

Developed by Professor Ryszard Piotrowicz, Aberystwyth University (United Kingdom), as part of a course on Human Rights

Introduction: What IHL is all about?

The obligation to protect human rights is universally accepted – even by those States that in practice breach them. The first part of this course looks at the special situation where human rights are, arguably, under the most extreme threat – during armed conflict, when civil order may have broken down and territory may be occupied by hostile forces, leaving the civilian population particularly vulnerable. Commonly known as International Humanitarian Law (IHL) or the Law of Armed Conflict, this is a most vibrant field of human rights law, and its relevance can be seen vividly in recent times, from the wars in Iraq and Afghanistan, to the civil conflict in Libya and, now, Syria, which has seen the use of chemical weapons, a major war crime (whoever was responsible).

We will also study the consequences of breaches of IHL – in particular international criminal law, which has evolved rapidly since the conflicts in the former Yugoslavia to the extent - unthinkable only a few years ago – that we could see an arrest warrant issued for Muammar Gaddafi while he was still in power (though not able to prevent his murder). Much closer to home, on 8 September 2011 the report was published into the death in British army custody during the Iraq war of Baha Mousa (<http://www.bahamousainquiry.org/report/index.htm>), detailing serious violations of IHL by British soldiers.

More recently, the ongoing conflicts in Congo, Syria and Yemen demonstrate the desperate need for greater respect for IHL, which continues to be violated on an outrageous scale.

Studying IHL, you will learn about the fundamental rules that govern the conduct of war. These rules aim to protect both civilians and combatants by setting out the rights of those affected, such as civilians and prisoners of war, but also by regulating the ways in which the fighting takes place. It will become clear why the death in British custody of one civilian - Baha Mousa - was a most serious crime, while the killing of hundreds of Iraqi soldiers in combat with British soldiers was no crime at all.

General Reading

There is a vast amount of material available on all aspects of IHL. It is a dynamic field in which there have taken place very significant developments in recent years, particularly with regard to criminal repression of violations of IHL and controls on the types of weapons that may be used in armed conflicts. The books

listed below are a few of the recent publications that deal comprehensively with the most essential aspects of IHL.

In addition, you will find extensive commentaries and analyses of all aspects of IHL in the international law journals available in the library and online. These are too numerous to refer to, although some articles are mentioned in the course outline. You will also find many exceptionally useful articles in the *International Review of the Red Cross* (IRRC), which is available, free, in electronic format at the ICRC's website. This contains some of the very best work on IHL.

- M. Sassòli, A. Bouvier and A. Quintin, *How Does Law Protect in War?* (3rd ed, 2011) – also contains an excellent bibliography (introductions to each subject are in the shorter volume 1; relevant primary materials are in volumes 2 & 3)
- L. Doswald-Beck and J.-M. Henckaerts, *Customary International Humanitarian Law. Volume 1: Rules* (2005)
- E. Wilmschurst and S. Breau (eds), *Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007)
- UK Ministry of Defence, *The Manual of the Law of Armed Conflict* (2004)
- F. Kalshoven and L. Zegveld, *Constraints on the Waging of War* (3rd ed, 2001), available on pdf at: http://www.loc.gov/rr/frd/Military_Law/pdf/Constraints-waging-war.pdf
- H. McCoubrey, *International Humanitarian Law* (2nd ed, 1998)
- M. Odello and R. Piotrowicz, *International Military Missions and International Law* (2011)
- A. Roberts and R. Guelff, *Documents on the Laws of War* (2000)
- G. Werle, *Principles of International Criminal Law* (3er ed, 2015)
- M. Walzer, *Just and Unjust Wars* (1977)

Websites

- International Committee of the Red Cross (ICRC): <http://www.icrc.org/eng>
- War Crimes Tribunal for the Former Yugoslavia: <http://www.icty.org>
- International Criminal Court: <http://www.icc-cpi.int/>
- United Nations: <http://www.un.org/english/>
- International Court of Justice: <http://www.icj-cij.org/>
- For primary materials on IHL, see the ICRC website at: <http://www.icrc.org/eng>, then click on War & Law. All your prayers will be answered.

Abbreviations

- GCI – 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- GCII – 1949 Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and

Shipwrecked Members of Armed Forces at Sea

- GCIII – 1949 Geneva Convention III Relative to the Treatment of Prisoners of War
- GCIV – 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
- PI – 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts
- PII – 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts

OUTLINE OF THE COURSE

- I. Introduction
- II. Sources of IHL and its historical development
- III. Scope of application of IHL
- IV. Non-international armed conflicts
- V. Protection of combatants and prisoners of war
- VI. Protection of the sick, wounded and shipwrecked
- VII. Protection of civilians
- VIII. Protection of cultural property
- IX. Methods and means of combat
- X. Displaced Persons and IHL
- XI. Collective security operations and IHL
- XII. Criminal repression of breaches of IHL
- XIII. Implementation of IHL
- XIV. The relationship between IHL and human rights law

I. INTRODUCTION

- Kalshoven and Zegveld, Ch. 1
- Henckaerts and Doswald-Beck, Ch.1, Ch.2 and Ch. 4
- F. Hampson, “Fundamental Guarantees”, in: Wilshurst and Breau, Ch.11
- UK Ministry of Defence, Ch.2
- Sassoli, Bouvier and Quintin, Vol.1, Chs. 1-2

IHL as International Law

“...if international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.”(H.Lauterpacht, 1952)

How law applies in war – *jus ad bellum/jus in bello*

Fundamental principles of IHL

- **Civilians shall enjoy general protection against military operations**
- **Attacks are allowed only against military objectives (distinguish between civilian objects and military objectives)**
- **It is prohibited to cause *unnecessary* losses or *excessive* suffering (proportionality)**

- **Respect, protect and assist the sick and wounded without discrimination**
- **Captured combatants and civilians in the power of the enemy shall be protected and well treated**

SCOPE

GCs, Art.2; PI, Art.3(1) – apply to declared wars and ACs from the beginning of the conflict

NON-RENUNCIATION OF RIGHTS

GCI-III, Art.7; GCIV, Art.8 – applies to all those in the power of the enemy forces

GRAVE BREACHES

GCI, Art.50; GCII, Art.51; GCIII, Art.130; GCIV, Art.147; PI, Arts.11,85

- especially serious breaches of the law of ACs

DISTINCTION BETWEEN CIVILIANS AND COMBATANTS

- distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The same distinction applies to civilian objects and military objectives (see, eg PI, Art.48). Why?

IHL and the soldier's dilemma

In the early morning, a column of tanks and personnel carriers made their way down the road of the heavily populated outskirts of the city. We were hemmed in by the wire fence of an air base on our left and a long narrow hamlet of buildings on our right. We stopped to assess the situation. My mate ducked inside the turret of the tank, saying: "I don't like the look of this". Our radio operator turned to me and said that he'd just heard reports of lots of guerilla soldiers hiding out in the area.

From where I rode, as tank gunner, I had a pretty clear view. Sure enough, through the dust and overcast morning weather, I could see silhouettes darting into positions among the cluster of village houses opposite our platoon of men in the personnel carriers up the road. I could see that the figures were clearly armed. Someone shouted to open fire.

You are the tank gunner. What do you do?

Walzer, Chs 1 and 2.

SOURCES OF IHL AND ITS HISTORICAL DEVELOPMENT

- Sassòli, Bouvier and Quintin, Vol.1, Chs. 3-4

- UK Ministry of Defence, Ch.1
- Kalshoven and Zegveld, Ch. 2
- Meron, "The Geneva Conventions as Customary Law", (1987) 81 AJIL 348

"Silent enim leges inter arma"

(Cicero, quite a long time ago)

"There is such a thing as legitimate warfare: war has its laws; there are things which may fairly be done, and things which may not be done..."

