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## #1 Introduction to International Humanitarian Law

### 1.1 The Basics

- It is a branch of Public International Law.
- It is also referred to as *jus in bello* and less commonly as the law of the armed conflict (LOAC).
- It is often contrasted with *jus ad bellum* that deals with legality of an armed conflict or war - article 2(4) and 51 of the UN Charter
- It is both complementary and supplementary to another branch of Public International Law –

## International Human Rights Law.

- It is also interrelated with international criminal law.
- It temporally applies to a situation qualifying as an armed conflict. (See #5 Classification)

> Peacetime IHL is a rhetoric, meaning the duty of states to domesticate and disseminate IHL even and specially in peace-time.

> Some residual obligations remain after termination of war, such as clearance of mines, repatriation of prisoners of war etc.

### 1.2. Primary Objectives of IHL

- IHL presupposes that wars are inevitable.
- It also presupposes the concept of 'fog of war' - coined by Prussian military analyst Carl von Clausewitz in 1832). Meaning: it is more difficult to make 'rational and correct choices' during a wartime than peace time.
- It presupposes that war is an extraordinary situation; that regular law and order are susceptible to breakdown during wars; that governance is difficult during war. Thus, it requires a special set of rules to ensure the 'minimum of humanity' is safeguarded during war.
- To this end, IHL seeks to:
  - > minimize the loss of civilian lives. (correction to the previous notes: IHL experts no longer say 'innocent civilians' because it somehow supposes 'guilty civilians'. There is no such thing as 'guilty civilians' in war')
  - > minimize unnecessary suffering on all the sides of the war
  - > minimize wanton destruction of civilian properties > preserve the 'minimum of humanity' even during the fog of war (see for example, common article 3 to the GCs and the Martens Clause)
- IHL does NOT seek to
  - > Prohibit all forms of violence during a war
  - > Protect everyone in every circumstance during a war.

- It provides a set of rules applicable during an armed conflict governing:
  - Treatment of sick and wounded and shipwrecked
  - Conduct of hostilities
    - Rules of targeting / rules of engagement
    - Means and methods of warfare
  - Detention in the context of an armed conflict
    - Prisoners of war
    - Civilian detention
    - Civilian internment

## # 2 IHL as a Branch of Public International Law

### 2.1. The two layers of IHL

> The **traditional layer**: governing the belligerent interrelationship between States. (For example, the common article 2 to the Geneva Conventions only mentions 'high contracting parties', i.e. the states)

> The **contemporary layer**: also called the constitutional and administrative law of the international community. In IHL, the belligerent as well as non-belligerent interrelationship between

- Between States and organized armed groups (for e.g. the armed conflict of Nepal 1996-2006)
- Between organized armed groups (for example between the Mexican drug cartels)
- Between states and IOs (such as the ICRC's right to humanitarian initiative) Etc.

### 2.2. Is IHL at a vanishing point of jurisprudence?

∞ What does this mean

- Vanishing point - the illusion that two parallel lines in the same plane are the same

- How does this apply to international law: Holland - 'international law' and 'jurisprudence' are two parallel concepts, that appear to be the same, but are not. International law is not jurisprudence (or law, for that matter), mainly because according to him, IL has weak to no enforcement mechanisms compared to domestic law.

∞ This debate is quite recurrent in IHL. There are two camps of thoughts:

- o Yes, it is at a vanishing point of jurisprudence

- > For example, *Robert A. Friedlander, On the Prevention of Violence (article)*: Yes, because armed violence has only grown over the last centuries. He cites increase in guerilla warfare and national liberation movements;

- > Experts point out the weak enforcement mechanism within IHL (for example the International Humanitarian Fact Finding Commission has only been activated once - Ukraine situation)

- > Fragrant violations of IHL (Syria, Yemen, ill-treatment of prisoners in Guantanamo Bay) among others.

- o No, it is not at a vanishing point of jurisprudence

- > There are some obvious elementary considerations of humanity that actors of war will zealously follow: Lauterpacht, *International Law (book)*, p. 37 (reiterated in the Martens Clause)

- > Compliance with IHL is in the best interest of the parties to the conflict, to maintain their public image. (*Antonio Cassese, Violence and Law in the Modern Age (book)*, pp. 4-7.

- o Conclusion: Well-developed and documented rules BUT relatively weak enforcement and compliance.

## 2.3. Sources of IHL

**Overview:** 1) Sources enumerated under article 38(1) of the Statute of the International Court of Justice: a) treaties; b) International customs; c) General Principles of Law; d) Subsidiary sources including judicial decisions and writings of experts; 2) Sources not enumerated under the ICJ statute: a) Peremptory norms or *jus cogens*; b) *Erga omnes* obligations; c) UN General Assembly Resolutions; d) UN Security Council Resolutions; e) Declarations and guiding principles.

### 2.3.1. Meaning of sources of IHL

- Malcolm N. Shaw - the process by which international law is made.

- 'source' of IHL not to be confused with 'reference material or evidence' of a rule of IHL.

