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# Introduction

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## I. Distinction between the Law of The Hague and the Law of Geneva

(*See Supra* Fundamentals of IHL, Historical Development of International Humanitarian Law)

**Introductory text**

The conditions for protection, the protective regimes and the applicable sources of IHL differ depending on whether a person finds themselves in the power of a party to the armed conflict or whether they are affected by hostilities. Rules of the first regime are traditionally referred to as 'Geneva Law' because such rules are mainly codified in the Geneva Conventions, while the rules of the latter are traditionally referred to as 'Hague Law' because they were initially codified in the Hague Regulations. Currently, however, the rules on the conduct of hostilities are mainly found in Protocol I, and in parallel in customary IHL applicable to both IACs and NIACs.

According to the protective regime governing the conduct of hostilities, civilians and, to a much more limited extent, combatants and fighters, are protected against attacks and effects of hostilities by an adverse party to the conflict, in whose power they are not. The first requirement of those rules is that only means (that is, weapons) and methods (in other words, tactics) of warfare that are not prohibited by IHL may be used. Second, only combatants, fighters, civilians directly participating in hostilities and military objectives may be directly targeted. Third, even if an attack is directed against a lawful target, its incidental impact on civilians and civilian objects (in other words, collateral damages) may not be excessive in relation to the anticipated military advantage gained from eliminating or neutralizing the target. Finally, all feasible precautionary measures must be taken to spare the civilian population and civilian objects from the effects of war. This protective regime is – for the most part – very similar in both IACs and NIACs.

In contrast, the legal regime protecting persons who are in the power of a party to the armed conflict differs substantially depending on whether the armed conflict is an IAC or a NIAC. In the former, protection is mostly afforded to 'protected persons'. Thus, the first question that must be addressed is whether the person who is in the hands of a party to the conflict qualifies as a 'protected person' under one of the four Geneva Conventions. If so and depending on the individual's specific situation and status, an individual is protected by one or more of the protection regimes established by the Conventions for the wounded and sick military on land (Convention I), the wounded, sick and shipwrecked at sea (Convention II), prisoners of war (Convention III) and civilians (Convention IV). The protective rules of Convention IV are further subdivided into rules protecting (mainly enemy) foreigners in a belligerent State's own territory and rules applicable to occupied territories that not only protect the population of such territories but also govern the occupying power's administration of the territory. Individuals who do not qualify as a 'protected person', however, only benefit from a more limited set of fundamental guarantees. In NIACs, civilians and fighters in the power of the enemy traditionally benefit from the same protection, but it is increasingly argued that IHL provides an inherent legal basis to intern the latter.

Similarly, as to the protection of objects, it is important to distinguish between the rules of Geneva Law that protect objects against destruction by the party controlling them and the rules of Hague Law that protect

objects against attacks by the adversary of the party controlling the objects. To take a concrete example, the destruction by a party to an armed conflict of houses in territory it occupies or controls will be governed by Geneva Law, and not by the rules on the conduct of hostilities. This means that such destruction is prohibited unless imperatively demanded by the necessities of the conflict, while the concept of military objective, crucial for the conduct of hostilities, is irrelevant here.

The demarcation between rules protecting persons in the power of an adverse party and the rules protecting persons against the effects of hostilities is obviously not absolute. Indeed, the rules on humanitarian assistance not only benefit civilians, POWs, military wounded and sick in the power of a party but are also equally addressed to any adversary of that party to the extent all parties to a conflict must permit the free passage of relief convoys and humanitarian organizations. Additionally, on the battlefield or the frontlines, it may prove difficult to determine whether persons are in the power of the party affecting them and thus which regime should apply. Similarly, it is also sometimes controversial whether certain prohibitions in IHL, such as the prohibition of murder in Common Article 3, applies only to summary executions of persons in the power of a party or whether it also extends to the conduct of hostilities.

Despite these nuances, the distinction between the rules falling under Geneva Law and those rules contained within Hague Law is important as it has a practical impact in several respects. First, the complicated question of who qualifies as a protected civilian either on the basis of nationality or arguably allegiance is relevant only to the application of Geneva Law. Second, the difficult debates regarding what constitutes direct participation in hostilities in both IACs and NIACs as well as about who is a civilian in a NIAC are irrelevant for Geneva Law as such questions only concern the application of Hague Law. Third, the distinction between IACs and NIACs is much more important for Geneva Law than for Hague Law because protection in IACs largely depends on status. Fourth, a party may conduct hostilities only against persons and objects that are not in its power. In contrast, the use of force against persons in the power of a party is governed by the relevant human rights rules relating to law enforcement operations.

A further and most important reason why Hague Law has still to be distinguished from Geneva Law, is that it is much easier to establish violations of Geneva Law (for example, whether a prisoner has been tortured, a person has been raped or a house in an occupied territory has been destroyed) than it is to determine violations of Hague Law (for instance, whether a person killed or a school destroyed by an aerial bombardment constituted a violation of IHL). What counts for the Hague Law is not what was destroyed or who was killed or injured but what and who was targeted. To target civilians or civilian objects violates IHL. Whether an attack is lawful under Hague Law does not depend on the results of the attack but rather an ex ante evaluation by the attacking party. Establishing whether an attack violated Hague Law requires a complex analysis of several legal factors, including the status of the targeted person or object, whether such person or object was the actual target, the actual or intended use of the targeted object, the military value to the attacker in eliminating the targeted person or object in relation to the extent (if any) of incidental effects upon civilians and whether the attacker took all feasible precautionary measures in attack to avoid or

minimize incidental effects upon civilians. Assessing these legal factors necessarily requires knowledge of the military plans of both parties. Parties, however, do not make such information public and they do not have an obligation to do so. Fact-finding bodies and the media therefore either neglect the fundamentals of the law or come only to very tentative conclusions concerning the legality of a given attack. Criminal tribunals do not even have this option, which may explain the limited number of convictions for violations of the Hague law.

Application of Geneva Law rules or enquiries into questions relevant only under Geneva Law when an issue of conduct of hostilities arises and vice versa is one of the most frequent mistakes committed by students, practitioners, the media and courts when determining the legal rules applicable and any violation(s) in relation thereto.

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

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## 1. Basic rule: Art. 48 of Protocol I

[CIHL, Rule 7]

**Quotation 1**

Article 48: Basic rule

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

[**Source**: Protocol I]

**Quotation 2**

Considering: [...]

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
That for this purpose it is sufficient to disable the greatest possible number of men. [...]

[**Source**: Declaration Renouncing the Use, in Time of War, of certain Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, November 29/December 11, 1868, paras 2-3 of the Preamble; original text in French; English translation in Parliamentary Papers, vol. LXIV, 1869, p. 659; reprinted from Schindler, D. & Toman, J. (eds), The Laws of Armed Conflicts: A Collection of Conventions, Resolutions and Other Documents, 4th ed., Leiden, Boston, M. Nijhoff, 2004, p. 91; also available on http://www.icrc.org/ihl]

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## 2. Field of application

P I, Art. 49

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a. **acts of violence in defence and offence**

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b. **no matter where, including attacks on the party’s own territory under enemy control**

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c. **attacks from land, air or sea affecting the civilian population on land**

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## 3. Principles

a. **only military objectives may be attacked**
(*See infra*, 4.Definition of Military Objectives)

b. **even attacks directed at military objectives are prohibited if the expected incidental effects on the civilian population are excessive**

(*See infra*, Conduct of Hostilities, 6.Prohibited Attacks, c.Indiscriminate Attacks, dd)Principle of Proportionnality)

c. **even when an attack directed at a military objective is not expected to have excessive effects on the civilian population, all feasible precautionary measures must be taken to minimize those effects**

(*See infra*, 10.Precautionary measures in attack)

## 4. Definition of military objectives

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

**Introductory text**

When the focus of the law on the conduct of hostilities shifted from the prohibition to attack undefended towns and villages [1] to the rule that only military objectives may be attacked, the definition of military

objectives became crucial. The principle of distinction is practically worthless unless at least one of the categories between which the attacker has to distinguish is defined. From the point of view of the philosophy of International Humanitarian Law (IHL), it would have been more satisfactory to define civilian objects. However, because objects become military objectives according to their use by the enemy or potential use by the attacker rather than because of their intrinsic character, it was military objectives that were defined. Indeed, all objects other than those benefiting from special protection [2] can become military objectives. By the same token, it has not been possible to draw up an exhaustive list of military objectives, although such a list would have greatly simplified practical implementation. Most definitions are therefore abstract but provide a list of examples. Protocol I chooses to illustrate its definition with an open-ended list of examples of civilian objects which are presumed not to be military objectives. [3]

Under the definition provided in Article 52(2) of Protocol I, an object [4] must cumulatively [5] meet two criteria to be a military objective.