(Cardinal Newman, 1864)

Henry Dunant

Martens Clause – In cases not covered by specific instruments, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

Hague law – rules relating to the actual conduct of armed hostilities (eg rules prohibiting or limiting the use of specific means and methods of warfare)

Geneva law – rules of IHL relating to the protection of persons placed hors de combat or not taking part in the hostilities (wounded, prisoners of war, civilians)

Status of the Geneva Conventions

- *Report of the Secretary-General of the United Nations on the Establishment of the War Crimes Tribunal for the Former Yugoslavia*, paras 35 and 37: confirm customary status of the Conventions. (1993) 32 ILM 1159
- T. Meron, 'The Geneva Conventions as Customary Law', (1987) 81 AJIL, 348-370

Role of ICRC

Significance of the Red Cross emblem

- The emblem is intended to ensure respect and protection for those using it; hence its use is strictly regulated: GCI, Arts.38-44; GCII, Arts.41-44; PI, Art.18
- Prohibition on misuse of the emblem: GCI, Art.53; GCII, Art.45; Additional Protocol III to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem 2005; PII, Art.12

"Common" law of armed conflict? – handle with care

Tadic case (Appeal against jurisdiction) (1996) 35 ILM 32, esp. paras 94, 127 [See Case No. 211, The

II. SCOPE OF APPLICATION OF IHL

- Sassòli, Bouvier and Quintin, Ch 2. III.
- J. Pejic, "Status of Armed Conflicts", in: Wilmshurst and Breau, Ch.4
- UK Ministry of Defence, Ch 3
- D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1995), Ch 2
- International Review of the Red Cross, 'Scope of the Law of Armed Conflict', 2014 No. 893, available at <https://www.icrc.org/en/international-review/scope-law-armed-conflict>

- S. Vite, 'Typology of armed conflicts in international humanitarian law: legal concepts and actual situations', (2009) 91 International Review of the Red Cross 69-94, available at <http://www.icrc.org/eng/assets/files/other/irrc-873-vite.pdf>

When does IHL apply?

- International armed conflicts (IAC)
- Non-international armed conflicts (NIAC)

IAC:

GCs I-IV, Art 2(1): IHL applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them"

GCs I-IV, Art 2(2): IHL also applies "to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance"

PI, Arts.1.3, 1.4, 9

PI, Art 1(4): wars of national liberation also to be treated as IAC

ILC Articles on State Responsibility, Art 8: conflict between government forces and rebel forces within one State becomes international if rebels are de facto agents of a third State

NIAC:

GCs I-IV, Art 3: applies to cases of "armed conflict not of an international character occurring on the territory of one of the High Contracting Parties"

PII, Art 1(1): applies to all ACs that are not IAC "and which take place on the territory of a ...Party between its

armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”

- Gap between Art 3 and PII Art 1
- PII does not cover conflicts within a State where government not involved
- PII does not cover “internal violence and tensions” (riots, isolated and sporadic acts of violence) – Art 1(2)

Prosecutor v Tadic, IT-94-1-AR72, Appeals Chamber, 2 October 1995 [See Case No. 211, *The Prosecutor v. Tadic* [Part A.]]

Para 70: “...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.”

Furthermore, IHL applies:

- From beginning of conflict beyond end of hostilities till general conclusion of peace reached
- Re NIAC, till peaceful settlement achieved
- Till then, IHL applies throughout territory of States in IAC
- Re NIAC, all territory under control of a protagonist, even if no fighting is taking place there

Terrorism?

If no AC, there is no IHL issue

If AC then IHL applies. Following prohibited:

- Attacks against civilians: PI, Art 51(2); PII, Art 13(2)
- Acts or threats whose main purpose is to spread terror among the civilian population: PI, Art 51(2); PII, Art 13(2)
- Acts of terrorism aimed against civilians in the power of the enemy: GCIV, Art 33; PII, Art 4(2.d) If IHL indeed applies to all during an AC, it must apply to those who commit terrorist acts during an AC.

Scope of Application of IHL

Personal application

- Usually, enemy nationals
 - Sick, wounded and shipwrecked
 - Prisoners of war
 - Civilians (protected persons)
- International criminal law

Temporal application

IHL applies as soon as AC starts

Tadic Case (Jurisdiction), paras 68-69 [See Case No. 211, The Prosecutor v. Tadic [Part A.]]

End of application?

- Sometimes hard to say when AC finishes
 - Intensity of hostilities may be reduced or they stop then recur
 - Rules on repatriation of prisoners of war, refugees

D. Jinks, 'The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts', International Humanitarian Law Research Initiative (2003), available at <http://www.hpcrresearch.org/sites/default/files/publications/Session3.pdf>

Geographical application

Tadic Case (Jurisdiction), paras 68-69 [See Case No. 211, The Prosecutor v. Tadic [Part A.]]

NON-INTERNATIONAL ARMED CONFLICTS

- Sassòli, Bouvier and Quintin, Ch.12
- UK Ministry of Defence, Ch.15
- Kalshoven and Zegfeld, 66-68, 142-150
- ICRC, 'Increasing respect for international humanitarian law in non-international armed conflicts' (2008), available at <http://www.icrc.org/eng/resources/documents/publication/p0923.htm>
- GCI-IV, common Article 3
- PII, Art.4 – fundamental guarantees
- PII, Arts.13-17 – protection of civilian population

The protection of human rights during civil wars has already been discussed in several contexts. Here the aim is to give an overview of the types of, and restrictions on, protections available.

Most armed conflicts nowadays are civil wars. The conflicts in Libya and Syria are good examples. Once the uprising against the government reached a threshold of sustained violence it became a civil war, rather than internal unrest. This triggered the application of IHL. Once other States became involved in the conflict, it became an international conflict (between them and Libya) but continued to be a civil war (between the regime and the insurgents).

III. PROTECTION OF COMBATANTS AND PRISONERS OF WAR

Combatants and Prisoner of War Status

- Sassòli, Bouvier and Quintin, Ch.6
- Henckaerts and Doswald-Beck, Ch.33
- A. Rogers, "Combatant Status", in: Wilmshurst and Breau, Ch.5
- A. Jachec-Neale, "Status and Treatment of prisoners of war and other persons deprived of their liberty", in: Wilmshurst and Breau, Ch.12
- UK Ministry of Defence, Ch.4 and Ch.8
- Kalshoven and Zegfeld, 53-58, 85-92

Entitlement to protection

- *Definition of protected persons ie, those covered by the GCs as combatants or prisoners of war* 1907 Hague Regulations Respecting the Laws and Customs of War on Land, Arts. 1-3, 23(f), 29-31GCIII, Art.4 – POWs – combatants who have fallen into the power of the enemy – who are members of the armed forces; militias and volunteer corps forming part of such armed forces

Note: armed resistance movements also protected if they meet **four** conditions:

- they are commanded by a person responsible for his or her subordinates;
- they have a fixed distinctive sign recognisable at a distance;
- they bear arms openly;
- they conduct their operations in accordance with the laws and customs of war

PI, Art.8 – equates treatment of civilian and military personnel

PI, Arts. 43-45

(note *Prosecutor v Tadic* (Appeal), paras 91-97: concerning status of irregular forces fighting against the authorities of the *same* State in which they live and operate (1999) 38 ILM 1518)

Mercenaries and spies

PI, Arts. 46-47

Treatment of POWs (GCIII)

General duties

Art.12 – responsibility of detaining power
Art.13 – obligation of humane treatment
Art.14 – entitlement to respect for POWs’ “persons and honour”; women to be treated “with all the regard due to their sex”.
Art.15 – obligation to provide food, shelter and health care
Art.16 – prohibition on discrimination

US detention of “unlawful belligerents”

- J. Aldrich, “The Taliban, al Qaeda, and the determination of illegal combatants”, (2002) 96 AJIL 891
- McDonald and Sullivan, “Rational interpretation in irrational times”, (2003) 44 *Harvard International Law Journal* 301
- A. Rogers, “The use of military commissions to try suspects”, (2002) 51 *ICLQ* 967
- Steyn, “Guantanamo Bay: The Legal Black Hole”, (2004) 53 *ICLQ* 1-15

