Conduct of hostilities

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CHAPTER BIBLIOGRAPHY


Introduction

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:

- GEIB Robin & SIEGRIST Michael, "Has the armed conflict in Afghanistan affected the rules on the conduct of hostilities?", iHR, Vol. 93, 2011, pp. 11-46.


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

Cases and Documents

- ICJ, Nuclear Weapons Advisory Opinion [Para. 75]
- France, Accession to Protocol I [Part A.]
- Colombia, Constitutional Conformity of Protocol II [Para. 6]

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

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:


1. Basic rule: Art. 48 of Protocol I

[ICHL, 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. [...]


Cases and Documents

- Belgium, Public Prosecutor v. G.W.
- ICRC, Appeals on the Near East
- Israel/Gaza, Operation Cast Lead
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- United States/Jordan, Report on the Conduct of the Persian Gulf War
- Case Study, Armed Conflicts in the former Yugoslavia (Para. 13)
- Federal Republic of Yugoslavia, NATO Intervention
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (Paras 229-230)

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Suggested reading:


Further reading:


2. Field of application

P I, Art. 49

SPECIFIC BIBLIOGRAPHY

Suggested reading:


a. acts of violence in defence and offence

CASES AND DOCUMENTS

- United States/United Kingdom, Report on the Conduct of the Persian Gulf War

SPECIFIC BIBLIOGRAPHY

Suggested reading:


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

SPECIFIC BIBLIOGRAPHY

Further reading:


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 Proportionality)
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) [Crit. 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 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 civilians outright. 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 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.

Under the definition provided in Article 52(2) of Protocol I, an object must cumulatively 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. "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. 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 military objectives, i.e., by weakening the military potential of the enemy. 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".

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- United States, War Crimes Act
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- Israel, Targeted Killings Case [Para. 44-45]
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- Extra/Extra, Awards on Military Objectives
- Extra, UN Security Council Assessing Violations of International Humanitarian Law [Part A]
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- Case Study, Armed Conflicts in the Former Yugoslavia [Para. 19 and 27]
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- Croatia, Prosecutor v. Ako Radulovic and Others
- Former Yugoslav Republic of Serbia, NATO Intervention [Part A, para. 1018; Part B, paras 55 and 71-79
- Afghanistan, Drug Dealers as Legitimate Targets
- United States, Military Commissions [Para. 5, D.
- Civil War in Nepal [Part II]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 31-51]
- Iran - Victim of Cyberwarfare
- Syria, Press conference with French President Francois Hollande and Russian President Vladimir Putin
- International Law Commission, Operation Protective Edge [Para. 33 June - 26 August 2014]
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 57, 158, 163, 215]

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Suggested reading:


Further readings:

- DOUGHERTY Bernard & QUEINIVET Noelle, "Has the Armed Conflict in Iraq Shown once more the Growing Dissonance Regarding the Definition of a Legitimate Target? What and Who can be Lawfully Targeted?", in Humanitàres Vollmerrecht, Vol. 4, 2003, pp. 188-196
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. Art. 50(1) of Protocol I logically defines civilians by excluding them from the corollary category of combatants: everyone who is not a combatant is a civilian benefiting from the protection provided for by the law on the conduct of hostilities. As will be seen below, civilians only lose their protection from attack and the effects of the hostilities if and for such time as they directly participate in hostilities. 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 protected, 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. 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 but does not mean that the non-civilians may not be individually attacked provided that the necessary precautions are taken.

CASES AND DOCUMENTS

• Israel/Gaza, Operation Cast Lead [Part I, paras 237-248, Part II, paras 393-437]
• European Court of Human Rights, Komnenov v. Latvia
• ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 118]

SPECIAL BIBLIOGRAPHY

Suggested reading


Further reading:


a. definition of a civilian

[See also infra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, VII) Loss of protection: The concept of direct participation in hostilities and its consequences]

P I Art. 50(1) [CIHL, Rule 5]

