CONDUCT OF HOSTILITIES

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CHAPTER BIBLIOGRAPHY

- BERUTO Luca (ed.), The conduct of Hostilities. Revisiting the Law of Armed Conflict 100 Years after the 1907 Hague Conventions and 30 Years after the 1977 Additional Protocol I

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 [Para. 6]
- 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. [...] 

(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. 656; 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)

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, d. Principle of Proportionality)
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 military potential of the enemy.

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 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.

First, the object, by its “nature, location, purpose or use”, has to contribute effectively to the military action 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.

Second, the object’s destruction, capture or neutralization has to offer a definite military advantage for the attacking side.

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.

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. 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.

COTES AND DOCUMENTS

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- ICRC, The Challenges of Contemporary Armed Conflicts [Part A]
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- United States, War Crimes Act
- France, Accession to Protocol I
- Israel, The Targeted Killings Case [Paras 40-42]
- Israel, Human Rights Committee’s Report on Beit Hanoun [Para. 47]
- Ethical/empirical, Awards on Military Objectives
- IHL, UN Security Council Resolution on International Humanitarian Law [Part A]
- United States/United Kingdom, Report on the Conduct of the Persian Gulf War
- United States, Surrendering in the Persian Gulf War
- United States/United Kingdom, Conduct of the 2003 War in Iraq Case Study, Armed Conflicts in the Former Yugoslavia [Paras 19 and 27]
- Cassir, Prosecutor v. Maksud Radiakovic and Others
- Federal Republic of Yugoslavia, NATO Intervention [Part A, paras 1018; Part B, paras 55 and 71-79]
- Afghanistan, Drug Dealers as Legitimate Targets
- United States, Military Commissions [Part D]
- Civil War in Nepal [Part B]
- 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
- Israel/Palestine, Operation Protective Edge [Gaza, 13 June – 26 August 2014]
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [paras 57, 158, 163, 215]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further readings:
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 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 fulfill 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 military occupation, no matter what their contribution to the war effort may be otherwise. 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 nor does it mean that the non-civilians may not be individually attacked provided that the necessary precautions are taken.

CASES AND DOCUMENTS

- 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.] Loss of protection: The concept of direct participation in hostilities and its consequences

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

CASES AND DOCUMENTS

- Australian/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. Kassem and Others [Part II. E. 4]
- Sudan, Report of the UN Commission of Inquiry on Darfur [Paras 291, 292 and 422]
- Case Study, Armed Conflicts in the former Yugoslavia [27]
- ICTY, The Prosecutor v. Blaškić (Paras 311-316)
- 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 Fatima Incident
- ICTY, The Prosecutor v. Radovan Karadžić

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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)

CASES AND DOCUMENTS

- Israel, Evacuation of Bodies in Jenin
- Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 34 and 47]
- Sudan, Report of the UN Commission of Inquiry on Darfur (Paras 263-267)
- Sri Lanka, Conflict in the Vanni [Paras 12-16]

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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. [14] IHL also proscribes attacks directed at civilian objects. [5] 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]

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:

- SALAH Reem, 'Israel's War Crimes: a First Hand Account of Israel's Attacks on Palestinian Civilians and Civilian Infrastructure', in Rutgers Law Record, Vol. 36, Fall 2009, pp. 201-223.

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, 3) Situations of application, C. Other situations, d) acts of terrorism?)

P.I Art. 51(2) (IHL, Rule 2)

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- Colombia, Response of armed groups to COVID-19
- Malaya, Osman v. Prosecutor
- Belgium, Public Prosecutor v. G.W.
- ICRC Appeals on the Near East (Part C., para. 7)
- Amnesty International, Breach of the Principle of Distinction
- Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- Belgium, Belgian Soldiers in Somalia
- ICTY, The Prosecutor v. Murgia (Part A., paras 8-10, 472); The Prosecutor v. Rajic (Part A., paras 53-56)
- Croatia, Prosecutor v. Rakit Radiolic and Others
- Democratic Republic of the Congo, Conflict in the Kivu (Part III, paras 12-22, 27, 30-34)
- Sierra Leone, Special Court Ruling in the AFRC Case (Part II., paras 660-670)
- Somalia, The fate of Children in the conflict
- The armed conflict in Syria
- ICTY, The Prosecutor v. Rodkan Keradzic

