



**International Humanitarian
Law and International
Criminal Justice:**
An Introductory Handbook



The Commonwealth

**International Humanitarian Law and International
Criminal Justice: An Introductory Handbook**

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Preface

International humanitarian law is the law dealing with armed conflict. It aims to limit the adverse effect on both combatants and civilians. Its provisions are primarily contained in the 1949 Geneva Conventions and related protocols. International criminal justice was developed to ensure that those who violate international humanitarian law are brought to account. The Commonwealth is a strong supporter of international humanitarian law and international criminal justice. It promotes the implementation of the Geneva conventions and other international treaties such as the Rome Statute which established the International Criminal Court. Under the principle of complementarity, the Rome Statute gives primacy to national jurisdictions. This means countries which have capacity are able to investigate and prosecute crimes under the Rome Statute.

The Commonwealth Secretariat has undertaken significant work to promote the Rome Statute and provides support to further the principle of complementarity. For many years, the Secretariat has been implementing extensive criminal justice systems in Commonwealth countries. The programme is aimed at strengthening human and institutional capacity to investigate, prosecute and adjudicate on criminal matters. Under this programme, the Secretariat has assisted member countries to develop legal toolkits such as model laws and guidelines. The Secretariat has also provided technical assistance and has developed regional and international networks to provide platforms for criminal justice officials to share knowledge and good practice. In recent years, there has been increased focus on bringing practical context to the criminal justice programme. For

example, officials have received mentoring and they have travelled to other countries on placement. The Secretariat has also collaborated with partners to provide virtual libraries and introduce online training, and has facilitated online networks through Commonwealth Connects, where users can meet to communicate and collaborate online.

Young people, in particular up-and-coming lawyers, can play a central role in promoting complementarity. A new programme is being developed for young lawyers aimed at developing knowledge, research and advocacy skills on international criminal justice. This programme includes an annual moot competition and establishing a Network of Commonwealth Young Lawyers (NCYL).

This handbook is for those wishing to develop some familiarity with the subject of international humanitarian law and international criminal justice. Young lawyers will find this a useful resource to increase their understanding and awareness in this area.

The handbook reflects the Commonwealth fundamental values of peace and security, human rights and the rule of law. These are enshrined in Commonwealth Declarations and the Commonwealth Charter adopted by Commonwealth Heads of Government in December 2012.

To find out more about the work of the Commonwealth Secretariat and the Network of Commonwealth Young Lawyers, contact:

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Acronyms

API	Additional Protocol I	ICCPR	International Covenant on Civil and Political Rights
APII	Additional Protocol II	ICJ	International Court of Justice
ECHR	European Convention on Human Rights	ICRC	International Committee of the Red Cross
GCI	First Geneva Convention	ICTR	International Criminal Tribunal for Rwanda
GCII	Second Geneva Convention	ICTY	International Tribunal for the Former Yugoslavia
GCIII	Third Geneva Convention	IHL	International humanitarian law, also known as the law of armed conflict
GCIV	Fourth Geneva Convention		
ICC	International Criminal Court		

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1. Introduction

This Handbook provides an introduction to two of the most important areas of international law directed at ameliorating the horrors of war and securing human dignity: international humanitarian law and international criminal law.

International humanitarian law (IHL) or 'the law of armed conflict' refers to the rules of international law that govern the conduct of participants in an armed conflict, including the rules that determine the way in which force may be used during conflict.

This branch of international law attempts to alleviate the calamities of war by regulating the means and methods of warfare and extending some protection to victims of armed conflict. While it is impossible to completely eliminate the suffering caused by war, humanitarian law attempts to minimise that suffering without undermining military effectiveness. International humanitarian law applies equally to all parties to an armed conflict. In other words, its application does not depend on whether a particular party is an aggressor state or is a state acting in self-defence.¹

International criminal law provides a means for the enforcement of international humanitarian law in addition to seeking to repress widespread violation of human rights and mass atrocity.

This Handbook provides an overview of the sources of international humanitarian law (*where is IHL found?*), its applicability (*when and where does IHL apply?*), and its key features and principles (*what is involved in IHL?*), such as the distinction between combatants and civilians and the law regulating the conduct of hostilities.

The Handbook then turns to the relationship between IHL and human rights law, examining the extent to which human rights law applies in time of armed conflict and how that body of law interacts with IHL. Finally, the Handbook examines international criminal law with a particular focus on the jurisdiction of the International Criminal Court.

The development of international criminal law

The concept of international crimes initially developed in relation to piracy (acts of violence committed for private ends on the high seas against another ship or its passengers). Since piracy occurred on the high seas, i.e. in an area in which no state had jurisdiction, all states were given jurisdiction to apprehend and try pirates – who were regarded as the enemy of all mankind. In the late nineteenth century, states began to take the view that violations of the emerging law of armed conflict engaged the criminal responsibility of the individual who had committed the violation. Accordingly, some states engaged in the trial of enemy personnel who had committed violations of the laws and customs of war or of their own soldiers. Thus, there were prosecutions by the United States at the end of the American Civil War and during the US-armed conflict in the Philippines in 1902. At the end of World War I, the Treaty of Versailles (with Germany) and the Treaty of Sèvres (with Turkey) provided for war crimes trials. The Treaty of Versailles (Art. 227–230) provided for the prosecution of Kaiser Wilhelm II before a special tribunal 'for a supreme offence against international morality and the sanctity of treaties'. However, the Kaiser fled to the Netherlands and was never tried. Although the treaty also recognised the right of the Allies to establish military tribunals to try German soldiers accused of war crimes, instead a compromise was reached under which Germany tried some of those accused of crimes – the 'Leipzig Trials'. Similarly, the Treaty of Sèvres was not ratified by Turkey and its replacement, the

Treaty of Lausanne, did not provide for war crimes prosecutions.

The main catalyst for the development of international criminal law was the establishment by the victorious Allied powers at the end of World War II of the International Military Trial at Nuremberg and the Tokyo International Criminal Tribunal. The Nuremberg Tribunal was established by the governments of France, the UK, the USA and the USSR 'acting in the interests of all of the United Nations' to try German leaders for war crimes, crimes against peace, and crimes against humanity. In addition, Control Council Law No. 10 provided for trials before military tribunals run by the occupying Allies or before German courts. This resulted in a large number of prosecutions.

International criminal tribunals were next established in the 1990s by the UN Security Council. During Yugoslavia's disintegration in the early 1990s, war broke out among the various factions and a number of significant atrocities were committed. In 1993, the UN Security Council, by Resolution 827, set up an International Criminal Tribunal for the Former Yugoslavia. That tribunal was established to deal with serious international crimes committed since 1991 on the territory of the former Yugoslavia and is based in The Hague. In 1994, the UN Security Council, by Resolution 955, set up an International Criminal Tribunal in Arusha, Tanzania, to try crimes committed during the genocide in Rwanda in which nearly a million people died.

As both tribunals were created by the UN Security Council all states have an obligation

to co-operate with them. These two tribunals are ad hoc in the sense that they are created to deal with crimes committed within a particular location and within a particular time period. Moreover, they were established after the fact. Both tribunals are now winding down after concluding the vast majority of their cases.

In addition to these international criminal tribunals, there are a number of 'internationalised', 'mixed' or 'hybrid' tribunals. These are tribunals established to prosecute those who are alleged to have committed international crimes where the tribunals are part international and part domestic. Examples include:

- The Special Court for Sierra Leone: established by agreement between the United Nations and the Government of Sierra Leone to prosecute international and national crimes committed in the war in that country.
- Special Panels for Serious Crimes: established in East Timor when that country was recognised by the UN.
- Extraordinary Chambers in the courts of Cambodia: established to deal with the crimes against humanity committed in Cambodia by the Khmer Rouge in the 1970s in which about 2 million people are estimated to have died.
- 'Regulation 64' Panels in the courts of Kosovo.
- The Special Tribunal for Lebanon.

These tribunals are described as hybrid or mixed because the judges and staff of

the tribunal are partly international and partly drawn from the country concerned; and the tribunals apply international law as well as national law. The manner in which these tribunals are established is varied. Some are established by international agreements (e.g. Sierra Leone), others are established by domestic law but with the support of the international community (e.g. Cambodia), and others are established by domestic law but at a time when the country is being administered by the UN (e.g. East Timor and Kosovo).



2. Sources of International Humanitarian Law

The most important treaties regulating the actions of participants in armed conflicts are:

- The Hague Conventions of 1899 & 1907 and in particular the Regulations attached to Hague Convention IV 1907 on Laws and Customs of War on Land.
- The four Geneva Conventions 1949.
- Additional Protocols I, II (1977) and III (2005) to the 1949 Geneva Conventions.

2.1. Treaties

The most important treaties regulating the actions of participants in armed conflicts are:

- The Hague Conventions of 1899 & 1907 and in particular the Regulations attached to Hague Convention IV 1907 on Laws and Customs of War on Land.
- The four Geneva Conventions 1949.
- Additional Protocols I, II (1977) and III (2005) to the 1949 Geneva Conventions.

In general, treaties are only binding on those states that have specifically consented to them and become party to them. However, the fact that a state is party to an IHL treaty does not mean it is bound to apply the treaty in a given armed conflict. The application of the treaty depends on what the treaty says and on whether the other party or parties to the conflict are bound by the treaty.

Older IHL treaties contained a 'general participation clause' which meant that those treaties only applied to a given armed conflict if all the parties to the armed conflict were parties to the treaty.² Even if just one party to an armed conflict involving several states was not a party to the treaty, no other state was bound to apply that treaty in that armed conflict.

However, Art. 2, para. 3 of the four Geneva Conventions (and Article 1 of Additional Protocol I) provides that even if one or some of the parties to an armed conflict are not parties to the treaties, the belligerents who are parties shall remain bound in their material relations. Nevertheless, these treaties will only apply if at least one state on each side of the conflict is a party to the treaty. Also, they will only apply to those states that are parties to the treaty in their

relations with other parties to the treaty.