CASES AND DOCUMENTS

• Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
• ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
• ICRC Appeals on the Near East [Part C., para. 7]
• Israel, Military Prosecutor v. Kasem and Others [Part II, E. 4]
• Sudan, Report of the UN Commission of Enquiry on Darfur [Paras 291, 292 and 422]
• Case Study. Armed Conflicts in the former Yugoslavia [27]
• ICTY, The Prosecutor v. Tadic [Part B., paras 633 and 686]
• Colombia, Constitutionality of IHL Implementing Legislation [Paras D 3.3.2. and 3.3.2.1., Para. E 1]
• Afghanistan, Code of Conduct for the Mujahideen [Arts 4 and 8]
• Israel, Blockade of Gaza and the Flotilla Incident
• ICTY, The Prosecutor v. Radovan Karadzic

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Suggested reading:


Further readings:


b. the presence of a combatant or a military objective among the civilian population

P I Art. 50(3)

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• Israel, Evacuation of Bodies in Jenin
• Israel, Blockade of Gaza and the Flotilla Incident
• ICTY, The Prosecutor v. Strugar [Part B., para. 282]
• ICTY, The Prosecutor v. Radovan Karadzic

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Suggested reading:


6. Prohibited attacks
Under IHL, lawful methods of warfare are not unlimited. In particular, IHL prohibits certain kinds of attacks. The civilian population may never be attacked; this prohibition includes attacks the purpose of which is to terrorize the population.\(^1\) IHL also proscribes attacks directed at civilian objects.\(^2\) Even those attacks directed at a legitimate military objective\(^3\) 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.\(^4\) 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”.\(^5\) 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.\(^6\) Finally, reprisals against civilians or civilian objects are prohibited under IHL.\(^7\)

## CASES AND DOCUMENTS

- **France**, Accession to Protocol I (Part A.)
- **United States**, President Rejects Protocol I
- **United States**, Trial of Lieutenant General Haruki Isayama and Others
- ICRC Appeals on the Near East (Part C., para. 7)
- Eritrea/Ethiopia, Awards on Military Objectives
- Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- Libya, NATO Intervention 2011

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### Suggested reading:


### Further readings:


### 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?)

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\text{P.I. Art. 51(2) [IHL, Rule 2]}
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- ICRC Strupi on Yemen, 1967
- Malaysia, Osman v. Prosecutor
- Belgium, Public Prosecutor v. G.W.
- ICRC Appeals on the Near East (Part C., para. 7)
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- Sierra Leone, Special Court Ruling in the AFRC Case [Part II, paras 660-670]
- Central African Republic, Coup d’Etat
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- ICTY, The Prosecutor v. Radovan Keradzic

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### Further reading:


### b. attacks against civilian objects

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\text{P.I. Art. 51(2) [IHL, Rule 10]}
\]

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- Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- The armed conflict in Syria
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### Suggested reading:


### c. indiscriminate attacks

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\text{[IHL, Rule 11]}
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- South Africa, Sagarius and Others
- ICRC, Iraq, Iraq, Memoranda
- Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- United States/United Kingdom, Conduct of the 2003 War in Iraq
- Iraq, Use of Force by United States Forces in Occupied Iraq
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Suggested reading:


Further readings:


aa) attacks not directed at a specific military objective

P 1, Art. 51(4)(a) [CHL, Rule 12(a)]

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- ECHR, Isayeva v. Russia
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 21-22]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 71-73]
- The armed conflict in Syria
- ICTY, The Prosecutor v. Gotovina and Markač
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
- Autonomous Weapon Systems
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Suggested reading:

Further readings:

- d. attacks against the civilian population (or civilians) by way of reprisals

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

**P I** Art. 51(d) and (21)

### CASES AND DOCUMENTS

- **United Kingdom and Australia, Applicability of Protocol I (Part C)**
- **United States, President Rejects Protocol I**
- **Hague Convention, 1907**
- **ICTY, The Prosecutor v. Krpenisic et al. (Para 527-530)**
- **Democratic Republic of Congo, Conflict in the Kasai (Part III, paras 12-23, 37)**
- **Israel, Blockade of Gaza and the Foxtrot Incident**
- **European Court of Human Rights, Konov v. Latvia**

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

**P I** Art. 51(d) P II, Art. 13(c), C IHL, Rule 8

**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.** Both in international and non-international armed conflicts, civilians lose their protection against attacks (and their protection against the incidental effects of attacks, afforded to the civilian population as a whole) if and for such time as they participate directly in hostilities.** Neither treaty nor customary law defines this concept. 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" which is covered as a "civilians" 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.**

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 forces and groups, or, as the Interpreting 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)."