For example: *hors de combat* should not be targeted - customary IHL (because state practice + *opinio juris*). Here, state practice + *opinio juris* (together making an international custom) is the 'source' of IHL. Compare this with reference of this custom - the ICRC's customary IHL database rule 47 (this is not the source, only the reference material or evidence that such a custom exists)



## Article 38(1) of the ICJ Statute

- Used by the judges of ICJ to determine what constitutes an international rule in cases *sub judice* in the court.
- Why is it generally quoted or referred in the source of international law? - Ian Brownlie: it has become an international custom not confined to the ICJ.
- Sources of PIL (and IHL, as a branch of PIL) mentioned in this article:

### I. **Primary/binding sources** (of international legal obligation):

- a) treaties;
- b) international customs/customary international law;
- c) general principles of law

### II. **Subsidiary/non-binding sources** (no legal obligation is created, and is to be used as subsidiary sources to

- a) interpret/construe the primary sources
- b) to check if a new international rule is evolving (*de lege ferenda*):
  - d.1. judicial decisions (both national and international)
  - d.2. works of highly qualified publicists (or simply, experts)

### 2.3.2. Treaties

∞ **Definition of a treaty:** Oppenheim: An international agreement (but not just any international agreement, necessary ingredient - consent to be bound (or consent to create binding legal obligation).

#### ∞ **Key Principles:**

> Consent to be (legally) (and not politically/morally) bound - art. 11 of VCLT

> *Pacta Sunt Servanda* (a treaty must be followed in a good faith) - art. 26 of VCLT

## ∞ **Types of treaties**

> On the basis of the form

o **Written treaties** (art. 2(1) of the Vienna Convention on the Law of the Treaties 1969) (VCLT applicable)

o **Verbal treaties**: non-written international agreement, indicating a consent to create legally binding obligation - *Qatar v Bahrain*, ICJ 1994 (VCLT inapplicable)

> On the basis of subjects

o **Treaties between states** (VCLT applicable)

o **Treaties between states and international organizations** (Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations) (VCLTIO applicable)

o **Treaties between international organizations** (VCLTIO applicable) > On the basis of number of parties

o Bilateral treaties (two parties)

o Multilateral treaties (including two or more parties)

## ∞ **Treaties as a source of IHL**

> **Evolution of the form**: Before mid 19<sup>th</sup> century - mostly bilateral treaties (exchange of prisoners of war and the sick and wounded); mid 19<sup>th</sup> century onwards - mostly multilateral (started with the 1864 (First) *Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*)

> **Subjects**:

IHL treaties are binding upon states as well as non-state actors (specially organized armed groups) - *ICRC Commentary to Common Article 1 to the Geneva Conventions*.

IHL treaties are not binding upon IOs as such. However, they have a practice of entering into bilateral treaties with states, for example: *Agreement Between NATO and Afghanistan on the Status of NATO Forces and NATO Personnel Conducting Mutually Agreed NATO-led Activities in Afghanistan*, 2014.

> **Reciprocity not applicable**: IHL treaties are not subject to reciprocity. This means, violation by one subject/actor does not justify violation by another.

> **Limitation in denunciation/withdrawal:** IHL treaties can be denounced/withdrawn from. However, the denunciations and withdrawal only take effect after the end of the armed conflict.

> **Material breach by a party cannot be the justification for termination of IHL treaties:** Unlike other treaties, IHL treaties cannot be terminated if there is a material breach of the treaty by another party - VCLT art. 60(5).

> **Main sources: The Hague Law and the Geneva Law**

o **The Geneva Law:** Rules on who are protected in a war and how they are protected

- The Four Geneva Conventions of 1949 protecting (in a simplified version of the titles):

> Sick and wounded at land

> Sick, wounded and shipwrecked at sea

> Prisoners of war

> Civilians

- The three Additional Protocols to the Geneva Conventions (in a simplified version of the titles)

> The first additional protocol applicable to international armed conflicts (1977)

> The second additional protocol applicable to non-international armed conflicts (1977)

> The third additional protocol regarding usage of the red crystal as a distinctive emblem (2005)

o **The Hague Law:** Rules covering the prohibited/limited means and methods of warfare

- The Hague Conventions of 1899 (4 in total)

- The Hague Conventions of 1907 (13 in total) and their annexed regulations

One of the most important sources among the Hague Law is the IV Hague Convention of 1907, specially the annex Regulations as it sets out the international law on occupation (a form of international armed conflict).

o **The separation is not very relevant in the modern context:** Since the first two additional protocols of the GCs imbibe much of the rules of warfare included in the Hague Conventions.

o **Specific ‘weapons conventions’ (IHL is interrelated with international disarmament law in this regard).** *Simplified/popular names of these conventions are*

- The 1925 Geneva Gas Protocol
- The 1954 Hague (Cultural Property) Convention
- 1972 Biological Weapons Convention
- 1976 Convention prohibiting Environmental Modification Techniques (ENMOD)
- 1980 Convention Weapons Convention and its five Protocols: 1) non-detectable fragments; 2) mines and booby-traps; 3) incendiary weapons; 4) blinding laser weapons; 5) explosive remnants of war
- 1993 Chemical Weapons Convention
- 1997 Ottawa Convention (prohibiting anti-personnel mines)
- 2008 Convention on Cluster Munitions
- 2017 Nuclear Weapons Convention

o Treaties related with repression of violations of IHL (IHL is interrelated with international criminal law in this regard)

- 1998 Rome Statute of the International Criminal Court Note: you can also mention the Statutes of the ICTY and ICTR, but they are *ad hoc*.

o Treaties where IHL and International Human Rights ‘converge’

- 1989 Convention on the Rights of the Child, in particular its 2000 Optional Protocol on the involvement of children in armed conflict
- 2006 Enforced Disappearance Convention

o Other treaties, relevant to the remit of IHL

- 1968 Treaty on Non-Proliferation of Nuclear Weapons (NPT)
- 1996 Comprehensive Nuclear Test Ban Treaty (CTBT)

