence, the works and installations containing dangerous forces, the natural environment (United Nations Convention of 10/10/1976 and Article 35(3) and 55 of Protocol I).
- B. Ban on attacking certain zones: non defended localities, neutral zones, the sanitary zones and localities and demilitarised zones (Protocol I, the mobile or permanent medical units and establishments).

3. *The ratione conditionis limitations*

- A. Limits or ban on certain weapons: ban because of their result (ICJ's opinion of 8/7/1996 on the legality of the use or threat of nuclear weapons), weapons banned as stated in the 10 April 1981 Convention (non-detectable fragments weapons, mines, booby-traps, incendiary weapons), Review Conference on anti-personnel mines and blinding laser weapons (September 1995, January and April-May 1996), Ottawa Convention (3/12/1997), new weapons.
- B. The limitation or ban of certain methods of warfare: perfidy, denial of quarter, forced enrolment, deportation, destruction with no military necessity, terrorist acts, taking of hostages, indiscriminate attacks, armed reprisals. Precautions in the attack.

SECTION 2: PERSONS IN THE HANDS OF THE ENEMY

1. *The protection of prisoners of war*

- A. The right of a combatant to the status of prisoner of war: depending on the nature of the conflict (IAC, NIAC, WNL); depending on the person captured (beneficiaries of Article 4, those excluded: the spy and the mercenary).
- B. Prisoner of war's right to the respect of internment provisions: conditions of the internment in the camp (affecting the material, intellectual and moral or legal situations). The end of captivity (individual and collective).

- C. The right of the prisoner to protective mechanisms: systems of prevention (role of the ICRC and intervention of captives) and systems of sanctions (for the State and the individual.)

2. *The rights of the wounded, sick and shipwrecked*

Example: the shipwrecked.

- A. Bestowing the status: the condition of shipwrecked, the definition, time limits on the status.
- B. The status: the nature of the rights, their application, their contents.

3. *The protection of civilian populations*

- A. The protection of civilians in the power of the enemy: people in the hands of one of the parties to the conflict (humane treatment); people in occupied territory.
- B. Specific guarantee for some categories. Rights of the child in war (child-victims; child-soldier; child-refugee); the protection of women in war (as a member of the civilian population; protection against the effects of hostilities); the protection of refugees in armed conflicts; the protection of foreigners.

CHAPTER 3: THE IMPLEMENTATION OF IHL

SECTION 1: PREVENTIVE MEASURES

1. *Ratification*

2. *Dissemination*

- A. Moderate the impact of violations.
- B. Prevent violations.

3. *Application*

- A. "Respect... in all circumstances".
- B. "Respect... and to ensure respect": legal character of the obligation, content.

SECTION 2: MEANS OF CONTROL

1. *The role of Protecting Powers*

2. *The role of the International Red Cross and Red Crescent Movement*

- A. The International Committee of the Red Cross: organisation, means, methods, headquarter agreements (19/3/1992). Role in the implementation of IHL. (operational activities and respect of IHL)
- B. National Societies.
- C. International Federation of Red Cross and Red Crescent Societies.
- D. International Conference of the Red Cross and the Red Crescent.

3. *The role of other NGOs*

- A. Religious NGOs. (Order of Malta, Caritas Internationalis, the World Council of Churches, the Salvation Army.)
- B. Borderless NGOs. (MSF, MDM, AMI, Handicap International)
- C. Scientific NGOs.

SECTION 3: MEANS OF REPRESSION

1. *Incriminations*

(international law crimes, grave breaches and war crimes, violations of common Article 3, and Protocol II)

2. *Mechanisms of investigation*

- A. Enquiry procedure of the 1929 and 1949 Conventions.
- B. International Fact-Finding Commission. (Art. 90 Protocol I): functioning (constitution, election, submission of cases); jurisdiction (investigation, mediation, reports)

3. *Judicial sanctions*

- A. National repression. (mechanism of universal jurisdiction)
- B. International repression. (*ad hoc* International Criminal Tribunals, the International Criminal Court.)

CHAPTER 4: EVOLUTION OF IHL

SECTION 1: THE CHARACTERISTICS OF CONFLICTS AT THE END OF THE 20TH CENTURY

1. *Conflict in the South Atlantic*

- A. Military operations.
- B. Application of IHL.

2. *The second Gulf War*

- A. The unfolding of the conflict.
- B. Application of IHL. (Methods and means of combat, the issue of weapons of mass destruction in Iraq, the fate prisoners of war and of civilians.)

3. *Ethnic Conflicts*

- A. Conflicts in the former Yugoslavia.
- B. Conflicts in West Africa.
- C. Rwanda's genocide.

4. *The Conflict in East Timor*

5. *NATO's intervention in Kosovo*

6. *The so-called "ingérence humanitaire" (humanitarian intervention)*

- A. The initiative: a conventional right.
- B. Assistance: a resolatory right.
- C. "Ingérence": a politico-media concept.

SECTION 2: THE CREATION OF *AD HOC* INTERNATIONAL CRIMINAL TRIBUNALS (ICT)

1. *The ICT for the former Yugoslavia*

- A. Jurisdiction and organisation: the scope of the ICT's jurisdiction and its internal organisation.

- B. The organisation and procedure of a case; organisation of the tribunal; the cases before the ICT; the decision of 2/10/1995, *The Prosecutor v. Dusko Tadic*; the *Drazen Erdemovic* case 29/11/1996; the *Dusan "Dusko" Tadic* decision of 13/7/1997; the *Tihomir Blaskic* case (decision of 3 March 2000).

2. The ICT for Rwanda

- A. The Rwandan crisis.
- B. The UN's recognition of the genocide.
- C. The creation of the ICTR. (Resolution 955 of 8/11/1994)

SECTION 3: THE INTERNATIONAL CRIMINAL COURT (TREATY OF 17/7/1998)

1. Jurisdiction

2. Structure

CONCLUSION

- 1. Violations of IHL.
- 2. Terrorism and IHL.
- 3. Strengthening the application of IHL.

IV. INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN INTERNATIONAL ARMED CONFLICTS, SYLLABUS, PROF. YORAM DINSTEIN, UNIVERSITY OF TEL AVIV (ISRAEL)

[Tel Aviv University: <http://www.tau.ac.il>]

1. Introduction

- a. Customary law and treaty law.
- b. Enumeration of key treaties (Hague, Geneva, etc.).
- c. The declaratory status of some of these treaties.
- d. *ius cogens*.
- e. The role of the ICRC.

2. Military necessity and humanitarian considerations

3. The basic rule of distinction between combatants and civilians

4. The distinction between lawful and unlawful combatants

5. Conditions of lawful combatancy under the Geneva Conventions and Additional Protocol I

6. Prisoners of war: the concept and the consequences

7. The treatment of prisoners of war

8. Release of prisoners of war

9. Prohibited weapons: general

- a. The principle of distinction (see *supra*).
- b. The prohibition of weapons causing superfluous injuries to combatants.

10. Conventional weapons explicitly banned or restricted by treaties

- a. Poison.
- b. Explosive bullets weighing less than 400 grams.
- c. "Dum-dum" bullets.
- d. Fragments in the human body non-detectable by X-ray.
- e. Booby-traps.
- f. Anti-personnel landmines.
- g. Naval mines.
- h. Torpedoes.
- i. Incendiaries.
- j. Blinding laser weapons.

11. Weapons of mass destruction explicitly banned by treaties

- a. Chemical weapons (gas warfare).
- b. Biological weapons.

12. The status of nuclear weapons

- a. The ICJ 1996 Advisory Opinion on Legality of Nuclear Weapons.
- b. Critique of the Advisory Opinion.

13. Military objectives

- a. The definition and its range: the meaning of "nature", "purpose", "use" and "location".
- b. Bridges as an illustration.

14. Problems relating to military objectives

- a. Retreating troops.
- b. Targeting individuals.
- c. Police forces.
- d. Industrial plants.
- e. Oil, coal and other minerals.
- f. Electric grids.
- g. Civilian airports and maritime ports.
- h. Trains, trucks and barges.
- i. Civilian TV and radio stations.
- j. Government offices.
- k. Political leadership.

15. Defended localities in land warfare**16. Naval warfare**

- a. General rules.
- b. Problems, *e.g.*, exclusion zones.

17. Air warfare

- a. General rules.
- b. Problems, *e.g.*, "target area" bombing.

- 18. The protection of civilians from attack**
 - a. Direct attacks against civilians.
 - b. Indiscriminate attacks.
- 19. Collateral damage and the principle of proportionality**
- 20. Cessation of protection**
- 21. Shielding military objectives with civilians**
- 22. Starvation of civilians**
 - a. General rules.
 - b. Problems, *e.g.*, siege and blockade.
 - c. Scorched-earth policy.
- 23. Special protection: *Hors de combat***
- 24. Special protection: medical and religious personnel and installations**
- 25. Other instances of special protection**
- 26. Works and installations containing dangerous forces**
- 27. Cultural property**
- 28. Protection of the environment**
- 29. Perfidy**
- 30. Ruses of war**
- 31. Espionage**
- 32. Booty of war**
- 33. Belligerent reprisals**
- 34. Hostage-taking**
- 35. Occupied territories**
- 36. War crimes**
- 37. The distinctions between war criminals and unlawful combatants**
- 38. Crimes against humanity**
- 39. [Crimes against peace]**
- 40. Command responsibility**
- 41. *Mens rea***
- 42. Admissible defences**
 - a. Mistake of fact.
 - b. Mistake of law.
 - c. Duress.
 - d. Insanity.
 - e. Intoxication (?).