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Further reading:


b. attacks against civilian objects

P.I Art. 51(2) (IHL, Rule 10)

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- Iraq, UN Security Council Assessing Violations of International Humanitarian Law
- ICTY, The Prosecutor v. Stigl (Part B., paras 222-228 and 292)
- The armed conflict in Syria
- Israel, Blockade of Gaza and the Flotilla Incident

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Suggested reading:


c. indiscriminate attacks

[IHL, Rule 11]

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- South Africa, Sagarius and Others
- ICRC, 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
SPECIFIC BIBLIOGRAPHY

Suggested reading:

- **CASES AND DOCUMENTS**
  - **aa) attacks not directed at a specific military objective**
    - P I Art. 51(4)(a) [CIHL Rule 12(a)]

**CASES AND DOCUMENTS**

- **bb) use of weapons which cannot be directed at a specific military objective**
  - P I Art. 51(4)(b) [CIHL Rule 12(b)]

**CASES AND DOCUMENTS**

- **United States/United Kingdom, Report on the Conduct of the Persian Gulf War**
  - ICTY, The Prosecutor v. Mladic [Part B, paras 303-313, 451-453 (470) and 472; Part C, 248]
  - Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 67-74]
  - ICTY, The Prosecutor v. Gotovina and Markač

**CASES AND DOCUMENTS**

- **cc) treating different military objectives as a single military objective**
  - P I Art. 51(5)(a) [CIHL Rule 12(c)]

**CASES AND DOCUMENTS**

- **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]

**CASES AND DOCUMENTS**

- also covers reasonably foreseeable incidental effects

**CASES AND DOCUMENTS**

- **ic) **
  - ICRC, The Challenges of Contemporary Armed Conflicts
  - ICL, Nuclear Weapons Advisory Opinion [Para. 43]
  - Israel/Gaza, Operation Cast Lead [Part I, paras 120-126, 230-232]
  - Israel, The Targeted Killings Case [Paras 40-46]
  - Israel, Human Rights Committee’s Report on Beit Hanoun [Paras 38-42]
  - United States/United Kingdom, Report on the Conduct of the Persian Gulf War
  - ICTY, The Prosecutor v. Kupreski et al. [Para. 526]
  - Federal Republic of Yugoslavia, NATO Intervention [Part A, paras 18-19 and Part B, paras 75-78]
  - Afghanistan, Drug Dealers as Legitimate Targets
  - Afghanistan, Aghshad Served from Attack
  - Afghanistan, Assessment of ISAF Strategy
  - Civil War in Nepal [Part 8]
  - ECHR, Isayeva v. Russia
  - Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 65-67]
  - Iraq — Victim of Cyberwarfare
  - ICTY, The Prosecutor v. Gotovina and Markač
  - ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2011
  - Autonomous Weapon Systems
  - Israel/Palestine, Operation Protective Edge (Gaza, 13 June - 26 August 2014)

SUGGESTED BIBLIOGRAPHY

Suggested reading:

Further readings:


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

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

**C A S E S A N D D O C U M E N T S**

- United Kingdom and Australia, *Applicability of Protocol I* [Part C]
- United States, *President Rejects Protocol I*
- ICRC, *Interim Memoranda*
- Democratic Republic of the Congo, *Conflict in the Kivus* [Part III, paras 12-23, 37]
- Israel, *Blockade of Gaza and the Flotilla Incident*
- European Court of Human Rights, *Koncov v. Latvia*

**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 “civilized”.[49] 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.[50] 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”.[51] 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.”

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 a group or of keeping a fighting function in such a group. Second, members of armed groups, or, as the 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).”

**C A S E S A N D D O C U M E N T S**

- Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
- ICRC, *The Challenges of Contemporary Armed Conflicts*
- ICRC, *Interpretative Guidance on the Nature of Direct Participation in Hostilities*
- ECHR, *Korkely 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, *Tambazo* [Paras 172 and 188]
- ICC, *The Prosecutor v. Thomas Lubanga Dyilo* [Paras 259-267]
Suggested reading:


Further reading:


- **OUÉDRAOGO Touwendé Roland**, “La distinction entre la participation directe aux hostilités par les civils et la légitime défense des civils”, *in* *RQDI*, No. 29.2, 2016, pp. 191-223.