First, the object, by its “nature, location, purpose or use”, has to contribute effectively to the military action of the enemy. [6] “Nature” refers to the object’s intrinsic character. “Location” admits that an object may be a military objective simply because it is situated in an area that is a legitimate target. Some States have clearly stated that their understanding of the word is that a specific area of land may be a military objective if its total or partial destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage. “Purpose” refers to the enemy’s intended future use, based on reasonable belief. “Use” refers to the current function of the object. For example, it is generally agreed that weapons factories and even extraction industries providing raw materials for such factories are military objectives, because they serve the military, albeit indirectly.

Second, the object’s destruction, capture or neutralization has to offer a definite military advantage for the attacking side. [7] According to declarations of understanding made by some States, the military advantage anticipated from an attack refers to the advantage anticipated from the attack considered as a whole, not just from isolated or particular parts of the attack. A direct connection with specific combat operations is not considered to be necessary. An attack as a whole must, however, be a finite event, not to be confused with the entire war.

What counts is that the action and the advantage have to be “military”; the political aim of victory may be achieved through violence only by using violence against military objectives, i.e., by weakening the military potential of the enemy. [8] By characterizing the contribution as “effective” and the advantage as “definite”, the drafters tried to avoid too broad an interpretation of what constitutes a military objective. However, the exact practical implications of those terms are subject to controversy. Both criteria must be fulfilled “in the circumstances ruling at the time”. Without this limitation to the actual situation, the principle of distinction would be void, as every object could in abstracto, in the wake of possible future developments, e.g., if used by enemy troops, become a military objective.

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## 5. Definition of the civilian population

P I, Art. 50

**Introductory text**

The principle of distinction can only be respected if not only the permissible objectives but also the persons who may be attacked are defined. As combatants are characterized by a certain uniformity and civilians by their great variety, [9] Art. 50(1) of Protocol I logically defines civilians by excluding them from the corollary category of combatants: everyone who is not a combatant is a civilian benefiting from the protection provided for by the law on the conduct of hostilities. [10] As will be seen below, civilians only lose their protection from attack and the effects of the hostilities if and for such time as they directly participate in hostilities. [11] The complementarity of the two categories, civilians and combatants, is very important in rendering IHL complete and effective, and thereby ensuring no one may fight but not be fought, or be attacked but not defend himself/herself – a privilege and a sanction which would never be respected and would undermine the whole fabric of IHL in a given conflict.

Recently, some scholars and governments have argued that persons belonging to an armed group failing to fulfil the collective requirements for combatant status (e.g., by not distinguishing themselves from the civilian population or because they do not belong to a party to the international armed conflict) may nevertheless be attacked like combatants and not only, like civilians, when and for such time as they directly participate in hostilities. This argument, which could be invoked to justify acts that would otherwise qualify as extra-judicial executions, is, at a minimum, incompatible with the wording of Art. 50(1) of Protocol I. Because of the difficulties in identifying such persons in the conduct of hostilities, it also puts other civilians at risk.

Thus, under this definition there is no category of “quasi-combatants”, i.e. civilians contributing so fundamentally to the war effort (e.g. workers in ammunition factories) that they lose their civilian status although not directly participating in hostilities. Indeed, in IHL there can logically be no such category. If the civilian population is to be protected, only one distinction is practicable: the distinction between those who (may) directly participate in hostilities, on the one hand, and all others, who do not, may not and cannot militarily hinder the enemy from obtaining control over their country by means of a complete military occupation, no matter what their contribution to the war effort may be otherwise, on the other.

To allow attacks on persons other than combatants would also violate the principle of necessity, because victory can be achieved by overcoming only the combatants of a country – however efficient its armament industry and however genial its politicians may be. All this obviously does not preclude military objectives, such as armament factories, from being attacked; subject to the principle of proportionality – the attack on a military objective does not become unlawful because of the risk that a civilian who works or is otherwise present in it may come to harm during the course of the attack.

If one person so defined is a civilian, any number of such persons constitute the civilian population. [12] According to proportionality as a general principle of law, the presence of individual non-civilians among a great number of civilians does not deprive the latter of the character of a civilian population, [13] nor does it mean that the non-civilians may not be individually attacked provided that the necessary precautions are taken.

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a. **definition of a civilian**
   [See also infra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities,7) Loss of protection: The concept of direct participation in hostilities and its consequences]
   P I, Art. 50(1) [CIHL, Rule 5]

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a. **the presence of a combatant or a military objective among the civilian population**
P I, Art. 50(3)

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## 6. Prohibited attacks

(*See also infra*, Conduct of Hostilities, III. Means and Methods of Warfare)

**Introductory text**

Under IHL, lawful methods of warfare are not unlimited. In particular, IHL prohibits certain kinds of attacks. The civilian population may never be attacked; this prohibition includes attacks the purpose of which is to terrorize the population. [14] IHL also proscribes attacks directed at civilian objects. [15] Even those attacks directed at a legitimate military objective [16] are regulated by IHL; such attacks must not be indiscriminate, i.e. the weapons utilized must be capable of being directed at the specific military objective and the means used must be in proportion to the military necessity. [17] The principle of proportionality prohibits attacks, even when directed at a military objective, if they “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”. [18] This principle is the inescapable link between the principles of military necessity and humanity, where they pull in opposite directions. Although military advantage, which may be taken into account, is qualified, the principle of proportionality remains very difficult

to apply, and any attempt to weigh the expected military advantage against the anticipated civilian losses or damage to civilian objects is inevitably dependent on subjective value judgements, especially when both probabilities, i.e. gaining the advantage and affecting civilians, can be gauged with less than 100% accuracy.

In addition, if a military objective is targeted and the principle of proportionality is respected, but civilians or civilian objects may nevertheless be affected by the attack, precautionary measures must be taken. [19] Finally, reprisals against civilians or civilian objects are prohibited under IHL. [20]

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a. **attacks against the civilian population as such (including those intended to spread terror)**
(*See also supra,* Fundamentals, B. International Humanitarian Law as a Branch of Public International Law, III. International Humanitarian Law: a branch of international law governing the conduct of States

and individuals, 1) Situations of application, C. Other situations, d) acts of terrorism?)
P I, Art. 51(2) [CIHL, Rule 2]

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- ICTY, The Prosecutor v. Strugar [Part A.; Part B., paras 220-222 and 280-288; Part C, paras 270-272]
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a. **attacks against civilian objects**
P I, Art. 52(1) [CIHL, Rule 10]

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a. **indiscriminate attacks**
[CIHL, Rule 11]

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

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

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

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cc) treating different military objectives as a single military objective
P I, Art. 51(5)(a) [CIHL, Rule 13]

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dd) principle of proportionality
(*See also supra*, Fundamentals of IHL, D. Sources of Contemporary International Humanitarian Law, III. Fundamental principles of International Humanitarian Law, 2) Principles of International Humanitarian Law, c) proportionality)
P I, Art. 51(5)(b) [CIHL, Rule 14]

- also covers reasonably foreseeable incidental effects

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a. **attacks against the civilian population (or civilian objects) by way of reprisals**

(*See infra* State Responsibility 2.Consequences of Violations c.Applicability of The General Rules on State Responsibility ee)Admissibility of Reprisals)

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

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## 7. Loss of protection: The concept of direct participation in hostilities and its consequences

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

## Introductory text

The concept of “direct participation in hostilities” is a cornerstone of the IHL on the conduct of hostilities, and its practical importance has grown as armed conflicts have become “civilianized”. [21] Both in international

and non-international armed conflicts, civilians lose their protection against attacks (and their protection against the incidental effects of attacks, afforded to the civilian population as a whole) if and for such time as they participate directly in hostilities. [22] Neither treaty nor customary law defines this concept. After a broad consultation of experts revealed an absence of agreement on certain crucial points, the ICRC tried to clarify several concepts in an “Interpretive Guidance”: [23] who is covered as a “civilian” by the rule prohibiting attacks except in case of direct participation; what conduct amounts to direct participation; the duration of the loss of protection; the precautions to be taken and the types of protection afforded in case of doubt; the rules governing attacks against persons who take direct part in hostilities; and the consequences of regaining protection. The first issue is probably the most controversial.