The **Geneva Conventions** (but not the Additional Protocols to them) have been universally ratified and are binding on all states.³ As a result of the universal acceptance of these treaties most of their provisions are regarded as rules of customary international law.⁴ These treaties deal mainly with humanitarian treatment of the victims of warfare, in particular those persons who do not, or who no longer, take part in armed conflict. They therefore deal with *protection of wounded, sick, and shipwrecked combatants; prisoners of war; and civilians.*

The titles of the four Geneva Conventions of 1949 specifies the persons protected by each:

- Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I).
- Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II).
- Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III).
- Protection of Civilian Persons in Time of War (Geneva Convention IV).

Supplementing the Geneva Conventions are three Additional Protocols:

- Protocol I (1977) relating to the Protection of Victims of International Armed Conflicts (API).

- Protocol II (1977) relating to the Protection of Victims of Non-International Armed Conflicts (APII).
- Protocol III (2005) relating to the Adoption of an Additional Distinctive Emblem. (This is a red crystal used for medical and religious personnel, establishments and objects.) (APIII).

2.2 Customary international law

Customary international law refers to unwritten rules of law derived from the practice or conduct of states.⁵

There is a body of rules dealing with armed conflict which is derived from state practice. The International Committee of the Red Cross (ICRC) conducted an extensive study of customary international humanitarian law, first published in 2005⁶, which provides an extensive analysis of state practice in this area. Many of the rules contained in the treaties considered above have also become rules of customary international law.⁷ As such they apply to all states and to states not party to the relevant treaty.

However, care must be taken in determining whether or not a treaty rule has become a rule of custom. The question of whether particular treaty rules have become custom or not is significant in the context of the Additional Protocols to the Geneva Conventions. Although these protocols are very widely ratified there are significant military powers that are not parties to them. As of December 2012, there were 172 states party to API and 166 party to APII. However, non-parties include India, Indonesia, Iraq, Israel, Pakistan and the United States. Both treaties came into force for Afghanistan only in November 2009. While some rules in API have been accepted as customary law, some of the more controversial rules do not represent customary law and are not binding on non-parties.

2.3 Judicial decisions

The rules regulating armed conflict are also to be found in judicial decisions considering these issues. For example, prosecutions for war crimes before either national or international tribunals will usually raise and decide issues concerning the laws of war. Thus the war crimes trials held after World War II and the case law of the International Criminal Court as well as the ad hoc International Criminal Tribunals for the former Yugoslavia and for Rwanda address issues regarding the laws of war.⁸

Similarly, some national judicial decisions address other issues covered by international humanitarian law. For example:

- In 2006, the US Supreme Court decided on the legality, under IHL, of the Military Commissions established to prosecute persons detained in Guantanamo Bay.⁹
- In 2006, the Israeli Supreme Court ruled on the legality, under IHL, of the policy of targeted assassinations practised by the Israeli government.¹⁰ That court has, on numerous occasions, had to deal with IHL issues regarding the Palestinian occupied territories.¹¹
- In October 2012, the UK Supreme Court ruled on the legality under the Geneva Conventions of the continued detention by the United States of an Al Qaeda operative transferred to US custody by United Kingdom forces in Iraq.¹²

The International Court of Justice (ICJ) may also deal with issues of humanitarian law.

These issues may arise in contentious cases, for example:

- *Military and Paramilitary Activities in and against Nicaragua*. The ICJ was asked, inter alia, to decide that the United States bore responsibility for the acts of the contra rebels in Nicaragua.¹⁵
- *Armed Activities on the Territory of the Congo (Democratic Rep. of Congo v. Uganda)*. The court held that Uganda and its troops violated their obligations under IHL during their incursion into and occupation of parts of the Democratic Republic of Congo.¹⁴

In addition, the ICJ is sometimes called upon to deal with issues of IHL in advisory proceedings:

- In 1996, the ICJ rendered an advisory opinion on the legality of the use of nuclear weapons: *Legality of the Threat or Use of Nuclear Weapons*.¹⁵
- In 2004, the ICJ delivered an advisory opinion on the *Legality of the Consequences of the Construction of a Wall in the Occupied Palestinian Territory* which addressed Israel's obligations under IHL.¹⁶





**Cour
Pénale
Internationale**

**International
Criminal
Court**

3. Applicability of International Humanitarian Law

The first issue to be determined in considering the application of IHL is whether a situation of violence is to be classified, as a matter of international law, as an armed conflict or not.

International humanitarian law applies to armed conflicts and only in times of armed conflict.¹⁷ Therefore, the first issue to be determined in considering the application of IHL is whether a situation of violence is to be classified, as a matter of international law, as an armed conflict or not.¹⁸ Whether a situation is classified as an armed conflict is a matter of objective determination and the views of the parties to the situations are not determinative.¹⁹ For this reason, IHL does not apply only to declared wars.

In *Tadić* (Jurisdiction Appeal), the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) stated that:

an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of

hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peace settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.²⁰

As this holding suggests, armed conflicts may be either *international* or *non-international*. IHL applies to both types of conflicts. In addition, there will be other situations of violence that do not constitute armed conflicts because they fail to meet the criteria for international or non-international armed conflicts. IHL does not apply to these other situations of violence. However, other bodies of international law, such as human rights law, will apply.

In the case of an international armed conflict, Common Article 2 of the Geneva Conventions provides that the conventions 'shall apply 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 recognised by one of them.' It also provides that the conventions apply to cases of partial or total occupation of the territory of a party even if the occupation meets with no armed resistance.

It is a factual question whether an armed conflict is taking place. The *Tadic* quotation above suggests that the threshold for force and violence which is required for determining that there is an international armed conflict is very low. Any resort to force between two states makes IHL applicable. Thus the Geneva Conventions apply to inter-state conflicts regardless of their level of intensity and will apply even to very low level conflicts. As will be seen below, a higher threshold of violence is required in order to classify a situation as a non-international armed conflict.

3.1 Distinction between international and non-international armed conflict

Until the middle of the twentieth century, the international law of wars (as this branch of international law was then called) concerned itself almost exclusively with international (i.e. inter-state) armed conflicts. In the period before then, it was possible for a government involved in an armed struggle with an internal insurgent group to recognise the belligerency of that group and to bring into application the laws of war in relation to that conflict.²² Otherwise, international law had little application to non-international or internal conflicts.²³

*Modern IHL applies not only to international armed conflicts but also to non-international armed conflicts.*²⁴ However, it is important to distinguish between the two types of armed conflict because the rules dealing with non-international armed conflicts are more limited than those applicable to international armed conflicts.

The rules dealing with non-international conflicts were first contained in Common Article 3 of the Geneva Conventions²⁵; the only provision in these treaties dealing with non-international conflict. Additional Protocol II (APII) deals exclusively with non-international armed conflicts and contains rules that are slightly more elaborate than those found in Common Article 3 of the Geneva Conventions. However, the rules

provided for in APII relating to the regulation of non-international armed conflicts are far more basic and substantially more limited than those provided for in the Geneva Conventions regulating international armed conflicts. In addition to over 500 substantive articles in the four Geneva Conventions, API, which deals with international armed conflicts, contains more than 80 substantive articles. However, APII contains only 15 substantive articles. That treaty contains only the most basic rules regarding the conduct of hostilities.

Despite the fact that the bulk of treaty rules relating to IHL apply only to international armed conflict, the gap between the regulation of international and non-international armed conflicts is greatly diminished. There have been two significant developments in this area.

1. Customary international law now provides for a broader set of rules covering such non-international armed conflicts. Indeed, it has been argued that the dichotomy between international and non-international armed conflicts is being eroded.²⁶ The International Committee of the Red Cross (ICRC) in its comprehensive study of customary international humanitarian law stated that:

This study provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and show the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to

non-international armed conflicts. In particular, the gaps in the regulations of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.²⁷

An acknowledgement of the erosion of the dichotomy between international and non-international armed conflicts is also to be found in the decision of the Appeals Chamber of ICTY in the *Tadic (Appeal on Jurisdiction)* case. In that case, the ICTY held that:

Notwithstanding . . . limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.²⁸

The ICTY also held that:

elementary considerations of humanity and common sense make it preposterous that the use by States of weapons prohibited in armed conflicts between themselves be allowed when States try to put down rebellion by their own nationals on their own territory.

What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife.²⁹

2. A number of modern treaties proscribe the use of certain weapons in both internal and international armed conflicts.

For example, the Convention on the Prohibition of the Development, Production, Stockpiling, Use of Chemical Weapons 1993 & Anti-Personnel Mines Convention 1997, the Second Protocol to the Hague Convention 1954 for the Protection of Cultural Property in Armed Conflict.

The extension of the applicable rules of IHL in non-international armed conflict can be seen from the fact that the war crimes in a non-international armed conflict listed in Article 8(2)(e) of the Rome Statute of the International Criminal Court Statute go beyond what is in APII. For example, Article 8(2)(e)(ix) dealing with killing or wounding treacherously, i.e. perfidy, Article 8(2)(e)(x) which prohibits declarations that no quarter will be given, and Article 8(2)(e)(xii) prohibiting the destruction or seizure of enemy property not justified by military necessity all criminalise acts which are not covered by APII.

However, despite the fact that customary international law and some recent treaties have eroded the distinction between the two types of conflict, the distinction has not been completely eliminated. Some significant differences remain between the law that applies in international and that which applies in non-international armed conflicts. These differences are particularly important with regard to the *prosecution and detention of persons*.

Prosecution of persons

The IHL regime that applies in international armed conflicts provides that lawful combatants are entitled to take part in hostilities (the combatants' privilege)³⁰ and they may not be prosecuted, even under domestic law, for lawful acts of war (the combatants' immunity). Such persons may only be prosecuted for acts that amount to war crimes or other violations of international law. However, in non-international armed conflicts, there is no concept of privileged combatants on the non-state side. The state is fully entitled to prosecute persons fighting for the non-state actor for the acts they commit or for the very fact of rebelling, whether such acts are contrary to international law or not. The regime regarding grave breaches of the Geneva Conventions, which imposes obligations on states to exercise universal jurisdiction over those individuals who commit such grave breaches, applies only to international armed conflicts.³¹

Detention of persons

Differences also exist between the IHL that applies in international and in non-international armed conflicts with regard to detention of persons during these conflicts: both of combatants and of civilians. Customary international law and Geneva Convention III provide an extensive regime regarding the protections to be accorded to prisoners of war in international armed conflicts. Likewise Geneva Convention IV provides important procedural and other protections with regard to civilians or other persons interned for reasons of security in international armed conflicts. However, a state is not obliged

to accord prisoner of war status to rebel forces engaged in a non-international armed conflict. Common Article 3 to the Geneva Conventions provides some basic rules with regard to treatment of those detained in non-international armed conflicts, but the

law of non-international armed conflicts does not set out who may be detained or what processes must be followed to ensure that persons are not unjustly detained in non-international armed conflicts.