Protection of the sick, wounded and shipwrecked

- Henckaerts and Doswald-Beck, Ch.34
- A. Bouvier, “Special Aspects of the use of the Red Cross or Red Crescent emblem” (1989) IRRC, No.272, pp438-458
- <http://www.icrc.org/eng/emblem>
- S. Bugnion, “Towards a comprehensive solution to the question of the emblem” Nov. 2003
- http://www.icrc.org/eng/assets/files/other/icrc_002_0778.pdf
- Kalshoven and Zegfeld, 48-53, 124-136
- <http://www.icrc.org/eng/emblem> - then click on “Use and misuse of the emblem”
- <http://www.icrc.org/eng/emblem> - then click on “The ICRC's position”
- Sassòli, Bouvier and Quintin, Ch.7
- UK Ministry of Defence, Ch.7

Principal protections for the sick, wounded and shipwrecked

- *Obligation of protection and care*: Common Art.12 – obligation of respect and protection, humane treatment irrespective of sex, race, nationality, religion, political opinions; special protection of women; PI, Arts.10, 11, 12
- *Wounded and sick to be treated as prisoners of war*: GCI, Art.14; GCII, Art.16
- *Obligation to search for wounded, dead and missing*: GCI, Art.15; GCII, Art.18; PI, Arts.32,33
- *Obligation to record and pass on information concerning identification of wounded, sick and dead*: GCI, Art.16; GCII, Art.19; PI, Art.33

Legal regime for those assisting the sick, wounded and shipwrecked

- *Civilian organisations and personnel may assist wounded, sick and shipwrecked and are not to be punished for doing so*: GCI, Art.18; GCII, Art.21; PI, Art.17
- *Prohibition of attacks on fixed and mobile medical establishments; ships*: GCI, Arts.19-23; GCII, Arts.22-35; PI, Arts.8,9,12-14
- *Obligation to respect and protect medical transports; hospital ships*: GCI, Art.35; GCII, Arts.22-25; PI,

Arts.8,22

- *Obligation to respect and protect medical personnel*: GCI, Arts.24-28; GCII, Arts.36-37; PI, Arts.8, 15-16

Protection during Non-international Armed Conflicts

Status of Protocol II

- *Prosecutor v Dusko Tadic (Jurisdiction)*, para.117: asserts that much of the Protocol declares or crystallises emerging rules of customary international law (1996) 35 ILM 32 [See Case No. 211, The Prosecutor v. Tadic [Part A.]]

General provisions

- *Field of application*: common Art.3 – applies to non-international armed conflicts PII, Art.1

Principal protections for the sick, wounded and shipwrecked

- *Obligation to “collect and care for” sick and wounded*: common Art.3(2)
- *Obligation to respect and protect wounded, sick and shipwrecked; search for and collect*: PII, Arts.7-8

Legal regime for those assisting the sick, wounded and shipwrecked

- *Obligation to respect and protect medical personnel*: PII, Arts.9-10
- *Obligation to respect and protect medical units and transports*: PII, Art.11

IV. PROTECTION OF CIVILIANS

Protection of the civilian population

- Sassòli, Bouvier and Quintin, Ch.8
- Henckaerts and Doswald-Beck, Ch. 32, Ch.39
- S.Breau, “Protected Persons and Objects”, in: Wilmshurst and Breau, Ch.7
- UK Ministry of Defence, Ch.9
- Kalshoven and Zegfeld, 58-66, 99-124
- ‘UK Government Strategy on the Protection of Civilians in Armed Conflict’, available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/32950/ukstrategy-protect-cvilians-arms-conflict.pdf
- H. Durham and K. O’Byrne, ‘The dialogue of difference: gender perspectives on international humanitarian law’ (2010) 92 International Review of the Red Cross 31-52, available at <https://www.icrc.org/en/international-review/article/dialogue-difference-gender-perspectives-international-humanitarian-law>
- T. Pfanner, ‘Various mechanisms and approaches for implementing international humanitarian law and protecting and assisting war victims’, (2009) 91 International Review of the Red Cross 279-328, available at <https://www.icrc.org/en/international-review/article/various-mechanisms-and-approaches-implementing-international>

Civilian population – GCIV

- Part I, Art.4 – those who, at a given moment, and in any manner at all, during a conflict or occupation find themselves in the hands of a party to the conflict or Occupying Power of which they are not nationals
- Part II – protections for all against the consequences of war
- Part III – status and treatment of protected persons
- Section I – Provisions common to territories of parties to a conflict and to occupied territories
 - *General protection* – GCIV Art.27, first para:
 - guarantees granted to all protected persons
 - respect for their person, honour, family rights, religion
 - right to humane treatment at all times
 - protection from violence and threats of violence

Note also general prohibitions under international law of discrimination, torture, inhuman and degrading treatment or punishment

- Section II – relates to aliens on territory of party to the conflict
- Section III – obligations towards the population of occupied territories; see also Hague Regulations, Arts.42-56
- PI, Part IV, Section III (Arts.72-79)
- PII, Arts.13-17: general provisions on protection of the civilian population

Protection of women

- J. Gardam, “Women, Human Rights and International Humanitarian Law”, (1998) IRRC No.324, 421-432
- C. Lindsey, “Women and War”, (2000) IRRC No.839, 561-579
- T. Meron, “Rape as a Crime under International Humanitarian Law”, (1993) 87 AJIL 424-428
- Sassòli, Bouvier and Quintin, Ch.2. II. 1. b)
- Islamic State and sexual slavery, available at <http://www.newstatesman.com/world-affairs/2015/08/he-treated-me-animal-surviving-life-sex-slave-islamic-state>

Protections against sexual violence

GCIV Art.27, second para:

“Women shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

PI Art.76.1:

Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

Common Art.3(1)(c)

prohibits outrages upon personal dignity, in particular humiliating and degrading treatment

PII Art.4.2 – prohibits

(e) outrages upon personal dignity, especially humiliating and degrading treatment, rape, enforced

prostitution and any form of indecent assault
(f) slavery

Protections as mothers

GCIV Arts.14, 16, 17, 21, 22, 23: special protections for the wounded and sick, infirm and expectant mothers – entitled to “particular protection and respect” (Art.16, + PI Art. 8(a)).

Protections for female detainees and prisoners of war

GCIII Art.14, second para: “Women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favourable as that granted to men.” (female POWs) GCIII Arts.25, 97, 108: women POWs to be detained in separate quarters from men GCIV Arts.76, 85, 124: women detainees to be held separate from men (except for those accommodated with their families) GCIV Art.97: female detainees may only be searched by a woman GCIV Art.89: extra food for detained expectant and nursing mothers GCIV Art.91: entitlement to care no worse than that available to general population GCIV Art.132: obligation to prioritise release of certain categories of internees, including pregnant women and mothers with young children PI Art.76.2 ; “utmost priority” to be given to consideration of cases of detained pregnant women and mothers with dependant infants – where detained for reasons related to the conflict PII Art.5.2(a): women to be detained separately from men (unless in family unit); and under supervision of women PII Art.6.4: no death penalty for pregnant women or mothers with young children

Protection of Children

- M. Dennis, “Newly Adopted Protocols to the Convention on the Rights of Children”, (2000) 94 AJIL 789-796
- Human Rights Watch, Reports on the Use of Child Soldiers: <http://www.hrw.org/publications/reports?topic=819®ion=All>
- Secretary-General’s Special Representative for Children and Armed Conflict: <http://www.un.org/special-rep/children-armed-conflict/index.html>
- UNICEF, Impact of Armed Conflict on Children: <http://www.unicef.org/graca/>

Geneva rules have following aims:

- shelter children from hostilities
- maintain family unity
- ensure necessary care, relief or protection for those caught in hostilities

Shelter from hostilities

GCIV Art.14: safety zones for wounded, sick and aged, children under fifteen, pregnant women, mothers of children under seven

GCIV Art.50:

- Occupying Power to facilitate proper working of all institutions dealing with care and education of children
- Organize care and education of orphaned children or those separated from their parents (preferably by people with same nationality, language and religion)
- Evacuations generally prohibited (GCIV Art.49, PI Art.78.1, PII Art.17) because they can be used to promote ethnic cleansing, but permitted in limited cases – GCIV Art.17 allows limited evacuation from besieged areas, of wounded, sick, infirm, elderly, children and maternity cases