**In international armed conflicts**, treaty law is clear that everyone who is not a combatant is a civilian benefiting from protection against attacks except if he or she takes a direct part in hostilities. Members of the armed forces of a party to the international armed conflict who lost their combatant status (e.g., because they did not distinguish themselves from the civilian population) may also reasonably be excluded. Some scholars also exclude members of armed groups that do not belong to a party to the international armed conflict. In our view, such “fighters” are either civilians or covered by the rule applicable to a parallel non-international armed conflict, discussed below.

**In non-international armed conflicts**, the absence of any mention of “combatants” might lead one to deduce that everyone is a civilian and that no one may be attacked unless they directly participate in hostilities. However, this would render the principle of distinction meaningless and impossible to apply. In addition, common Article 3 confers protection on “persons taking no active part in hostilities, including members of armed forces who have laid down their arms or are otherwise *hors de combat*”. The latter part of the phrase suggests that for members of armed forces and groups, it is not sufficient to no longer take active part in hostilities to be immune from attack. They must take additional steps and actively disengage. On a more practical level, to prohibit government forces from attacking clearly identified fighters unless (and only while!) the latter engage in combat against government forces is militarily unrealistic, as it would oblige them to react rather than to prevent, while facilitating hit-and-run operations by the rebel group. These arguments may explain why the Commentary on Protocol II considers that “[t]hose belonging to armed forces or armed groups may be attacked at any time.” [24]

There are two ways of conceptualizing this conclusion. First, “direct participation in hostilities” can be understood to encompass the simple fact of remaining a member of the group or of keeping a fighting function in such a group. Second, members of armed groups, or, as the ICRC Interpretive Guidance suggests, those members of an armed group whose specific function is continuously to commit acts that constitute direct participation in hostilities, may not be considered “civilians” (and therefore do not benefit from the rules that protect them against attacks unless and for such time as they directly participate in hostilities). The latter suggestion ensures that membership of the armed group is distinguished from simple affiliation with a party to the conflict for which the group is fighting – in other words, membership of the

political, educational or humanitarian wing of a rebel movement. In every case, however, in practice the difficult question arises as to how government forces are to determine (fighting) membership in an armed group while the individual in question does not commit hostile acts.

As for the question about what conduct amounts to “direct participation”, the ICRC Interpretive Guidance concludes, based on a broad agreement among experts, that the following criteria must be cumulatively met in order to classify a specific act as direct participation in hostilities:

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

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## 8. The civilian population is not to be used to shield military objectives

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

**Introductory text**

IHL prohibits attacks against the civilian population and civilian objects. [25] IHL also prohibits abuse of this

prohibition: civilians, the civilian population and certain specially protected objects may not be used to shield a military objective from attack. [26] The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions [27] is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender's specific intention to obtain "protection" for its military forces and objectives, or simply of a lack of care for the civilian population.

If the defender violates the prohibition to use human shields, the "shielded" military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects. [28] It is generally agreed that involuntary human shields nevertheless remain civilians. Care must therefore be taken to spare them when attacking a legitimate objective. [29] In an extreme case, if the anticipated incidental loss of life or injury among involuntary human shields is excessive in relation to the concrete and direct military advantage expected from attacking the military objective or combatants, an attack directed against the latter may become unlawful. [30] The status of voluntary human shields is more controversial. Some consider that acting as voluntary human shields constitutes direct participation in hostilities, which would cause the persons concerned to lose protection against the effects of hostilities while they act as human shields. Others object, first, that in order to classify an act as direct participation, the act must provoke, through a physical chain of causality, harm to the enemy or its military operations. Human shields are a moral and legal rather than physical means to an end: to hinder the enemy from attacking. Second, the theory considering voluntary human shields as civilians directly participating in hostilities is self-defeating. If it were correct, the presence of human shields would not have any legal impact on the ability of the enemy to attack the shielded objective – but an act which cannot have any impact whatsoever upon the enemy cannot possibly be classified as direct participation in hostilities. Third, the distinction between voluntary and involuntary human shields refers to a factor, i.e. the voluntary involvement of the target, which is very important in criminal law and, to a lesser extent, in law enforcement operations, but is completely irrelevant in IHL. A soldier of a country with universal compulsory military service is just as much (and for just as long) a legitimate target as a soldier who is a member of an all-volunteer army. Fourth, the distinction is not practicable. How can a pilot or soldier launching a missile know whether the civilians he observes around a military objective are there voluntarily or involuntarily? What counts as a voluntary presence? Fifth, in a self-applied system like that of IHL during armed conflict, the suggested loss of protection against attacks may prompt an attacker to invoke the prohibition to use human shields abusively, as an alibi, as a mitigating circumstance or "to ease his conscience".

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## 9. Protected objects

## Introductory text

In order to further safeguard the civilian population during armed conflicts, IHL protects specific objects from attack. It prohibits attacks against civilian objects, which are all objects not defined as military objectives; [31] thus, a civilian object is one failing to contribute to military action because of, for example, its location or function, and because its destruction would provide no military advantage.

In addition, IHL grants some objects, most of which are civilian objects anyway, special protection. In addition to the general protection afforded to them as civilian objects, special protection means that these objects may not be used for military purposes by those who control them and should therefore never become military objectives under the two-pronged test of the definition of military objectives. Second, even if they meet the test and are effectively used for military purposes, specially protected objects may only be attacked under restricted circumstances and following additional precautionary measures. For each category, the specific rules on these issues are different.

Specially protected objects include: cultural objects; [32]

Conventions on the Protection of Cultural Property
]; P I, Arts 53 and 85(4); P II, Art. 16; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, March 26, 1999 [See

Conventions on the Protection of Cultural Property
]. *See also infra*Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 9) Protected objects, b. specially protected objects, aa) cultural objects objects indispensable for the survival of the civilian population, such as water; [33] works and installations containing dangerous forces (e.g., dams, dykes and nuclear electrical power generating stations). Attacks against military objectives located in the vicinity of such installations are also prohibited when they would cause sufficient damage to endanger the civilian population. [34] The special protection of these works and installations ceases only under limited circumstances. [35] The environment (made up of civilian objects) also benefits from special protection. Means or methods of warfare with the potential to cause widespread, long-term, and severe damage to the environment are prohibited. [36] Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited. [37]

a. **civilian objects**
P I, Art. 52(1) [CIHL, Rule 9]

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a. **specially protected objects**

aa) cultural objects
P I, Art. 53 [CIHL, Rules 38-40]

"Total wars", inter-religious strife and inter-ethnic conflicts are increasingly marked by the destruction of civilian objects, in particular cultural objects. Experience unfortunately shows that, far from being accidental or mere collateral damage, such destruction is very often clearly deliberate and part of the war effort.