Distinguishing between international and non-international armed conflict

Despite the significance of the distinction, it is not always easy to distinguish between an international and a non-international armed conflict.

The conflict is international if it takes place between the armed forces of two or more states. However:

- The question of whether a conflict is an inter-state one may be difficult where one of the parties claims to be a state and the other party rejects that claim – as happened, for example, during the break-up of Yugoslavia. It is possible that what began as an internal armed conflict becomes an international armed conflict when an internal rebel group has been successful in becoming a state.
- If the conflict that takes place on the territory of one state between a government and rebel groups, it may become international by the intervention of the military forces of a second state in aid of the rebel group. For example, the long-running civil war in Afghanistan between the Taliban and the Northern Alliance was internationalised by the intervention in

2001 of the America-led coalition on the side of the Northern Alliance.

- In a conflict which takes place on the territory of one state between a rebel group and the government, if the rebel group acts on behalf of another state this makes it international. The ICTY held in *Prosecutor v. Tadic (Merits)*³² that, because the Bosnian Serbs were under the overall control of the Federal Republic of Yugoslavia, the conflict between that group and the Muslim-led Bosnian government was an international armed conflict.
- Under Article 1(4) of Additional Protocol I, there has been an attempt to widen the definition of an international armed conflict. Under this provision, that treaty which covers only international armed conflicts shall also apply to '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...'

3.2 Distinction between internal strife/civil disturbance and non-international armed conflict

IHL does not apply to situations of internal strife or civil disturbance that do not rise to the level of non-international armed conflicts.

Common Article 3 does not provide a threshold test. In the *Tadic* case, the ICTY spoke of 'protracted armed violence between governmental authorities and organised armed groups or between such groups within a State'³³, which suggests that the violence and force must reach a relatively high degree of intensity. The test pronounced in *Tadic* for whether there is a non-international armed conflict under customary international law means that one has to look at the organisation of the parties to the conflict and the intensity of the conflict/fighting.³⁴

APII does provide a threshold test for its application and specifically states that it does not apply to situations of internal disturbance and tensions such as riots or isolated and sporadic acts of violence. Under Article 1(1) of that treaty, the rules contained therein only apply to armed conflicts which take place on the territory of a party 'between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to

carry out sustained and concerted military operations and to implement this Protocol'. However, this provision applies only to APII and is probably a more stringent test of non-international armed conflicts than that which exists in customary international law. This can be seen from the fact that the test excludes conflicts between two or more organised armed groups which *Tadic* recognises as amounting to non-international armed conflicts.

The rest of this Handbook focuses on international armed conflicts.





4. Combatants and Civilians in International Armed Conflicts

States must never make civilians the object of attack and must never use weapons that are incapable of distinguishing between civilians and combatants.

One of the central principles of international humanitarian law is the distinction between combatants and civilians. This distinction is important for a number of reasons:

- Combatants are legitimate targets and non-combatants are not. States must never make civilians the object of attack and must never use weapons that are incapable of distinguishing between civilians and combatants.³⁵
- Combatants are entitled to participate in hostilities and, if captured, are to be treated as prisoners of war.³⁶ Furthermore combatants may not be prosecuted merely for taking part in hostilities unless they contravene the laws of war. This is a rule of customary international law which is also implicit in Article 87 of Geneva Convention III.³⁷ Civilians, on the other hand, are not entitled to take active part in hostilities. They will lose the protections afforded to civilians if they do so.
- Civilians or 'unlawful combatants' are not entitled to prisoner of war (POW) status

and may be prosecuted for acts carried out during the conflict. The term 'unprivileged' or 'unlawful' combatants is often used to refer to a person who takes a direct part in hostilities but who is not entitled to combatants' privilege (e.g. civilians who engage in hostilities or irregulars who do not fulfil the requirements for lawful combatant status).

These last two points can be seen in *Ex parte Quirin*³⁸, a World War II case dealing with the capture by the United States of German soldiers. In that case, the US Supreme Court noted that the laws of war distinguish between combatants and civilians and between lawful and unlawful combatants. It went on to state that:

Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful.³⁹

As already stated in section 3.1, the concept of privileged or lawful combatants does not apply in non-international armed conflicts. Governments facing armed insurrections are free to try rebels for treason or for their violent acts, even if those acts comply with the laws applicable in international armed conflicts.

4.1 Combatant status under the Geneva Conventions

The definition of a combatant is provided for in Arts 13, 13 and 4 of Geneva Conventions I, II and III (respectively). According to Art. 4, Geneva Convention III:

Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:
 - (a) that of being commanded by a person responsible for his subordinates;
 - (b) that of having a fixed distinctive sign recognizable at a distance;
 - (c) that of carrying arms openly;

(d) that of conducting their operations in accordance with the laws and customs of war.

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.⁴⁰

These provisions make a distinction between members of the regular armed forces of a state and irregulars. Paragraphs (1) and (3) deal with regular armed forces and paragraph (2) with members of irregular forces.

Members of the regular armed forces of a state are stated to be combatants without any qualification in the provisions themselves. Para. 3 stresses that regular forces have this status even if the government that they fight for is not recognised by the opposing party. There is a question concerning whether regular forces are required to meet the conditions stated in para. 2 with regard to irregulars. In drafting these provisions, it was assumed that these forces would automatically meet these conditions as this is how regular armed forces operate. It was assumed that members of regular forces will wear uniforms, have an organised hierarchy, and know and respect the laws and customs of war. However, a regular soldier can be deprived of his lawful combatant status if some of these conditions are not met.

In *Mohamed Ali v. Public Prosecutor*,⁴¹ the Privy Council held that an Indonesian soldier captured in Singapore (then part of Malaysia) during a confrontation between Indonesia and Malaysia was not entitled to POW

status because he was not in uniform when committing an act of sabotage. Similarly, in *Ex parte Quirin*,⁴² the US Supreme Court decision held that German soldiers who took off their uniforms on a sabotage mission in the US (where they had landed by submarine) were not entitled to prisoner of war (POW) status.

These cases establish that, under customary international law, the obligation on combatants to distinguish themselves applies as much to regular soldiers as it does to irregulars although this is not stated expressly in the Hague Regulations or the Geneva Conventions. Thus, the position is that regular soldiers will effectively forfeit their combatant status and may be open to prosecution as saboteurs or as spies if they engage in hostilities while disguised as civilians.

Article 4(A)(2) of GCIII provides that *irregulars or members of militias or resistance movements* are to be accorded combatant status if they meet the four conditions in that provision:

1. That of being commanded by a person responsible for his subordinates.
2. That of having a fixed distinctive sign recognisable at a distance. Irregulars are not required to wear uniforms, unlike regular forces, but may satisfy the condition by wearing other special clothing, i.e. an insignia, a headdress or helmet, or a coat. The distinctive sign must be worn throughout the conduct of military missions and must be recognisable at a distance.
3. That of carrying arms openly. This also ensures that irregulars do not achieve

unfair advantage in attacks. The enemy must be able to recognise irregulars in the same way as members of armed forces.

4. That of conducting their operations in accordance with the laws and customs of war.

In addition to these explicit conditions, the chapeau to Article 4(A)(2) implies that the movement must be organised in some form and that it must belong to a party to the conflict.⁴³ The former condition is probably just another way of restating the condition that the members of the group must be commanded by a person responsible for his subordinates. A person operating on his own is not entitled to combatant status. This is because it is more likely that organisations with a hierarchical framework are able to impose discipline on their members.

These requirements are intended to ensure that irregular forces distinguish themselves from civilians, in order to protect the civilian population.

The conditions for lawful combatancy are relaxed in the case of inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously, and without having had time to form themselves into a regular armed unit, take up arms to resist.⁴⁴ This is known as *levée en masse*. In this case, persons who take up arms are also to be regarded as combatants. However, to be accorded that status, such persons must carry arms openly and respect the laws and customs of war.

4.2 Combatant status under Additional Protocol I

The conditions for according combatant status under the Geneva Conventions to irregular or guerrilla forces are difficult to meet without jeopardising their military operations. This is particularly the case for irregular forces resisting an occupation. For example, in order for a combatant to meet the conditions relating to an organised group commanded by a superior he would have to reveal the identities and whereabouts of his comrades and thus jeopardise their security. Likewise the requirement of carrying arms openly would be difficult to meet in the case of a resistance movement in occupied territory since these groups operate clandestinely and rely on the element of surprise.

Realisation of the inadequacy of these provisions to provide privileged combatant status for irregulars fighting in colonial wars, occupied territory or struggles for self-determination led to initiatives to relax the 1949 convention standards in the negotiation of API.⁴⁵

ARTICLE 43

Eliminates the distinction between regular armed forces and irregulars. It defines the armed forces of a party as consisting 'of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.' Thus, there is a requirement for there to be a

command link between party to the conflict and armed forces. This might be difficult to prove in the case of irregulars. However, this requirement is simply another way of stating the 'belonging to a party' requirement in Article 4(A)2 of Geneva Convention III.

ARTICLE 43(1) Requires that the armed forces of a party be subject to an internal disciplinary system that shall enforce compliance with the rules of international law applicable in armed conflict. This requirement restates The Hague and Geneva requirements that there be a hierarchal organisational framework and that there should be compliance with the laws and customs of war. However, it should be more difficult to abuse this provision as the fact that one or more members of the group act in violation of the laws and customs of war does not take the group as a whole outside this condition.

ARTICLE 44(2) States that violations of the laws of armed conflict by an individual combatant does not generally deprive him of his right to be a combatant or to be a POW.⁴⁶ This provision emphasises that a combatant is only to be denied POW status where he fails to distinguish himself or is a spy or mercenary. However, it extends this treatment to irregulars as well as regulars.