- 2013 Arms Trade Treaty
- 1951 Refugee Convention

### 2.3.3. International Customs / Customary International Law

#### ∞ The concept of international customs / customary international law

> A General practice accepted as law: art. 38(1)(b) of the ICJ Statute

> Elements: state practice (*usus*) (objective element) and *opinio juris sive necessitates* (or simply *opinio juris*) (subjective element) - *North Sea Continental Shelf Case*, ICJ 1969 + *Nicaragua Case*, ICJ 1986)

> **State practice** - material acts of a state. For example, in IHL (*Jean-Marie Henckaerts*, 'Study on Customary IHL', *International Review of the Red Cross*, 2006:

- Physical acts.
  - Battlefield behavior
  - Use of certain weapons
  - Treatment afforded to different categories of persons
- Verbal Acts:
  - Military manuals
  - National legislations
  - National case-law
  - Instructions to armed and security forces
  - Military communiques
  - Diplomatic protests
  - Opinion of official legal advisers

- Comments by governments on draft treaties
- Executive decisions and regulations
- Pleadings before international tribunals
- Statements in international fora
- Government positions on resolutions adopted by international organizations

Note: only those state practices which have: a) widespread participation; b) uniformity; c) consistency qualify as CIL - *Asylum Case*, ICJ 1950

> **Opinio Juris** - a practice done with the intent that it will have legal consequences (*North Sea Continental Shelf Case*, ICJ 1969) or that doing so is a legal right of the state for a certain military, economic or political demands (*Nicaragua Case*, ICJ 1986)

> Usually, the verbal acts of a state, noted above by Henckaerts also serve as evidence of *opinio juris* of a state.

## ∞ **Significance of international customs in IHL**

> The Geneva Conventions are 'almost' universally ratified, however other treaties are not. Customary IHL crystallize those rules as binding norms for the non-parties.

> Fulfills the legal vacuum of rules applicable in non-international armed conflict, left unaddressed by the Geneva Conventions and its Additional Protocol II.

> *ICRC's CIHL Study/ Database*: There are 161 rules of customary IHL. 136 of them are based on the rules of Additional protocol 1 applicable to IACs, equally applicable to NIACs.

## ∞ **Examples of Customary IHL**

> **As documented by the ICRC in the its CIHL Database\*:**

- Distinction between civilians and combatants (rules 1-6)
- Distinction between civilian objects and military objectives (rules 7 – 10)
- Prohibition on indiscriminate attack (rules 11-13)

- Proportionality and precaution in attack (rules 14 – 24)
- Protection of medical and religious objects (rules 25 – 30) and so on...

\*most of these rules embody the Geneva Conventions and their first two Additional Protocols. Almost the entirety of the 'Geneva Law' has crystallized into Customary IHL, except and notably:

- The concept of 'national liberation movement' - art. 1(4) of API
- The concept of (implicit) right to asymmetrical warfare - art. 43 of API
- The mandate of International Humanitarian Fact Finding Commission - art. 90 of AP I

> **Common Article III to the GCs:** The entire article encapsulates the 'elementary considerations of humanity' and are international customs - *Nicaragua Case*, ICJ 1986.

> **The *Tadic* definition of non-international armed conflict:** Since the common article III does not define NIAC, the definition adopted in *Tadic* is used persuasively, and as customary international law. It defines a NIAC as one involving one or more nongovernmental organizations and meet these two criteria: a) minimum intensity; b) a level of (structural) organization (*Tadic Trial*, ICTY 1997)

> **The *Tadic* overall control test:** An armed conflict that starts off as a NIAC can transform into an IAC if a state "organizes, coordinates or plans the military actions...in addition to financing, training and equipping or providing operational support" to an organized armed group. (*Tadic Appeals*, ICTY 1999). This concept is absent in the Geneva Conventions.

> **Customary law as a sufficient source of obligation in international criminal tribunals:** A norm need not to be expressly stated in an international convention for it to crystallize as a crime under customary international law. What, indeed, would be the meaning of a customary rule if it only became applicable upon its incorporation into an international instrument such as the Rome Treaty? (Direct Quote) *The Norman Case*, Trial Judgement, Special Court of Sierra Leone (SCSL), 2004)

> **The Lieber Code 1863:** An American military manual applied in the American Civil War. It is now recognized as an embodiment of customary IHL.

> **Hague Convention IV and the Hague Regulations Annexed to it** embody customary IHL - Nuremberg Trials + Nuclear Weapons Advisory Opinion, ICJ 1996.

#### 2.3.4. General Principles of Law

- **Procedural:** General principles of law are procedural law recognized as fundamental to their legal system by states around the world. Note: the concept of 'civilized nation' litmus test for recognition of such laws as general principles of law has become redundant.

- **Example:** a) Due process of law including the principle of natural justice and fair trial; b) estoppel; c) stare decisis (common law countries);

*The Lithgow Case, European Court of Human Rights (ECtHR), 1989* → Compensation for interference in the right to property is a general principle of law.

Ø **Interesting Fact:** Although article 38(1)(c) of the ICJ statute enlists General Principles of Law as a primary source of International Law, there is not a single case within the ICJ decided solely on the basis of a General Principle of Law.

### Ø The Martens Clause

§ Enshrined in the preamble to the 1899 Hague Convention, it essentially recommends that in absence of concrete rules in a situation clearly requiring such rules, humanity and public conscience shall remain the guiding principles in the legal assessment of the conducts of states (also non-state actors).

§ This contemporary interpretation of this *Clause* is a General Principle of Law.

§ It is also an international custom + treaty law if a state is party to the Hague Conventions of 1899 and/or API to the GCs.