43. Inadmissible defences

- a. Obedience to national law.
- b. Obedience to superior orders.
- c. Acts of State.

44. Mitigation of punishment

V. COURSE OUTLINE BY PROF. AKUNGA MOMANYI, UNIVERSITY OF NAIROBI (KENYA)

[University of Nairobi: <http://www.uonbi.ac.ke>]

THEME I - INTRODUCTION, DEFINITION OF TERMS AND CONCEPTS

- Understanding IHL.
- Nature and characteristics of IHL.
- Differentiating "humanitarian law" from "human rights law".
- Common terms and concepts in IHL *e.g.* "conflicts" "Refugees", "Victims" "Internally displaced persons", "Stateless persons", "Humanitarian crises or situations", "humanitarian intervention or response", etc.

THEME II - HISTORY AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW

- Development of the international humanitarian movement.
- Historical foundations of current IHL.
- Underlying Issues (causes and crises): war and armed conflict; civil strife and politico-religious persecution; internal displacement of populations; natural disasters and calamities.
- Legal and institutional developments and responses: 1864 Geneva Convention to the present.
- Developments in Refugee Law.

THEME III - LEGAL AND INSTITUTIONAL STRUCTURES

- IHLs: Conventions and Treaties: The Laws of the Hague; the Laws of Geneva; Laws Relating to Refugees and Stateless persons.
- Legal Arrangements for judicial intervention, peace-keeping; humanitarian assistance.
- Institutional Arrangements and Frameworks: the UN and its Specialized Agencies and bodies (esp. UNHCR); International, Inter-Governmental and Non-Governmental agencies and bodies; the ICRC and International Federation of the Red Cross and Red Crescent Societies.
- Regional and national humanitarian law.

THEME IV - UNDERSTANDING VICTIMS OF WAR, ARMED CONFLICTS AND OTHER HUMANITARIAN SITUATIONS

- Refugees, Internally displaced persons and Stateless persons
- Causes of crises and situations.
- Legal Status and Rights of Victims; Refugees, Internally displaced persons and stateless persons.
- Vulnerable Groups of Victims: Children, women, ageing and elderly persons, persons with disabilities, the sick, minorities, etc.
- "Humanizing" the laws of war.

THEME V - REMEDYING/REDRESSING BREACHES OF INTERNATIONAL HUMANITARIAN LAW

- Judicial Remedies: Nuremberg and Tokyo Tribunals, ICTY, ICTR, ICC, etc.
- Use of Force/Military Intervention.
- Peace-keeping.
- Humanitarian Aid and Assistance; food, medicine, shelter, advocacy and activism.

THEME VI - NEW AND EMERGING ISSUES IN INTERNATIONAL HUMANITARIAN LAW

- Recent developments and crises: the ICC; new wars and conflicts; new humanitarian disasters, etc.
- IHL and Third Generation Rights e.g. right to peace, to clean environment; to development.
- IHL and HIV/AIDS.
- IHL and a Unipolar Political Dispensation. (a U.S. dominated world)
- IHL and New Scientific, Military and Technological Developments.

VI. INTERNATIONAL HUMANITARIAN LAW, COURSE OUTLINE, BY DR RAY MURPHY, NATIONAL UNIVERSITY OF IRELAND, GALWAY

[Irish Centre for Human Rights. National University of Ireland, Galway: http://www.nuigalway.ie/human_rights]

Seminar 1 - Topic: Introduction to IHL

Learning outcome: To critically examine the concept and purpose of IHL. To familiarise students with basic concepts and the nature of IHL and its relationship to Public International Law. To familiarise students with the historical development and legal basis of IHL. To examine the law regulating the use of force in international law and its consequences. The *Ius ad Bellum* and *Ius in Bello* rules.

Seminar 2

Topic 1 - IHL and Human Rights Law

Learning outcome: To familiarise students with the fields of application of both regimes, protected persons and implementation.

Topic 2 - Categorisation of Armed Conflicts - Types of Conflict and Thresholds of Applicability of IHL

Learning outcome: To analyse and discuss the legal regimes governing International and Non-International Armed Conflicts.

Common Art. 3 and Protocol II.

Types of non-international armed conflict.

Seminar 3 - Topic: Non-International Armed Conflict: Case Studies - Northern Ireland and Colombia

Learning outcome: To explain and apply the criteria for the categorisation of conflict, and outline the legal and practical consequences in Northern Ireland, Sierra Leone and Colombia.

Seminar 4 - Topic: Conduct of Hostilities

Learning outcome: To examine the distinction between the Law of The Hague and the Law of Geneva. To analyse and explain the framework for the protection of the civilian population against the effects of hostilities, and the means and methods of warfare.

- Prohibited attacks, definition of civilian population, military objectives and targets. The principles of distinction and proportionality. Hague Rules Arts 25-28; Draft Hague Rules on Aerial Warfare 1923 Arts 22-6; Geneva Civilians Convention 1949 Arts 13-26 and 27-34; and Protocol 1 1977 Arts 48-60.

Seminar 5 - Topic: Case Studies: Protection of Civilians/ The NATO Campaign in Kosovo; the Russian campaign in Chechnya and the US Campaign in Afghanistan

Learning outcome: To analyse and explain the legal regime governing the protection of civilians against effects of hostilities, and against arbitrary treatment. The legal regime governing refugees and displaced persons under IHL. To be able to apply the rules of IHL to contemporary situations of conflict.

Seminar 6 - Special Rules on Occupied Territories

Learning outcome: To analyse and discuss the historical development of the Laws of Occupation, in particular the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 1949. To examine the difference between belligerent and non-belligerent occupation. To examine the Israeli presence in the West Bank and Gaza strip in the context of IHL and the rules on occupied territories.

Seminar 7 - Combatants and Prisoners of War: Status and Treatment

Learning outcome: To explain the general criteria for determining combatant and POW status, and to examine the regulations governing the treatment of POW's.

Seminar 8 - Topic: IHL and Peace Support Operations

Learning outcome: To examine the relevance of IHL to United Nations and similar peace support operations. To assess the relevance of the Convention for the Protection of UN Personnel, and the Secretary-General's Bulletin on Observance by UN forces of international humanitarian law.

To consider the implications of the Report of the Panel on United Nations Peacekeeping; the Report of the Rwanda Genocide and the Report of the Fall of Srebrenica.

Seminar 9 - Topic: IHL and Peace Support Operations (contd)**Case studies: Somalia and Lebanon**

Learning outcome: To examine the role of IHL in traditional peacekeeping in Lebanon (UNIFIL), and in peace enforcement in Somalia during the UNITAF and UNOSOM II operations.

To consider the application of IHL by and in failed states.

Seminar 10 - Topic: Implementation of IHL

Learning outcome: General problems, Measures to be taken in peacetime, Repression of Violations, The role of the United Nations and the ICRC, Municipal law measures in Canada and Ireland.

Seminar 11 - Topic: War Crimes and International Tribunals

Learning outcome: To analyse and discuss the case law of the ICTY and ICTR, and the implications for the development of IHL.

VII. INTERNATIONAL HUMANITARIAN LAW,
BY PROF. XAVIER PHILIPPE, UNIVERSITY
OF WESTERN CAPE (SOUTH AFRICA)

[University of Western Cape: <http://www.uwc.ac.za>]

PART 1: INTERNATIONAL HUMANITARIAN LAW BEFORE THE CONFLICT**1st Seminar: Definition of IHL and its Relationship with International Human Rights Law through an Historical Perspective**

Aim of the lecture: to understand how IHL fits in Public International Law; to understand the specificities of IHL compared to International Human Rights Law.

Study or restudy: Nature and sources of International Law, birth of IHL and International Human Rights Law and their separate development.

Discussion Theme: Case Study.

2nd Seminar: The Threshold of Applicability of IHL

Aim of the lecture: To understand when IHL is applicable and when it is not; to get known the role-played by IHL and the necessity to disseminate.

Study or restudy: The key distinctions between:

- 1) *ius ad bellum* and *ius in bello*
- 2) Internal and international armed conflict
- 3) Internal strife and internal armed conflict

Discussion Theme: Case Study (Genocide in Rwanda?).

PART 2: INTERNATIONAL HUMANITARIAN LAW DURING THE CONFLICT

3rd Seminar: The Distinction between Combatants and Protected Persons

Aim of the lecture: to understand the distinction between combatants and civilians, the specific protection granted to civilians in case of armed conflict; to understand the different levels of protection between civilians regarding their location (occupied or non-occupied territories) and their situation (nationality) and the nature of the conflict (international or internal); to understand the difficulties of implementation of such distinctions; to understand the consequences of such a distinction especially in case of violation of IHL.