ARTICLE 44(3) Spells out the obligation of combatants to distinguish themselves from civilians. This reflects an obligation to be found in customary international law.⁴⁷ If they fail to do so, then the combatants lose their entitlement of POW status. The first sentence obliges combatants

to distinguish themselves only 'whilst engaged in an attack or in a military operation preparatory to an attack'. The provision does not state how combatants are to distinguish themselves but Article 44(7) states that it is not intended to change the practice of regular soldiers wearing uniforms. Therefore, the customary rules of having a fixed distinctive sign and carrying arms openly are maintained.

This article permits a person to be a part-time combatant as long as he distinguishes himself while engaging in attacks or preparing for them. However, the second sentence recognises that there are some situations where the nature of the hostilities would make it impossible for a combatant to comply and in such circumstances sets a lower threshold for distinction. In these circumstances the requirement is for the combatant to distinguish himself by carrying arms openly 'during each military engagement' and 'during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate'.

This lower threshold was controversial during the diplomatic conference that drafted API. Some have argued that this lower threshold puts civilians at risk.⁴⁸ This provision is one of the main reasons given by Israel and the US for failure to ratify API.⁴⁹ Other states have argued that this exception only applies in the case of resistance movements in occupied territories and in national liberation conflicts.⁵⁰ They argue that it is only in these circumstances that the nature of the hostilities make it impossible to distinguish at all times while preparing for an attack.

ARTICLE
45(1)

Creates a presumption that a person who takes part in hostilities is entitled to POW

status. It also reiterates the provision of Article 5 of Geneva Convention III that, in the event of doubt, a captured combatant is entitled to POW status until the matter is determined by a competent tribunal. However, Article 45 makes it clear that as long as a detainee who has taken part in hostilities claims POW status or if that status is claimed on his behalf by his state or if he appears to have that status, a contrary view by the detaining power creates doubt which must be resolved by a competent tribunal.





5. The Conduct of Hostilities

Parties to an armed conflict must use only those weapons and methods of combat which are necessary to attain the ultimate goal of overpowering the enemy.

International humanitarian law is animated by the idea that there must be a balance between military necessity and humanitarian protection. The attempt to strike this balance is reflected in the rules restricting the means and methods of warfare. One of the basic overarching principles of IHL is that the right of the parties to choose methods or means of warfare is not unlimited.⁵¹ Thus, IHL limits the methods, targets and weapons that are permissible in armed conflict.

The approach taken by the law here is that parties to an armed conflict must use only those weapons and methods of combat which are necessary to attain the ultimate goal of overpowering the enemy.

This has given rise to fundamental principles of customary law regarding *targeting* and the *weaponry* that may be used in an armed conflict. The main principle regarding targeting is that civilians and civilian objects are not legitimate military targets.⁵² With regard to weaponry, in addition to treaties dealing with specific weapons, customary international law prohibits the use of weapons which cause unnecessary suffering or which needlessly aggravates the suffering of combatants.⁵³

These two principles were referred to by the ICJ in the Nuclear Weapons Advisory Opinion as cardinal principles of humanitarian law.⁵⁴ The targeting principle was included in the Lieber Code, issued in 1863 during the American Civil War, and the weaponry principle in the St Petersburg Declaration of 1868. These principles were reflected, to a limited degree, in the Hague Conventions of 1899 and 1907. Article 22 of the Hague Regulations states that the 'right of belligerents to adopt means of injuring the enemy is not unlimited' and Article 23 prohibits the employment of 'arms, projectiles or material calculated to cause unnecessary suffering.' Article 25 prohibits the attack or bombardment of undefended towns, villages or dwellings.

These principles, that meant that civilians were not to be the object of attack and that they were to be spared as much as possible, came under threat with the development of air power and with the practices of World War II. During that war there was widespread violation of the principles by all sides, resulting in massive civilian casualties. Nearly 50 per cent of the casualties in WWII war were civilian, as opposed to 5 per cent in WWI.

The Geneva Conventions of 1949 did little to regulate issues relating to the means and methods of warfare. These issues were

returned to in the drafting of the Additional Protocols.

The three important principles regarding targeting during hostilities

1. *Distinction*

The first and most important principle regarding conduct. Under this principle, which is contained in Article 48 API and in customary international law, parties to a conflict must distinguish between the civilian population and combatants and between civilian objects and military objectives. Accordingly the civilian population and civilian objects must not be the object of an attack.⁵⁵ An attack is defined in Article 49(1) API as 'acts of violence against the adversary, whether in offence or in defence'.

2. *Proportionality*

This follows from the principle of distinction. It provides that military objectives should not be attacked if the attack is likely to cause civilian casualties or damage that would be excessive in relation to the concrete and direct military advantage to be gained by the attack.

3. *Prohibition of indiscriminate attacks*

This principle prohibits attacks that are not directed at a specific military objective or employ means or methods of combat that cannot be so directed and that are likely to strike military and civilian objects and objectives without distinction. This principle is contained in Article 51(4) API.

5.1 Principle of distinction and the protection of civilians

The principle of distinction is intended to protect both civilians and civilian objects. In applying the principle to the targeting of people, the first thing that must be done is determine which people are civilians and which are combatants.

Combatants are legitimate targets unless they are hors de combat, i.e. they are wounded and unable to take part in hostilities or have surrendered etc. Individual civilians and the civilian population must not be targeted. However, Article 51(3) API provides that civilians are only entitled to protection from attack 'unless and for such time as they take a direct part in hostilities'. Therefore, civilians are not legally immune from attack if they take a direct part in hostilities.

Civilians are defined in Article 50(1) API as anyone who does not come within Article 4A GCIII or Article 43 API. In other words, anyone who is not a combatant under those provisions is a civilian.

Questions have arisen as to whether or not there is an intermediate category between civilians and combatants. Is there a category of *quasi-combatants*, i.e. people who contribute so fundamentally to the war effort that they lose their civilian status even though they do not take a direct part in the hostilities? In addition, it has been argued that people who take a direct part in hostilities but do not fulfil the requirements for lawful combatancy

are in-between the civilian and combatant status. Some regard the so-called category of 'unlawful combatants' as meaning that these persons do not benefit from combatants' immunity (in terms of prosecution) and POW status but also do not benefit from the immunity from attack that civilians have. The Israeli Supreme Court held in *Public Committee against Torture in Israel v. Govt of Israel (Targeted Killings Case)*⁵⁶ that there is no third category under customary international law. In this case, the Israeli policy of targeted killing of members of terrorist organisations was challenged as being contrary to IHL. The Israeli Supreme Court held that a person is either a civilian or a combatant. 'Unlawful combatants' are civilians and will only lose their protection for such time as they take a direct part in hostilities.

Direct participation in hostilities

A civilian may be the object of an attack if he is participating directly in hostilities. There are two key questions with regard to whether a civilian may be attacked:

- What constitutes direct participation in hostilities?
- When is a person to be considered as no longer taking a direct part such that he again benefits from civilian immunity?

There is no clear definition of what constitutes direct participation in hostilities. According to the ICRC Commentary on API, hostile acts are:

acts which by their nature and purpose are intended to cause actual harm to the personnel and equipment of the armed forces.⁵⁷

In the *Targeted Killings Case*, the Israeli Supreme Court stated, correctly, that acts which are intended to cause damage to civilians should also be regarded as hostile acts. According to the International Committee of the Red Cross (ICRC)'s 2009 *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*:⁵⁸

In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria:

- 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and**
- 2. There must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and**
- 3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).**

It is therefore clear that a civilian who takes up arms and intends to use it offensively against opposing enemy forces will be taking a direct part in hostilities.

The concept of direct participation extends beyond taking part in actual fighting. A civilian who is employed by a private company to service or operate a weapons system is taking a direct part in hostilities.⁵⁹ It has also been argued that a civilian who gathers information in an area of hostilities is taking a direct part. However, the concept does not extend to all those whose activities support the war effort of a state. Working in a factory that produces armaments is not taking a direct part in hostilities. The harm that is caused by the production of weapons does not occur in one causal step from that act. For that harm to occur other steps still need to occur (i.e. the use of those weapons); therefore there is no direct causal link between the act of the person and the harm that occurs.

Civilians present in military objectives are not protected against attacks directed at those objectives. For example, the presence of civilian workers in an arms production plant will not immunise that plant from attack. It was held in *Public Committee against Torture in Israel case*⁶⁰ that providing logistical or general support including monetary aid is not taking a direct part in hostilities. However, it was held in that case that direct participation includes the commander or sender of the person who takes a direct part in hostilities and those who plan his activities.

Although there might be some agreement that some acts constitute direct participation in hostilities there is disagreement on which side of the line other activities fall, e.g. driving ammunition. The

problem is that there is no agreed definition or form of words on what constitutes direct participation. The ICRC's recent interpretive guidance goes a long way in providing the analytical tools for deciding on whether an act does constitute direct participation. This guidance takes a narrow view of the scope of the notion of direct participation, which seems the right approach to take. A narrow interpretation is suggested by the text and structure of the provisions that deal with direct participation in hostilities. The text of the relevant provisions speaks not of participation in armed conflict but of participation in hostilities, something narrower than being involved in the conflict in general. Participation in hostilities suggests participation in military operations. Furthermore, participation must be 'direct'. So, not all participation in military operations means loss of protection from attack.

Even when a civilian has taken a direct part in hostilities, Article 51(3) API provides that the person can only be targeted 'for such time' as they continue to take a direct part in hostilities. In the *Public Committee against Torture in Israel*⁶¹ case the Israeli Government argued that the part of Article 51(3) API that provides that civilians may only be targeted 'for such time' as they take a direct part in hostilities does not reflect customary international law. The US government has taken the same view. The Israeli Supreme Court rejected this view. Therefore, the questions to ask are:

- When does a person no longer take a direct part in hostilities?

- What is the position of a person who intermittently or sporadically takes up arms or engages in hostile acts?
- May that person be targeted at a time when he is not engaging in or preparing to engage in a hostile act?

The Israeli Supreme Court held that the provision was customary law in its entirety. In the Israeli case above, the Supreme Court held that the 'revolving door' phenomenon should be avoided, meaning that persons who participate repeatedly in hostile acts can be targeted in periods of rest.