GCIV Art.51: Occupying Power cannot compel those under eighteen to work

GCIV Arts.24 and 50: children have right to protection of their cultural environment, education and exercise of religion

Maintenance of the family unit

Note restrictions on evacuation, aboveObligation to facilitate reunion of dispersed families: GCIV Art.26, PI Art.74, PII Art.4.3(b)Obligation to maintain family unit during detention or internment: GCIV Art.82, PI Art.75.5

Protection during hostilities

GCIV Art.38.5 – priority for children under fifteen, pregnant women and mothers of children under seven in distribution of relief suppliesPI Art.8: new-born babies treated as “sick or wounded”PI Art.77 – measures aimed at protection of children

- Special respect for children; protected against “any form of indecent assault”
- Children under age of fifteen must not take direct part in hostilities
- If children are involved in hostilities, they still get special protection of Art.77
- Detained children to be held separately from adults unless in a family unit
- No death penalty permissible for those under eighteen at time of offence

PII Art.4.3(c-d)

Convention on the Rights of the Child 1989

Art.38

1. States Parties undertake to respect and to ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child.
2. In accordance with their obligations under International Humanitarian Law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Child Soldiers

Convention on the Rights of the Child 1989 Art.38

1. States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.
2. States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, states Parties shall endeavour to give priority to those who are oldest.

See also PI Art.77(2)

Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000

Art.1 – States to take “all feasible measures” to ensure that armed forces under eighteen do not take “a direct part” in hostilities
Art.2 – prohibition of compulsory recruitment of persons under eighteen into armed forces
Art.3(1) – States to raise minimum age for voluntary recruitment to armed forces to eighteen

ILO Convention No. 182 on the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour 1989

- prohibits forced or compulsory recruitment of children for use in armed conflict

Punishment of breaches

The law on punishment of those who breach human rights during armed conflict is dealt with separately. Here you should simply note that one of the most important trends in recent developments has been the increasing recognition of the particular vulnerability of women and children.

V. PROTECTION OF CULTURAL PROPERTY

- Sassòli, Bouvier and Quintin, Ch.9. II. 9. b) aa)
- Henckaerts and Doswald-Beck, Ch.12
- Kalshoven and Zegveld, 48-51, 175-180
- J.-M. Haenckerts, ‘New rules for the protection of cultural property in armed conflict’, (1999) International Review of the Red Cross, available at <https://www.icrc.org/eng/resources/documents/article/other/57jq37.htm>

Principal Laws

- Hague Regulations 1907, Art 27
- Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954
- Second Protocol to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1999

1954 Convention

Art 1 – definition of cultural property

- Moveable or immovable property of great importance to the cultural heritage of every people – eg, monuments, works of art, manuscripts, scientific collections
- Buildings whose main purpose is to preserve or exhibit movable cultural property and refuges intended to shelter it during armed conflicts
- Centres containing a large amount of cultural property (as defined above)

Type of protection – general or special

Art 2 – general protection: to safeguard and respect
 Art 3: safeguarding – obligation to prepare during peace time for safeguarding of cultural property
 Art 4 – respect

- obligation not to use protected property for purposes likely to lead to its damage or destruction during armed conflict
- obligation to refrain from acts of hostility against cultural property
- obligation to prohibit, prevent and stop theft, pillage, misappropriation or vandalism against cultural property
- no reprisals against cultural property
- para 2 – obligations may be waived in cases of imperative military necessity

Art 5 – general obligation of occupying power to support competent national authorities in protecting cultural property
 Art 6 – distinctive marking – Dutch Ministry of Defence
 Art 18 – applies to international conflicts but not of
 Art 19 – parties to civil war must apply at least those parts of the Convention on respect for cultural property (see Art 4).
 Art 8 – special protection for limited number of refuges intended to shelter movable cultural property during conflict, as well as centres of significance – has not worked – hence adoption of 1999 protocol.
 Art 11 – withdrawal of immunity

- where one party violates immunity of cultural property then the other one does not have to respect it; or
- exceptional cases of unavoidable military necessity

1999 Protocol

- supplements 1954 Convention, which remains in force
- changes to system of general protection
- retains definition of cultural property

- new system of 'enhanced' protection (instead of special protection)
- applies to international and civil wars (Art 22)

Art 6 – respect for cultural property – more difficult to justify attacks on cultural property – waiver under Art 4(2) of Convention subject to conditions:

- the cultural property has been made a military objective by its function
- no feasible alternative to achieve the purpose

Art 7 – precautions in attack – obligations to minimize risk to cultural property
 Art 8 – precautions against effects of hostilities – as far as possible,

- remove cultural property from vicinity of military objectives
- avoid locating military objectives near cultural property

Art 9 – obligations in occupied territory, to prohibit and prevent:

- illicit exports, removal or transfer of ownership of cultural property
- archaeological excavations (unless required to safeguard the property)
- change to cultural property aimed at hiding or destroying cultural, historical or scientific evidence

Enhanced Protection

Art 10 – criteria for qualification for enhanced protection

- must be of greatest importance for humanity
- protected by domestic legal and administrative measures that recognize the exceptional cultural and historic value and ensure highest level of protection
- not used for military purposes and a declaration made to that effect

Art 24 – Committee for the Protection of Cultural property in the Event of Armed Conflict – places qualifying properties on a special List.
 Art 12 – obligation not to attack properties with enhanced protection; nor to use them or their immediate surroundings in support of military action
 Art 13(1)(b) – loss of status where property has by its use become a military objective; property may be attacked subject to conditions set out in Art 13(2).

Criminal Responsibility and Jurisdiction

Art 15: serious violations to be made criminal offences under national law

- making CP under EP object of attack
- using CP under EP or its immediate surroundings in support of military action
- extensive destruction or appropriation of CP

- making protected CP the object of attack
- theft, pillage or misappropriation or vandalism of protected CP

VI. METHODS AND MEANS OF COMBAT

- Sassòli, Bouvier and Quintin, Ch.9
- Henckaerts and Doswald-Beck, Ch.20
- UK Ministry of Defence, Ch.s 5 and 6
- Kalshoven and Zegveld, 35-41, 92-99
- W. Frelick, "Specific Methods of Warfare", in: Wilmshurst and Breau, Ch.9
- S. Haines, "Weapons, Means and Methods of Warfare", in: Wilmshurst and Breau, Ch.10
- J.-F. Queguiner, 'Precautions under the law governing the conduct of hostilities', (2006) 88 *International Review of the Red Cross* 793-821, available at https://www.icrc.org/eng/assets/files/other/irrc_864_queguiner.pdf

Hague Convention No.IV (1907), Arts.22-28

- right of the belligerent to adopt means of injuring the enemy is not unlimited (Art.22)
- obligation to avoid causing unnecessary suffering (Art.23(e))

GC PI

- In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited (Art.35(1))
- It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art.35(2))
- The civilian population must be protected against the effects of hostilities: obligation to distinguish between civilian and military objectives: PI, Art.48
- The civilian population, as well as individual civilians, shall not be the object of attack: PI, Art.51(2)
- Definition of military objectives: PI, Art.52(2) – see also Art.52(3)
-
- Civilian objectives are not to be made the object of attacks: PI, Art.52(1)

Nuclear Weapons

- See the articles cited in Sassòli, Bouvier and Quintin, Ch.9. III. 2. g)
- Kalshoven and Zegveld, 169-172
- Henckaerts and Doswald-Beck, Ch.22
- Piotrowicz, "The World Court judges nuclear weapons unjudgeable", (1996) 70 *Australian Law Journal* 659-962
- International Review of the Red Cross, 'The Human Cost of Nuclear Weapons' No.899 (2016), available at <https://www.icrc.org/en/international-review/human-cost-nuclear-weapons>
- C. Greenwood, 'The Advisory Opinion on nuclear weapons and the contribution of the International

Court to international humanitarian law', (1997) International Review of the Red Cross, available at <https://www.icrc.org/eng/resources/documents/article/other/57jnfp.htm>

- *Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (Nuclear Weapons Advisory Opinion)*, (1996) 35 *ILM* 814, paras 74-97

Para.97: "...in view of the present state of international law viewed as a whole...the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake."