The first attempts to protect cultural objects against the effects of war date back to the adoption of Hague Convention IV of 1907. This protection has been considerably developed in the Hague Convention for the

Protection of Cultural Property in the event of Armed Conflict and its 1954 and 1999 Protocols, in the 1949 Geneva Conventions and in Additional Protocols I and II of 1977.
Cultural objects are defined as “movable or immovable property of great importance to the cultural heritage of every people” (which include in particular monuments of architecture, archaeological sites, works of art, scientific collections and collections of books or archives) and as “buildings whose main and effective purpose is to preserve or exhibit movable cultural property” (such as museums, libraries or refuges intended to shelter cultural property).

On the basis of provisions applicable in both international and non-international armed conflicts, States parties are required to safeguard and respect cultural objects. Safeguarding comprises all the preventive measures to be taken in peacetime (which include the obligations to list, signal and mark the cultural objects with a distinctive emblem). Respect for cultural objects implies refraining from attacking them and prohibiting any form of pillage or destruction.

Considered as civilian objects under special protection, cultural objects must not be attacked and may not be used for military purposes. Even if they are, they do not automatically become legitimate military objectives. Their immunity may only be waived in cases of “imperative military necessity”.

In spite of the many detailed provisions designed to guarantee their protection, cultural objects are still often collateral victims of modern conflicts. In most cases, their irreparable destruction often constitutes a serious obstacle to the restoration of normal relations between former belligerents.

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bb) objects indispensable to the survival of the civilian population

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

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cc) works and installations containing dangerous forces

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

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dd) medical equipment

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a. **the natural environment**

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

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## 10. Precautionary measures in attack

## Introductory text

Under IHL only military objectives may be attacked. [38] Even such attacks, however, are not without restrictions. An attack must be cancelled if it becomes apparent that it is of a type that is prohibited. [39] If circumstances permit, an advance warning must be given for those attacks which may affect the civilian population. [40] In determining the objective of an attack, and when a choice is possible, the one causing least danger to the civilian population must be selected. [41] Furthermore, IHL requires those planning and deciding on an attack to take precautionary measures, [42] including refraining from attacking when incidental loss of civilian life or destruction of civilian objects outweighs the military advantage of the attack. [43] The meaning of these obligations in practice remains controversial in many cases, mainly with regard to which precautions are "feasible". Military and humanitarian considerations may influence the feasibility of such precautions: the importance and the urgency of destroying a target; the range, accuracy and effects radius of available weapons; the conditions affecting the accuracy of targeting; the proximity of civilians and civilian objects; the possible release of hazardous substances; the protection of the party's own forces (and the proportionality between the additional protection for those forces and the additional risks for civilians and civilian objects when a certain means or method is chosen); the availability and feasibility of alternatives; the

necessity to keep certain weapons available for future attacks on targets which are militarily more important or more risky for the civilian population.

## CASES AND DOCUMENTS

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- ICRC, The Challenges of Contemporary Armed Conflicts
- Israel, Operation Cast Lead [Part I, paras 132-133, Part II, para. 529]
- Israel, Human Rights Committee's Report on Beit Hanoun [Paras 26 and 38-42]
- Israel, Report of the Winograd Commission [Para. 26]
- Case Study, Armed Conflicts in the former Yugoslavia [27]
- Human Rights Committee, Guerrero v. Colombia
- Afghanistan, Goatherd Saved from Attack
- ECHR, Isayeva v. Russia
- ECHR, Khatsiyeva v. Russia [Paras 21 and 139]
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 18-25]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 66-67, 74-82]
- The armed conflict in Syria
- Israel, Blockade of Gaza and the Flotilla Incident
- Libya, NATO Intervention 2011
- Libya, Report of the Office of the UN High Commissioner for Human Rights (2014/15)
- UN, Report of the Secretary-General for the World Humanitarian Summit
- United States, The US Plan to Mitigate Civilian Harm in Armed Conflicts

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QUÉGUINER Jean-François, “Precautions under the law governing the conduct of hostilities”, in *IRRC*, Vol. 88, No. 864, December 2006, pp. 793-821.

a. **an attack must be cancelled if it becomes apparent that it is a prohibited one**
P I, Art. 57(2)(b) [CIHL, Rule 19]

## CASES AND DOCUMENTS

- France, Accession to Protocol I (Part B., para. 16)
- Israel, Human Rights Committee’s Report on Beit Hanoun (Para. 26)
- Federal Republic of Yugoslavia, NATO Intervention (Part A., para. 6)
- Afghanistan, Attack on Kunduz Trauma Centre
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (Paras 155, 160, 178-180)

a. **advance warning must be given, unless circumstances do not permit**
P I, Art. 57(2)(c) [CIHL, Rule 20]

## CASES AND DOCUMENTS

- France, Accession to Protocol I [Part B., para. 16]
- Israel, Operation Cast Lead [Part I, paras 262-265, Part II, paras 499-536]
- Israel/Lebanon/Hezbollah, Conflict in 2006 (Part I, paras 149-158)
- Federal Republic of Yugoslavia, NATO Intervention (Part A., paras 18, 20, 22-25 and B., para. 77)
- Civil War in Nepal [Part II.]
- ECHR, Isayeva v. Russia (Paras 15, 25, 72, 164, 171, 187, 192-193)
- ECHR, Khatsiyeva v. Russia (Paras 21 and 139)
- Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)
- The Netherlands, Fighting in the Chora District (Afghanistan)

## SPECIFIC BIBLIOGRAPHY

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a. **when a choice is possible, the objective causing the least danger to the civilian population must be selected**

P I, Art. 57(3) [CIHL, Rule 21]

b. **additional obligations of those who plan or decide on an attack**
P I, Art. 57(2)(a) [CIHL, Rules 16 and 17]

## CASES AND DOCUMENTS

- Israel, The Rafah Case (Paras 54-58)
- United States/United Kingdom, Report on the Conduct of the Persian Gulf War
- United States/United Kingdom, Conduct of the 2003 War in Iraq
- Iraq, Use of Force by United States Forces in Occupied Iraq
- Federal Republic of Yugoslavia, NATO Intervention
- Afghanistan, Operation “Enduring Freedom” [Part B.]
- The Netherlands, Fighting in the Chora District (Afghanistan)

aa) verify that objectives are not illicit

## CASES AND DOCUMENTS

- United States/United Kingdom, Conduct of the 2003 War in Iraq
- ECHR, Khatsiyeva v. Russia [Paras 135-138]
- Afghanistan, Attack on Kunduz Trauma Centre
- The Netherlands, Fighting in the Chora District (Afghanistan)

bb) choose means and methods avoiding or minimizing civilian losses

## CASES AND DOCUMENTS

- United States/United Kingdom, Report on the Conduct of the Persian Gulf War
- United States/United Kingdom, Conduct of the 2003 War in Iraq
- Afghanistan, Goatherd Saved from Attack
- Afghanistan, Assessment of ISAF Strategy
- Afghanistan, Code of Conduct of the Mujahideen [Arts 41(C.) and 46]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 74-82]
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (Paras 257-258)

cc) refrain from attacks causing disproportionate civilian losses

## CASES AND DOCUMENTS

- United States/United Kingdom, Conduct of the 2003 War in Iraq
- Afghanistan, Drug Dealers as Military Targets
- Afghanistan, Goatherd Saved from Attack
- Afghanistan, Assessment of ISAF Strategy
- Civil War in Nepal [Part II.]