**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. [64] 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. [65] The decisive factor for distinguishing the use of human shields from non-compliance with the obligation to take passive precaution 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. [66] It is generally agreed that involuntary human shields nevertheless remain civilians. Care must therefore be taken to spare them when attacking a legitimate objective. [67] 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. [68] 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 far 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".

Cases and Documents

- Israel/Gaza, Operation Cast Lead [Part I, para. 151-169; Part II, paras 429-468]
- Israel, The Targeted Killings case
- Israel, Human Rights Committee’s Report on Bel Henoun [Para. 34]
- Israel,又是以色列虐杀巴勒斯坦人 [In 2008] [Part II, paras 6-11]
- International 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
- Sri Lanka, Conflict in the Vanni [Para. 32]
- Sri Lanka, Naval War against Tamil Tigers

**SPECIFIC BIBLIOGRAPHY**
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 objectives. Their immunity may only be waived in cases of "imperative military necessity". 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 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 intended to shelter cultural property).

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 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.

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 Additional Protocols and 30 Years After the 1977 Additional Protocols: Current Problems of International Humanitarian Law

"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 special protection of these works and installations ceases only under limited circumstances. 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. Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited.

Suggested reading:

- SASSOULI Marco: "The obligation to take feasible passive precautions and the prohibition of the use of human shields: can military considerations, including force protection, justify not to respect them?" in Colloquium (Autumn 2016), Proceedings of the Anglo-Colloquium, Urban Warfare

Further reading:


Suggested reading:

- SASSOULI Marco & CAMERON Lindsey, ‘‘The Protection of Civilian Objects Current State of the Law and Issues de Lege Ferenda’’, in RONZITTI Natalino & VENTURINI Gabriella (eds), Current Issues

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 the items 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, Arts 53 and 54; CIHL, 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, a) 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. 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. Medical equipment (including transport used for medical purposes) is a final group of specially protected objects against which attack is prohibited.

a. civilian objects

- P I, Art. 52(1) [IKHL, Rule 9]

Cases and Documents

- Israel, House Demolitions in the Occupied Palestinian Territory [Parts D and E]
- Israel, UN Security Council Assessing Violations of International Humanitarian Law
- Croatia, Prosecutor v. Rajko Radijovic and Others
- Afghanistan, Operation "Ensuring Freedom" [Part B.]
- 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 [IKHL, 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 which are 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.

Cases and Documents

- Conventions on the Protection of Cultural Property
- France, Accession to Protocol I [Part B., paras. 10]
- Israel, Taking Shelter in Ancient Ruins
- Israel, Taking Shelter in Ancient Ruins [Arts 189-192]
- InViraq, UN Security Council Assessing Violations of International Humanitarian Law [Part A., Annex, para. 50]
**SPECIFIC BIBLIOGRAPHY**

Suggested reading:


Further reading:


bb) objects indispensable to the survival of the civilian population

P I, Art. 54 [IYHL, Rules 52 and 54]

**CASES AND DOCUMENTS**

- ICRC, international humanitarian law and the challenges of contemporary armed conflicts in 2014 (Para. 206)
- Libya, Report of the Office of the UN High Commissioner for Human Rights (201415)
- water

**Cases and Documents**

**Water and Armed Conflicts**

- Israel, Operation Cast Lead [Part II, paras 913-986]
- ICRC, international humanitarian law and the challenges of contemporary armed conflicts in 2014 [Paras 165, 166]

**SPECIFIC BIBLIOGRAPHY**

Suggested reading:


Further reading:


cc) works and installations containing dangerous forces

P I, Art. 54 [IYHL, Rule 4]

**Cases and Documents**

- Croatia, Prosecutor v. Raiko Radulovic and Others
- Colombia, Constitutionality of IHL Implementing Legislation [Paras 2, and E.3]
- Iran - Victim of Cyberwarfare