The ICRC has taken a narrow approach to the question of the temporal scope of direct participation:

Civilians lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities, whereas members of organized armed groups belonging to a non-State party to an armed conflict cease to be civilians (see above II), and lose protection against direct attack, for as long as they assume their continuous combat function.⁶²

The ICRC rejects the notion of continuous direct participation; the idea that a person who takes a direct part in hostilities remains a valid target until he opts out of the hostilities through extended non-participation. The view that such a person is always subject to attack even in the periods when not specifically engaging in the hostile act is contrary to the narrow notion of direct participation in hostilities adopted by the

ICRC. However, the ICRC was willing to broaden slightly the notion of the specific act which constitutes taking a direct part in hostilities. It stated that:

Measures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution, constitute an integral part of that act.⁶³

The ICRC's apparent rejection of the notion of continuous direct participation does not, in most cases, change the results one would get if one adopted a continuous direct participation analysis. In most cases, adopting either approach would probably mean that the revolving door of participation causes the person to lose immunity, even beyond the specific occasions when he acts. All that is changed is the category into which the person falls. This is because, on the ICRC's analysis, the person would probably be a member of an organised armed group and thus subject to direct attack for so long as s/he is a member. Membership in such group is defined by the ICRC as a person who assumes a continuous combat function. So applying the ICRC analysis, one would arrive at the same conclusion as the Israeli Supreme Court when it said:

On the other hand, a civilian who has joined a terrorist organization which has become his 'home', and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, loses his immunity from attack 'for such time'

as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.⁶⁴

The only difference is that, on the ICRC's analysis, the person would not be a civilian but rather a member of an organised armed group.

5.2 Principle of distinction and the definition of military objectives

The principle of distinction applies to *objects* as much it applies to people. Only objects that can be regarded as military objectives are legitimate targets. Article 52(2) API attempts to specify which objects may be taken as military objects. It provides that:

In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

The definition includes two cumulative criteria, which in reality amount to the same thing:

- the object must make an effective contribution to military action; and
- its destruction offers a definite military advantage.

The military advantage is to be appraised at the time in question. Furthermore, the military advantage is not restricted to tactical gains but must be viewed in the light of an attack as a whole. Thus, an air raid which misleads the enemy to shift its strategic gaze to the wrong sector offers a military advantage even though the destruction of

the specific objects in and of themselves does not.⁶⁵ It is also important to note that the advantage in question must be military and not merely political. Likewise, the object must make an effective contribution to military action. This must not be construed too widely, for example by targeting all objects sustaining the war or all economic resources of the state.⁶⁶ Such an approach would be a return to the total war policies of the early twentieth century, which API decisively rejects.⁶⁷

Article 52(2) API, which is recognised as customary international law, refers to objects which by nature, location, purpose or use make an effective military contribution:

- *Nature* refers to the intrinsic character or inherent attributes of the object. Thus, a tank or other military equipment or buildings make a military contribution by nature.
- *Location* refers to an object can be regarded per se as a military objective if there is something distinctive about it, e.g. land controlling access to a harbour, an important military pass, an area overlooking a straight.
- *Purpose* refers to the intended future use of the object. Thus an object which is not by nature military and which is not in use for military purposes might be a legitimate target if it is intended to be used for military purposes.
- *Use* refers to any object that, even if normally a civilian object, can become a military object if used in a manner

which makes an effective contribution to military action. Thus, a school becomes a legitimate target if arms are stored there or if troops are based there. Under Article 52(3), in cases of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it is to be presumed as not being so used. The question here is what degree of doubt brings the principle into play.

The definition of legitimate military objectives means that even items that are normally reserved for civilian use may be regarded as legitimate targets so long as they are at the time making an effective contribution to military action. Furthermore, objects that are used both by military and civilians are legitimate targets as they make a contribution to the military action, i.e. power stations, bridges and railways that supply both the military and civilians are legitimate targets. However, these objects are not to be attacked where the civilian damage would be disproportionate to the military advantage gained.

During the NATO campaign on the Federal Republic of Yugoslavia in 1999, questions were raised as to whether NATO attacks on bridges and in particular on a television station, complied with international humanitarian law. A committee established by the ICTY prosecutor to examine these issues came to the conclusion that attack on a broadcasting facility would be justifiable if that facility was part of the command, control and communication facilities of the enemy. However, attacking media outlets

simply because they are used to broadcast propaganda is unlawful.⁶⁸

Some items are specifically exempted from attack under API, other treaties and customary international law. This includes provisions dealing with medical facilities⁶⁹ and those relating to cultural objects.⁷⁰ Under Article 54 API, it is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. Under Article 56 API, works or installations containing dangerous forces are not to be made the object of an attack if such attack may cause the release of dangerous forces and severe losses among the civilian population, e.g. dams, dykes, and nuclear electricity plants.

5.3 Indiscriminate attacks

A corollary of the principle of distinction is that commanders must not use methods or means of combat that are incapable of distinguishing between civilians and combatants [Article 51(4) API]. In this scenario, the attacker is not necessarily trying to attack civilians but s/he is simply reckless as to whether or not civilians are caught up in the attack. Thus, it is prohibited to fire blindly into territory of the enemy without attempting to discern whether the target in question is military. Indiscriminate bombing of a wide area, such as carpet-bombing of a city, would constitute violation of this principle [Art. 51(5)(a) API]. Likewise the use of weapons that cannot be directed at particular targets or where it cannot be predicted where they will land would violate this principle. Thus, Iraq's use of SCUD missiles in 1990 was a violation of the prohibition. During the Kosovo conflict the question was raised as to whether it was lawful to bomb from very high altitudes when it was likely that a distinction could not be made between civilian and military objects.

5.4 Principle of proportionality

Under the principle of proportionality, an assessment must be made as to whether any military advantage to be gained outweighs the collateral civilian damage likely to result from the attack. There is an obligation not to launch an attack that will cause disproportionate or excessive collateral civilian damage in relation to the concrete and direct military advantage to be gained [Article 50(5)(b), Article 51(5)(b), 57(2)(a)(iii) and (b) API]. Likewise there is an obligation to use weapons and methods that are likely to minimise collateral civilian casualties and damage.

5.5 Principle of precaution

There is a duty to show constant care to spare the civilian population [Article 57]. This means that there is a duty on a commander who orders an attack and on those who plan attacks to:

- Do everything feasible to verify that targets attacked consist of combatants and military objectives and that they are not subject to special protection.
- Take feasible precautions in the choice of means and methods of attack in order to minimise incidental civilian loss. This means that where there is a choice of weapons and methods of attack, planners and commanders are bound to select those most likely to avoid or minimise incidental civilian casualties and damage. This does not mean that the commander or planner must always use the most discriminating weapons. They are entitled to take into account the effectiveness of the weapons concerned, the risk to their own forces and the extent of resources at their disposal, e.g. the amount of particular weapons they might have. But it does mean that the likely effect in increasing or reducing collateral civilian casualties must always be a primary consideration.
- Refrain from launching attacks that may be expected to cause incidental loss of civilian life, injury or damage that would be excessive in relation to the concrete and direct military advantage

anticipated. Similarly, once an attack has been launched there is an obligation to call it off if it emerges that there is a disproportionate risk of civilian losses.

- Choose a target that can be attacked with the least risk of civilian casualties where there is a choice of targets that would produce similar military advantage.

5.6 Obligations of defending forces

Under Article 58 API, states are under a duty to avoid locating military objectives within or near densely populated areas. States are also under a duty to remove the civilian population from the vicinity of military objectives. A policy of encouraging or even compelling human shields is not only contrary to Article 58 but specifically prohibited by Article 51(7). The failure of the enemy to comply with these requirements does not absolve attacking forces from complying with their obligations under the principles of distinction and proportionality [Article 51(8)]. The question that arises is whether a breach of the Article 58 obligation affects the way in which the proportionality test is to be applied: will a higher level of civilian casualties be acceptable where military objectives are deliberately located nearby?

5.7 Prohibition of causing unnecessary suffering to combatants

An important principle limiting the means by which states may wage war is the principle prohibiting the causing of unnecessary suffering [Article 35(2) API; Article 23(e) Hague Regs]. The point here is not that great suffering must not be caused but rather that the weapon chosen or the means used in combat must not cause suffering or injury that is avoidable. Essentially, this principle requires a comparison between the weapon used (or to be used) and others available at the time. If there are other weapons available that are as effective in achieving the military objective and that would cause less suffering, the combatant is required to use that other weapon. Or, to put it differently, if there is increased military advantage to be gained by the use of that weapon then the fact that that weapon will cause increased suffering cannot be taken to mean that it causes unnecessary suffering.

Quite apart from the general principles relating to weapons that cause unnecessary suffering, there are treaty rules relating to specific weapons that either ban or restrict the use of such weapons. These include rules relating to a number of *conventional weapons*, such as weapons which injure with fragments that cannot be detected by X-rays; certain uses of mines and booby

traps; anti-personnel landmines; and blinding laser weapons. For example:

- 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons.
- 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction.
- 2001 Amendment to Article 1 of 1980 Convention on Certain Conventional Weapons, in order to Extend it to Non-International Armed Conflicts.

In addition, there are treaties prohibiting the *use of non-conventional weapons* such as poison gas, chemical and biological weapons. The prohibition of poisonous gases goes back to the Hague Declarations of 1899. However, this prohibition was consolidated in the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods. This treaty prohibits the use of chemical and biological weapons. Many of the parties to the treaty accepted it subject to a reservation permitting the use of these weapons if such weapons have first been used against them. These prohibitions have been strengthened by the 1971 Biological Weapons Convention and the 1995 Chemical Weapons Convention. Both of these treaties prohibit the development, stockpiling and use of biological and chemical weapons.