Study or restudy: criteria of distinction between combatants and non-combatants; rights and obligations of combatants and civilians in case of armed conflicts (see the relevant 1949 Geneva Conventions and 1977 Additional Protocols).

Discussion Theme: Case Study (Case on Angola - the 'side effects' of the UNITA/ Government conflict).

4th Seminar: The Protection Entitled by the Status of Prisoner of War

Aim of the lecture: to understand who is entitled to the status of combatant (distinction between international and internal armed conflicts) and those who are not (spies, mercenaries, saboteurs); to understand the presumption of 'prisoner-of-war status' that shall be granted to former combatants; to get known the rules regarding the treatment of prisoners of war.

Study or restudy: *Discussion Theme:* Case Study (Case on the situation of prisoners, fighting for the ANC during the apartheid regime).

5th Seminar: The Protection of The Civilian Population: Women in War

Aim of the lecture: to understand the protection of civilians against arbitrary treatments and especially the protection of vulnerable populations such as women, children or elder people.

Study or restudy: Geneva Convention IV and 1977 Protocols (especially 1st one).

Discussion Theme: Case Study (Case on the specific situation of women and sexual violence against women in Rwanda and Sierra-Leone).

6th Seminar: The Protection of the Wounded and the Sick Combatant

Aim of the lecture: To understand the rules related to wounded & sick combatants especially regarding the protection of all combatants without distinction; to get known the specific protection allocated to medical & religious personnel, to locations such as hospitals and ambulances; to understand the basic rules related to safety zones, to understand the limits of such a protection; to get known the rules related to the dead and missing.

Study or restudy: Geneva Convention I and II and 1977 Protocols.

Discussion Theme: Case Study (Case study on safety zones in the Former Yugoslavia).

**7th Seminar: Means and Methods of Warfare:
The Prohibition of Use of Indiscriminate Weapons**

Aim of the lecture: To understand the distinction between the Law of the Hague and the Law of Geneva; to get known the definition of military objectives and the prohibition of targeting the civilian population; to get known the limitation regarding the means of warfare (prohibition and restriction in the use of weapons) and the methods of warfare (prohibition of non quarter orders and of perfidy); the obligation to accept humanitarian assistance.

Study or restudy: Geneva Convention IV and 1977 Protocols.

Discussion Theme: Case Study (Case study on the use of landmines in Africa).

8th Seminar: The Law of Naval Warfare

Aim of the lecture: to understand the specificities of the law of naval warfare regarding the different zones of the law of the sea, the applicable principles and the means and methods of warfare; to identify the protected objects.

Study or restudy: San Remo Manual on International Law applicable to Armed conflicts at Sea.

Discussion Theme: Case Study (Case on Argentina v. UK, the Falkland case).

**9th Seminar: The Distinction between Internal &
International Armed Conflicts: Growing Incertitude**

Aim of the lecture: to compare the applicable rules of international and internal armed conflicts; to understand the fundamental differences of protection, to identify the body of rules.

Study or restudy: Common article 3 to the 1949 Geneva Conventions, 1977 additional protocols (especially no 2); Turku Declaration on minimum humanitarian standards.

Discussion Theme: Case Study (Case on Rwanda and the DRC).

10th Seminar: Collective Security Operations and IHL

Aim of the lecture: to focus on the relationship between peacekeeping operations and humanitarian assistance and to understand the differences between the two.

Study or restudy: UN Charter, Chapter VI & VII, the distinction between *ius ad bellum* and *ius in bello*; the principles of neutrality in humanitarian assistance.

Discussion Theme: Case Study (Case on Sierra Leone, Liberia & Guinea or the DRC).

PART 3: INTERNATIONAL HUMANITARIAN LAW AFTER THE CONFLICT

11th Seminar: The End of Applicability of IHL

Aim of the lecture: to identify criteria for ending the application of IHL, to study the rules applicable during the transitional period; to understand the necessity not to waive IHL application when no municipal rule is yet applicable (failed state); to get known the limits of peacekeeping operations.

Study or restudy: Organisation & nature of Peacekeeping operations; role & limits of action of peacekeepers.

Discussion Theme: Case Study, Specificities of Humanitarian Action (Case study on Somalia).

12th Seminar: Drawing Lessons From Past Conflicts: Prosecuting Violations of IHL

Aim of the lecture: to get known the actors (ICRC, IGOs, NGOs) and their relationship, to understand the role of the UN Security Council in conflict resolution and humanitarian action, to get known judicial institutions able to prosecute and try international crimes (municipal courts, *ad hoc* tribunals and the International Criminal Court).

Study or restudy: IGOs & NGOs status, means of enforcement of International Norms, International crimes & Universal Jurisdiction. ICTY & ICTR Status, the Rome status and the definition of war crimes, crimes against humanity and genocide.

Discussion Theme: Case Study Constitutional Court of South Africa AZAPO Case CCT 17/96 (main extracts) or how to deal with criminal children soldiers.

VIII. THE PROTECTION OF HUMAN RIGHTS DURING ARMED CONFLICTS, BY PROF. RYSZARD PIOTROWICZ, UNIVERSITY OF WALES, ABERYSTWYTH (UNITED KINGDOM)

[University of Wales: <http://www.aber.ac.uk>]

Abbreviations

- GCI** - 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- GCII** - 1949 Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- GCIII** - 1949 Geneva Convention III Relative to the Treatment of Prisoners of War
- GCIV** - 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
- PI** - 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts

P11 - 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

SUMMARY OF THE COURSE

Introduction

Sources of IHL and its historical development

Types of conflict

Some basic concepts

Protection of combatants

Protection of civilians

Methods and means of combat

Non-international armed conflicts

The relationship between IHL and human rights law

Criminal repression of breaches of IHL

Refugees and armed conflicts

INTRODUCTION

IHL as International Law

"if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." (H.Lauterpacht, 1952)

How law applies in war -*ius ad bellum/ius in bello*

Fundamental principles of IHL:

- Civilians shall enjoy general protection against military operations
- Attacks are allowed only against military objectives (distinguish between civilian and military objectives)
- It is prohibited to cause unnecessary losses or excessive suffering (proportionality)
- Respect, protect and assist the sick and wounded without discrimination
- Captured combatants and civilians in the power of the enemy shall be protected and well treated

IHL and the soldier's dilemma

In the early morning, a column of tanks and personnel carriers made their way down the road of the heavily populated outskirts of the city. We were hemmed in by the wire fence of an air base on our left and a long narrow hamlet of buildings on our right. We stopped to assess the situation. My mate ducked inside the turret of the tank, saying: "I don't like the look of this". Our radio operator turned to me and said that he'd just heard reports of lots of guerilla soldiers hiding out in the area.

From where I rode, as tank gunner, I had a pretty clear view. Sure enough, through the dust and overcast morning weather, I could see silhouettes darting into positions among the cluster of village houses opposite our platoon of men in the personnel carriers up the road. I could see that the figures were clearly armed. Someone shouted to open fire.

You are the tank gunner. What do you do?

SOURCES OF IHL AND ITS HISTORICAL DEVELOPMENT

"Silent enim leges inter arma" (Cicero, quite a long time ago)

"There is such a thing as legitimate warfare: war has its laws; there are things which may fairly be done, and things which may not be done" (Cardinal Newman, 1864)

- Henry Dunant
- Martens Clause
- Hague law
- Geneva law
 - Status of the Geneva Conventions
 - *Report of the Secretary-General of the United Nations on the Establishment of the War Crimes Tribunal for the Former Yugoslavia*, paras 35 and 37: confirm customary status of the Conventions. (1993) 32 ILM 1159
- "Common" law of armed conflict? - handle with care

Tadic case (Appeal against jurisdiction) (1996) 35 ILM 32, esp. paras 94, 127

TYPES OF CONFLICT

International armed conflicts

- Field of application
 - GCs, common Art.2
 - PI, Arts.1.3, 1.4, 9

Non-international armed conflicts

Internal disturbances

Internal tensions

SOME BASIC CONCEPTS

Apart from the fundamental principles set out in the INTRODUCTION section, you should be aware of the following aspects of the Geneva Conventions, which are really separate from the actual rights guaranteed by the Conventions:

Scope

- GCs, Art.2; PI, Art.3(1) - apply to declared wars and armed conflicts from the beginning of the conflict

Non-renunciation of rights

- GCI-III, Art.7; GCIV, Art.8 - applies to all those in the power of the enemy forces

Grave breaches

- GCI, Art.50; GCII, Art.51; GCIII, Art.130; GCIV, Art.147; PI, Arts.11,85
- especially serious breaches of the law of armed conflicts

Distinction between civilians and combatants

- distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The same distinction applies to civilian objects and military objectives (see, eg PI, Art.48). Why?