## 11. Precautionary measures against the effects of attacks

GC IV, Arts 18(5); P I, Art. 58 [CIHL, Rules 22-24]

**Introductory text**

Contrary to Art. 57 of Protocol I, [44] which lays down rules for the conduct to be observed in attacks on the territory under the control of the enemy, Art. 58 of Protocol I relates to specific measures which every Power must take in its own territory in favour of its nationals, or in territory under its control. These precautionary measures against the effects of attacks (which are often referred to as “Conduct of Defence” [45]) include three specific obligations that Parties to a conflict shall discharge “to the maximum extent feasible”: [46]

1. They must “endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objectives”. [47] In most cases, only specific categories of the population (i.e. children, the sick or women) are evacuated; sometimes the entire population is evacuated. It should be underlined that, when carrying out such measures, occupying powers remain bound by the strict limitations spelled out in Art. 49 of Convention IV.
2. They must “avoid locating military objectives within or near densely populated areas”. [48] This obligation, which covers “both permanent and mobile objectives [...] should already be taken into consideration in peacetime”. [49]
3. They must “take the other necessary precautions to protect the civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations”. [50] Practically speaking, the “other measures” are chiefly building shelters to provide adequate protection against the effect of hostilities for the civilian population and the training of efficient civil defence services.

The wording, however, clearly indicates that these obligations are weaker than those of an attacker. They have to be taken only “to the maximum extent possible,” and the defender only has to “endeavour to remove” the civilian population and “avoid” locating military objectives nearby. While responsibility for the protection of the civilian population against the effects of hostilities is shouldered by both the attacker and the defender, its weight is not equally distributed.

## CASES AND DOCUMENTS

- UN, Secretary-General's Reports on the Protection of Civilians in Armed Conflict
- Israel, Operation Cast Lead [Part I, paras 151-169, Part II, paras 439-498]
- Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law [Parts C. and D.]
- United States/United Kingdom, Report on the Conduct of the Persian Gulf War
- Civil War in Nepal [Part II.]
- ECHR, Isayeva v. Russia [Paras 15, 23, 25-26, 69-70]
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 18-25]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 79-82]
- The armed conflict in Syria
- Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 218]
- Mexico, Recapture of Ovidio Guzmán, One of the Leaders of the Sinaloa Cartel

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## 12. Presumptions

P I, Arts 50(1) and 52(3)

## CASES AND DOCUMENTS

- France, Accession to Protocol I (Part B., para. 9)
- Belgium, Public Prosecutor v. G.W.
- United States/United Kingdom, Report on the Conduct of the Persian Gulf War
- Human Rights Committee, Guerrero v. Colombia

- Afghanistan, Drug Dealers as Legitimate Targets
- ECHR, Khatsiyeva v. Russia [Paras 21, 132-139]
- European Court of Human Rights, Kononov v. Latvia

## 13. Zones created to protect war victims against the effects of hostilities

GC I, Art. 23; GC IV, Arts 14 and 15; P I, Arts 59 and 60 [CIHL, Rules 35-37]

### Introductory text

While IHL mainly tries to protect civilians and other categories of protected persons by obliging combatants to identify positively military objectives and to only attack them, respecting civilians wherever they happen to be, it also foresees different types of zones aimed at separating civilians from military objectives. The following table summarizes the different types of protected zones. They have in common the purpose of protecting war victims from the effects of hostilities (but not from falling under the control of the enemy) by assuring enemy forces that no military objectives exist in a defined area where war victims are concentrated. Thus, if the enemy respects IHL, the war victims run no risk of being harmed by the effects of hostilities. The risk with such zones is that they presuppose the willingness of the enemy to respect IHL. Hence, they are pointless against an enemy determined to violate IHL. On the contrary, such zones may then lead to the displacement of civilians and help the enemy target and abuse civilians by concentrating them in a confined location. Established under jus in bello, such zones have to be distinguished from the safe areas, humanitarian corridors or safe havens recently created under Chapter VII of the UN Charter, i.e. under jus ad bellum, and meant to prevent certain areas and the war victims in them from falling into enemy hands.

**Protected Zones According to International Humanitarian Law**

| Armed Conflict | International | | | | | Non International |
|---|---|---|---|---|---|---|
| Legal Basis | GC I, Article 23<br>GC I, Annex I | GC IV, Article 14<br>GC IV, Annex I | GC IV, Article 15 | P I, Article 59 | P I, Article 60 | GC I-IV, common Article 3(3) |
| Terminology | Hospital zones and localities | Hospital and safety zones and localities | Neutralized zones | Non-defended localities | Demilitarized zones | "Neutralized zones" |
| Categories of Protected Persons | Sick, wounded, and related personnel | Specific categories of civilians: wounded, sick, aged persons, children under 15, expectant mothers and mothers of children under 7 | All civilians who do not take part in the hostilities and wounded and sick combatants | Civilian population (in its place of residence) | Civilian population (in its place of residence) | Civilian population |
| Modality of Creation | Written agreement between the Parties or unilateral declaration with recognition of the opposing party | Written agreement between the Parties or unilateral declaration with recognition of the opposing party | Written agreement between the Parties | Notification to the opposing Party (or *ad hoc* agreement if not all conditions satisfied) | Express agreement | Agreement between the Parties<br>Practice of the ICRC |
| Characteristics:<br>- location<br>- time-frame | Distant from the front<br>Durable | Distant from the front<br>Durable | Inside the combat zone<br>Provisional | Near or inside the combat zone; Open to occupation; Military personnel and equipment evacuated | Prohibition to extend military operations to such zones | By analogy with the principles of GC IV, Article 15 |
| Markings | Red cross/crescent | Oblique red bands on white ground | To be defined | To be agreed upon by the Parties | To be agreed upon by the Parties | Red cross emblem (if under authority of the ICRC) |

## CASES AND DOCUMENTS

- Sri Lanka, Jaffna Hospital Zone
- Sri Lanka, Conflict in the Vanni [Paras 12-16]
- Case Study, Armed Conflicts in the former Yugoslavia [14]
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- Netherlands, Responsibility of International Organizations [Paras 2.4 and 2.6]
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- PATEL Bimal N., "Protection zones in international humanitarian law", in *The Indian Journal of International Law*, Vol. 39/4, 1999, pp. 689-702.


**Further reading:**


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a. **open cities**

## SPECIFIC BIBLIOGRAPHY

**Suggested reading:**


ELKIN G., "Application of the 'Open City' Concept to Rome 19421944", in Air Force Law Review, 1980-1981, pp. 188-200.

## 14. Civil defence

P I, Arts 61-67

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JAKOVLJEVIC Bosko, New International Status of Civil Defence, Geneva/The Hague, Henry-Dunant Institute/M. Nijhoff, 1982, 142 pp.

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SCHULTZ E., Civil Defence in International Law, Copenhagen, Danish National Civil Defence and Emergency Planning Directorate, 1977, 59 pp.

**Footnotes**

- [1] See HR, Art. 25
- [2] Those specially protected objects, e.g., dams, dikes, and hospitals, may not be used by those who control them for military action and should therefore never become military objectives. If they are however used for military purposes, even they can under restricted circumstances become military objectives. (See, e.g.,P I, Art. 56(2); GC IV, Art. 19)
- [3] See P I, Art. 52(3)
- [4] Indeed, only a material object can be a military objective under IHL, as immaterial objectives can only be achieved, not attacked. It is the basic idea of IHL that political objectives may be achieved by a belligerent with military force only by directing the latter against material military objectives. As for computer network attacks, they can only be considered as “attacks” if they have material consequences.
- [5] In practice, however, one cannot imagine that the destruction, capture, or neutralization of an object contributing to the military action of one side would not be militarily advantageous for the enemy; it is just as difficult to imagine how the destruction, capture, or neutralization of an object could be a military advantage for one side if that same object did not somehow contribute to the military action of the enemy.
- [6] One cannot imagine how it could do this other than by its “nature, location, purpose or use.” Those elements foreseen in Art. 52(2) only clarify that not only objects of a military nature are military objectives.
- [7] Characterizing the contribution as “effective” and the advantage as “definite” – as Art. 52(2) does – avoids that everything can be considered as a military objective, taking into account indirect contributions and possible advantages; thus, the limitation to “military” objectives could be too easily undermined.
- [8] If force could be used to achieve the political aim by directing it at any advantage, not just military

objectives, even the civilian population as such would be attacked, as they might well influence the enemy government. Then, however, there would be no more IHL, merely considerations of effectiveness.