**SPECIFIC BIBLIOGRAPHY**

Suggested reading:

- md) medical equipment

**Cases and Documents**

- Israel, IYHL/Hezbollah. Conflict in 2006 (Part 1, paras 172-177)
Suggested reading:

- the natural environment
  - P.J. Arts 36(f) and (g), ICHL Rules 44 and 45

Cases and Documents

- The Environment and International Humanitarian Law
- Iraq, IHL and Environmental Protection
- ICA, Nuclear Weapons Advisory Opinion [Para 20] and 23
- Israel/Lebanon/Hezbollah, Conflict in 2006 (Para 1, paras 209-220)
- Nat'l/UN Security Council Assessing Violations of International Humanitarian Law
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 (para 386)

SPECIFIC BIBLIOGRAPHY

Further reading:


Further reading:

- SCHWABACH Aaron, 'Environmental Damaging Resulting from the NATO Military Action Against Yugoslavia', in Columbia Journal of Environmental Law Vol. 25/1, 2000, pp. 117-140.

10. Precautionary measures in attack

Introductory text

Under IHL only military objectives may be attacked. 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. If circumstances permit, an advance warning must be given for those attacks which may affect the civilian population. 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 risky for the civilian population.

Cases and Documents

- ICRC, The Challenges of Contemporary Armed Conflicts
- Israel, Operation Cast Lead (Part I, paras 152-233, Part 6, para. 52)
• Israel. Human Rights Committee’s Report on Beit Hanoun [Paras 26 and 38-43]
• Israel. Report of the Winnowed 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. Khatayeva 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]

The armed conflict in Syria

• Israel. Bilocation of Gaza and the Flotilla Incident
• Libya. NATO Intervention 2011
• UN. 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

SPECIAL BIBLIOGRAPHY

Suggested reading:


Further readings:


a. an attack must be cancelled if it becomes apparent that it is a prohibited one
P 1 Art. 57(2)(b) [CHL, 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 2011 [Paras 166, 165, 178-180]

b. advance warning must be given, unless circumstances do not permit
P 1 Art. 51(2)(c) [CHL, 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’s “Bilocation of Gaza” Case 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. Khatayeva v. Russia [Paras 21 and 129]
• Israel. Palistine. Operation Protective Edge [Gaza, 13 June - 26 August 2014]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

C. when a choice is possible, the objective causing the least danger to the civilian population must be selected
P 1 Art. 57(2) [CHL, Rule 21]

d. additional obligations of those who plan or decide on an attack
P 1 Art. 57(2)(c) [CHL, 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. Khatayeva 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(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 2011 [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 B.]
11. Precautionary measures against the effects of attacks

**Introductory text**

Contrary to Art. 57 of Protocol I [art. 57] 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” [56]) include three specific obligations that Parties to a conflict shall discharge “to the maximum extent feasible” [60]:

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” [88]. 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” [93].

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 151-165; Part II, paras 439-498)
- Involving, 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 I, paras 15-21, 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. 216]

**Suggested Bibliography**

- **Further reading:**

12. Presumptions

**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 it. 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, and meant to prevent certain areas and the war victims in them from falling into enemy hands.

**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, Guererro 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

**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 it. 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, 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 Vavuniya (Paras 12-16)
- Case Study, Armed Conflicts in the former Yugoslavia (Paras 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)

GENERAL 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.
- SANDÒZ Yves, "Localités et zones sous protection spéciale", in Quatre études du droit international humanitaire, Geneva, Henry-Dunant Institute, 1985, pp. 35-47.

Further reading:

  a. open cities

GENERAL BIBLIOGRAPHY
14. Civil defence

P I, Arts 61-67

sPECIAL BIBLIOGRAPHY

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

Footnotes

[2] Those specifically protected objects, e.g., dams, dikes, and hospitals, may not be used as objects which allow them for military action and should therefore never become military objectives. If they are however used for non-military purposes, even they can under restricted circumstances become military objectives. (See, e.g., P I, Arts 50(2) GC IV, Art. 19).
[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 enemy objects, if not a complete destruction, they can only be considered “attacks” if they have catastrophic 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 objectives of a military nature are military objectives.
[7] Characterizing the contribution as “effective” and the advantage as “definitive” – 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. Therefore, there would be no more IHL merely considerability 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).
[14] See P I, Arts 54, 51(2) and 85(3); P II, Art. 13.
[17] See HR, Art. 22 P I, Art. 51(4) and (5).
[19] See HR, Art. 27 and GC IV, Art. 18 (concerning hospitals); P I, Art. 57(2).
[20] See P I, Arts 51, 50(1), 56(1), 56(6), 56(4) and 56(1).
[22] See P I, Art. 51(3); P II, Art. 13(3).
[26] See supra.
[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.
[29] See P I, Arts 58(8) and 57.
[31] See HD, Arts 26 and 27; P I, Arts 48, 52, and 85(3).
[34] See P I, Arts 56, 55, 49, 55(3) and 56.
[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 80(1) and 80(1); GC II, Arts 23, 23(2), and 23(3); GC III, 49(1); GC IV, Arts 19(3) and 21; 22; 21; P I, Arts 20 and 21; P II, P II, Art. 11.
[38] See supra.
[40] See P I, Art. 57(2)(b).
[41] See HD, Arts 26 GC IV, Art. 19 (concerning hospitals); P I, Art. 57(2)(a).
[43] See P I, Arts 57(2)(b) and supra.
[44] See 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.

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 22-24

Introductory text

[We are deeply grateful to Dr. Théo Boutruche-JHL consultant, who wrote his PhD thesis | 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.

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[62] and the ban on specific weapons, such as explosive projectiles weighing less than 400 grams[63] or dum-dum bullets[64], as well as particular methods like killing or wounding treacherously.[65] 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 inductriment attacks, including those which employ a method or means of combat the effects of which cannot be limited as required by the Protocol.[66] 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.[68]

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.[66] The principles prohibiting the means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering[66] and the principle prohibiting means and methods of warfare causing indiscriminate effects[64] 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, 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.[64] 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 are prohibited in all circumstances because of their nature and 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 of warfare.

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[64]. 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 means or methods 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

- I.C.I. Nuclear Weapons Advisory Opinion [Para. 76]
- United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons [Paras 4 and 8]
- Israel, ebanov/Herzallah, Conflict in 2006 [Part I, paras 249-253]
- United States, Surrendering in the Persian Gulf War
- Afghanistan, Assessment of ISAF Strategy
- Afghanistan, Code of Conduct of the Mujahideen [Art.41]
- ECHR, Isayeva v. Russia [Paras 19, 23, 165, 167, 193]
- Georgia/Russia, Human Rights Watch's Report on the Conflict in South Ossetia [Paras 8, 20-22, 28]
- 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.[64] 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[73] and weapons of mass destruction[74]. Although the Geneva Conventions and Additional Protocols limit means and methods of warfare (including those severely damaging the environment),[75] they neither prohibit nor restrict the use of any specific weapon; however, various other conventions do.[76] 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.[77]

CARES AND DOCUMENTS

- Invrags. 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)
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para.73-274, 280]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

Further reading:

a. explosive bullets

[SAGE Journals, Rule 78]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

a. dum-dum bullets

[SAGE Journals, Rule 77]

SPECIFIC BIBLIOGRAPHY

Suggested reading:

a. certain conventional weapons

CARES 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

Suggested reading:

Further reading:

aa) mines

[ICRC, Rules 80-83]

CARES AND DOCUMENTS

- Convention on the Prohibitions of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction
- Geneva Call. Pursuant States of Somalia adhering to a total ban on anti-personnel mines

SPECIFIC BIBLIOGRAPHY

Suggested reading:

a. explosive bullets

[SAGE Journals, Rule 78]


bb) incendiary weapons

[CIHL, Rules 84 and 85]

CASES AND DOCUMENTS

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III to the 1980 Convention)

Inter-American Commission on Human Rights, Tablada [Para. 186]

SPECIFIC BIBLIOGRAPHY

Suggested reading:


Further reading:


cc) non-detectable fragments

[CIHL, Rule 78]

CASES AND DOCUMENTS

Protocol on Non-Detectable Fragments (Protocol I to the 1980 Convention)