PROTECTION OF COMBATANTS AND PRISONERS OF WAR

Combatants and Prisoner of War Status

- Entitlement to protection

Definition of protected persons i.e. those covered by the GCs as combatants or prisoners of war

1907 Hague Regulations Respecting the Laws and Customs of War on Land, Arts.1-3, 23(f), 29-31

GCIII, Art.4 - POWs

Note: armed resistance movements also protected if they meet four conditions:

- they are commanded by a person responsible for his or her subordinates;
- they have a fixed distinctive sign recognisable at a distance;
- they bear arms openly;
- they conduct their operations in accordance with the laws and customs of war

PI, Art.8 and Arts. 43-45

(note *Prosecutor v. Tadic* (Appeal), paras 91-97: concerning status of irregular forces fighting against the authorities of the same State in which they live and operate (1999) 38 ILM 1518

- Mercenaries and spies

PI, Arts. 46-47

- Treatment of POWs (GCIII)

General duties

Arts.12-16.

- US detention of "unlawful belligerents"

US Position:

www.defenselink.mil/news/Jan_2002

www.whitehouse.gov/news/releases/2002/02/20020207-13.html

Protection of the sick, wounded and shipwrecked

- Principal protections for the sick, wounded and shipwrecked

- Obligation of protection and care

common Art.12 ; PI, Arts.10, 11, 12

- Wounded and sick to be treated as prisoners of war

GCI, Art.14; GCII, Art.16

- Obligation to search for wounded, dead and missing

GCI, Art.15; GCII, Art.18; PI, Arts.32,33

- Obligation to record and pass on information concerning identification of wounded, sick and dead

GCI, Art.16; GCII, Art.19; PI, Art.33

- **Legal regime for those assisting the sick, wounded and shipwrecked**
 - Civilian organisations and personnel may assist wounded, sick and shipwrecked and are not to be punished for doing so

GCI, Art.18; GCII, Art.21; PI, Art.17

- Prohibition of attacks on fixed and mobile medical establishments; ships

GCI, Arts.19-23; GCII, Arts.22-35; PI, Arts.8,9,12-14

- Obligation to respect and protect medical transports; hospital ships

GCI, Art.35; GCII, Arts.22-25; PI, Arts.8,22

- Obligation to respect and protect medical personnel

GCI, Arts.24-28; GCII, Arts.36-37; PI, Arts.8, 15-16

- **Significance of the Red Cross emblem**
 - The emblem is intended to ensure respect and protection for those using it; hence its use is strictly regulated

GCI, Arts.38-44; GCII, Arts.41-44; PI, Art.18

- Prohibition on misuse of the emblem

GCI, Art.53; GCII, Art.45

Protection during Non-international Armed Conflicts

- Status of Protocol II

- *Prosecutor v Dusko Tadic* (Jurisdiction), para.117: asserts that much of the Protocol declares or crystallises emerging rules of customary international law (1996) 35 ILM 32

- General provisions

- Field of application

common Art.3 - applies to non-international armed conflicts; PII, Art.1

- Principal protections for the sick, wounded and shipwrecked

- Obligation to "collect and care for" sick and wounded

common Art.3(2)

- Obligation to respect and protect wounded, sick and shipwrecked; search for and collect

PII, Arts.7-8

- Legal regime for those assisting the sick, wounded and shipwrecked

- Obligation to respect and protect medical personnel

PII, Arts.9-10

- Obligation to respect and protect medical units and transports

PII, Art.11

- **Significance of the Red Cross/Red Crescent emblem**
- Prohibition on misuse of the emblem

PII, Art.12

PROTECTION OF CIVILIANS

Protection of the civilian population

- **Civilian population - GCIV**

Part I, Art. 4; Part II; Part III, Section I

- General protection - GCIV Art.27, first para.

Note also general prohibitions under international law of discrimination, torture, inhuman and degrading treatment or punishment

Section II - relates to aliens on territory of party to the conflict

Section III - obligations towards the population of occupied territories; see also Hague Regulations, Arts.42-56

PI, Part IV, Section III (Arts.72-79)

PII, Arts.13-17: general provisions on protection of the civilian population

- **Protection of women**
- **Protections against sexual violence**

GCIV Art.27, second para.; PI Art.76.1.; Common Art.3(1)(c); PII Art.4.2

- **Protections as mothers**

GCIV Arts.14, 16, 17, 21, 22, 23

- **Protections for female detainees and prisoners of war**

GCIII Art.14(2), 25, 97,108.; GCIV Arts.76, 85,89,91, 97,132, 124; PI Art.76.2.; PII Art.5.2(a). and 6.4.

- **Protection of Children**

Geneva rules have following aims:

- shelter children from hostilities
- maintain family unity
- ensure necessary care, relief or protection for those caught in hostilities

- **Shelter from hostilities**

GCIV Art.14, 24 and 51

- **Maintenance of the family unit**

Note restrictions on evacuation, above

GCIV Art.26, PI Art.74, PII Art.4.3(b); GCIV Art.82; PI Art.75.5

- **Protection during hostilities**

GCIV Art.38.; PI Art.8 and 77.; PII Art.4.3(c-d)

- **Convention on the Rights of the Child 1989**

Art.38(1) (4)

- **Child Soldiers**

- Convention on the Rights of the Child 1989

Art.38 (2) (3)

(see also PI Art.77(2))

- Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000

Arts.1, 2 and 3(1)

- ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1989
- prohibits forced or compulsory recruitment of children for use in armed conflict

- **Punishment of breaches**

The law on punishment of those who breach human rights during armed conflict is dealt with separately. Here you should simply note that one of the most important trends in recent developments has been the increasing recognition of the particular vulnerability of women and children.

Protection of Cultural Property

- 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict
- 1954 First Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict
- 1999 Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict

METHODS AND MEANS OF COMBAT

- **Hague Convention No.IV (1907), Arts.22-28**

- right of the belligerent to adopt means of injuring the enemy is not unlimited (Art.22)
- obligation to avoid causing unnecessary suffering (Art.23(e))

- **GC PI**

- In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited (Art.35(1))
- It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art.35(2))

- **The civilian population must be protected against the effects of hostilities:** obligation to distinguish between civilian and military objectives: PI, Art.48

- **The civilian population, as well as individual civilians, shall not be the object of attack:** PI, Art.51(2)

- **Definition of military objectives:** PI, Art.52(2) - see also Art.52(3)

- **Civilian objectives are not to be made the object of attacks:**
PI, Art.52(1)

Nuclear Weapons

Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (Nuclear Weapons Advisory Opinion), (1996) 35 ILM 814

Para.97: "in view of the present state of international law viewed as a whole the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."

Anti-personnel Landmines

- Convention on Prohibitions or Restrictions on the Use of Certain Conventional weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Inhumane Weapons Convention) 1980
 - Protocol II (as amended, 1996)
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) 1999

Protection of the Environment

- Specific rules

GCIV, Arts.53, 147; PI, Arts.35-36, 51-52, 54-58

- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 - applies mostly to international armed conflicts but see Art.19
- Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, Art.2; in force 1975. (1972) 11 ILM 309
- Stockholm Declaration on the Human Environment 1972, Arts.2, 5-7, 21-22, 26. (1972) 11 ILM 1416
- Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) 1977; in force 1978. (1977) 16 ILM 88
- Security Council Resolution 687 (1991) on Kuwait. (1991) 30 ILM 847
- Inhumane Weapons Convention 1980 (as amended 1996), Protocol II (landmines), Arts. 3, 10. (1996) 35 ILM 1206
- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines 1997; in force 1999, (1997) 36 ILM 1507 Art.5
- Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) 35 ILM 809, paras. 35-36, 74-98
- Individual Responsibility for Environmental Harm Draft Code of Crimes Against the Peace and Security of Mankind 1996

<http://www.un.org/law/ilc/texts/dcode.htm>

- Article 20(g)
- ICC Statute

Certain war crimes for which individual responsibility exists:

Arts.8.2.a.iv, 8.2.b.ii,iv, v, ix, 8.2.b.xvii-xviii, 8.2.b.xx (international conflicts)

Art.8.2.

NON-INTERNATIONAL ARMED CONFLICTS

GCI-IV, common Article 3

PII, Art.4 - fundamental guarantees

PII, Arts.13-17 - protection of civilian population

The protection of human rights during civil wars has already been discussed in several contexts. Here the aim is to give an overview of the types of, and restrictions on, protections available.

IHL AND HUMAN RIGHTS LAW

The legal protection of human rights during armed conflicts is not the monopoly of IHL.

What happens to human rights law (HRL) during armed conflicts? The relationship between IHL and HRL is complex but may be divided into three principal areas:

- (i) fields of application
- (ii) types of right protected
- (iii) implementation mechanisms

Fields of application

IHL - during armed conflicts and (to some extent) periods of occupation

HRL - always, including during armed conflicts

IHL - applies to specific categories of protected person

HRL - applies to all people under the jurisdiction of the state

IHL - does not allow derogations

HRL - derogations from some rights permitted in certain emergency situations (eg, during armed conflicts)

Rights protected

IHL - protects all types of right: civil and political, economic, social and cultural, group rights - in so far as they are threatened by armed conflict

HRL - applies all the time (not just during armed conflicts) but has different regimes for different types of rights

Implementation

IHL - enforcement after the event - through international criminal law and 'enforcement' before and during armed conflict through dissemination of IHL, especially amongst protagonists to the conflict

HRL - treaties aim to establish human rights standards - breaches generally addressed through compensation to individuals affected; (some-times) amendment to domestic laws

Bankovic and Others v Belgium and 16 other Contracting States

2002 European Court of Human Rights

Application no. 52207/99

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004

<http://www.icj-cij.org/icjwww/idocket/imwp/imwprframe.htm>

esp. paras 102-113; 123-137

CRIMINAL REPRESSION OF BREACHES OF IHL

Nuremberg tribunal

Individual responsibility under the Geneva Conventions

ICTY

ICTR

ICC

The establishment of individual criminal responsibility and its evolution in the context of armed conflict

1. Nuremberg Charter 1945

- established international military tribunal to try and punish persons, acting for the European Axis countries, for three types of offence - on the basis that there was individual responsibility for these offences.