Nuclear weapons

While there are treaties prohibiting the transfer of nuclear weapons, the development of such weapons by some

states, and the deployment of nuclear weapons in certain regions, there is no treaty that comprehensively prohibits the use of nuclear weapons. In 1996, the International Court of Justice delivered an advisory opinion,⁷¹ at the request of the UN General Assembly, on whether the threat or use of nuclear weapons was lawful under international law. The court held that the general principles of humanitarian law – particularly the principle of not making civilians the object of attacks and the prohibition of causing unnecessary suffering – apply to nuclear weapons, but also found that there was no customary or conventional rule specifically prohibiting the use of nuclear weapons. The court stated that the characteristics of nuclear weapons are hardly reconcilable with the principles of distinction and of avoiding unnecessary suffering. It went on to hold by seven votes to seven and on the basis of the president's casting vote, that:

The threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake.

This is a very ambiguous decision which leaves uncertain many aspects of the law

relating to the use of nuclear weapons. For example, it is not clear if the example given by the court in the second paragraph – extreme circumstance of self-defence in which the very survival of a state would be at stake – is the only circumstance where use of nuclear weapons might be lawful. If the principles of humanitarian law would generally prohibit the use of such weapons, what would make their use lawful in the circumstances set out by the court? After all, there is no suggestion that chemical or biological weapons can lawfully be used in these circumstances.

5.8 Other restrictions on the methods of warfare

In addition to the general principles outlined above, there are specific restrictions on the methods of waging warfare that have been developed over time. These include rules prohibiting:

- Perfidy, i.e. killing or wounding the enemy treacherously. For example, feigning an intent to negotiate under a flag of truce, or feigning incapacitation by wounds or feigning civilian or other protected status [Art. 23(b) and 34 Hague Regs; Article 37(1) API].
- Killing or wounding an enemy who has laid down arms [Art. 23(c) Hague Regs].
- Improper use of a flag of truce [Art. 23(f) Hague Regs; Article 38 API].
- Destruction or seizure of enemy property when not justified by military necessity.
- Declaring that no quarter shall be given [Art. 23(d) Hague Regs; Article 40 API].
- Starvation of a civilian population [Article 54 API].
- Acts intended or expected to cause widespread, long-term and severe damage to the natural environment [Arts 35(3) and 55(1) API; 1977 UN Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modifications Techniques].



6. The Relationship between International Humanitarian Law and Human Rights Law

From the names of both bodies of law it is evident that international humanitarian law and human rights have overlapping objectives. They both aim, in part, to ensure humanitarian treatment of individuals and to secure rights for individuals. However, there are also clear differences in the two bodies of law. These differences relate to the circumstances in which these two bodies of law apply, the persons protected by the law, and the rights guaranteed by these areas of law.

One of the key questions in this area is whether human rights treaties and the obligations they contain continue to apply in time of armed conflict. It is important to answer this question because human rights treaties may provide for particular rights that may not exist under IHL. In addition, human rights treaties will often provide better procedural rights. In other words, they will usually have an enforcement procedure which cannot be matched by IHL. Therefore victims may prefer to rely on human rights treaties because that treaty is incorporated in domestic law (e.g. the UK Human Rights Act) and is therefore justiciable in national courts. Or there might be an international tribunal established to monitor compliance with human rights treaties. By contrast, there are

no generally established judicial mechanisms for the enforcement of IHL through civil claims by victims. While IHL can be enforced by international criminal tribunals, this is obviously different to bringing a civil claim. IHL also relies on a system of 'protecting powers' and belligerent reprisals for its enforcement. It is possible for claims for compensation to be brought by one state against another for a violation of IHL but that would depend on whether there is an international tribunal with jurisdiction over the claim. Such claims may be brought in the ICJ⁷² or in a specially established tribunal such as the United Nations Compensation Commission (for example, claims against Iraq with respect to its invasion of Kuwait and the following conflict) or the Eritrea–Ethiopia Claims Commission.⁷³

6.1 Who is protected by the law?

It is important to bear in mind that while human rights law specifically guarantees rights to individuals when it imposes obligations on states, international humanitarian law does not always guarantee rights to individuals.

Much of international humanitarian law grants rights only to states who are parties to the armed conflict. It is also important to note that while human rights law protects all people within the jurisdiction of a state, IHL categorises persons and affords different protections to different groups of protected persons. For example, there is a distinction between the rights afforded to combatants and that afforded to civilians. Also, the Geneva Conventions of 1949 only apply to protected persons within the meaning of each of those conventions. Therefore, it has to be established that a particular individual is under the protection of the particular convention. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 1949 (GCIV) provides a good example of these limitations. Although Article 4 of GCIV states that it covers civilians who find themselves, in a case of an international armed conflict or occupation, in the hands of a party to the conflict, the convention does not actually cover all civilians. Article 4 excludes from the scope of the convention: nationals of the state holding them; nationals of neutral states; and nationals of co-belligerents where the co-belligerent has normal diplomatic representation in the state who holds the civilian.

6.2 When are human rights treaties applied in armed conflict?

International humanitarian law applies only during an armed conflict, whether international or internal. That body of law is designed specifically to regulate the circumstances in which hostilities are taking place. Therefore, unless a specific rule of IHL provides for derogation on the grounds of military necessity, rules of IHL apply in fully. It is to be assumed that the considerations of military necessity have already been taken into account in the design of the rule.

International human rights law is designed to apply mainly in times of peace. However, human rights law and human rights treaties also apply in time of armed conflict. This is evident from the fact that some human rights treaties (e.g. Article 4 of the International Covenant on Civil and Political Rights) provide that states may derogate from some of the provisions of these treaties in time of public emergency which threatens the life of the nation. It is recognised that situations of war or armed conflict are the foremost examples of public emergencies that may permit a state to derogate from some of its obligations under a human rights treaty. Article 15 of the European Convention on Human Rights (ECHR) makes this clear when it provides that:

In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation,

provided that such measures are not inconsistent with its other obligations under international law.

The logic of these derogation provisions makes it clear that the obligations of the state under the human rights treaties apply even in situations of public emergency unless the state has taken steps to derogate from those obligations.

The International Court of Justice has confirmed that human rights treaties continue to apply in times of armed conflict. In the advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁷⁴ the court stated that:

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights.

It must be remembered that the leading human rights treaties provide that a state is bound to secure the rights provided in the treaty to persons 'within their jurisdiction' (Article 1, ECHR) or, in the case of the ICCPR (Article 2), to 'all individuals within its territory and subject to its jurisdiction'. Thus, it is clear that these treaties apply to persons within the territory of the state and therefore to armed conflicts taking place on the territory of the state. The European Court of Human Rights applied the ECHR to the conduct of Russian troops in Chechnya during the conflict in that province.⁷⁵

Questions have arisen as to whether human rights treaties apply extraterritorially and

therefore as to whether those treaties govern the acts of a state (and its armed forces) when it is engaged in an armed conflict abroad. Although the International Court of Justice has not considered the question in any detail, its case law suggests that it considers human rights treaties do apply to the acts of states conducted outside the territory of that state. In the *Armed Activities Case*,⁷⁶ the ICJ found that Ugandan activities in the territory of the Democratic Republic of Congo amounted to violations of the ICCPR, the African Charter on Human and Peoples Rights, and the Convention on the Rights of the Child. Likewise, in the *Nuclear Weapons Advisory Opinion*, although the court stated it was not called upon to decide on a case of the internal use of nuclear weapons, it nevertheless held that, in principle, the right to life, provided for in the ICCPR, applied to the case and constituted a limitation (albeit one conditioned by IHL) on the use of nuclear weapons.

Although international tribunals have made it clear that there are circumstances when a state would be bound by its human rights obligations even when it acts outside its territory, there has not been a consensus on precisely when those obligations apply extraterritorially. It is clear that a state's human rights obligations apply extraterritorially in circumstances where a state exercises effective overall control over an area outside its national territory it is obliged to secure to the inhabitants of that area those rights provided for in treaties which that state is a party to. In the *Israeli Wall in Palestinian Territory Advisory Opinion*, the ICJ held that Israel was bound by obligations under human rights treaties it is party to with respect to the occupied Palestinian territories.⁷⁸ The European

Court of Human Rights has taken a similar view. In *Loizidou v. Turkey (Preliminary Objections)*, it stated that:

Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises effective control of an area outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such control whether it be exercised directly, through its armed forces, or through a subordinate local administration.⁷⁹

The European Court of Human Rights has also held in *Issa v. Turkey* that:

a State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State.⁸⁰

In that case, the court examined whether Turkey had violated its obligations under the ECHR during a military operation conducted in Northern Iraq. Although the court held that Turkey did not exercise effective overall control over the area, and thus accepted that the situation was similar to that in the *Loizidou* case, it nevertheless investigated whether Turkish troops operated in the area in question and thus whether Turkish responsibility was engaged. The principles set out in this decision are similar

to those which were enunciated by the Human Rights Committee in its General Comment No. 31 of 2004 where it stated 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 . . . 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.

This principle goes beyond that applying human rights treaties to territory which is under the effective control of a state. Under this principle persons who are within the power of a state would have rights against that state even if the territory in question was not under the effective control of the state.

The validity of this broader principle was questioned in some cases decided under the European Convention on Human Rights. In *Al Skeini v. Secretary of State for Defence*,⁸¹ the United Kingdom's House of Lords held that the decision in *Issa* was contrary to what the House regarded as the 'watershed' ECHR case of *Bankovic v. Belgium*,⁸² a case in which the ECtHR had held that the Convention did not apply to the NATO bombing campaign in Yugoslavia in 1999. That case held that the notion of jurisdiction provided for in Article 1 of the Convention is essentially territorial and that the Convention operates, subject to article 56, 'in an

essentially regional context and notably in the legal space (*espace juridique*) of the contracting states' (i.e. within the area of the Council of Europe countries).⁸³ Under that case, there were only very limited circumstances in which Convention rights operated extraterritorially and more so outside the area of the Council of Europe. Following *Bankovic*, the House of Lords held that the Convention did operate with respect to a prison operated abroad by the UK armed forces, but it was not prepared to accept that it applied to acts of UK forces when the UK was the occupying power in Iraq.

The Grand Chamber of the European Court of Human Rights in *Al Skeini v. United Kingdom* (2011)⁸⁴ effectively overruled the decision in *Bankovic* and returned to a somewhat broader view of the extraterritorial application of the Convention. In that case, it held that the acts of UK forces in Iraq were subject to the Convention since they assumed in Iraq the exercise of some of the public powers normally exercised by a sovereign government. The court accepted that:

whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual.⁸⁵

Thus a state possesses human rights obligations to individuals not only where it controls territory in which such individuals are found but also where it exercises control over the individuals themselves (even where it does not control the territory they are in).