Anti-personnel Landmines

- See the articles cited in Sassòli, Bouvier and Quintin, Ch.9. III. 2. c) aa)
- Kalshoven and Zegveld, 169-190
- Henckaerts and Doswald-Beck, Ch.29 – Rules 81-83
- Piotrowicz, "Anti-personnel mines: the world nibbles the bullet", (1996) 70 *Australian Law Journal* 693-699
- Piotrowicz, "Anti-personnel landmines – the political time bomb under the superpowers' table", (1999) 73 *Australian Law Journal* 100-103

Convention on Prohibitions or Restrictions on the Use of Certain Conventional weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (Inhumane Weapons Convention) 1980

Protocol II – Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices (as amended, 1996)

Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction (Ottawa Convention) 1999

Cluster Bombs Convention on Cluster Munitions 2008

Cyber Warfare?

Protection of the Environment

- A. Bouvier, "Protection of the environment in time of armed conflict", (1991) 73 *IRRC* 567-578
- ICRC, *Protection of the Environment in Time of Armed Conflict* (1992)
- Special themed issue of the International Review of the Red Cross, No.879 (2010):
<http://www.icrc.org/eng/resources/international-review/review-879-environment/index.jsp>
- Henckaerts and Doswald-Beck, Ch.13, Ch. 14

Specific rules

GCIV, Arts.53, 147

PI, Arts.35-36, 51-52, 54-58 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 – applies mostly to international ACs but see Art.19 Convention on the Prohibition of

Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972, Art. 2; in force 1975. (1972) 11 *ILM* 309Stockholm Declaration on the Human Environment 1972, Arts. 2, 5-7, 21-22, 26. (1972) 11 *ILM* 1416Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques (ENMOD) 1977; in force 1978. (1977) 16 *ILM* 88Security Council Resolution 687 (1991) on Kuwait. (1991) 30 *ILM* 847Inhumane Weapons Convention 1980 (as amended 1996), Protocol II (landmines), Arts. 3, 10. (1996) 35 *ILM* 1206Art. 3 – General restrictions on the use, of mines, booby-traps and other devices

Art. 10 – Removal of minefields, mined areas, mines, booby-traps and other devices and international cooperationConvention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines 1997; in force 1999, (1997) 36 *ILM* 1507Art. 5 Destruction of anti-personnel mines in mined areasAdvisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (1996) 35 *ILM* 809, paras 35-36, 74-98

Individual Responsibility for Environmental Harm

Draft Code of Crimes Against the Peace and Security of Mankind 1996, available at http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf

Article 20(g): 'in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs'

- deemed to be an offence for which there would be individual responsibility at international law

ICC StatuteCertain war crimes for which individual responsibility exists:Arts.8.2.a.iv, 8.2.b.ii,iv, v, ix, 8.2.b.xvii-xviii, 8.2.b.xx (international conflicts)Art.8.2.

For the purpose of this Statute, "war crimes" means:(a.iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;(b.ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;(xvii) Employing poison or poisoned weapons;(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;(xx) Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an

amendment in accordance with the relevant provisions set forth in articles 121 and 123...

VI. DISPLACED PERSONS AND IHL

- International Review of the Red Cross (2001) No.843, Special issue: 50th Anniversary of the Refugee Convention. The Protection of Refugees in Armed Conflict (available at ICRC website: www.icrc.org): in particular the articles by Brett and Lester, Contat Hickel, Forsythe, Jaquemet, Kälin and Krill
- Sassòli, Bouvier and Quintin, Ch.8. III.
- Henckaerts and Doswald-Beck, Ch.38
- R. Piotrowicz, "Displacement and Displaced Persons", in: Wilmshurst and Breau, Ch.13
- F. Boucher-Saulnier, The Practical Guide to Humanitarian Law (2002), 159-162, 324-331
- J. Fitzpatrick, "Temporary Protection of Refugees: Elements of a Formalised Regime", (2000) 94 AJIL 279-306
- J. Willms, 'Without order, anything goes? The prohibition of forced displacement in non-international armed conflict', (2009) 91 International Review of the Red Cross 547-565, available at <https://www.icrc.org/eng/assets/files/other/irrc-875-willms.pdf>
- Goldman, "Codification of International Rules on Internally Displaced Persons", (1998) IRRC No.324, 463-466
- Lavoyer, "Refugees and Internally Displaced Persons: International Humanitarian Law and the Role of the ICRC", (1995) IRRC No.305, 162-180
- Lavoyer, "Guiding Principles on Internal Displacement", (1998) IRRC No.324, 467-480
- R. Piotrowicz and C. van Eck, "Subsidiary Protection and Primary Rights", (2004) 53 International and Comparative Law Quarterly pp.107-138, esp. 131-136
- H. Storey and R. Wallace, "War and Peace in Refugee Law Jurisprudence", (2001) 95 AJIL 349-366

Introduction: who are refugees?

Situations that cause refugees:

- Internal political circumstances
- Natural disaster
- Armed conflict – international and non-international – population movements –forced deportation and internal displacement

Aim of the lecture: to look

- i. at the protection of those who were refugees prior to an armed conflict after it commences; and
- ii. those who become refugees as a consequence of an armed conflict.

Definition of a refugee:

Convention Relating to the Status of Refugees 1951

Art 1A(2): a refugee is anyone who

...owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country...

OAU: Convention on the Specific Aspects of Refugee Problems in Africa 1969 Art 1 (1) – as above Art 1(2) The term 'refugee' shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

Principle of non-refoulement

Refugees Convention, Art 33(1): No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.

UNHCR, Guidelines on International Protection No.12: Claims for Refugee Status related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees and the Regional Refugee Definitions, 2 December 2016, available at <https://www.refworld.org/docid/583595ff4.html>

Geneva Conventions

As civilians, generally entitled to same basic protections as other civilians.

- GCIV, Arts 35-46 – aliens in the territory of a party to an armed conflict
- GCIV, Art 44 – refugees with nationality of enemy State not to be treated as enemy aliens if they do not have protection of any government.
- GCIV, Art 45(4) – prohibition on return to a State where the individual fears persecution for political or religious beliefs
- GCIV, Art 49 – prohibition on individual and mass deportations from occupied territories (a grave breach – see
- GCIV, Art 147)
- GCIV, Art 70(2) – guarantees for those who fled to a territory subsequently occupied by their own State
- PI, Art 73 – stateless persons and refugees to be treated as protected persons
- GCs, common Art 3 – “persons taking no active part in hostilities”
- PII, Art 17 – prohibition of forced movement of civilians

Internally Displaced Persons

- not a separate category under IHL

Guiding Principles on Internally Displaced Persons

(UN Doc. E/CN.4/1998/53/Add.2); also at Sassòli, Bouvier and Quintin, [See Document No. 56, UN, Guiding Principles on Internal Displacement]

Definition (para 2):

Internally displaced persons are persons or groups of persons who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflict, situations of generalized violence, violations of human rights or natural or human-made disasters, and who have not crossed an internationally recognized State border.