Art.6 (a) (b) (c) and Art.8

These provisions were adopted by the International Law Commission in Principles of International Law Recognized in the Charter of the Nuremberg Tribunal and in the Judgment of the Tribunal:

1950 Yearbook of the ICL, vol.II

<http://www.un.org/law/ilc/texts/nurnberg.htm>

2. Convention on the Prevention and the Punishment of the Crime of Genocide 1948

78 United Nations Treaty Series 277

Article VI; Art.II

3. Geneva Conventions of 12 August 1949

- established notion of grave breaches of IHL for which there is individual responsibility and duty of States to punish - States have criminal jurisdiction:

GCI, Art.49 and 50

4. Eichmann Case

1961 vol. 36 International Law Reports 5

5. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984

(1984) 23 ILM 1027; (1985) 14 ILM 535

Arts.1(1), 4(1) and 5(2)

6. International Criminal Tribunal for the Former Yugoslavia

Statute of the Tribunal (Annex to Report of Secretary General of UN): (1993) 32 ILM 1192

- based on Security Council Resolution 808 (1993)
 - (i) Report of UN Secretary-General: (1993) 32 ILM 163

Paras. 6-7, 9 and 33-39

(ii) Annex

Art.2-5 and Art.7(1), (3) and (4)

7. Draft Code of Crimes Against the Peace and Security of Mankind 1996

1996 Yearbook of the ILC, vol.II(2)

<http://www.un.org/law/ilc/texts/dcodefra.htm>

- latest of several such drafts, it anticipates the establishment of the International Criminal Court

Art.2, 3, 5 and 7

8. Tadic Case (Tadic IT-94-1)

(1996) 35 ILM 32

(1997) 36 ILM 908

<http://www.un.org/icty/tadic/trialc2/judgement/tad-sj970714e.pdf>

<http://www.un.org/icty/tadic/trialc2/judgement/tad-tsj70507JT2-e.pdf>

9. International Criminal Tribunal for Rwanda

10. International Criminal Court

<http://www.un.org/law/icc/index.htm>

In force since 2002. The UK is a party.

Principal features

- Jurisdiction
 - limited to classic international crimes

Genocide (Art. 6)

Crimes against humanity (Art. 7) - the acts concerned must be committed "as part of a widespread or systematic attack directed against any civilian population"

War crimes (Art. 8)

Aggression (Art. 5)

Note Art. 8.2(b)(viii): makes ethnic cleansing a war crime

- Individual responsibility

Art.25(2)and (3) ; Art.27; Art.28 and Art.31(d)

- Superior orders

Art.33 (i) (ii) and (iii)

Orders to commit genocide or crimes against humanity are always manifestly unlawful.

Recognition under International Criminal Law of the Special Risks Faced by Women and Children

- Genocide Convention 1948

See above

- ICC Statute

Art.6 - genocide - same definition as above

Art.7 - Crimes Against Humanity

especially Art.7.1(g); 7.2(c) and 7.2(f)

Art.8 - War Crimes

- International armed conflicts: Art.8.2(a)(ii), (iii), (b)(xxii), (xxvi)
Non-international armed conflicts - includes Art 8.2(c)(i)-(ii); (e)(vi) and (vii)

Case law of international tribunals on the crime of rape

- Prosecutor v Akayesu

Case No. ICTR-96-4-T, Judgment of 2 September 1998

- Prosecutor v Furundzija

Case No. IT-95-17/1-T, Judgment of 10 December 1998

See especially paras. 165-189

- Rape can be prosecuted as a crime against humanity - Akayesu, paras. 685-697
- Rape can be a crime against humanity, a grave breach of the Geneva Conventions, a war crime or an act of genocide - Furundzija, para. 172

REFUGEES AND ARMED CONFLICT

Introduction: who are refugees?

Situations that cause refugees:

- Internal political circumstances
- Natural disaster
- Armed conflict - international and non-international - population movements -forced deportation and internal displacement

Aim of the lecture: to look

- at the protection of those who were refugees prior to an armed conflict after it commences; and
- those who become refugees as a consequence of an armed conflict.

Definition of a refugee:

- Convention Relating to the Status of Refugees 1951

Art. 1A(2).

- OAU: Convention on the Specific Aspects of Refugee Problems in Africa 1969

Art. 1 (1) and (2).

Principle of non-refoulement

Refugees Convention, Art. 33(1).

Geneva Conventions

As civilians, generally entitled to same basic protections as other civilians.

GCIV, Arts. 35-46 and Art 49 and 70(2).; PI, Art. 73; GCs, common Art. 3; PII, Art. 17

Internally Displaced Persons

- not a separate category under IHL

Guiding Principles on Internally Displaced Persons

(UN Doc. E/CN.4/1998/53/Add.2);

Role of ICRC and UNHCR

European Union law

Temporary Protection

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons

Art. 2

Subsidiary Protection

Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection

Persons subject to real risk of serious harm if returned to their country of origin, but who do not qualify as refugees (under Refugees Convention) are entitled to subsidiary protection.

Art. 15

Enforcement

ICTY Statute

Art. 2 and 5(d)

ICC Statute

Art. 7(d), Art. 8 para.2 (a)(vii) and Art. 8 para.2 X(b)(viii)

CONCLUSION

"He knew that the essence of war is violence, and that moderation in war is imbecility." (Macaulay, 1831)

Who is closer to reality - Macaulay or Dunant?

And who is closer to the truth?

After all that:

- What are the legal arguments for and against the bombing of Hiroshima and Nagasaki?
- The destruction of Warsaw and Dresden? Can one distinguish between the two on the grounds that Dresden was located in the aggressor state?

- Can a combatant lawfully shoot a civilian? Can a civilian lawfully shoot a combatant?
- Is Saddam Hussein a prisoner of war?
- Can you ever lawfully get children to serve in the armed forces?

IX. ARMED CONFLICTS AND INTERNATIONAL LAW, BY PROFESSOR JULIO JORGE URBINA, UNIVERSITY OF SANTIAGO DE COMPOSTELA (SPAIN)

[Universidade de Santiago de Compostela: <http://www.usc.es>]

I. ARMED CONFLICTS IN THE INTERNATIONAL SOCIETY

Lesson 1: War, and its influence on international society

1. War and Politics: Clausewitz.
2. Transformations of the concept of war: war limited to total war.
3. Armed conflict in the nuclear era.
 - A. Nuclear deterrence.
 - B. The multiplication of regional armed conflicts.

Lesson 2: Post-Cold War conflicts

1. The end of the Cold War as the cause of the resolution of armed conflicts.
2. Crisis and armed conflicts in the transitional period.
3. The new typology of armed conflicts in the post-Cold War era.
 - A. Ethnical nationalism and regional conflicts.
 - B. Territorial conflicts and the appearance of new States.

II. THE INTERNATIONAL LEGAL REGULATION OF ARMED CONFLICTS

Lesson 3: The control of the use of armed force in international relations

1. The use of armed force and contemporary international law: the United Nations Charter.
2. Nature and content of the norm forbidding the resort to armed force.
3. Exceptions to the ban on the use of armed force.
 - A. Self-defence, individual and collective.
 - B. The use of force by the Security Council.
4. The ban on the use of force and the principle of self-determination.

Lesson 4: Peacekeeping and the idea of a "new world order"

1. The role of the United Nations in contemporary international society.
2. The Security Council and Peacekeeping: recent aspects.
 - A. Chapter VII of the Charter and its application by the Security Council.
 - B. Peacekeeping operations.
3. Limits and control of the Security Council powers.
4. United Nations humanitarian operations and Chapter VII.

III. LIMITATIONS ON THE VIOLENCE OF ARMED CONFLICTS

Lesson 5: IHL (I) - General aspects

1. Armed conflicts and the development of their international regulation.
 - A. Origins and evolution.
 - B. Concept and general characteristics.
2. Field of application.
 - A. International armed conflicts.
 - B. Non-international armed conflicts.
 - C. Other forms of violence.
3. IHL, International Human Rights Law and Refugee Law.
4. General principles of IHL.

Lesson 6: IHL (II) - Conduct of military operations

1. Limitations in the choice of objectives.
 - A. Military objectives.
 - B. Civilian objects.
 - a) Scope and content.
 - b) Civilian objects with special protection.
2. Conduct of hostilities and protection against collateral damage.
 - A. Ban on indiscriminate attacks.
 - B. The principle of proportionality.
 - C. Measures of precaution in preparing the attack.
3. Limits in the choice of methods and means of combat.
 - A. Ban or limits on methods of combat.
 - B. Ban or limits on means of combat.