*Direct Quotation:* Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience

- **Are necessity, proportionality and precaution General Principles of Law?**

Ø No, but they are international customs in their specific rules (see the section on Customary IHL)

Ø Why not? (The explanation to this is a little too complex and non-essential for LLB J. But, for reference -> by themselves, they are abstract meta -> rules à Marco Sassoli)

### 2.3.5. Judicial Decisions (Subsidiary Source)



- **Non-binding:**

- > Decisions of the ICJ are only binding on parties of a particular case. For example, the Nicaragua judgement is binding only on the US and Nicaragua - art. 59 of the ICJ Statute.

- > The ICC 'may' apply principles and rules of law as interpreted in its previous decisions - art. 21(2) of the Rome Statute.

- **No hierarchy between national and international tribunals**

- > If the courts make extensive and cogent assessment of international law as a basis of their decisions.

- > There might be preference though. For example, the ICJ prefers the *Nicaragua* 'effective control test' (state responsibility for wrongful acts) and the ICTY prefers the *Tadic* 'overall control test' (individual criminal responsibility for international crimes) which are more or less overlapping concepts.

- **Key jurisprudence from national courts**

- > *Hamdan v Rumsfeld*, United States Supreme Court, 2006: Treatment of prisoners in Guantanamo Bay.

- > *Public Committee Against Torture in Israel v. Government of Israel*, Supreme Court of Israel, 2006: Targeted assassination and ill-treatment of civilian in an occupied territory

- > *Secretary of State for Foreign & Commonwealth Affairs v. Rahmatullah* United Kingdom Supreme Court, 2012: Ill-treatment of terrorist suspects

- > *Al-Shimari v. CACI Premier Technology*, the US 4<sup>th</sup> Circuit Court, 2016: obligations of a private military force/organization.

- > You may also cite some case law from the Supreme Court of Nepal (see 'National Implementation of IHL')

- **ICTR and ICTY (see 'International Repression Mechanisms in IILL')**

- **ICC (see 'International Repression Mechanisms in IILL')**

- **ICJ:**

- > *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. the US), 1986: the US was held responsible for the acts of contra rebels in the Nicaragua.

> *Legality on the Use of Nuclear Weapons*, 1996: Use of nuclear weapons in the context of an armed conflict would violate the prohibition on indiscriminate attacks and effects of attacks.

Reiterated in the *Marshall Islands v. India*, 2016 (although the case itself was dismissed, the court did reaffirm the IHL assessment of legality of nuclear weapons)

> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (BiH v. Serbia), 1996: The 'ethnic cleansing' in Bosnia and Herzegovina were indeed Genocide. Serbia has to surrender the fugitives accused of genocide to the ICTY.

> *Legality of the Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Construction of a Wall Advisory Opinion), 2004: Law of occupation (sub-branch of IHL) and international human rights law are complementary and Israel's activities violated both.

> *Armed Activities on the Territory of the Congo* (Democratic Republic of Congo v. Uganda), 2005: the invasion and occupation of DRC by Uganda followed many violations of IHL.

### **2.3.6. Works of Highly Qualified Publicists / Expert publications**

∞ According to *Jan Klabbers, International Law* (book)

> Non-binding but have a direct effect on international law making - scarcity of jurisprudence and capacity of the experts in international law

> Scholars can change hats and become judges, for example, Cassese became the president of ICTY. His seminal works automatically become highly valuable.

> Scholars indicate the 'dominant paradigm' since they represent independent opinions v state opinions that are prone to biasness.

∞ Some of the noted expert publications are:

> Publications of the ICRC: such as the *2010 Interpretative Guideline on Direct Participation in Hostilities*, *Customary IHL Database* and the Commentaries to the Geneva Conventions and their Additional Protocols.

> Publications of UN (the International Law Commission, the specialized agencies) and other supranational organizations such as the European Commission.

> Publications of other noted International organizations, such as the Human Rights Watch and Amnesty

International

> Publications by experts such as Antonio Cassese and Jean Pictet.

### 2.3.7. Jus Cogens and Erga Omnes Obligations

#### ∞ Jus Cogens

> Treaty conflicting with a peremptory norm is void - art. 53 of VCLT

> A peremptory norm means a norm from which no derogation is permitted.

> Although it is generally said that there is no hierarchy in primary sources of international law, peremptory norms or *jus cogens* are regarded 'highest-order norms'

> Examples

- *Armed Activities in the DRC Case*, ICJ 2005 - The prohibition on Genocide is *jus cogens*

- *Furundiza Trial*, ICTY 1995 - The prohibition on torture is *jus cogens* + reiterated in the Pinochet Trial, UK House of Lords 1999

Ø However and ironically, the concept of *jus cogens* is not 'universally recognized' as the ultimate norm in international law that raises above every other norm. Specially in two cases concerning State Immunity.

- *Al-Adsani Case*, EtCHR, 2001 - main issue: compensation for torture. The 'majority opinion' was that a foreign state could not be compelled to appear before a court against its protected state immunity invoking the *jus cogens* prohibition on torture.

- Reiterated in *Italy v. Germany*, ICJ 2012 - concerned claim of reparation to the Italian soldiers and their family members whose territory were invaded and occupied by Germany in the second World War.

#### · **Erga Omnes Obligation**

Ø Meaning: obligation of a state towards 'international community as a whole'

Ø Interrelationship between *jus cogens* and *erga omnes*

- *Jus cogens* - highest order norms (by logic, automatically *erga omnes*, thus usually overlap- Jan Klabbers).  
Example: prohibition on torture.