Role of ICRC and UNHCR

European Union law

Temporary Protection

Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons... Art 2 – establishes obligation for Member States to allow aliens to stay on their territory (initially for one year):

- where there has been a mass influx of displaced persons from third countries
- who cannot return in the short term
- who have fled areas of armed conflict or endemic violence; or are at serious risk of, or have been the victims of, systematic or generalized violations of their human rights

Subsidiary Protection

Council Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 (“Qualification Directive”) on standards for the qualification of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast)

Article 6: Persecution can be by the State parties or organizations controlling the State or a substantial part of its territory non-state actors, where the State or those in control are unable or unwilling to provide protection against persecution or serious harm

Article 15: Entitlement to subsidiary protection based on following threats, which are ‘serious harm’:

- Death penalty or execution

- Torture or inhuman or degrading treatment or punishment in the country of origin
- Serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of armed conflict

QD and AH (Iraq) (Appellants) v Secretary of State for the Home Department (Respondent) [2009] EWCA Civ 620/Elgafaji v. Staatssecretaris van Justitie, C-465/07, European Union: European Court of Justice, 17 February 2009, available at <http://www.unhcr.org/refworld/docid/499aaee52.html> UN High Commissioner for Refugees, UNHCR Statement on Subsidiary Protection Under the EC Qualification Directive for People Threatened by Indiscriminate Violence, January 2008, available at <http://www.unhcr.org/uk/protection/operations/479df9532/unhcr-statement-subsidiary-protection-under-ec-qualification-directive.html>

International Criminal Law and Displacement of Civilian Population ICTY Statute

- Art 2 – power to prosecute grave breaches of GCs: para (g) – unlawful deportation or transfer of a civilian
- Art 5(d) – deportation a crime against humanity

ICC Statute

- Art 7(d) – deportation or forcible transfer a crime against humanity
- Art 8 para.2 (a)(vii) – unlawful deportation or transfer a war crime
- Art 8 para.2 X(b)(viii) – the deportation or transfer of all or parts of the population of the occupied territory within or outside the territory

VII. COLLECTIVE SECURITY OPERATIONS AND IHL

- Sassòli, Bouvier and Quintin, Ch.13. VIII. 5. and the sources cited there
- UK Ministry of Defence, Ch.14
- Faite and Grenier (eds), *Expert Meeting on Multinational Peace Operations. Applicability of International Humanitarian Law and International Human Rights Law to UN Mandated Forces* (Report), ICRC, Geneva, 2004
- M. Goulding, *Peacemonger*, London, 2002, Ch.2 (“United Nations Peace Operations”)
- U. Palwankar, “Applicability of international humanitarian law to United Nations peace-keeping forces”, (1993) *International Review of the Red Cross* (no.294) 227
- Odello and Piotrowicz, *International Military Missions and International Law* (2011)
- Shraga, “UN Peacekeeping Operations: Applicability of International Humanitarian law and Responsibility for Operations-Related Damage”, (2000) 94 *AJIL* 406
- International Review of the Red Cross, ‘Multinational Operations and the Law’, No 891/892 (2013), available at <https://www.icrc.org/en/international-review/multinational-operations-and-law>

Introduction

- definition of collective security operations (CSO)
- nature of the problem – how are armed forces in CSO bound by IHL?

Types of CSO

- multi-national operations without UN authority
- with UN authority
 - under national or regional command
 - under UN command

UN “peace” operations

- under UN command and control
- under national/regional command and control
- four categories
 - peace making
 - peace building
 - peace keeping
 - peace enforcement

Ius ad bellum and ius in bello

- the lack of consent by a state to the intervention does not affect application of IHL – the issue is not whether IHL applies, but rather to what extent it applies to CSOs.

Application of IHL to UN forces

- *Secretary-General's Bulletin*, 6 August 1999
- Section 1 – scope – rules in the Bulletin apply to:
 - UN forces “in situations of armed conflict”
 - actively engaged as combatants
 - to extent and for duration of the engagement
 - in enforcement actions
 - peacekeeping operations where force permitted in self-defence
- Section 5 – protection of the civilian population
- Section 6 – means and methods of combat
- Section 7 – treatment of civilians and persons hors de combat
- Section 8 – treatment of detained persons
- Section 9 – protection of the wounded, the sick and medical and relief personnel
- *Convention on the Safety of United Nations and Associated Personnel 1994*

Application of IHL to CSOs under UN mandate but not UN command

- these are not UN forces; they are national forces and subject to IHL

Application of IHL to CSOs operating without UN mandate

- subject to IHL

Distinction between international armed conflicts and non-international armed conflicts

- Prosecutor v Tadic (Jurisdiction) (1996) 35 International Legal Materials 32 [See Case No. 211, The Prosecutor v. Tadic [Part A.]]
 - “common” law of armed conflicts (paras 126-7)
 - Protection of civilians from hostilities, especially indiscriminate attacks
 - Protection of civilian objects, especially cultural property
 - Protection of those no longer taking an active part in hostilities
 - Prohibition of certain means of warfare
 - Prohibition of certain methods of conducting hostilities
- Henckaerts and Doswald-Beck, Customary International Humanitarian Law

Distinction between armed conflict and occupation

- relevance of Hague Convention IV respecting the laws and customs of war on land and GCIV, especially Arts 13-26, 27-34, 47-78
- state practice

Obligations under human rights law

- *Legality of the threat or use of nuclear weapons*, Advisory Opinion, 8 July 1996, paras 24-5 [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]
- *Legal consequences of the construction of a wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, para 109 [See Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory]
- *Bankovic v Belgium and 16 Other Contracting States*, European Court of Human Rights, 12 December 2001, Application no.52207/99 [See Case No. 227, ECHR, Bankovic and Others v. Belgium and 16 Other States]

VIII. CRIMINAL REPRESSION OF BREACHES OF IHL

- Werle – extensive discussion of the whole subject
- Sassòli, Bouvier and Quintin, Ch.13, section X
- Henckaerts and Doswald-Beck, Chs 43 and 44
- C.Garraway, “War Crimes”, in: Wilshurst and Breau (eds), Ch.15
- UK Ministry of Defence, Ch.16
- Cassese, esp. Chs.3-5, 18-19
- Kalshoven and Zegveld, 72-81, 160-164, 241-258
- Piotrowicz, “Crime and punishment, or the establishment of a true international court of justice”, (1998)

- C.Staker, "Defence of Superior Orders Revisited", (2005) 79 *Australian Law Journal* 431-447
- Wagner, "The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the former Yugoslavia", (2003) 85 *IRRC* 351-383
- M.D. Oberg, 'The absorption of grave breaches into war crimes law', (2009) 91 *International Review of the Red Cross* 163-183, available at <https://www.icrc.org/eng/assets/files/other/irrc-873-divac-oberg.pdf>
- ICRC, International Criminal Jurisdiction, available at <http://www.icrc.org/eng/war-and-law/international-criminal-jurisdiction/index.jsp>
- **Nuremberg tribunal**
- **Individual responsibility under the Geneva Conventions**
- **ICTY**
- **ICTR**
- **ICC**
- **The establishment of individual criminal responsibility and its evolution in the context of armed conflict**

Nürnberg Charter 1945

- established international military tribunal to try and punish persons, acting for the European Axis countries, for three types of offence – on the basis that there was individual responsibility for these offences.

Art.6

- a. Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.
- b. War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.
- c. Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

Art.8

The fact that the defendant acted pursuant to order of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment.

These provisions were adopted by the International Law Commission in *Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal*:

http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_1_1950.pdf

Convention on the Prevention and the Punishment of the Crime of Genocide 1948 78 United Nations Treaty Series 277 **Article VI:** Persons committing genocide or any of the other acts enumerated in Article III (conspiracy to commit, direct and public incitement to commit, attempt to commit, complicity in) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Art.II – genocide includes:

- killing members of the group
- causing serious bodily or mental harm to members of the group
- deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- imposing measures intended to prevent births within the group
- forcibly transferring children of the group to another group

Geneva Conventions of 12 August 1949

- established notion of grave breaches of international humanitarian law for which there is individual responsibility and duty of States to punish – States have criminal jurisdiction:

GCI, Art.49: obligation to ensure effective penal sanctions for grave breaches

GCI, Art.50: grave breaches include: wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.

Eichmann Case: 1961 vol.36 *International Law Reports* 5 **Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984**

(1984) 23 *ILM* 1027; (1985) 14 *ILM* 535

Art.1(1): torture can be physical or mental; must be intentionally inflicted; pain or suffering must be inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Art.4(1): acts of torture must be made criminal offence under national laws.

Art.5(2): universal jurisdiction – States must prosecute or extradite alleged offenders present on their

territory.