Lesson 7: IHL (III) - protection of victims of armed conflict

1. Protection of victims of armed conflicts.
 - A. Protection of combatants.
 - a) The concept of combatants.
 - b) Protection of the wounded, sick and shipwrecked.
 - c) Protection of prisoners of war.
 - B. Protection of civilian population.
 - a) The concept of civilian and of civilian population.
 - b) Protection of civilians in the hands of the enemy.
 - c) Protection of civilian populations against the effects of hostilities.
2. IHL and non-international armed conflicts.

Lesson 8: IHL (IV) - Implementation

1. Mechanisms to ensure the respect of IHL.
 - A. Preventive means.
 - B. The role of the Protecting Powers.
 - C. The role of the ICRC.
2. Control of the application of IHL: the International Fact-Finding Commission.
3. Repression of violations and individual responsibility.
 - A. Normative developments. The concept of grave breaches.

- B. Mechanisms to punish violations of IHL.
 - a) National Tribunals.
 - b) Development of an international legal court: the International Criminal Court.
- 4. International responsibility of States.
- 5. Other means to ensure respect of IHL.
 - A. The United Nations.
 - B. The role of NGO's.

X. LL.M. COURSE ON IHL FOR POSTGRADUATE STUDENTS AT THE UNIVERSITY CENTER FOR INTERNATIONAL HUMANITARIAN LAW, BY PROFESSOR MARCO SASSÒLI, UNIVERSITY OF GENEVA (SWITZERLAND)

[University Center for International Humanitarian Law: <http://www.cudih.org/english>]

Lesson 1

- Mutual introduction
- Presentation of the course and the subject
- Discussion of the learning and the evaluation methods suggested
- Introduction by the professor:
 - Concept and purpose of IHL
 - IHL as a branch of public international law
 - Fundamental distinction between *ius ad bellum* (legality of the use of force) and *ius in bello* (humanitarian rules to be respected)
 - Situations to which IHL applies: international and non-international armed conflicts

(Read introductory texts appearing in vol. I, pp. 81-118 to repeat Lesson 1 and those appearing on pp. 121-148 to prepare for Lesson 2).

Lesson 2

- Introduction by the professor:
 - Historical development of IHL
 - Sources of contemporary IHL
 - The fundamental distinction between civilians and combatants

*(Read introductory texts appearing in vol. I, pp. 149-160 and discuss **Case No. 216** to prepare for Lesson 3).*

Lesson 3

- Case Study: The detainees held in Guantánamo Bay, Cuba (**Case No. 216**) p. 2309.
- Supplementary lecture on:
 - Combatants and prisoners of war

*(Read introductory texts appearing in vol. I, pp. 161-171 and discuss **Cases No. 125 and 67**, to prepare for Lesson 4).*

Lesson 4

- Case Studies: Israel, Navy Sinks Dinghy off Lebanon (**Case No. 125**, p. 1337) and UK, Misuse of the Emblem (**Case No. 67**, p. 991)
- Supplementary lecture on:
 - Protection of the wounded, sick and shipwrecked

*(Read introductory texts appearing in vol. I, pp. 173-185 and discuss **Case No. 147**, to prepare for Lesson 5).*

Lesson 5

- Case Study: UN, Detention of Foreigners (**Case No. 147**, p. 1569)
- Lecture on:
 - Protection of civilians

*(Read introductory text appearing in vol. I, pp. 186-197 and discuss **Case No. 107**, to prepare for Lesson 6).*

Lesson 6

- Case Study: International Court of Justice and Israeli High Court of Justice, Separation Wall/Security Fence in the Occupied Palestinian Territory (**Case No. 107**, p. 1151).
- Supplementary lecture on:
 - Special rules on occupied territories

*(Read introductory texts appearing in vol. I, pp. 199-217 and discuss **Case No. 193**, to prepare for Lesson 7).*

Lesson 7

- **Case No. 193**, Federal Republic of Yugoslavia, NATO Intervention (**Case No. 193**, p. 2077).

(Read introductory texts appearing in vol. I, pp. 218-230 to prepare for Lesson 8).

Lesson 8

- Supplementary lecture on:
 - The conduct of hostilities

*(Read introductory texts appearing in vol. I, pp. 249-265 and 303-305 and discuss **Case No. 180** to prepare for Lesson 9).*

Lesson 9

- Case Study: ICTY, The Prosecutor v. Tadic (**Case No. 180**, p. 1804)

(Read introductory texts appearing in vol. I, pp. 249-269 to prepare for Lesson 10).

Lesson 10

- **Case No. 180**, ICTY, The Prosecutor v. Tadic (continued)
- Lecture on:

- The law of non-international armed conflicts

(Read introductory texts appearing in vol. I, pp. 271-340 to prepare for Lesson 11).

Lesson 11

- Lecture on:
 - Implementation of IHL

*(Read introductory texts appearing in vol. I, pp. 341-353 and discuss **Case No. 133**, to prepare for Lesson 12).*

Lesson 12

- **Case No. 133**, Inter-American Commission on Human Rights, *Coard v. US*, p. 1387.
- Supplementary lecture on:
 - IHL and Human Rights

(Read introductory texts appearing in vol. I, pp. 355-384 and discuss the ICRC Report on its Visits to Abu Ghraib Prison, Iraq, to prepare for Lesson 13).

Lesson 13

- ICRC Report on its Visits to Abu Ghraib Prison, Iraq, leaked to the media by US sources, online: http://www.globalsecurity.org/military/library/report/2004/icrc_report_iraq-feb2004.pdf
- Lecture on:
 - The International Committee of the Red Cross

*(Discuss **Case No. 229**, and think about general comments on IHL and the teaching method to prepare for Lesson 14).*

Lesson 14

- **Case No. 229**, Russian Federation, Chechnya, Operation Samashki, p. 2416.
- Evaluation of the course and of the subject

WRITTEN EXAM:

The written exam lasting four hours consists of two parts:

1. (75% of the grade) A theoretical development: Students may choose between two subjects consisting of a theoretical problem to be developed starting from one of the cases discussed during the course (e.g. "The interplay between Human Rights and IHL based on the case Inter-American Commission on Human Rights, *Coard v. US*")
2. (25% of the grade) A hypothetical: Students receive some hypothetical fact to be evaluated under IHL and they must indicate what additional facts they would need to know to evaluate the situation under IHL and how they would judge the situation under IHL depending on those facts (e.g.: "A food convoy marked with red cross emblems is attacked and destroyed by a party to an armed conflict." Students need to indicate that they would need to know whether the conflict is international or non international, whether the

food is intended for the military or the civilian population and in the latter case whether the convoy is run by the ICRC or the Federation and then indicate whether the marking with red cross emblems and the destruction of the convoy violated IHL depending on those facts).

XI. IHL TEACHING OUTLINE FOR THE WEB-BASED DISTANCE EDUCATION DIPLOMA

Offered by the National Academy of Legal Studies and Research (NALSAR) University of Law, Hyderabad, India (<http://www.nalsarpro.org>)

PAPER 1

INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW

1. Introduction

- IHL and public international Law
- *Ius in bello* and *Ius ad bellum*

2. Definition and Concept of IHL

- Fundamental Principles of IHL
- Sources of IHL
- Ancient Indian and Oriental Philosophies on the Law of War
- Eastern and Western Philosophies on the Law of War
- History of International Legal Instruments on the Laws of War

3. Application of IHL

- Definition of War (Traditionally viewed as an International Conflict)
- The Concepts of International and Internal Armed Conflicts
- Applicability of IHL in Various Conflict Situations & Common Article 3 of the Geneva Conventions: Its Applicability and the question of threshold

4. IHL and Human Rights

- Origin, Development and Scope of Human Rights Law
- A comparative Study of the Two Bodies of Law - Similarities, Differences and Areas of Overlap
- Application of Human Rights Provisions in Conflict Situations - Conditions and Provisions for Derogation
- Applicability of Human Rights Norms to Internal Disturbances and Tensions
- Treatment of Detainees and other Deprived of Liberty - Applicable Norms
- Developments concerning a Declaration of Minimum Humanitarian Standards

PAPER 2

PROTECTION OF DEFENCELESS VICTIMS OF ARMED CONFLICTS

1. Introduction

2. The General Obligation of Humane Treatment

3. Protection to the Wounded, Sick and Shipwrecked

- Medical personnel
- Medical objects
- Work of Relief Societies. Importance of the Emblems

4. Participants in the Conflict: Definitions of Combatants and Non-Combatants

5. Protection of Prisoners of War

- Determination of Status
- Treatment, supervision and repatriation

6. Protection of Civilians

- Protection against arbitrary treatment
- Protection of Women and Children. Question of Child Soldiers
- Protection of Refugees and Internally Displaced Persons
- Civilians in Occupied Territories

7. Activities of the International Committee of the Red Cross in favour of victims of armed conflicts

PAPER 3

LIMITATIONS ON MEANS AND METHODS OF WARFARE

1. Introduction

- Protection of civilians against the effects of hostilities

2. General Limitations on Means and Methods of Warfare

- Principles applicable to means and methods of warfare
- Definition of military objectives and civilian objects

3. The Law Relating to Naval Warfare

4. The Law Relating to Air Warfare

5. Specific Weapons Regimes

- Some early developments
- Chemical, Biological and Bacteriological Weapons
- Nuclear Weapons
- Conventional Weapons (Conventional Weapons Convention and its Protocols)

- Anti-personnel Landmines
- Recent Developments (Small Arms, Unexploded remnants of armed conflicts, etc.)