- *Erga omnes* - not necessarily the highest order norm. For example: freedom of movement.
- Non-compliance of both are regarded as 'serious breach' by Articles on Responsibilities of States for Internationally Wrongful Acts (ARSIWA), article 41.
- Basically, all *jus cogens* norms are *erga omnes* but not all *erga omnes* obligations are *jus cogens* CI

Ø *Barcelona Traction Case*, ICJ 1970 - although related with environment law, the court pointed out four *erga omnes* obligations: a) prohibition on aggression; b) prohibition on Genocide; c) prohibition on slavery; d) prohibition on racial discrimination.

Ø The prohibition on Genocide as an *erga omnes* was reiterated in the *Armed Activities in the DRC*, ICJ 2005.

Ø *Construction of a Wall Advisory Opinion*, ICJ 2004: recognition of right to self-determination (in that context, of people of occupied Palestine) as an *erga omnes* obligation of states (here, Israel).

### **2.3.8. United Nations General Assembly Resolutions and Declarations**

- Not mentioned in article 38(1) of the ICJ Statute
- Non-binding on states
- But carry 'political weight' and can lead to development of international law.
- Examples:

> Universal Declaration on Human Rights (1945)

> UNGA Res. 1514: Declaration on granting independence to colonial countries and people

> UNGA Res. 2625: Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations

> UNGA Res. 3314: Definition of Aggression

### **2.3.9. United Nations Security Council Resolutions**

- Another important source not mentioned in article 38(1) of the ICJ Statute

- Are they binding? Not immediately clear

> Yes, on the member states, if - interpretation of article 24 of the UN Charter – authority of the UNSC to maintain international peace and security - UN Charter is regarded international 'constitutional' law.

> *Lockerbie Case*, ICJ 1992 - referred to UNSC res. 748 placing economic sanction on Libya as 'binding' on Libya. Thus, a line of interpretation could be - on the particular states that they address.

- Examples:

> UNSC Res. 827 establishing the ICTY and 955 establishing the ICTR

> UNSC Res. 1325 on 'women, peace and security'

> UNSC Res. 1593 referring the situation in Darfur, Sudan to the International Criminal Court

> UNSC Res. 1825 establishing the UN Peacekeeping Mission in Nepal (UNMIN)

## 2.4. Interrelationship between *Jus in Bello* and *Jus Ad Bellum*

### **Jus Ad Bellum**

It is a branch of public international law governing the legality of use of force.

It is concerned with whether a war itself is legitimate or not

States are the subjects of jus ad bellum, as this law seeks to regulate interstate behavior.

### **Jus In Bello**

In common parlance, referred to as International

Humanitarian Law.

It is a branch of public international law governing principles and rules of warfare.

Is concerned with whether a conduct in a war are legitimate or not

States, as well as non-state actors are the subjects of jus in bello, as this law seeks to regulate behaviors of all the parties to the conflict including organized armed groups engaged in a non-international armed conflict and civilians, who bear both rights and duties (i.e. not to shield combatants, not to directly participate in hostilities).

There is a general prohibition on use of force against the territorial sovereignty or political independence of another state - art. 2(4) of the UN Charter

Not all forms of violence are prohibited by International Humanitarian Law. Such violence is prohibited which contravenes the principles of a) humanity; b) distinction; c) military necessity; d) proportionality; e) precaution; f) non-discrimination

The recognized exceptions to this general prohibition are:

a) Individual or collective self-defense- (art. 51 of the UN Charter)

There are no exceptions or derogations permitted from the principles of IHL.

b) Authority of the UNSC to take action against threat or breach of peace and aggression - (art. 42 of the UN Charter; mandate for peace enforcement missions)

Superior order/order carried out in an official capacity cannot be a defense for violation of IHL. (Customary IHL rules 154 and 155)

However, there is one caveat: Actions of the parties to the conflict have to be assessed on the basis of 'fundamental circumstances ruling at the time'. There is a popular dictum in IHL 'hindsight vision is 20/20'.

c) Controversially, the doctrine of Responsibility to Protect (for e.g. used by the US Coalition to justify its military actions in Syria, Afghanistan)

The leading source is the UN Charter

The leading sources are the Geneva Law, the Hague Law and the Customary IHL.

The 1928 Kellogg-Briand Pact is regarded as the watershed in the crystallization of jus ad bellum.

Jus in bello gradually emerged through state practices in the era when use of force was legal and justified under the doctrine of jus war. However, the 1864 Geneva Convention is regarded as the watershed in the crystallization of jus in bello.

∞ **Basic idea: Jus Ad Bellum and Jus In Bello are two distinct branches of PIL and have no legal bearing on each other**

Ø *Nicaragua Case*, ICJ 1986: The following two are distinct legal questions: (*simplified*)

- Whether the US violated article 2(4) of the UN Charter and the customary prohibition on use of force against another state, i.e. Nicaragua in proxy through the contra rebels.
- Whether the US violated IHL in the international armed conflict?

> This distinction essentially has two legal consequences:

- Even if a use of force is justified under the exceptions mentioned (in the table) above, the parties to the conflict need to adhere to their IHL obligations.
- Even if a use of force is unjustified, not all the conducts of the parties to the conflict in the conflict will automatically be regarded illegal (fruit of the poison tree doctrine inapplicable) if the conducts comply with IHL.

Simply put:

A state may comply with *jus in bellum*, yet violate *jus in bello* And a state may violate *jus in bellum*, yet comply with *jus in bello* But it is possible, and more common, that state violate both.