6.3 What happens where both apply?

In circumstances where human rights treaties apply in armed conflict, the question arises of what the relationship should be between the two branches of the law. In the advisory opinion on *The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*,⁸⁶ the ICJ stated that:

As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

Therefore, principles of IHL are to be used in interpreting the relevant principles of human rights treaties where those treaties are to be applied in armed conflict. For example, the ICJ held in the *Nuclear Weapons Advisory Opinion*⁸⁷ that although the right not to be arbitrarily deprived of life, provided for in the ICCPR, continues to apply in armed conflict, the decision of what is an arbitrary deprivation of life in times of armed conflict is to be made by reference to the IHL.



7. International Criminal Law and Enforcement of International Humanitarian Law

In order to ensure compliance with IHL and to prevent violations of the law, states have an obligation to disseminate the texts of the Geneva Conventions and the Additional Protocols widely.⁸⁸ In addition there is an obligation on states to issue orders and instructions requiring compliance with the law of armed conflict⁸⁹ and to ensure that legal advisers are available, when necessary, to advise military commanders at an appropriate level on the application of IHL.⁹⁰

Parties to an international armed conflict also have an obligation to appoint a 'protecting power' (a neutral state) who is charged with safeguarding the interests of the parties to the conflict with respect to the application of the Geneva Conventions and Additional Protocols. The protecting powers are meant to have a supervisory role with regard to the implementation of IHL by the belligerent parties. As such, they are to co-operate with the parties, and other protecting powers, to seek to ensure application of the Conventions, and they lend their good offices with a view to settling disagreements between the parties. One of the main roles of the protecting powers is to visit prisoners of war and civilian internees. They have authority to interview the detainees in private and full liberty to select the places they wish to visit. The duration and frequency of these visits shall not be

restricted. Visits may not be prohibited except for reasons of imperative military necessity, and then only as an exceptional and temporary measure. In addition to its humanitarian assistance functions the International Committee of the Red Cross (ICRC) plays an important supervisory role with regard to the application of IHL. Where the parties to a conflict fail to appoint protecting powers, and this is usually the case, they are bound to accept the ICRC as a substitute.⁹³

If violations of international humanitarian law occur, those violations will engage the legal responsibility of the person or entity that has committed the violations. Where the violations are committed by states, those states will bear legal responsibility under international law for the acts of organs of the state, or of officials of the state (such as members of the

armed forces) that are attributable to that state. Article 91 of Additional Protocol I to the Geneva Conventions sets out this principle when it states that:

A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.' In situations where they have jurisdiction, international courts, including human rights tribunals, may be called upon to determine the responsibility of states for violations of the law of armed conflict.⁹⁴

7.1 Purpose and definition

In addition to state responsibility, violations of international humanitarian law will also lead to the criminal responsibility of the individuals who commit or order acts that amount to an international crime.

International criminal law has developed as a primary means to enforce the laws of armed conflict. International crimes are acts which are prohibited by international law and which entail the personal criminal liability of the individual who has committed the act. These crimes may be created by rules of customary international law or by treaties. The personal criminal responsibility of the accused is created by international law independently of the provisions of national law, although national law may (and will often) incorporate and reflect the prohibitions established under international law. Usually international criminal responsibility is imposed with respect to acts which are deemed to be of concern to the international community as a whole. This will include violations of the law of armed conflict or serious breaches of human rights norms whether committed during armed conflict or not (e.g. torture, genocide and crimes against humanity). In addition to the body of rules defining the substantive law to be applied in relation to these crimes, international criminal law also includes the principles and procedures governing the investigation and prosecution of these crimes.

The purpose of international criminal law is the same as that of national criminal law, i.e. it is to repress and possibly deter

acts which the community deems to be particularly wrongful. In this case, the relevant community is the international community so international criminal law is meant to protect values of the international community and to punish those who commit acts that violate fundamental principles of international law. Traditionally, international law was addressed to states. However, by the middle of the twentieth century, it was realised that in order to establish the effectiveness of some of the rules of international law, it was important for those prohibitions to be addressed directly to individuals and to create obligations directly for individuals. The International Military Tribunal established at Nuremberg to prosecute German officials at the end of World War II stated that:

Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced ... individuals have duties which transcend the national obligations of obedience imposed by the individual State.⁹⁵

Using the definition above, the main international crimes are:

- War crimes – serious violations of the laws and customs of war whether occurring in international or internal armed conflict.
- Genocide.
- Crimes against humanity.
- Aggression or crimes against peace – planning or waging an aggressive war.
- Torture.

7.2 National prosecutions for war crimes and international crimes

Prosecutions for international crimes may take place before national or international courts. States have jurisdiction to legislate with respect to international crimes, and to prosecute in accordance with the principles of jurisdiction laid down in international law. According to these principles, states may exercise jurisdiction in cases where there is a specified link between the crime, the perpetrator or the victim on the one hand and the state on the other hand.

Thus, states have jurisdiction over crimes on the basis of:

- a. Territoriality – the crime occurred within their territory.
- b. Nationality – the crime was committed by their national.
- c. Passive personality – the crime was committed against their national.⁹⁶
- d. The protective principle – the crime is committed against their vital national interests.

In the case of international crimes, states also have jurisdiction on the basis of a further principle:

- e. The principle of universality.

According to this principle, all states can exercise jurisdiction over certain international crimes without the

requirement of a link between the state on the one hand, and the crime, the person accused of the crime or the victim on the other hand.⁹⁷ All that is required for the exercise of jurisdiction over the crime is the presence of the accused in the territory of the state seeking to prosecute.

Although there has been controversy regarding the extent to which international law permits universal jurisdiction, the principle is accepted in both customary international law and in treaties. *The principle of universality* is provided for with respect to grave breaches of the Geneva Conventions which provide that each state has an 'obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts'.⁹⁸ With regard to customary international law, much of the controversy has centred on whether international law allows universal jurisdiction in absentia (i.e. the initiation of an investigation or prosecution without the presence of the accused) rather than on the universal jurisdiction exercised where the accused is present in the territory of the state.⁹⁹

7.3 The International Criminal Court

The International Criminal Court (ICC) is a permanent court established to prosecute international crimes, including war crimes. A number of other international criminal tribunals preceded the ICC, and, in some cases, continued to exist alongside the ICC or were even established after the ICC (see the Introduction for more detail). However, unlike the other international criminal tribunals, the ICC does not possess jurisdiction over particular countries or regions but is intended to have a global jurisdiction. The Statute of the ICC was adopted in 1998 and it came into force in 2002. At the time of writing, in 2014, 122 states had become party to the ICC Statute.

Under Article 5 of the ICC Statute, the ICC has jurisdiction over genocide, crimes against humanity, war crimes and the crime of aggression. Its jurisdiction over aggression is subject to amendments to the ICC Statute adopted in Kampala in June 2010, which have yet to come into force.¹⁰⁰

War crimes are violations of the laws and customs of war. They can be committed in both international and non-international armed conflicts, though there are differences in regard to the war crimes that may be committed in the two types of conflicts. Accordingly, Art. 8(2) which sets out the list of war crimes is divided into:

- a. Grave breaches of the Geneva Conventions [Arts 50, 51, 130, 147, GCs I, II, III and IV]. Since the Geneva Conventions

apply only to international armed conflicts, liability for these crimes ensues only when the armed conflict is international, as confirmed by the ICTY in *Prosecutor v. Tadic (Appeal on Jurisdiction)*.¹⁰¹

- b. Other serious violations of the laws and customs applicable in international armed conflicts. These crimes are provided for in customary international law but many are also grave breaches of Additional Protocol I [Art. 85(3) and (4)].
- c. Serious violations of Common Article 3 of the Geneva Conventions, which deals with non-international armed conflicts.
- d. Other serious violations of the laws and customs applicable in non-international armed conflicts.¹⁰²

Personal jurisdiction of the ICC

There are four grounds on which the court may exercise jurisdiction over an individual:

- The state on whose territory the crime was committed is a party to the Statute.¹⁰³
- The accused person is a national of a state party to the Statute.¹⁰⁴
- The territorial state or the state of nationality of the accused is not a party to the Statute but has accepted the jurisdiction of the court with respect to the crime in question.¹⁰⁵
- The court is exercising jurisdiction on the basis of a referral by the Security Council.¹⁰⁶

Temporal jurisdiction of the ICC

The jurisdiction of the court is not retrospective. It only applies from the date when the Statute

came into force in respect of a particular state.¹⁰⁷ Thus the Statute only covers crimes from that date and the ICC will not have jurisdiction to deal with crimes committed before 1 July 2002. It can only deal with crimes committed after the relevant states have become parties to the Statute. However, a state that is not a party to the Statute may accept the jurisdiction of the court with respect to crimes committed on its territory or by its nationals.¹⁰⁸

Under Art. 124, a state can temporarily opt out of the jurisdiction of the court with respect to war crimes. This can be done by declaration made at the time of becoming a party to the Statute and the opt-out lasts for seven years.

Trigger mechanisms for prosecution

There are three ways in which prosecutions can be initiated in the ICC. These are provided for in Art. 13 of the Statute:

- i. Situations in which crimes have been committed can be referred by states parties to the Statute to the Prosecutor.
- ii. Situations in which crimes have been committed can be referred by the UN Security Council acting under Chapter VII of the UN Charter to the Prosecutor.
- iii. The Prosecutor can initiate an investigation on his own motion.

All three of these trigger mechanisms were used in the first decade of the court's existence. In that period there were eight situations referred to the ICC. The first three situations referred to the ICC were referred by states parties. These were the situations in Uganda, the Democratic Republic of

Congo, and the Central African Republic. There has also been a state referral by Mali. Contrary to what was probably expected in the drafting of the ICC Statute, these referrals have not come from states referring other states to the ICC. Instead these have been referrals by states with respect to crimes committed within those states – so called 'self-referrals'.¹⁰⁹ The UN Security Council has also referred two situations to the ICC: Sudan (Darfur) and Libya. Finally, the Prosecutor has exercised the power to investigate and prosecute on his or her own motion twice: with regard to Kenya and Cote d'Ivoire.