- [9] This variety justifies the presumption of civilian status provided for in P I, Art. 50(1).
- [10] The definition of civilians benefiting from protected civilian status under the Convention IV is more restrictive in that it excludes those in the power of their own side, but it is also complementary to that of the combatant. (See GC IV, Art. 4)
- [11] See P I, Art. 51(3) and *infra*, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 7) Loss of protection: The concept of direct participation in hostilities and its consequences
- [12] See P I, Art. 50(2)
- [13] See P I, Art. 50(3)
- [14] See P I, Arts 48, 51(2) and 85(3); P II, Art. 13
- [15] See P I, Arts 52-56 and 85(3)
- [16] See P I, Art. 52(2)
- [17] See HR, Art. 22; P I, Art. 51(4) and (5)
- [18] See PI, Art. 51(5)(b)
- [19] See HR, Arts 26 and 27; GC IV, Art. 19 (concerning hospitals); P I, Art. 57(2)
- [20] See P I, Arts 51(6), 52(1), 53(c), 54(4), 55(2) and 56(4)
- [21] *See supra*
- [22] See P I, Art. 51(3); P II, Art. 13(3)
- [23] See ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
- [24] Y. Sandoz et al. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, ICRC, Geneva, 1987, para. 4789
- [25] See P I, Art. 51(2), 52-56, Art. 85(3); P II, Art. 13
- [26] See GC IV, Art. 28; P I, Art. 51(7)
- [27] See P I, Art. 58 and *infra*Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 11) Precautionary measures against the effects of attacks
- [28] See P I, Art. 52
- [29] See P I, Arts 51(8) and 57
- [30] See P I, Art. 51(5)(b)
- [31] See HR, Arts 25 and 27; P I, Arts 48, 52, and 85(3)
- [32] See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14 1954 [See
- [33] See P I, Art. 54; P II, Art. 14
- [34] See P I, Art. 56; P II, Art. 15
- [35] See P I, Art. 56(2)
- [36] See P I, Art. 55; see also Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques (ENMOD)
- [37] See GC I, Arts 19(1) and 36(1); GC II, Arts 22, 24-27, and 39(1); GC IV, Arts 18-19 and 21-22, P I, Arts 20 and 21-31; P II, Art. 11

- [38] See P I, Art. 52(2)
- [39] See P I, Art. 57(2)(b)
- [40] See HR, Art. 26; GC IV, Art. 19 (concerning hospitals); P I, Art. 57(2)(c)
- [41] See P I, Art. 57(3)
- [42] See P I, Art. 57(2)(a)
- [43] See P I, Art. 57(2)(a)(iii)
- [44] *See supra,*Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 10) Precautionary measures in attack
- [45] See Mulinen, F de, Handbook on the Law of War for Armed Forces, ICRC, 1987, p. 104
- [46] See P I, Art. 58(1)
- [47] See P I, Art. 58(a)
- [48] See P I, Art. 58(b)
- [49] See Sandoz, Y, Swinarski, C. & Zimmermann, B. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva, ICRC, M. Nijhoff, 1987, Art. 58, para. 2251
- [50] See P I, Art. 58(c)

# III. Means and methods of warfare

(*See also supra* Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 6) Prohibited attacks and 10) Precautionary measures in attack)

HR, Arts 22-34

**Introductory text**

[We are deeply grateful to Dr. Théo Boutruche, IHL consultant, who wrote his PhD thesis (*L'interdiction des maux superflus : contribution à l'étude des principes et règles relatifs aux moyens et méthodes de guerre en droit international humanitaire*, Graduate Institute of International and Development Studies, Geneva, 2008) on the concept of superfluous injury or unnecessary suffering, for this contribution.]

Under IHL the term "rules on means and methods of warfare" refers to a complex and large set of norms that are relatively fragmented and not systematically identified as such. While the term "means of warfare" commonly relates to the regulation of weapons, the term "methods" covers a broader array of rules depending on the definition considered. Traditionally, with regard to weapons, "means" encompasses weapons, weapons systems or platforms employed for the purposes of attack, whereas "methods" designates the way or manner in which the weapons are used. However, the concept of method of warfare also comprises any specific, tactical or strategic, ways of conducting hostilities that are not particularly related to weapons and that are intended to overwhelm and weaken the adversary, such as bombing, as well as the specific tactics used for attack, such as high altitude bombing. The term "methods" is rather new in treaty law. [51]

State practice offers examples of these two understandings of “methods”. The IHL governing means and methods of warfare contains two types of norms: general principles banning certain effects, and specific rules addressing particular weapons or methods. The distinction between “means” and “methods” is also related to the way IHL regulates the use of weapons. This branch of law either prohibits the use of certain weapons in any circumstances due to their inherent characteristics or it merely restricts and limits certain ways of using all weapons or certain specific weapons. For example, the prohibition of indiscriminate effects may be relevant in relation to the very nature of the effects of a weapon and at the same time for any type of weapon that can potentially be used indiscriminately.

Historically, prohibitions and limitations on means and methods of warfare were prompted by the concern to protect combatants, which saw the emergence of the principle prohibiting weapons causing superfluous injury or unnecessary suffering [52] and the ban on specific weapons, such as explosive projectiles weighing less than 400 grams [53] or dum-dum bullets [54], as well as particular methods like killing or wounding treacherously. [55] Protocol I laid down elaborate principles and rules governing means and methods of warfare aimed at protecting the civilian population and objects, such as the prohibition of indiscriminate attacks, including those which employ a method or means of combat which cannot be directed at a specific military objective, [56] or those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol. [57] While most of the treaty norms pertaining to means and methods of warfare apply only in times of international armed conflict, international customary law applicable to non-international armed conflicts progressively evolved to contain the same rules in this regard. [58]

The overarching principle of IHL governing means and methods of warfare stipulates that the right of the parties to a conflict to choose means and methods of warfare is not unlimited. [59] The principles prohibiting the means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering [60] and the principle prohibiting means and methods of warfare causing indiscriminate effects [61] are derived from this. Protocol I does not list the latter principle among the basic rules under the section on means and methods of warfare, but in the section on the protection of the civilian population against effects of hostilities. Indeed, this principle protects only civilians. Protocol I further prohibits means or methods of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment. [62]
The relationship between the general principles and the specific rules on weapons remains a delicate issue, notably concerning the extent to which the latter merely crystallize the former. For example, the prohibition to cause superfluous injury or unnecessary suffering is considered by some to outlaw in and of itself certain weapons in the absence of a particular rule, while others assert that it must be translated by States into specific prohibitions before it can produce proper legal effects. The latter approach is questionable, however, as it appears to confuse the normative value of the principle per se with the issue of its interpretation and application to specific weapons. First, it is well recognized that a weapon not covered by a specific norm remains regulated by the general principles. Second, States do rely on the principles themselves, including to prohibit methods of warfare.

Furthermore, the States parties to Protocol I are under an obligation to assess the legality of new weapons, means or methods of warfare, including in the light of the general principles. [63] General principles hence are legal rules with a normative value of their own.

Outside the Geneva Conventions and Protocols, IHL contains a series of prohibitions and limitations of use for specific weapons. Certain weapons are forbidden in all circumstances because of their characteristics, [64] while others are only governed by restrictions in use. [65] As several treaty regimes are in place, a weapon can be both prohibited and its use limited. [66]

Specific prohibited methods of warfare not particularly related to weapons primarily comprise the denial of quarter [67] and perfidy. [68] There is nevertheless no agreed list of specific prohibited methods, which may vary in State practice and according to scholars. Some include as specific prohibited methods of warfare those aimed at spreading terror, reprisals, the use of human shields, and the manipulation of the environment. Conversely, others treat those methods as distinct prohibitions, separate from the issue of methods.

Besides norms on means and methods of warfare per se, IHL also contains additional obligations with regard to the choice of means and methods when planning and deciding on an attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. [69] Those precautionary measures in attack, while being designed with reference to the protection of civilians and civilian objects, might be considered relevant for other types of means and methods of warfare to ensure respect for all relevant norms of IHL.