International Criminal Tribunal for the Former Yugoslavia

Statute of the Tribunal (Annex to Report of Secretary General of UN): (1993) 32 ILM 1192 [See Case No. 210, UN, Statute of the ICTY]

- based on Security Council Resolution 808 (1993)

(i) Report of UN Secretary-General: (1993) 32 ILM 163

Paras 6-7, 9: refers to 'grave breaches' of Geneva Conventions: wilful killing, ethnic cleansing, mass killings, torture, rape, pillage, destruction of civilian property, arbitrary arrests.

Paras 33-39: says Geneva Conventions constitute rules of International Humanitarian Law and provide core of customary law applicable 'in international armed conflicts' (para.37).

(ii) Annex

Art.2: power to prosecute for ordering or committing grave breaches of Geneva Conventions (see Art.2 (a-h))**Art.3:** power to prosecute war crimes**Art.4:** power to prosecute genocide**Art.5:** power to prosecute crimes against humanity**Art.7(1):** individual responsibility for crimes mentioned in Arts.2-5**Art.7(3):** responsibility of superiors**Art.7(4):** superior orders not a defence – possible mitigation

Draft Code of Crimes Against the Peace and Security of Mankind 1996

1996 *Yearbook of the ILC*, vol.II(2)

http://legal.un.org/ilc/texts/instruments/english/draft%20articles/7_4_1996.pdf

- latest of several such drafts, it anticipates the establishment of the International Criminal Court

Art.2: individual responsibility for crime of aggression (Art.16); crime of genocide (Art.17); crimes against humanity (Art.18); war crimes (Art.20).

Art.3: individuals committing such crimes are liable to punishment.

Art.5: no defence of superior orders, but may mitigate.

Art.7: official position of accused (eg, as Head of State) does not relieve him/her of criminal responsibility.

Tadic Case (Tadic IT-94-1)

[See Case No. 211, The Prosecutor v. Tadic [Part A.]]

(1996) 35 *ILM* 32

(1997) 36 *ILM* 908

<http://www.un.org/icty/tadic/trialc2/judgement/tad-sj970714e.pdf>

<http://www.un.org/icty/tadic/trialc2/judgement/tad-ts70507JT2-e.pdf>

International Criminal Tribunal for Rwanda

[See Case No. 230, UN, Statute of the ICTR]

10. International Criminal Court

[See Case No. 23, The International Criminal Court]

<http://www.un.org/law/icc/index.html>

In force since 2002. The UK is a party.

Principal features

Jurisdiction:

- limited to classic international crimes:
 - Genocide (Art 6)
 - Crimes against humanity (Art 7) – the acts concerned must be committed “as part of a widespread or systematic attack directed against any civilian population”
 - War crimes (Art 8)
 - Aggression (Art 5)

Note **Art 8.2(b)(viii)**: makes **ethnic cleansing** a war crime – ‘The transfer, directly or indirectly, by the Occupying Power of parts of its own civilian population into the territory it occupies, or the deportation or transfer of all or parts of the population of the occupied territory within or outside this territory.’

Individual responsibility Art.25(2): ‘A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.’

Art.25(3): acts which give rise to responsibility

- doing the crime
- ordering the crime to be committed
- aiding and abetting, including supplying the means to do the goods
- any contribution to commission of a crime by a group of persons with a common purpose

Art.27: no immunity for Heads of State or Government Art.28: responsibility of commanders commanders also responsible where those under their authority commit crime and they knew, or should have known, about it.

Art.31(d): exclusion of criminal responsibility

- if crime was committed under duress of a threat of imminent death or serious bodily harm against the accused or another person
- and the accused acted reasonably so as to avoid this threat
- then responsibility is excluded so long as the person 'does not intend to cause a greater harm than the one sought to be avoided'.

Superior orders

Art.33: committing a crime under order does not relieve the accused of responsibility, unless:

- (i) the accused was obliged to obey the order (the order came from a superior); and (ii) the accused did not know the order was unlawful and (iii) the order was not manifestly unlawful. Orders to commit genocide or crimes against humanity are always manifestly unlawful.

Recognition under International Criminal Law of the Special Risks Faced by Women and Children

ICC Statute

Art.6 – genocide – same definition as above

Art.7 – *Crimes Against Humanity* Acts must be part of a “widespread or systematic attack directed against any civilian population, with knowledge of the attack”

- various offences could apply to women and children, such as torture, but specific offences include: Art.7.1(g): rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity Art.7.2(c): ‘Enslavement’ means the exercise of any or all of the powers attaching to the right of ownership and includes the exercise of such power in the course of trafficking in persons, in particular women and children Art.7.2(f): ‘Forced pregnancy’ means the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law...

Art.8 – *War Crimes*

International armed conflicts - includes

- grave breaches of the Geneva Conventions, including:
- Art.8.2(a)(ii) – torture or inhuman treatment, including biological experiments
- Art.8.2(a)(iii) – willfully causing great suffering, or serious injury to body or health Art.8.2(b)(xxii) – committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence also constituting a grave breach of the Geneva Conventions Art.8.2(b)(xxvi) – conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

Non-international armed conflicts – includes

- Art 8.2(c)(i)-(ii) – violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; committing outrages upon personal dignity, in particular humiliating and degrading treatment (these are violations of common Art 3 of the GCs)
- Art.8.2(e)(vi) – committing rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, and any other form of sexual violence also constituting a serious violation of common Art 3 GCs
- Art.8.2(e)(vii) – conscripting or enlisting children under the age of fifteen years into the national armed forces or using them to participate actively in hostilities

Case law of international tribunals on the crime of rape

Prosecutor v Akayesu

Case No ICTR-96-4-T, Judgment of 2 September 1998 [See Case No. 234, ICTR, *The Prosecutor v. Jean-Paul Akayesu*]

Prosecutor v Furundžija Case No. IT-95-17/1-T, Judgment of 10 December 1998 See especially paras 165-189

Rape can be prosecuted as a crime against humanity – *Akayesu*, paras 685-697 Rape can be a crime against humanity, a grave breach of the Geneva Conventions, a war crime or an act of genocide – *Furundžija*, para 172

IX. IMPLEMENTATION OF IHL

- Sassòli, Bouvier and Quintin, Ch.13
- Kalshoven and Zegveld, pp 68-72, 150-155
- Henckaerts and Doswald-Beck, Chs 40-41
- D. Turns, “Implementation and Compliance”, in Wilmshurst and Breau (eds), Ch.14
- UK Ministry of Defence, Ch.16, esp. pp411-423
- R. Wolfrum, “Enforcement of International Humanitarian Law”, in D. Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* (1999), Ch.12

- International Committee of the Red Cross, 'Generating Respect for the Law', No.895-896, available at <https://www.icrc.org/en/international-review/generating-respect-for-the-law>

What is IMPLEMENTATION of IHL?

- Distinction between enforcement (including reprisals and criminal prosecutions) and implementation
- National Implementation Database, available at <http://www.icrc.org/ihl-nat>
- Guidelines for assessing the compatibility between national law and obligations under treaties of international humanitarian law

Ways of Implementation

ICRC, The Domestic Implementation of International Humanitarian Law. A Manual (2015) (ICRC Manual), available at <https://www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf>

ICRC Manual, p.23:Under IHL a range of measures must be taken. Among the main ones are:

- to have IHL instruments translated into the national language(s);
- to spread knowledge of them as widely as possible both within the armed forces and the general population;
- to repress all violations of IHL instruments and, in particular, to adopt criminal legislation that punishes war crimes;
- to ensure that persons, property and places specifically protected by the law are properly identified and marked;
- to adopt measures to prevent the misuse of the red cross, the red crescent, the red crystal and other emblems and signs provided for in IHL;
- to ensure that protected persons enjoy judicial and other fundamental guarantees during armed conflicts;
- to appoint and train persons in IHL; in particular, to ensure the presence of legal advisers within the armed forces;
- to provide for the establishment and/or regulation of:- National Red Cross and Red Crescent Societies and other voluntary aid societies– civil defence organizations;– national information bureaux;
- to take account of IHL when selecting military sites and in developing and adopting weapons and military tactics;
- to provide for the establishment of hospital zones, neutralised zones and demilitarised zones

1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, Article 16, 17

GC common Article 1

“The High Contracting Parties undertake to respect and ensure respect for the present Convention in all circumstances”

See also PI, Art.1

Nicaragua case (Nicaragua v USA) (Merits) (1986), para 220 [See Case No. 153, ICJ, Nicaragua v. United States]:

“... there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to “respect” the Conventions and even “to ensure respect” for them “in all circumstances”, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of ... the Geneva Conventions.”