### CASES AND DOCUMENTS

- **Australia/ Afghanistan, Inquiry into the Conduct of Australian Defence Forces**
- **ICRC, The Challenges of Contemporary Armed Conflicts**
- **ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities**
- **ECHR, Kovack v. Hungary**
- **Israel, The Targeted Killings Case (Paras 24-40)**
- **Israel, Detention of Unlawful Combatants (Part A, paras 13 and 21; Part B)**
- **Inter-American Commission on Human Rights, Taliban (Paras 172 and 188)**
- **ICC, The Prosecutor v. Thomas Lubanga Dyilo (Paras 259-267)**
The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender’s specific intention to obtain “protection” for its military forces and objectives, or simply of a lack of care for the civilian population.

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.

Further reading:
- **LYALL Rewi**, “Human Volunteer Shiel...”

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

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

Introductory text

IHL prohibits attacks against the civilian population and civilian objects. IHL also prohibits abuse of this prohibition: civilians, the civilian population and certain specially protected objects may not be used to shield a military objective from attack. The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precautions is whether the intermingling between civilians and combatants, and/or military objectives, is the result of the defender’s specific intention to obtain “protection” for its military forces and objectives, or simply of a lack of care for the civilian population.

If the defender violates the prohibition for human shields, the “shielded” military objectives or combatants do not cease to be legitimate objects of attack merely because of the presence of civilians or protected objects. It is generally agreed that involuntary human shields nevertheless remain civilians. Care must therefore be taken to spare them when attacking a legitimate objective. 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. 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 of a country who has a 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”.

Cases and Documents

- **Israel/Gaza, Operation Cast Lead** [Part I, paras 551-169; Part II, paras 439-488]
- **Israel, The Targeted Killings case**
- **Israel, Human Rights Committee’s Report on Bet HaBonim [Para. 34]
- **Israel, Military/Herzliya, Conflict in 2008* [Part II, paras 61-11]
- **Iraq, U.S. Security Council Asserting Violations of International Humanitarian Law* [Parts C, D and E]
- **United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
- **Sri Lanka, Conflict in the Vanni [Paras 3-9]
- **Democratic Republic of the Congo, Conflict in the Kivus [Part III, paras 24-26]
- **ECHR, Iasypu v. Russia* [Paras 15, 23, 75-96, 69-79]
- **Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 79-93]*
- **Israel/Palestine, Operation Protective Edge (Gaza, 13 June – 26 August 2014)**
- **Sri Lanka, Naval War against Tamil Tigers**

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Suggested reading:
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. 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 of utility 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.

Conventions on the Protection of Cultural Property

- P. I, Art. 53 and 54

Cases and Documents

- Israel, House Demolitions in the Occupied Palestinian Territory (Parts B, C and D)
- Côte d’Ivoire, Prosecutor v. Gbagbo [Part B., para. 262]
- Afghanistan, Code of Conduct for the Mujahideen (Art. 21-25, 52-53-58)
- Libya, NATO Intervention 2011
- Iraq, Forced displacement and deliberate destruction

sSpecific Bibliography

Suggested reading:


b. 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 for the Protection of Cultural Property in the event of Armed Conflict).

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. They are only legitimate military objectives if they are used for military purposes.

On the basis of the 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.
Further reading:


bb) objects indispensable to the survival of the civilian population

P i Art. 54 (ICHL, Rules 52 and 54)

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- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2014 (Para. 206)
- water

Cases and Documents

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Suggested reading:


Further reading:


cc) works and installations containing dangerous forces

P i Art. 56 (ICHL, Rule 40)

Cases and Documents

- Croatia, Prosecutor v. Rajois Radulovic and Others
- Colombia, Constitutionality of IHL, Implementing Legislation (Paras 2 and E.3)
- Iran - Victim of Cyberwarfare

SPECIFIC BIBLIOGRAPHY

Suggested reading:


dd) medical equipment

Cases and Documents

- Israel, Lebanon/Hezbollah, Conflict in 2006 (Part I, paras 172-177)
c. the natural environment

P.I. Arts 36(2) and 64 [EHL Rules 44 and 45]

Suggested reading:

- THE Environment and International Humanitarian Law
- ICRC, UN Security Council Assessing Violations of International Humanitarian Law
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para. 286]

Further reading:


10. Precautionary measures in attack

Introductory text

Under IHL only military objectives may be attacked [41] 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 [42] If circumstances permit, an advance warning must be given for those attacks which may affect the civilian population [43] 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 [44] Furthermore, IHL requires those planning and deciding on an attack to take precautionary measures [45] Including refraining from attacking when incidental loss of civilian life or destruction of civilian objects outweighs the military advantage of the attack. [46] The meaning of these obligations in practice remains controversial in many cases, mainly with regard to what 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 precision 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 risky for the civilian population.

Cases and Documents

- ICRC, The Challenges of Contemporary Armed Conflicts
- Israel: Operation Cast Lead (Part I, paras 192-233, Part II, para. 52/429)

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. Military and humanitarian considerations may influence the feasibility of such precautions: the importance and the urgency of destroying a target; the range, accuracy and precision 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 risky for the civilian population.
Cases and Documents

- Israel, Human Rights Committee's Report on Beit Hanoun [Paras 26 and 39-43]
- Israel, Report of the Winograd Commission [Para. 26]
- Case Study, Armed Conflicts in the former Yugoslavia [27]
- Human Rights Committee, Guerrero v. Colombia
- Afghanistan, Gaithered Saved from Attack
- ECHR, Isayeva v. Russia
- ECHR, Khadzhyev v. Russia [Paras 21 and 129]
- 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]

Suggested reading:

**SPECIFIC BIBLIOGRAPHY**


Further readings:


Suggested reading:

- an attack must be cancelled if it becomes apparent that it is a prohibited one
  - P I Art. 57(9)(b) [CHIL, 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

b. advance warning must be given, unless circumstances do not permit
  - P I Art. 51(2)(c) [CHIL, 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 499-538]
- Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)

Suggested reading:


b. when a choice is possible, the objective causing the least danger to the civilian population must be selected
  - P I Art. 57(2)[I] [CHIL, Rule 21]

d. additional obligations of those who plan or decide on an attack
  - P I Art. 57(9)(c) [CHIL, 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.]

aa) verify that objectives are not illicit

Cases and Documents

- United States/United Kingdom, Conduct of the 2003 War in Iraq
- ECHR, Khadzhyev v. Russia [Paras 135-138]
- Afghanistan, Attack on Kunduz Trauma Centre

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, Gaithered Saved from Attack
- Afghanistan, Assessment of ISAF Strategy
- Afghanistan: Code of Conduct of the Mujahideen [Arts 41(1) 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 2014 [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, Gaithered Saved from Attack
- Afghanistan, Assessment of ISAF Strategy
- Civil War in Nepal [Part II]
11. Precautionary measures against the effects of attacks

**Introductory text**

Contrary to Art. 57 of Protocol I[40] 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 151-166; Part II, paras 439-498)
- INVD, 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]
- 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]

**SPECIFIC BIBLIOGRAPHY**

**Suggested reading:**


**Further reading:**


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, 137-139]
- 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 ad bellum, 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 under IHL

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]
- ECHR, Isayeva v. Russia [Paras 16 and 186]

Specific Bibliography

Suggested reading:
- BOUVIER Antoine, "Zones protégées, zones de sécurité et protection de la population civile", in BOUSTANY Katia & DORMOY Daniel Perspectives humanitaires entre conflits, droit(s) et action, Brussels, Bruylant, 2002, pp. 251-269.

Further reading:
  a. open cities

Specific Bibliography
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.

For example, the prohibition of attacks on objects which are not capable of being used for military purposes, even if they can under restricted circumstances become military objectives. [See supra, Art. 52(2)]

IF commandos 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 effect.

This variety justifies the presumption of civilian status provided for in Art. 50(1)

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 GCIV, Art. 4]

(1) See P I Art. 51(1) 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.

(2) See supra, Art. 51(3) P I Art. 13(1)

(3) See ICRC, Interim Guidance on the Notion of Direct Participation in Hostilities.


(5) See P I Art. 51(1), 52, 56, 49(3) P II, Art. 13


(7) See P I Art. 51(2) 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.