The exact content and scope of the term “method of warfare” within the principles and rules of IHL that refer to it remain unclear. Indeed, although the prohibition of superfluous injury or unnecessary suffering traditionally concerns the nature of means of warfare, it also covers the way to use weapons as well as specific methods with particular features. Contemporary challenges in the field of the regulation of means and methods of warfare include the issue of the interaction between the general principles in the case of a means of warfare that allows for better compliance with IHL rules protecting civilians but conversely may cause superfluous injury or unnecessary suffering to combatants.

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

[CIHL, Rule 70]

**Quotation**

Part III: Methods and means of warfare [...]
Section I: Methods and means of warfare
Article 35 – Basic rules

1. In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
2. It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. [...]

[**Source**: Protocol I]

## CASES AND DOCUMENTS

- ICJ, Nuclear Weapons Advisory Opinion [Para. 78]

- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Paras 4 and 8]
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- Afghanistan, Code of Conduct of the Mujahideen [Art.41]
- ECHR, Isayeva v. Russia [Paras 19, 33, 165-167, 191]
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## 2. Prohibited or restricted use of weapons

**Introductory text**

Lowering the level of cruelty between combatants and protecting those hors de combat and the civilian population in a more effective manner requires the regulation and, ultimately, the prohibition of certain means of warfare. To this end, several provisions of IHL applicable to international armed conflicts limit the means of warfare, i.e. weapons. [70] These provisions aim, in particular, to prohibit weapons causing "superfluous injury or unnecessary suffering". In practice, the application of this basic rule is always a compromise between military necessity and humanity, as the principle of "superfluous injury or unnecessary suffering" has been interpreted as referring to harm that would not be justified by military utility, either because of the lack of even the slightest utility or because utility is considerably outweighed by the suffering caused. Although this

standard may seem too vague to be effective, it has nevertheless led to efforts to prohibit and restrict certain conventional weapons [71] and weapons of mass destruction. [72] Although the Geneva Conventions and Additional Protocols limit means and methods of warfare (including those severely damaging the environment), [73] they neither prohibit nor restrict the use of any specific weapon; however, various other conventions do. [74] Recognizing that it is much easier to prohibit a weapon's use prior to its incorporation into a State's arsenal, Protocol I also places constraints on the development of new weapons. [75]

## CASES AND DOCUMENTS

- ICRC, Protection of civilians against digital threats
- Iran/Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- Case Study, Armed Conflicts in the former Yugoslavia [28]
- Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)
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**a. explosive bullets**

[CIHL, Rule 78]

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[CIHL, Rule 77]

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**c. certain conventional weapons**

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aa) mines

[CIHL, Rules 80-83]

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bb) incendiary weapons

[CIHL, Rules 84 and 85]

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[CIHL, Rule 79]

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dd) blinding weapons

[CIHL, Rule 86]

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ee) explosive remnants of war

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ff) cluster munitions

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gg) other weapons for which limitations are under discussion

– light weapons
– anti-vehicle mines
– fragmentation weapons

a. **chemical weapons**
[CIHL, Rules 74-76]

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

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f. **bacteriological and biological weapons**

[CIHL, Rule 73]

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a. **nuclear weapons**

**Quotation**

3. Mr. PAOLINI (France) made the following statement:

[...]

[A]lready in 1973, the French Government noted that the ICRC did not include any regulations on nuclear weapons in its drafts. In participating in the preparation of the additional Protocols, therefore, the French Government has taken into consideration only conflicts using conventional weapons. It accordingly wishes to stress that in its view the rules of the Protocols do not apply to the use of nuclear weapons.

[**Source**: Official Records of the Diplomatic Conference on the reaffirmation and development of International Humanitarian Law applicable in armed conflicts, Geneva (1974-1977), Federal Political Department, Bern, Vol. II, 1978, p. 193]

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- France, Accession to Protocol I [Part B., para. 2]
- United Kingdom, Interpreting the Act of Implementation
- ICRC, Bringing the era of nuclear weapons to an end
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 290, 292, 295-299]

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a. **"new means and methods"**

P I, Art. 36

As a measure of precaution, Art. 36 of Protocol I requires the States Parties to assess whether the use of any new weapon or of any new method of warfare that they develop or plan to acquire or deploy in operations is allowed by, and compatible with, international law.

The rapid evolution of new military technologies and the development of potentially devastating means and methods of warfare lends added resonance to this legal review.

The parties to Protocol I are obliged to conduct such reviews, but it would also be appropriate for States that are not parties to Protocol I to do so. This would allow them to verify that their armed forces act in conformity with international rules regulating the use of means and methods of warfare.
Art. 36 does not specify the practical modalities of such reviews, which are left to the parties to decide. It is understood that the legal review should cover the weapons themselves and the ways in which they might be used. Particular attention should be paid to the potential effect of the weapon concerned on both civilians (prohibition of indiscriminate effects) and combatants (prohibition of unnecessary suffering).

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- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Para. 2]
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## 3. Prohibited methods of warfare

**Introductory text**

The concept of method of warfare encompasses any tactical or strategic procedure meant to outweigh or weaken the adversary.

The limitations or prohibitions to resort to specific methods of warfare stipulated in IHL are predicated on three premises:

- the choice of the methods of warfare is not unlimited; [76]
- the use of methods of a nature to cause unnecessary suffering or superfluous injury is forbidden; [77]
- the only legitimate object of war is to weaken the military forces of the enemy. [78]

Contemporary IHL forbids, for instance, methods of warfare involving terror, [79] starvation, [80] reprisals against protected persons and objects, [81] pillage, [82] the taking of hostages, [83] enforced enrolment of protected persons [84] and deportations. [85]

Under the specific heading “prohibited methods of warfare”, two methods of warfare are usually discussed, namely perfidy and denial of quarter.

Unlike ruses of war, [86] which are lawful, perfidy [87] is outlawed in IHL. Ruses of war are intended to mislead an adversary or to induce him to act recklessly. Perfidy, on the contrary, invites the confidence of an adversary and leads him to believe that he is entitled to or is obliged to provide protection under the rules of IHL.

The main aim of the prohibition of the denial of quarter [88] is to protect combatants when they fall into enemy hands by ensuring that they will not be killed. The objective is to prevent the following acts: to order that there shall be no survivors, to threaten the adversary therewith, or to conduct hostilities on this basis.

Most cases of perfidy and denial of quarter are grave breaches of IHL and hence war crimes.

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- Afghanistan, Code of Conduct for the Mujahideen [Arts 7-9, 23-25, 54]
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 75, 79, 82-83, 87-89]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia

[Paras 94-100]

a. **giving or ordering no quarter**
P I, Art. 40 [CIHL, Rule 46]

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- British Policy Towards German Shipwrecked
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a. **perfidy:the distinction between perfidy and permissible ruses of war**
P I, Art. 37 [CIHL, Rules 57-65]

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- United States Military Court in Germany, Trial of Skorzeny and Others
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**wearing of enemy uniforms**

## CASES AND DOCUMENTS

- United States Military Court in Germany, Trial of Skorzeny and Others
- Bosnia and Herzegovina, Using Uniforms of Peacekeepers

a. **starvation of civilians**
(See infra, Conduct of Hostilities, IV. International Humanitarian Law and Humanitarian Assistance)

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## 4. Cyber warfare

The term cyber warfare can be defined as the means and methods of warfare that rely on information technology and are used in situations of armed conflict. The second part of the definition is of importance: IHL will only apply to cyber operations occurring during – or triggering by themselves – an armed conflict. The debates on whether a cyber-attack may amount to a “use of force” or even an “armed attack” under the UN Charter, which are ius ad bellum issues, are distinct, but parallel to the question of whether a cyber-attack alone can trigger the applicability of the IHL of international or of non-international armed conflicts. Determining the beginning of an armed conflict itself remains tricky in situations where cyber-attacks are employed alone, short of any kinetic use of force. It is argued that the respective traditional thresholds for international and non-international armed conflict should also be applied in such situations [89]. Even then, in practice, the nature of information technology often makes it difficult to attribute an attack to a State or to an armed group (which is important to differentiate international from non-international armed conflicts) or to determine the existence of a sufficiently organized armed group (which is necessary to trigger IHL of non-international armed conflicts).