Complementarity

Unlike the ad hoc UN tribunals, the ICC is not intended to supersede the exercise of jurisdiction by national courts. The ICTY and ICTR had primacy over national courts and those courts were required to defer to exercise of jurisdiction of the UN tribunals. However, the ICC is intended to be complementary to national courts (Art. 1) and is only intended to exercise its functions when national courts are unable or unwilling to act. Thus the ICC places an onus on states to prosecute. The Statute does not create an obligation on states to exercise their criminal jurisdiction over international crimes, but if they fail to do so then it opens the door to ICC prosecution. This is the *principle of complementarity*.

Admissibility

Art. 17(1) of the ICC Statute provides that a case shall be inadmissible where:

(i) it is being investigated or prosecuted by a state that has jurisdiction over it;

- (ii) it has been investigated by a state with jurisdiction which has decided not to prosecute, unless the state is unwilling or genuinely unable to carry out the investigation or prosecution; or**
- (iii) the person concerned has already been prosecuted for the conduct in question,¹¹⁰ unless the proceedings were for the purpose of shielding the person from criminal responsibility or the proceedings were not conducted impartially or independently in accordance with norms of due process and were conducted in circumstances inconsistent with an intent to bring the person to justice.**

A case is also inadmissible where it is of insufficient gravity.

The admissibility of a case is first reviewed by the Prosecutor who may decide not to proceed with a prosecution. In such a case, the decision not to prosecute may be challenged before a pre-trial chamber of the court by the referring state or the Security Council or on the pre-trial chamber's own motion.¹¹¹

Where the prosecutor decides to commence an investigation, s/he shall inform all states parties as well as states that have jurisdiction over the crime. If any of those states informs the court that it is investigating or has investigated persons accused of the crime and requests the prosecutor to defer to the state's investigation, the prosecutor shall defer unless the pre-trial chamber, at the request of the prosecution, decides to authorise the investigation.

When the prosecutor does decide to prosecute, challenges may be made to the jurisdiction of the court or the admissibility of the case by:

- (i) the court;
- (ii) the accused;
- (iii) a state which has jurisdiction over the case; or
- (iv) a state from whom acceptance of jurisdiction is required under Art. 12.¹¹³

Notes

- ¹ See the Preamble to the 1st Additional Protocol of 1977 to the 1949 Geneva Conventions: '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'.
- ² See Article 2 Hague Convention IV, 1907.
- ³ By January 2014, 195 states had ratified the four Geneva Conventions, making them the most widely ratified treaties.
- ⁴ See Henckaerts and Doswald-Beck (2005).
- ⁵ See generally, Thirlway (2014), chapter 4.
- ⁶ Henckaerts and Doswald-Beck (2005).
- ⁷ Meron (1998: 154); Henckaerts (2005).
- ⁸ For a good overview of the history and significance of these cases, see McGoldrick (2004), 9.
- ⁹ *Hamdan v. Rumsfeld* (2006) US Sup. Ct. www.supremecourt.us/opinions/05pdf/05-184.pdf
- ¹⁰ *Public Committee Against Torture in Israel v. Government of Israel* (Supreme Court of Israel, HCJ 769/02, December 2006) http://elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.HTM
- ¹¹ *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* (2005). Also available at www.mfa.gov.il/NR/rdonlyres/599F2190-F81C-4389-B978-7A6D4598AD8F/0/terrorism_law.pdf
- ¹² *Secretary of State for Foreign & Commonwealth Affairs v. Rahmatullah* [2012] UKSC 48.
- ¹³ ICJ Reps, 1986, p. 14. www.icj-cij.org/icjwww/icasess/inus/inusframe.htm
- ¹⁴ ICJ Reps, 2005, www.icj-cij.org/icjwww/idocket/ico/icoframe.htm
- ¹⁵ ICJ Reps, 1996, p. 66; 110 ILR 1.
- ¹⁶ ICJ Reps, 2004; (2004) 43 ILM 1009 www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm
- ¹⁷ In limited cases the application of IHL will extend beyond the duration of an armed conflict, such as where persons detained during an armed conflict benefit from the protections of IHL (e.g. Prisoners of War or civilian internees) those protections will continue to apply in cases where the person is not released at the end of the conflict. See Art. 5 GCIII and Art. 6 GCIV (1949).
- ¹⁸ See Wilmshurst (2012), especially Akande in Chapter 3.
- ¹⁹ See Art. 2 Common to all four Geneva Conventions, quoted in this section of the main text.
- ²⁰ *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 Oct. 1995, Case No. IT-94-1-AR72, 105 ILR 419, Para. 70
- ²¹ Fenrick (2008).
- ²² Moir, (2002), p. 5 et seq.
- ²³ See Akande (2012), Sections 2 and 5.3.
- ²⁴ *Ibid.*

References

- Additional Protocol I (1977) to the Geneva Conventions of 1949 and Relating to the Protection of Victims of International Armed Conflicts.
- Additional Protocol II (1977) to the Geneva Conventions of 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts.
- Additional Protocol III (2005) to the Geneva Conventions of 1949 and Relating to the Adoption of an Additional Distinctive Emblem.
- Akande, D (1997), 'Nuclear Weapons, Unclear Law? Deciphering the Nuclear Weapons Advisory Opinion of the International Court', *British Yearbook of International Law*, Vol. 68 No. 1, 165–217.
- Akande, D (2010), 'Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities', 59 *International and Comparative Law Quarterly*.
- Akande, D (2011), 'US/NATO Targeting of Afghan Drug Traffickers: An Illegal and Dangerous Precedent?', in Gaston (ed.) *The Laws of War and 21st Century Conflict*, Idebate Press, New York.
- Akande, D (2012), 'Classification of Armed Conflicts: Relevant Legal Concepts', chapter 3 in E Wilmschurst (Ed.), *International Law and the Classification of Conflicts*, OUP, Oxford.
- Aldrich, G (2000), 'The Laws of War on Land', *American Journal of International Law* 94.
- Boelaert-Suominen, S (2000), 'Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism', *Journal of Conflict and Security Law*, Vol. 5 No. 63.
- Boisson de Chazournes, L and P Sands (Eds.) (1999), *International Law, the International Court of Justice and Nuclear Weapons*, CUP, Cambridge.
- Burchill, R, N White and J Morris (Eds.) (2005), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, CUP, Cambridge.
- Dinstein, Y (2004), *The Conduct of Hostilities under the Law of International Armed Conflict*, CUP, Cambridge.
- Fenrick, W (2008), 'Article 8 War Crimes', in O Triffterer (Ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (2nd edition), Beck/Hart, Oxford.
- Geneva Conventions (1949) for the Amelioration of Condition of the Wounded and Sick in Armed Forces in the Field (GC I); for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces a Sea (GC II); Relative to the Treatment of Prisoners of War (GC III); Relative to the Protection of Civilian Persons in Time of War (GC IV).
- Hague Convention IV (1907) Respecting the Laws and Customs of War on Land.
- Hague Regulations (1907) Respecting the Laws and Customs of War on Land.
- Henckaerts, J-M (2005), 'Study on Customary International Humanitarian Law: A Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict', 87 *International Review of the Red Cross*, 175 No. 857.
- Henckaerts, J-M and Doswald-Beck, L (Eds.) (2005), *Customary International Humanitarian Law*, OUP, Oxford.

- ICRC (2009), *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva.
- McGoldrick, D (2004), 'Criminal Trials before International Tribunals: Legality and Legitimacy', in D McGoldrick, P Rowe and E Donnelly, *The Permanent International Criminal Court: Legal and Policy Issues*, Hart, Oxford, 9.
- Roscini, M (2005), 'Targeting and Contemporary Aerial Bombardment', 54 *International and Comparative Law Quarterly* 411.
- Meron, T (1998), 'Geneva conventions as customary law', in T Meron, *War Crimes Law Comes of Age*, OUP, Oxford, 154.
- Milanovic, M (2011), 'European Court Decides Al Skeini and Al Jedda', EJIL: Talk!, July, available at: www.ejiltalk.org/european-court-decides-al-skeini-and-al-jedda/ (accessed January 2014)
- Milanovic, M (2012), 'Al Skeini and Al Jedda in Strasbourg', *European Journal of International Law*, Vol. 23, 121–139.
- Moir, L (2002), *The Law of Internal Armed Conflict*, CUP, Cambridge.
- Moir, L (2005), 'Towards the unification of international humanitarian law?', in R Burchill, N White and J Morris (Eds), *International Conflict and Security Law: Essays in Memory of Hilaire McCoubrey*, CUP, Cambridge.
- O'Keefe, R (2009), 'The Grave Breaches Regime and Universal Jurisdiction', *Journal of International Criminal Justice*, Vol. 7 No. 4, 811–831.
- O'Keefe, R (2004), 'Universal Jurisdiction: Clarifying the Basic Concept', *Journal of International Criminal Justice*, Vol. 2 No. 3, 735–760.
- Robinson, D (2011), 'The Controversy over Territorial State Referrals and Reflections on ICL Discourse', *Journal of International Criminal Justice*, Vol. 9 No. 2, 355–384.
- Sandoz, Y, C Swinarski and B Zimmermann (1987), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Martinus Nijhoff, Geneva, 618, also available at: www.icrc.org/ihl.nsf/COM/470-750065?OpenDocument (accessed January 2014)
- Schmitt, M (2004–2005), 'Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees', *Chicago Journal of International Law*, Vol. 5.
- Sofaer, A (1988), 'Agora : The U.S. Decision Not to Ratify Protocol I to the Geneva Conventions on the Protection of War Victims (Cont'd)', *American Journal of International Law*, 82, 784.
- Thirlway, H (2014), 'The sources of international law', in M Evans (Ed.), *International Law* (Fourth Edition), OUP, Oxford, 121.
- Wilmshurst, E (Ed.) (2012), *International Law and the Classification of Conflicts*, OUP, Oxford.

A person is seen from the side, reading a book. The background is a library with wooden shelves filled with rows of books. The books have gold and red labels. The scene is softly lit, creating a warm and scholarly atmosphere.

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