(8) See P I Art. 52

(9) See P I Art. 51(8) and 57

(10) See HC, Arts 35 and 51; P I Arts. 49, 52, and 55(3)

(11) See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of May 14 1954 [See supra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 10) Precautionary measures in attack]

(12) See P I Art. 54; P II, Art. 14

(13) See P I Art. 55; P I Art. 15

(14) See P I Art. 56(2)

(15) 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)

(16) See GC I, Arts 16(1) and 36(1); GC II, Arts 23, 24, 27, and 36(1); GC IV, Arts 18 and 21-22; P I, Art. 20 and 21-22; P II, Art. 11

(17) See P I, Art. 50(4) and (5)

(18) See P I, Art. 52(1)


(20) See HC, Arts 28, GC IV, Art. 19

(21) See supra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities, 10) Precautionary measures in attack.


(23) See P I, Art. 58(1)

(24) See P I, Art. 58(4)

(25) See P I, Art. 58(8)

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

HR, Arts 22-24

Introductory text

We are deeply grateful to Dr. Théo Boutruche, JHL consultant, who wrote his PhD thesis on the relation des maux superficiels : 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. [53]

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 inductominating attacks, including those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol[56]. 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-national 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 and in 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.

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further reading:

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

[CBHL, Rule 74]

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

- IHL: Nuclear Weapons Advisory Opinion [Para. 74]
- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Paras 4 and 8]
- Israel, ebanov/Herzollah. Conflict in 2006 [Part 1, paras 249-263]
- United States, Surrendering in the Persian Gulf War
- Afghanistan, Assessment of ISAF Strategy
- Afghanistan, Code of Conduct of the Mujahideen [Art.41]
- ECHR, Izagria v. Russia [Paras 15, 33, 165,167, 183]
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 8, 20-22, 26]
- Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 58-63]
- Autonomous Weapon Systems

SPECIFIC BIBLIOGRAPHY

Suggested reading:

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[72]. 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] even if they are not classified as prohibited. 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. 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.[72]

CASES AND DOCUMENTS

- Inayatullah, UN Security Council Assessing Violations of International Humanitarian Law
- Case Study: Armed Conflicts in the former Yugoslavia[72]
- 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 73-274, 287]

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:


Specific bibliography:

- explosive bullets
  - [CIHL, Rule 78]

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Specific bibliography:


Specific bibliography:

- certain conventional weapons

CASES AND DOCUMENTS

- 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
- Autonomous Weapon Systems

Specific bibliography:


Further reading:


Specific bibliography:

- Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction
- Geneva Call, Partisan Use of Somalia, adhering to a total ban on anti-personnel mines

Specific bibliography:

Suggested reading:
Further reading:

bb) incendiary weapons
[CIL, Rules 84 and 86]

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further reading:

c) non-detectable fragments
[CIL, Rule 78]

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:

dd) blinding weapons
[CIL, Rule 86]

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:

ee) explosive remnants of war

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:

ff) cluster munitions

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:

CASES AND DOCUMENTS

SPECIFIC BIBLIOGRAPHY

Suggested reading:
The armed conflict in Syria

SPECIFIC BIBLIOGRAPHY

Suggested reading:
Further reading:
g) other weapons for which limitations are under discussion
   a. light weapons
   b. anti-vehicle mines
   c. fragmentation weapons
d. chemical weapons
   [CIHL, Rules 74-76]

CASES AND DOCUMENTS

• The Geneva Chemical Weapons Protocol
• Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993
• Switzerland, Prohibition of the Use of Chemical Weapons
• UN/ICRC, The Use of Chemical Weapons

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further reading:
• poison
   HR, Art. 23(a) [CIHL, Rule 72]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

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

CASES AND DOCUMENTS

• The Geneva Chemical Weapons Protocol
• Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction, Paris 13 January 1993
• ICRC, Biotechnology, Weapons and Humanity

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further reading:

g. nuclear weapons

Quotation
3. Mr. PAOLINI (France) made the following statement: [...] [Already in 1973, the French Government noted that the CRC 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.