SPECIFIC BIBLIOGRAPHY

Suggested reading:


dd) blinding weapons

[CIHL, Rule 80]

CASES AND DOCUMENTS

Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)

United States, Memorandum of Law: The Use of Lasers as Anti-Personnel Weapons

SPECIFIC BIBLIOGRAPHY

Suggested reading:


ee) explosive remnants of war

CASES AND DOCUMENTS


Case Study, Armed Conflicts in the former Yugoslavia [28]

SPECIFIC BIBLIOGRAPHY

Suggested reading:


f) cluster munitions

CASES AND DOCUMENTS

Convention on Cluster Munitions

Georgia/Russia, Human Rights Watch’s Report on the Conflict in South Ossetia [Paras 48, 51, 65, 74]

Georgia/Russia, Independent International Fact-Finding Mission on the Conflict in South Ossetia [Paras 64-70]

Cambodia/Thailand, Border Conflict around the Temple of Preah Vihear
• The armed conflict in Syria

SPECIFIC BIBLIOGRAPHY

Suggested reading:
Further reading:
g) other weapons for which limitations are under discussion
– light weapons
– anti-vehicle mines
– 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

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:

• 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:

- “Special Issue: The Advisory Opinion of the International Court of Justice on the Legality of Nuclear Weapons and International Humanitarian Law”, inIRRC, No. 316, February 1997, p. 3 ff (articles of CONDOMELLI Luigi, DAVID Éric, DOSWALD-BECK Louise and GREENWOOD Christopher).

Further reading:


h. “new means and methods”

P A L. 36

As a measure of precaution, Art. 36 ofProtocol 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 toProtocol 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 READING:

- 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 challenges of contemporary armed conflicts in 2011
- Autonomous Weapon Systems
- General Assembly, The use of drones in counter-terrorism operations
- U.S.: Lethal Operations against Al-Qa’ida Leaders
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para 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 ruses 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, D.5.4.4, E.2 and Dissenting opinion]
- Afghanistan, Code of Conduct for the Mujahideen [Arts 7-9, D.5.25-26, 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. 40 (IHL, Rule 40)

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

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.

stavation 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 Flotilla 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 arelaus 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. Determining the beginning of an armed conflict thereby is employed alone, short of any kinetic tricks in situations where cyberattacks are deployed. 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 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 [89]? Is it necessary to them 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 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 [92]. As a consequence, the question arises of what 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 interconnection also affects the question 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 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 can 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 2011
- ICRC, International humanitarian law and the challenges of contemporary armed conflicts in 2015 [para67-223]

SPECIFIC BIBLIOGRAPHY

Suggested reading:
ICRC, Cyber warfare and international humanitarian law: The ICRC’s position 2013, 4 pp.

Further reading:

Footnotes

[61] See P.I, Part III, Section I
[62] See 3D Petersberg Declaration of 1868, Preublic Hnelski Act, 23(e)
[63] See 3D Petersberg Declaration of 1868
[64] See Declaration Concerning Expanding Bullets (adopted by the First Hague Peace Conference of 1899)
[65] See IHL Art 25(b)
[66] See P.I, Art 63(3)(a)
destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”

See [87] See HR, Art. 22 P.I, Art. 35(1)

[88] See P.I, Art. 35(2)

[89] See P.I. Art. 35(3) and 35(4)

[90] See P.I, Art. 36


[94] See P.I. Art. 49(1)(c)

[95] The issue of “neutralization”, but this time of targets, is also discussed in relation to the definition of “attacks” under IHL.

[96] For example, chemical weapons, use of poison, bacteriological and biological weapons, and – without success – nuclear weapons.

[97] For example, dum-dum bullets, mines, incendiary weapons, non-detectable fragments, and cluster munitions.

[98] 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 Veno-Mental or other Weapons; the 1927 and 1928 Geneva Conventions, as amended on 3 May 1996 (Protocol II to the 1980 Convention).


[100] The issue of “neutralization”, but this time of targets, is also discussed in relation to the definition of “attacks” under IHL.

[101] See P.I. Art. 52(7) “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.”

[102] See P.I, Art. 51(5)(c)