Role of ICRC Advisory Services

The ICRC set up its Advisory Service in 1996 to step up its support to States committed to implementing IHL:

- encourage all States to ratify IHL treaties;
- encourage States to fulfil their obligations under these treaties at the national level

Structure: a unit attached to the ICRC's Legal Division in Geneva, i.e. one supervisor plus three legal advisers, one specialized in civil law, one in common law and one in the Advisory Service's database a team of legal experts based in each continent

Services:

- The Advisory Service works closely with governments, taking into account their specific needs and their respective political and legal systems. It also works with the following:
 - National Red Cross and Red Crescent Societies;- academic institutions;- international and regional organizations
- Organizes meetings of experts
- Arranges national and regional seminars on the implementation of IHL and meetings of experts on selected topics; takes part in international fora
- Offers legal and technical assistance in incorporating IHL into national law
- Translates IHL treaties; carries out studies on the compatibility of national law with the obligations arising from these treaties; provides legal advice
- Encourages States to set up national IHL committees and assists them in their work
- Supports the work of advisory bodies to governments with respect to implementing, developing and disseminating IHL
- Promotes the exchange of information
- Manages a collection of texts on legislation, case law, national studies and manual for the armed forces;

a database on the implementation of IHL accessible on the ICRC's website (www.icrc.org) and on the ICRC's CD-ROM on IHL

Publishes specialist documents Produces factsheets on the main IHL treaties and topics relating to implementation; kits for ratifying treaties; guidelines on implementation measures; regular reports on national implementation worldwide; reports on seminars and meetings of experts

Fact sheet: Implementing International Humanitarian Law: from Law to Action, available at http://www.icrc.org/eng/assets/files/other/implementing_ihl.pdf

Who can implement IHL?

- Government
- National Red Cross societies
- Human rights bodies
- NGOs
- International Fact-Finding Commission (PI Art.90)
- International tribunals

Implementation in UK law: https://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawsByCategorySelected.xsp?xp_countrySelected=GB

Measures to be taken in peacetime

- Dissemination (GCI Art.47, GCII Art.48, GCIII Art.127, GCIV Art.144, PI Art.83)
- Translation (GCI Art.48, GCII Art.49, GCIII Art.128, GCIV Art.145, PI Art.84)
- Training of qualified personnel (PI Art.6, 82 (legal advisers in armed forces), 83)

Protecting Powers

- Safeguard interests of Parties by checking and scrutinising application of GCs (GCI-III, Art.8, GCIV, Art.9)
- Lend good offices to help settle disagreements between Parties (GCI-III, Art.11, GCIV, Art.12)
- Visit prisoners of war and civilian internees (GCI-II Art.126, GCIV Art.143)
- Now little used – more common to use ICRC as intermediary

Role of ICRC

- Humanitarian activities for protection of wounded and sick, medical personnel and chaplains, with the consent of the parties to the conflict (GCI-III Art.9, GCIV, Art.10)
- Humanitarian assistance to prisoners of war (GC III Art 125, 126)
- Humanitarian assistance to civilian population of countries in conflict (GCIV, Art.142, 143)
- De facto Protecting Power (P1, Art. 5(4))

Implementation in NIACsGC Art.3

“...The Parties to the conflict should ...endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.”

ICRC may “offer its services to the Parties to the conflict”.

PII, Art.19

“This Protocol shall be disseminated as widely as possible.”

Non-Legal factors that might contribute to respect for IHL

- Military interest
- Public opinion
- Ethical and religious considerations

ICRC Customary IHL Study

Rule 139: Each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control.

Rule 140: The obligation to respect and ensure respect for international humanitarian law does not depend on reciprocity.

Rule 141: Each State must make legal advisers available, when necessary, to advise military commanders at the appropriate level on the application of international humanitarian law.

Rule 142: States and parties to the conflict must provide instruction in international humanitarian law to their armed forces. Rule 143: States must encourage the teaching of international humanitarian law to the civilian population

CONCLUSION

“He knew that the essence of war is violence, and that moderation in war is imbecility.”

(Macaulay, 1831)

Who is closer to reality – Macaulay or Dunant? And who is closer to the truth? After all that:

- **What are the legal arguments for and against the bombing of Hiroshima and Nagasaki?**
- **The destruction of Warsaw and Dresden? Can one distinguish between the two on the grounds**

that Dresden was located in the aggressor state?

- Can a combatant lawfully shoot a civilian? Can a civilian lawfully shoot a combatant?
- Was Saddam Hussein a prisoner of war?
- Can you ever lawfully get children to serve in the armed forces?
- Does IHL have any beneficial impact at all?

X. IHL AND HUMAN RIGHTS LAW

- Sassòli, Bouvier and Quintin, Ch.14
- C. Droegge, 'The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict', Research Paper 14-07 (2007), available at <https://www.icrc.org/eng/resources/documents/article/other/ihl-human-rights-article-011207.htm>
- Doswald-Beck and Vite, "International Humanitarian Law and Human Rights Law", (1993) *IRRC* No.293, 94-119
- Eide, Rosas and Meron, "Combating Lawlessness in Gray Zones Through Minimum Humanitarian Standards", (1995) 89 *AJIL* 215-223
- R. Kolb, "The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions", (1998) *International Review of the Red Cross* 409-419
- N. Lubell, 'Human rights obligations in military occupation' (2012) 94 *International Review of the Red Cross* 317-337, available at <https://www.icrc.org/eng/assets/files/review/2012/irrc-885-lubell.pdf>
- T. Meron, "The Humanization of Humanitarian Law", (2000) 94 *AJIL* 239-278
- Moir, Ch.5
- Provost, *International Human Rights and Humanitarian Law* (2002)
- Declaration of Minimum Humanitarian Standards (Turku Declaration) 1990, in: Sassòli, Bouvier and Quintin [See Document No. 55, UN, Minimum Humanitarian Standards [Part A.]]

The protection of human rights during armed conflicts is not the monopoly of IHL

What happens to human rights law (HRL) during armed conflicts? The relationship between IHL and HRL is complex but may be divided into three principal areas:

- fields of application
- types of right protected
- implementation mechanisms

Fields of application

- IHL – during armed conflicts and (to some extent) periods of occupation
- HRL – always, including during armed conflicts
- IHL – applies to specific categories of protected person
- HRL – applies to all people under the jurisdiction of the state
- IHL – does not allow derogations
- HRL – derogations from some rights permitted in certain emergency situations (eg, during armed conflicts)

Rights protected

- IHL – protects all types of right: civil and political, economic, social and cultural, group rights – in so far as they are threatened by armed conflict
- HRL – applies all the time (not just during armed conflicts) but has different regimes for different types of rights

Implementation

- IHL – enforcement after the event – through international criminal law and ‘enforcement’ before and during armed conflict through dissemination of IHL, especially amongst protagonists to the conflict
- HRL – treaties aim to establish human rights standards – breaches generally addressed through compensation to individuals affected; (sometimes) amendment to domestic laws

Bankovic and Others v Belgium and 16 other Contracting States [See Case No. 227, ECHR, *Bankovic and Others v. Belgium and 16 Other States*] 2002 European Court of Human Rights Application no. 52207/99

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004, esp. paras 102-113; 123-137 [See Case No. 123, ICJ/Israel, *Separation Wall/Security Fence in the Occupied Palestinian Territory*, available at <http://www.icj-cij.org/docket/index.php?p1=3&p2=4&code=mwp&case=131&k=5a&p3=0>]