6. Protection of Environment in Times of Armed Conflicts

7. Protection of Cultural Property in Times of Armed Conflicts

PAPER 4

IMPLEMENTATION OF INTERNATIONAL HUMANITARIAN LAW

1. Introduction

2. National Implementation of IHL

- Role of national legislations
- Other national measures for IHL implementation

3. Internal Implementation of IHL

- Role of the United Nations
- System of Protecting Powers
- Role of the ICRC
- International Fact-finding Commission

4. International Criminal Law Mechanisms for Implementation of IHL

- Introduction to the general concept of war crimes trials
- Early War Crimes Trials - Nuremberg and Tokyo Trials
- The *ad hoc* War Crimes Tribunals for the Former Yugoslavia and Rwanda
- Developments Concerning Creation of a Permanent International Criminal Court

5. Special Issues Concerning Implementation of IHL in Times of Internal Armed Conflict

INDEX OF PART I

[N.B.: Part I will then refer to the pertinent Cases and Documents in Part III.]

A

Additional Protocol I of 1977	103, 116, 127, 133, 162, 199, 201, 218, 226
Additional Protocol II of 1977	109, 127, 133, 255, 262
Addressees	115, 118-120, 266 , 293, 333, 376
Aerial bombardment: <i>see</i> bombardment	
Agreements	131-133, 137, 159, 171-172, 217, 234, 237, 262, 280
Airborne troops	145
Aircraft	145, 241-248
Air warfare	201, 241-248
Ambulances: <i>see</i> medical transports	
Amendment	119, 132
Amnesty	259, 320
Analogies.	241, 251, 258-261
Annexation	187, 190
Armament: <i>see</i> means of warfare	
Armed forces: <i>see</i> combatants	
Assistance	182, 226-230 , 257, 288-291, 357-361, 361-364 , 366, 371-372
Attack	81-82, 138-139, 144, 161, 164, 166, 173, 199-217 , 247, 307

B

Beginning of hostilities	116, 190
Biological or bacteriological weapons.	222 , 323
Blockade	226, 236 , 361
Bombardment	201, 205-214 , 231, 241-246, 256-257
Booby-traps	220

C

Capture	149, 154-155, 157, 171, 202, 231
Capture cards	158 , 171
Cease-fire	116

- Central Tracing Agency **170-171, 360-361**, 372, 375
- Charter of the Nations: *see* United Nations
- Chemical weapons **222**, 260, 323
- Children **177-179**, 196, 255, 323
- Civil defence 216
- Civil war: *see* non-international armed conflict
- Civil internees **173-174, 181-182**, 193, 359-360
- Civilian hospital: *see* medical units
- Civilian object 139, 199, 201, 205-206, 208, **209**, 213-214, 231, 235, 242
- Civilian population 143-144, **173-182**, 199-201, 203-206, 208, 228, 253-254, 258-259
- Civilians taking part in hostilities 143-144, 148, 203-204
- Classification of conflicts: *see* *Qualification of conflicts*
- Codification 105, 121-123, **131-133**, 134-137, 231-233, 242, 273, 324, 341
- Collective punishment 181
- Colonial domination 111
- Combatants **143-154**, 203-205, 229, 243, 258-259, 275, 349
- Commanders 213, 304, **313**, 315, 316, 318
- Communication 157-158, 360
- Compensation 283-285, 297, **299**
- Conditions of detention 154-155, 181, 193, 254, 359-360
- Conduct of hostilities 115, 127, **199-230**, 231, **256-258**, 260, 322, 338
- Convention on bacteriological (biological) weapons 222
- Conventional weapons: *see* Weapons Convention of 1980
- Correspondence 157-158
- Crimes against humanity 265, **307-308**
- Cultural objects 127-128, 197, 209, **210**, 237, 242, 252, 256
- Culture 83, **85-88, 124-125**, 338-339
- Customary law 134-139, 372

D

- Dams 209, 211
- Dead persons 170-172
- Declaration of intention 119, 263
- Declaration of St. Petersburg of 1868 200
- Declaration of war 108, 111
- Demilitarized zones 217
- Denunciation 119, 132
- Deportation 184, 186, 194, 225, 254, 307
- Depositary 119
- Derogations 182, 343-344, 349, 351
- Detainees, protection of 156-158, 181-182, 192-193, 254, 359-360, 363, 371

Detaining Power	154-155, 158-159
Displaced persons	182-184 , 185, 254, 359-360
Dissemination	275-276, 287, 333, 353, 364-365 , 373, 378
Distinction	139, 142, 143-148 , 199, 201-205, 235, 243-245, 257-259
Due process	156, 180, 192, 254-255, 321, 347
Dum-dum bullets	218-219
Dunant, Henry	122, 355
Dykes	209, 211

E

Economic sanctions	272, 295, 325
Emblems	161, 167-170 , 255, 260, 274, 277-279, 287, 289, 331, 355
End of hostilities	116-117, 159, 197
Enemy: <i>see</i> protected persons	
Enemy <i>hors de combat</i>	145
Enquiry	280, 296-298 , 379
Environment	209, 211 , 237, 243, 362
Equality of belligerents	106, 266, 273
Escape	157
Espionage	91, 151
"Ethnic cleansing".	265
Excessive damage: <i>see</i> proportionality	
Extradition	321

F

Failed States	147
Family reunification	179, 360-361
Field hospitals: <i>see</i> medical units	
Forced labour	177-178, 181, 265
Foreign intervention.	264, 268
Fragmentation munitions	222
<i>Francs-tireurs</i>	149-150
Fundamental principles: <i>see</i> principles of IHL	
Fundamental principles of the Red Cross: <i>see</i> Red Cross/Red Crescent Principles	

G

General principles: <i>see</i> principles of IHL	
Geneva Conventions	
of 1864	121-123, 356
of 1929	126
of 1949	126

Geneva Gas Protocol, 1925	126, 222
Genocide	265, 307-308, 309-313
Grave breaches: <i>see</i> war crimes	
Guerrilla	146, 149-150, 154

H

Hague Conventions	
1907	133, 231-232, 241
1954	209-210
Hospital ships	232, 237, 238-239
Hospital zones	215-217, 357
Hospital and safety zones	167, 215-217 , 357
Hospitals: <i>see</i> medical units	
Human dignity	86, 180
Human rights applicable in armed conflicts	341-353
Humanity	138-139, 141 , 219, 367, 369

I

Implementation	271-340, 348-353, 373
Incendiary weapons	221
Indiscriminate attacks	205-208 , 243, 257-259, 323
Indiscriminate weapons	218-219
Individual responsibility for violations	303-330
Information, transmission of	157, 170-171, 179, 281, 283, 357, 360-361
Insurgents	249-251, 259, 260, 266-269
International armed conflict	108-109 , 111-112, 252
International Committee of the Red Cross	85, 122, 158, 168-169, 273, 280-283, 331, 349, 353, 355-384
International Conferences of the Red Cross and the Red Crescent	356, 367
International Criminal Court	110, 316-317, 323-326 , 329-330
International Criminal Tribunal for Rwanda (ICTR)	321-322 , 327-328
International Criminal Tribunal for the former Yugoslavia (ICTY)	115, 321-322 , 326-327
International Humanitarian Fact-Finding Commission	296-297, 298-299
Internationalized internal conflicts	263
Internment	154-156, 160, 174 , 181-182, 192-193, 259
Interpretation	107, 119, 132
Interstate relations	89-90, 114, 118, 189
Intervention	226-227, 264, 268
<i>ius ad bellum</i> : <i>see</i> UN Charter	
<i>ius cogens</i>	132, 135, 297

J

- Journalists 179, 338
 Judicial guarantees: *see* due process

L

- Land mines 128, 220, 222, 363
 Laser weapons 221, 323
 Law of Geneva 123, 199
 Law of The Hague 123, 199
 Legal advisers 275, 287
 Legal status of the parties 266, **268-269**, 331
 Legislation 191-192, 294, **277-279**, 287, 303, 319, 331-332, 364
Levée en masse 151
 Liberation wars 102, 109, **111-112**, 150

M

- Martens clause 139-141
 Means of warfare 123, **218-224**, 235-236, 260, 364
 Media: *see also* journalists 338, 340
 Medical aircraft 244, **247**
 Medical ethics 165, 347
 Medical personnel 161, **163-165**, 255, 366
 Medical supplies 161, 166, 209, 211
 Medical transports 166, 209, 237, 247
 Medical units 166, 169, 255, 366
 Meetings of States Parties 286
 Mercenary 152
 Merchant shipping 238
 Military manuals 134, 276
 Military necessity 81, 139, 142, **201-203**, 219, 257
 Military objective **201-202**, 205, 207-209, 213-214, 216, 232, 235, 243, 245, 275
 Militia and volunteer corps 149-150
 Mines 132, 219-**220**, 222, 236, 363
 Missing and dead persons **170-172**, **360-361**, 372, 375