Once the applicability of IHL is triggered, the question becomes one of the adaptability of the rules on the conduct of hostilities. Do cyber attacks amount to “attacks” in the sense of Article 49 of Protocol I [90]? Is it necessary for them to result in physical consequences such as destruction of objects or injury or death of persons? Some argue that acts resulting in mere destruction of data, i.e. interference with information systems, should also be considered as amounting to attacks at least if they have a considerable effect upon the targeted party [91]. This question is conceptually distinct from the above-mentioned question of when a cyber operation triggers an armed conflict, but similar elements may be decisive for both answers.

If considered an attack under the IHL meaning, a cyber operation will have to comply with the principles of distinction, proportionality and precautions.

Looking at distinction first, the principle is put at stake by the nature of information networks: with most military networks relying on civilian infrastructure (optic cables, satellites, etc.), the latter virtually becomes a "dual use" object with both civilian and military functions, leading to increased difficulties in effectively identifying military objectives. In addition, while destruction of information is at the centre of the majority of cyber operations, military objectives are circumscribed to objects under IHL [92]. As a consequence, the question arises of whether data, which is by definition intangible, can ever be considered a legitimate target. With regards to persons, may a hacker operating for a party to an armed conflict be considered as directly participating in hostilities?

Second, applying the principle of proportionality to cyber operations is not an evident task either. The interconnected nature of cyber space means that any act may result in infinite reverberating or "knock-on" effects, which may easily be considered disproportionate in relation to the concrete and direct military advantage anticipated [93]. Another recurring question concerns the attacks that do not result in any destruction or loss of life, but only in mere inconvenience for civilians, mainly because civilian objects are rendered inoperative for a certain amount of time. Inconvenience not being included in the definition of proportionality, a majority of experts conclude that "inconvenience, irritation, stress, or fear […] do not qualify as collateral damage because they do not amount to “incidental loss of civilian life, injury to civilians, damage to civilian objects” [94].

Finally, as one can imagine, the issue of interconnectedness also affects the principle of precaution, in particular the obligation for parties to take passive precautions in segregating between military objectives and the civilian population and civilian objects [95].

In the light of such new challenges, legal experts met in Tallinn to discuss whether and how the rules of IHL could actually be applied to cyber operations. This resulted in the *Tallinn Manual on the International Law Applicable to Cyber Warfare* [96], which brings some clarification to some of the issues mentioned here as well as to numerous other ones, and at least presents the remaining controversies. In the end, it is essential to continue the discussion in order to determine whether the traditional rules of IHL provide sufficient protection to civilians from the effects of warfare, keeping in mind the enormous humanitarian impact that some cyber operations may have in the real world. It may be that this is one of the few fields in which the existing rules of IHL are indeed inadequate, because of the completely different environment in which cyber operations are conducted and because they are necessarily either over-inclusive or under-inclusive on some issues. Until such new regulation is in force, the existing rules have anyway to be applied according to their object and purpose. The Tallinn Manual makes many useful suggestions in this respect.

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**Footnotes**

- [51] See P I, Part III, Section I
- [52] See St Petersburg Declaration of 1868, Preamble; HR, Art. 23(e)
- [53] See St Petersburg Declaration of 1868
- [54] See Declaration Concerning Expanding Bullets (adopted by the First Hague Peace Conference of 1899)
- [55] See HR, Art 23(b)

- [56] See P I, Art. 51(4)(b)
- [57] See P I, Art. 51(4)(c)
- [58] See ICRC, Customary International Humanitarian Law and ICTY, The Prosecutor v. Tadic [Part A., para. 125],
- [59] See HR, Art. 22; P I, Art. 35(1)
- [60] See P I, Art. 35(2)
- [61] See P I, Art. 51(4)
- [62] See P I, Arts 35(3) and 55(1)
- [63] See P I, Art. 36
- [64] See Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
- [65] See Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)
- [66] See, for example, the antipersonnel mines regime set out in the 1997 Ottawa Convention [Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction] and Art. 3(3) of the Protocol on Mines, Booby-Traps and Other Devices [Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, as amended on 3 May 1996 (Protocol II to the 1980 Convention)].
- [67] See HR, Art. 23(d); P I, Art. 40
- [68] See P I, Art. 37
- [69] See P I, Art. 57(2)(a)(ii)
- [70] See HR, Arts 22 and 23(e); P I, Art. 35
- [71] For example, dum-dum bullets, mines, incendiary weapons, non-detectable fragments, and cluster munitions.
- [72] For example, chemical weapons, use of poison, bacteriological and biological weapons, and – without success – nuclear weapons.
- [73] See P I, Arts 35(3) and 55; see also Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Geneva, May 18, 1977
- [74] For example, the Declaration Concerning Expanding Bullets (adopted by the First Hague Peace Conference of 1899); the 1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare [The Geneva Chemical Weapons Protocol] (extending the Hague Regulation of 1899 prohibiting use of “poison or poisoned weapons”); the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction [See ICRC, Biotechnology, Weapons and Humanity [Part A.]], and the 1980 UN Convention on the Prohibitions or Restrictions of Use of Certain Conventional Weapons which may be Deemed to be Excessively Injurious or to have Indiscriminate Effects and subsequent Protocols [See: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, Amendment to Article 1 of the 1980 Convention, in Order to Extend it to Non-International Armed Conflicts, Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention), Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention), Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention), Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other

Devices, as amended on 3 May, 1996 (Protocol II to the 1980 Convention), Protocol on Explosive Remnants of War (Protocol V to the 1980 Convention)].

- [75] See P I, Art. 36
- [76] See HR, Art. 22; P I, Art. 35(1)
- [77] See HR, Art. 23(e); P I, Art. 35(2)
- [78] See 1868 St Petersburg Declaration, Preamble
- [79] See P I, Art. 51(2); P II, Art. 13
- [80] See P I, Art. 54; P II, Art. 14
- [81] See GC I-IV, Arts 46/47/13(3)/33 respectively; P I, Arts 20 and 41-56
- [82] See HR, Arts 28 and 47; GC I, Art. 15; GC II, Art. 18; GC IV, Arts 16 and 33; P II, Art. 4
- [83] See GC I-IV, common Art. 3; GC IV, Art. 34; P I, Art. 75
- [84] See GC III, Art. 130; GC IV, Art. 51
- [85] See GC IV, Art. 49; P II, Art. 17; *see also supra*, Civilian Population, IV. Special Rules on Occupied Territories
- [86] See HR, Art. 24; P I, Art. 37(2)
- [87] See HR, Art. 23; P I, Art. 40
- [88] See HR, Art. 23(b); P I, Art. 37(1)
- [89] See The Law > Fundamentals of IHL > B. International Humanitarian Law as a Branch of Public International Law > III. International Humanitarian Law: a branch of international law governing the conduct of States and individuals > Situations of Application: https://www.icrc.org/casebook/doc/book-chapter/fundamentals-ihl-book-chapter.htm#b_iii_1
- [90] See P I, Art. 49(1): " 1. "Attacks" means acts of violence against the adversary, whether in offence or in defence."
- [91] The issue of "neutralization", but this time of targets, is also discussed in relation to the definition of "attacks" under IHL.
- [92] See P I, Art. 52(2): "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."
- [93] See P I, Art. 51(5)(b)
- [94] See Tallinn Manual on the International Law Applicable to Cyber Warfare, 2009, Rule 51
- [95] See P I, Art. 58
- [96] Tallinn Manual on the International Law Applicable to Cyber Warfare, 2009

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