> *Sainovic Appeals*, ICTY 2014, para. 1662:

Whether the resort to the use of force is legitimate under international law is a question of *jus ad bellum*, which is distinct from whether the way in which that force was used was legal under international humanitarian law,[1] i.e. *jus in bello*. The rules of international humanitarian law do not require a military commander to refrain from defending his country but demand that he ensures that his conduct and that of his subordinates comply with established humanitarian principles. [...]

∞ **Areas and Issues where a clear distinction is problematic (identified as a challenge to IHL)**

> Legality of use of nuclear weapons - as evidenced in the Nuclear Weapons Advisory Opinion, ICJ, 1996

> National Liberation Movements/ Wars based on the philosophy of self-determination -)as evidenced in the Construction of a Wall Advisory Opinion, ICJ, 2004

## #3 Historical Development of International Humanitarian Law

∞ **Introduction**

> Tracing the development on the basis of sources: Philosophies and varying state practices - doctrines such as Hugo Grotius's *De Jure Belli Ac Pacis* (on the law of war and peace) - development of the Geneva and

Hague Law - development of customary IHL

> The codification history of IHL can be broadly categorized as:

- Before the 1864 (First) Geneva Convention

- After the 1864 (First) Geneva Convention

> Postcolonial critique of IHL - IHL is a western instrument

- But the basis philosophies or 'humanitarian elements' found around the world since ancient time - axiom 'the laws of wars are as old as wars themselves'

- The reason the four Geneva Conventions are almost universally recognized is because there was essentially almost universal participation of states during its drafting and adoption - Marco Sassoli, *How Does Law Protect in War* (book)

### **3.1. IHL before 1864**

#### **3.1.1. Ancient and abstract sources inculcating 'humanitarian elements'**

##### **> Judaism**

- (simplified) "Even when you open the snares of wickedness, do not destroy everything. Free the oppressed. Give bread to the hungry. When you see a naked person, give them cloth. Shelter the poor." (Isaiah)

##### **> Christianity**

- (simplified) "Inherit your kingdom. Give meat to the hungry. Give drink to the thirsty. Give shelter to a stranger and cloth to the naked. Treat a sick prisoner with kindness' (St. Matthew's Gospel)

##### **> Islam**

Ten Rules in *Ta'rikh al-Rusul wa al-Muluk*, including:

- o You must not mutilate,

- o Neither kill a child or aged man or woman.



- o Do not destroy a palm-tree, nor burn it with fire and do not cut any fruitful tree.
- o You must not slay any of the flock or the herds or the camels, save for your subsistence
- o You are likely to pass by people who have devoted their lives to monastic services; leave them to that to which they have devoted their lives.

### > **Ancient Chinese philosophy**

- Confucius' *The Analects*: Do not impose on others what you yourself do not desire.
- Sun Tsu's *The Art of War*: "Treat your captives well, care for them. All soldiers taken must be cared for with sincerity".

### > **Hindu Philosophy**

- The *Mahabharata* - Concept of Dharma Yuddha (just war) and Adharma/Kutta Yuddha (unjust war).
- Asoka's conquest of Kalinga included slaughter, death and carrying away captives of the people, This was regarded as a matter of profound sorrow and regret. (Girnar inscription, Gujarat)
- *Manusmriti*:
  - o Wars must have honest duels
  - o Travelers should be spared, so should people who are eating, drinking water or pursuing special avocations and diplomatic errands
  - o Brahmins should be spared at all cost and are not to be engaged in war

### **3.1.2. Development of state practices and doctrines**

> **Case of Peter Von Hagenbach (1474)**: "Von Hagenbach was accused of crimes against the laws of God and humanity and tried before a tribunal. "In his defence, he argued that he had followed superior orders. The court denied this plea, convicted him of the crime and executed him."

### > **16<sup>th</sup> and 17<sup>th</sup> century doctrines, including works such as**

- Hugo Grotius' *De jure belli ac pacis* (On the Law of War and Peace) that contained the concept of just and unjust war and the law of war was described as a part of the natural law - directly influenced the

1648 *Treaty of Westphalia*.

- Other noted scholars include Alberato Gentili, Bathazor Ayala, Francisco Suarez and Francisco de Vittoria

### > **19<sup>th</sup> century state practices and movements**

- The battle of Solferino, 1859: 40,000+ casualties, lack of treatment to the sick and wounded) philanthropist and businessman Henry Dunant organized civilian relief programs to assist the wounded soldiers. He recorded the experience in '*A Memory of Solferino*'
- The *Lieber Code*, 1863: a code of conduct for US Field Armies that fought the American Civil War. Prepared by Francis Lieber and signed by Abraham Lincoln. It is now regarded as an embodiment of customary IHL.
- Initiation of the International Red Cross Movement, 1863: by Henry Dunant, after his Solferino experience. The movement included three things:
  - o Formation of the International Committee of the Red Cross (ICRC)
  - o Formation of the national red cross societies
  - o Finalization of the draft of the first Geneva Convention
- Adoption of the 1<sup>st</sup> Geneva Convention Amelioration of the Condition of the Wounded in Armies in the Field, 1864:
  - o Only protected sick and wounded combatants
  - o Did not cover civilians or protect about prisoners of war
  - o Contained no rules of hostilities
  - o Did not cover sick and wounded in naval warfare

### **3.2. IHL after 1864 (marks gradual progression in the codification of IHL)**

- Ø Saint Petersburg Declaration, 1968 - renunciations of explosive projectiles that mostly targeted moving vehicles. Watershed in the development of 'weapons law' in IHL. Also contains the principle of proportionality

- the legitimate object is to weaken the enemy. Excess of this would be contrary to the principle of humanity.