Suggested reading:


Further reading:


h. "new means and methods"

P. 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).

SUGGESTED DOCUMENTS

- ICRC, New Weapons
- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Para. 2] UN, Statement of a Special Rapporteur on Drone Attacks
- US, Obama’s Speech on Drone Policy
- ICRC, International humanitarian law and the contemporary laws of armed conflict in 2011
- Autonomous Weapons Systems
- General Assembly, The use of drones in counter-terrorism operations
- US, Lethal Operations against Al-Qa'ida Leaders
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 21-241]
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
- the use of methods of a nature to cause unnecessary suffering or superfluous injury is forbidden
- the only legitimate object of war is to weaken the military forces of the enemy

Contemporary IHL forbids, for instance, methods of warfare involving terror, starvation, reprisals against protected persons and objects, the taking of hostages, enforced enrolment of protected persons, and deportations.

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

Unlike rules of war which are lawful, perfidy 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 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.

CASES AND DOCUMENTS

- Colombia, Constitutionality of IHL Implementing Legislation [Paras 4, 356-44, E.2 and Dissenting opinion]
- Afghanistan, Code of Conduct for the Mujahideen [Arts 75, 95-95, 54]
- Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 75, 76, 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.J. Art. 46 [IHL, Rule 46]

CASES AND DOCUMENTS

- British Policy Towards German Shipwrecked
- Belgium, Public Prosecutor v. G.W.
- Israel, Navy Strikes Dinmyo off Lebanon
- ICRC, Trailing Memoranda
- United States, Surrendering in the Persian Gulf War
- Inter-American Commission on Human Rights, Tablada [Paras 182-185]
- Civil War in Nepal

SUGGESTED READING:


b. perfidy: the distinction between perfidy and permissible ruses of war

P.J. Art. 37 [IHL, Rules 57-65]

CASES AND DOCUMENTS

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

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:

- JON HELLER Kevin, “Disguising a Military Object as a Civilian Object: Prohibited Perfidy or Permissible Ruse of War?”, in International Law Studies, Vol. 91, 2015, pp. 517-539.

wearing of enemy uniforms

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

c. starvation of civilians

(See infra, Conduct of Hostilities, [IV International Humanitarian Law and Humanitarian Assistance])

CASES AND DOCUMENTS

- Angola, Famine as a Weapon
- The armed conflict in Syria
- Israel, Blockade of Gaza and the Fintilla Incident
- Yemen, Naval Blockade
- Yemen, Potential Existence and Effects of Naval Blockade

SPECIFIC BIBLIOGRAPHY

Suggested reading:

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 us 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 conflict. In determining the beginning of an armed conflict, international law does not rely on 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 [88]. Even then, in practice, the nature of information technology often makes it difficult to attribute an attack to a State or 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? Is it necessary for them to result in physical consequences such as destruction of objects or injury or death of persons? Some argue that acting results 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 target 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 [87]. As a consequence, the question arises of whether data, which 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 [100]. 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'" [84].

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 [85].

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 [86], 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.

CASES AND DOCUMENTS

- Iran, Victim of Cyberwarfare
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2010
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para 87-223]

SPECIFIC BIBLIOGRAPHY

Suggested reading:
- GISEL Laurent, RODENHAUSER Tilman & DORMANN Knut, "Twenty years on: International humanitarian law and the protection of civilians against the effects of cyber operations during armed conflicts", in Leiden Journal of International Law, 2012, pp. 201-216

Further reading:
The issue of “neutralization”, but this time of targets, is also discussed in relation to the definition of “attacks” under IHL. For example, chemical weapons, use of poison, bacteriological and biological weapons, and – without success – nuclear weapons.

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 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.]); the Geneva Chemical Weapons Protocol (Protocol III to the 1980 Convention) and on their Destruction.

See the ICRC, Biotechnology, Weapons and Humanity [Part A.]; the Geneva Chemical Weapons Protocol (Protocol III to the 1980 Convention) and on their Destruction.

See the ICRC, Biotechnology, Weapons and Humanity [Part A.]; the Geneva Chemical Weapons Protocol (Protocol III to the 1980 Convention) and on their Destruction.

See the ICRC, Biotechnology, Weapons and Humanity [Part A.]; the Geneva Chemical Weapons Protocol (Protocol III to the 1980 Convention) and on their Destruction.

See the ICRC, Biotechnology, Weapons and Humanity [Part A.]; the Geneva Chemical Weapons Protocol (Protocol III to the 1980 Convention) and on their Destruction.