N

- Napalm: *see* incendiary weapons
 National liberation wars: *see* liberation wars
 National Red Cross and Red Crescent Societies: *see* Red Cross/Red Crescent Societies
 Naval bombardment: *see* bombardment
 Naval warfare: *see* warfare
 Necessity: *see also* military necessity 298, **300**, 316, **318**, 336

Neutral states: <i>see also</i> distinctive emblems	160, 272, 280-282
Neutralized zones	215-217
Non-defended localities	216-217
Non-detectable fragments	221
Non-governmental organizations	288-289
Non-international armed conflict	108-110, 183-184, 247-269 , 292, 304, 306, 330-335
<i>Non-refoulement</i>	183, 185
Nuclear power stations	209, 211
Nuclear weapons	223

O

Objective of war	81, 200-201
Occupation	109, 111, 116-117, 186-197, 227, 261
Offer of services	288, 331, 333 , 356-357, 375, 376
Open cities	216-217

P

Participation in hostilities	81, 143-146, 148, 149, 156, 165, 177, 179, 186, 203-205, 250, 253
Peace-keeping: <i>see</i> United Nations, forces	
Perfidy	225 , 226
Poison	121, 219, 222
Police	110, 276, 344 , 349
Precautions against attacks	214-215
Precautions in attacks	205, 208-209, 213-214 , 235, 244, 248, 258
Presumptions	154, 201, 215
Principles of IHL	81, 138-142, 218, 251, 256-258
Prisoners of war in general	148, 149-160 , 357, 359, 361, 375
conditions for status	149-150, 153-154
conditions of detention	156
treatment	154-157
<i>see also</i> combatants	
Property: <i>see also</i> civilian object	193-194, 196
Proportionality	81, 139, 142, 204, 207 , 213-214, 340
Protected persons	114-116 , 162, 174, 180, 190, 253, 264, 297, 302, 322, 344
Protecting Powers	158, 181, 280-283 , 357, 376
Protection of children: <i>see Children</i>	
Protection of the civilian population: <i>see also Civilian population</i>	199-217 , 371
Protection of the environment: <i>see Environment</i>	
Protection of women: <i>see Women</i>	
Public conscience	139-140
Public opinion	338, 340
Punishment	145, 156-157, 181

Q

Qualification of conflicts	108-114 , 189-190, 249, 261-265
Qualified personnel	275, 279 , 287
Quarter, denial of	225
<i>Quasi</i> -combatant	204

R

Rape	176-177 , 307, 310, 323
Rebels	249, 258-259, 266-269 , 331, 333
Reciprocity	118, 132, 272, 297, 301-302 , 339-340
Recognition of belligerency	108, 262
Red cross, red crescent: <i>see</i> distinctive emblems	
Red Cross/Red Crescent principles	367
Red Cross/Red Crescent Societies	164, 167-168, 170, 287-288 , 356, 360, 366 , 374
Refugees	182-185 , 359
Relief	166, 175, 196, 226-230 , 256, 257, 288-289, 358, 361-364, 366
Religious personnel	163-165
Reparation	283, 297, 299
Repatriation	158-160 , 164, 172, 180, 185
Repression of breaches	170, 303-330
Reprisals	205, 208, 272, 302-303
Requirements of humanity: <i>see</i> humanity	
Resistance	150, 186
Reunion of families	179, 360-361
Right of initiative	331, 333, 356-357, 375-376
Role of the civilian population	164, 339
Ruses of war	225-226

S

Sabotage	152
Safe havens	216
Sea mines	231, 236
Secession	249, 264
Self-defence	102-105 , 301 , 317 , 336
Self-determination	102, 111-112
Self-executing rules	277-278
Settlements	194-195
Shipwrecked	161-163, 232, 239
Sick: <i>see</i> wounded and sick	
Solferino	122, 126, 161, 355
Special Court for Sierra Leone	328

- Spy: *see* espionage
- Starvation 144, **226, 228**, 256-257
- State responsibility 109, 273-274, 283-284, **296-303**
- Stateless persons 187
- Statutory limitations 320
- Submarines 232, 236
- Superior orders 316, 318, 337, 340
- Superiors: *see Superior orders and commanders*
- Superfluous injury: *see unnecessary suffering*

T

- Tensions **110**, 344
- Terrorism **112-114**, 147-148, 153, 205-206
- Theatre of war 117-118, 233-234
- Torture 156, 180, 255, 307, 310, 347, 360, 363
- Tracing 157-158, 170-172, 179, 360-361, 372, 375
- Training: *see also* Part II, Chapter I **274-277, 279**, 287, 349, 353, 364-365, 373
- Treachery: *see* perfidy
- Tribunal 156-157, 186, 192, 319, **321-330**

U

- Undefended towns: *see* non-defended localities
- Uniform 149-150, 225-226
- United Nations
- in general 273, **289-296**, 349
 - Charter **102-105**, 216, 273, 284, 289-290, 292, 297, 299, 324
 - emblem: *see* distinctive emblems
 - forces 107, 264, **290, 293-295**
 - International Law Commission 105, 283, 297, 372
 - Security Council 289-290, 324
- Universal jurisdiction 277, 303, 307, 311, **319-321**, 332
- Universality **85-87, 121-125**, 367
- Unlawful combatants **147-148**
- Unnecessary suffering 81, 139, 142, **218-219**, 224, 323
- Use of force: *see* UN Charter

V

- Violations 271-274, 283-285, **296-313**, 321-325, 331-332, 335-338, 348-350, 379-384

W

War crimes	265-277, 303-307
War effort.	200-203
War graves	172
War of national liberation: <i>see</i> liberation wars	
Warfare	
air	241-248
land	200-230
naval.	231-239
Warning	213
Water.	211, 230, 362
Weapons	218-224, 260
Convention of 1980.	220-222
development	224
of mass destruction	222-225
Women	163, 175-177 , 255
Wounded and sick	145, 161-163 , 165-167, 255, 288

Z

Zones: *see* demilitarized zones and neutralized zones

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MISSION

The International Committee of the Red Cross (ICRC) is an impartial, neutral and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance. It directs and coordinates the international relief activities conducted by the Movement in situations of conflict. It also endeavours to prevent suffering by promoting and strengthening humanitarian law and universal humanitarian principles. Established in 1863, the ICRC is at the origin of the International Red Cross and Red Crescent Movement.

How Does Law Protect in War? is the first book of its kind in the field of International Humanitarian Law (IHL). In this second, expanded and updated edition, a selection of more than two hundred and thirty cases provides university professors, practitioners and students with the most updated and comprehensive collection of documents on International Humanitarian Law available. A comprehensive outline of International Humanitarian Law puts the contents of these cases into their systematic context and theoretical perspective.

Part I presents IHL carefully and systematically. This Part of the book provides an outline of important and non-controversial elements on each topic through Introductory Texts. In addition, readers are enabled and encouraged to expand their knowledge on a given subject as they are directed to references to the pertinent parts of Cases and Documents on that issue that are reproduced in Part III. For each topic, references to articles from the Geneva Conventions and their Additional Protocols and references to the Rules of the ICRC Study on Customary IHL are also provided. Finally, a selected bibliography facilitates further study and deeper understanding of each topic.

Part II provides advice and recommendations on how to teach IHL and a series of teaching outlines, which may be useful for university professors who wish to introduce a course on IHL. The suggested teaching outlines are primarily addressed to law faculties, but they also target faculties of journalism and political science. This Part ends with eleven course outlines written by experts in IHL.

Part III, entitled Cases and Documents, is the main body of the present book. In this Part, the reader can find all the Cases and Documents in chronological and geographical order. The nature of each Case or Document varies according to the topic: the student or scholar will thus find national and international tribunal judgements, Security Council resolutions, extracts from documents, or press releases. Each Case and Document has been carefully edited according to the specific topic(s) of International Humanitarian Law referred to in Part I. The originality of this section lies in the second part of each case, entitled "Discussion", where the reader is asked questions that raise issues in relation to the case at hand.

The main goal of this book is to show that International Humanitarian Law remains relevant in contemporary practice and that it provides – although inherently insufficient – answers to the humanitarian problems in armed conflicts.

The first English edition of this work was published in 1999; an updated French version appeared in 2003. This second English edition has incorporated the significant revisions and updates of the French edition, which included some 40 new Cases and Documents, revised Introductory Texts and considerable improvements to the section on Teaching International Humanitarian Law. A further 30 Cases and Documents reflecting the most recent practice have been added in this new English edition. Furthermore, some Introductory texts have been added, others revised.

In publishing this edition, the ICRC hopes to encourage practice-related teaching of International Humanitarian Law in universities world-wide and to provide practitioners with a reference book on contemporary practice in International Humanitarian Law.



ICRC