Ø International Declaration Concerning the Laws and Customs of War, 1874 and Oxford Manuals on the Law of War on Land and Naval Warfare, 1880: greatly influenced the lexis of subsequent Hague Conventions and Regulations and the Geneva Conventions.

Ø Hague Conventions, 1899 - the preamble contains the first ever reference to the Martens Clause (see chapter #2)

Ø Revision of the First Geneva Convention in 1906 - Between 1906 and 1949 the first Geneva Convention was revised thrice.

Ø Hague Conventions 1907 and their annexed regulations - codified the foundation of what constitutes the 'weapons law' in IHL as well as the 'law of occupation'.

Ø Direct effects and outcomes of the First World War (1914-1918):

- A scale and intensity of warfare never before encountered.

- Aircraft and tanks were successfully used as weapons of war for the first time

- In 1919 a commission on the responsibility of the authors of the war and on enforcement of penalties was appointed by the allies.

- Leipzig trials in the Supreme Court of Germany - war criminals of the first world war prosecuted

- The Treaty of Paris, 1928 (also known as the Kellogg-Briand Pact) through which State parties renounced the use of war as an instrument of national policy.

Ø Adoption of the Geneva Gas Protocol, 1925

Ø Adoption of the 1929 Geneva Convention relative to the Treatment of Prisoners of War (superseded by the 1949 GC III)

Ø Direct effects and outcomes of the Second World War (1939-1945)

- Total war with tactics such as "terror bombing" and wide-scale attacks against civilian targets being employed by all belligerents, resulting in unprecedented losses of civilian life and widespread damage.

- Targeting of racial and religious minorities, amounting to ethnic cleansing and Genocide and the denial of

basic human rights to POW and internees

- Establishment of the IMT and the development of Nuremberg Principles (see # International Repression Mechanisms) as well as the IMTFE for prosecution of the German and Japanese war criminals - controversial and lopsided trials that did lead to substantial development in international criminal law.

- Genocide Convention, 1948:

- Definition of Genocide (now a part of CIL) - acts committed with the intent to destroy in whole or in part of a national/ethnic/racial/religious group, as such.

- Repression - State and individual criminal responsibility for acts constituting genocide .

- The Geneva Conventions, 1949:

- Significance:

- o Concept of international and non-international armed conflict. The whole of GCs applicable to IAC and Common Article (also called a mini Convention) applicable to NIAC

- o Introduced the concept of grave breach.

- Classification:

- o I: protection of sick and wounded in the field

- o II: protection of the sick, wounded and shipwrecked at sea

- o III: protection of prisoners of war

- o IV: protection of civilians

- > Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 - created the regime of general protection, special protection and enhanced protection of cultural properties and also created the distinctive emblem to denote them 'Blue Shield Emblem'.

- > Evolution of forms and challenges of modern warfare

- Rise of guerilla wars

- National liberation movements
  
- > Adoption of the Additional Protocols to the Geneva Conventions, 1977
  
- Protocol I applicable to IAC
  - o Recognition of national liberation wars as IACs
  - o Protection of civilians against general effects of hostilities
  - o Rules on prohibited methods of warfare
  - o Fundamental guarantees
  
- Protocol II applicable to NIAC
  - o Upper-threshold NIACs (where OAG exercises control over territory)
  - o The sovereignty clause
  - o Fundamental guarantees
  
- > UN Convention on Prohibitions or Restrictions of the Use of Certain Conventional Weapons, 1980
  
- > Paris Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993
  
- > Development of the ICTY and ICTR 1993/1994 (ad hoc tribunals established by the UNSC, however produced many landmark jurisprudences related to IHL)
  
- > Protocols to the 1980 Weapons Convention: Protocol IV on Blinding Laser Weapons, 1995/96
  
- > Ottawa Convention Banning Anti-Personnel Land Mines, 1997
  
- > Adoption in Rome of the Statute of the International Criminal Court, 1998 - first and only permanent court to repress serious violations of IHL (among other serious crimes) (entered into force on July 1, 2002)
  
- > Protocol II to the Convention on the Protection of Cultural Property, 1999
  
- > Optional Protocol to the Convention on the Rights of the Child, on the Involvement of Children in Armed

Conflicts (amending article 38 of the CRC), 2000

> Publication of the ICRC Study on Customary International Humanitarian Law, 2005 - based on a decade long study of state practices around the world. States themselves contributed by submitting such state practices upon request to the ICRC. Its authenticity is generally unchallenged (even by the US).

> Convention on Cluster Munitions, 2008

> Nuclear Weapons Convention, 2017

> Future:

- Call for a convention prohibiting/limiting autonomous weapons
- The draft Crime against Humanity Convention has been drafted by the ILC - will it be adopted and come into force?

## #4 Interrelationship between IHL and International Human Rights Law

- **Commonalities:**

> Both branches of public international law

> Common concern - to ensure the best protection of human life and preserve the best of humanity

> They inevitably share number of basic principles and rules

§ For example, the concept of fundamental guarantees: such as preservation of human dignity and prohibition on ill-treatment.

- **Traditional Notion: Complete separation**

This means traditionally, it was viewed that IHRL does not apply at all to war times.

*Raja Ram Dhakal et al .v HMG*, 2059 (2002) - the terms human rights and humanitarian law are 'different entities with different conditions'.

- **Moderate notion: *lex specialis derogat generali***

> The special law derogates general law.

> A clear distinction was made between 'special law applicable to war time' and 'general law applicable to both war and peace time' - *Nuclear Weapons Advisory Opinion*, ICJ 1996

> In overlapping matters, for example, selection of means and methods of warfare - IHL should apply, because it is *lex specialis*

> Problem with this position: IHL cannot entirely be *lex specialis* and IHRL cannot entirely be *lex generalis*. For example, the second Optional Protocol to the CRC prohibiting recruitment of child soldiers would be the *lex specialis* in this particular subject.

> ILC - *lex specialis* presumption does not apply when doing so 'frustrates the purpose of the law'.

· **Contemporary view: systematic interpretation to fill into the gap and maximize the protective sphere during war**

> **IHL and IHRL are complementary** to each other in laying down the protective sphere in war time.

#### **Explanation:**

> IHL is still the *lex specialis* in the sense that it applies only in armed conflicts.

However, there is a scale of applicable laws in its application.

· During relative peace - domestic laws and IHRL apply

· During riot/internal violence/civil strife - domestic laws and IHRL apply, but IHRL is the dominant law (to curb the abuse of authority by the states)

· In non-international armed conflicts - Domestic law, IHRL and IHL apply in increasing volume respectively.

o Domestic laws because the issue of territorial sovereignty remains. AP II itself has a 'sovereignty clause' - art. 3(1) of APII.

o IHRL, mostly in treatment of people in the hands of a party to the conflict, the twilight zone of protection in NIAC

o IHL - common article III, AP II (if state party) and CIHL (specially the rules of waging warfare)

- In international armed conflict:
  - o Abjectly less of domestic law - mostly administrative and procedural law
  - o IHRL - to fulfill the gap of protection
  - o IHL - Entirety of the Geneva Conventions, APs and other treaties (if state party) and Customary IHL.

\*it is a misconception that CA III does not apply in IACs - ICRC *Commentary to CA III 2016*

## ∞ **Elaboration of Systematic Interpretation – Interrelationship between Humanitarian Law and Human Rights**

> *Legal Consequences of the Construction of a Wall in the Occupied Palestine Territory Advisory Opinion*, ICJ, 2004, para. 106 - three possible situations of interrelationship between IHL and IHRL

- Situations in which only IHL applies (divergence)
- Situations in which only IHRL applies (divergence)
- Situations in which both IHL and IHRL apply (convergence and complementarity)

### > **Situations in which only IHL applies**

- An important consequence: No derogation from the rules would be permitted - IHL treaties are non-derogable; IHRL treaties - conditional derogations permitted
- Rules of targeting
  - o IHRL does not permit distinction between combatants and civilians and civilian objects and military objectives in peace time. However, IHL requires such distinction during war.
  - o The applicable laws would Hague Law, the APs to the GCs and CIHL (rules 1-6 mostly)
- Interpretation of the phrase 'arbitrary deprivation of life'
  - o In peace time, taking of life a) not in self-defense; b) to protect the life of another; c) extreme necessity is arbitrary.
  - o In war time, principles of military necessity, proportionality and precaution apply.



- o The applicable laws would be Hague Law, the APs to the GCs and CIHL (rules 1-6 mostly)
- o Affirmed in *Cyprus v Turkey*, InterAmerican Commission of Human Rights, 1982\*\*
- Treatment of civilian internees and prisoners of war
- o Since these concepts are absent in peacetime.
- o The applicable laws would be GC III and IV, as well as CIHL.
- Weapon law during wartime (is IHL). All the particular provisions and exceptions enshrined in the specific conventions apply. For example, use of tear gas is completely banned in war, but not in peacetime.
- \*\* BUT a challenge to this exclusivity on conduct of hostilities has been coming from EtCHR:

*Al-Skeini Case*, EtCHR 2011 - European Convention of Human Rights applies to 'extraterritorial military operations' if the military forces exercise control or authority over the territory or persons subject to such military operations (applied human rights to trace the legality of bombing campaigns in Iraq)

#### Ø Situations in which only IHRL should apply (at least is the yardstick for interpretation)

- involvement of children in armed conflict - the second Optional Protocol to the CRC
- right to demonstrate - ICCPR
- freedom of expression - ICCPR
- right to education - ICESCR
- rights of the disabled or differently abled - CRPD
- torture and ill-treatment - CAT The *Delalic Case*, ICTY 1998
- enforced disappearance - Convention on Enforced Disappearance

#### Ø Situations in which both apply (complementarity)

- IHL permits use of force against civilians who directly participate in hostilities - art. 51(3) of AP I, 13(3) of AP II. BUT whether to kill or capture? IHL experts say that the Basic Principles on use of force in IHRL applies.

- Similarly, not all violence happens in the context of an armed conflict. For example, civilian protests (politically motivated) happening concurrently with an armed conflict (this happened in the armed conflict in Nepal, as well). In such situations, the former - IHRL; the latter- IHL
- Law of occupation: definition as well as rights and duties of the occupier come from IHL, but the interpretation of those rights and duties come from IHRL -*Construction of a Wall Advisory Opinion*, ICJ 2004
- Treatment of detainees: the classification and preconditions for legitimate detention would come from IHL (such as when can a civilian be interned) and the rules regarding their treatment (such as condition at the detention center) would come from IHRL.
- Interpretation of fair-trial standards (how narrow - IHL; procedural safeguards, such as right against appeal - IHRL) (ICCPR, art. 14; art. 5, 105 and 106 of GC III; arts. 68-79 of GC IV; art. 75 of AP I)
- Special protection of women, children, religious personnel and objects, cultural properties, refugees and so on (arts. 76 and 77 of AP I; UNSC Resolutions 1325 and 1820)
- Interpretation of the principle of non-discrimination - CA III and at. 27 of GC IV

§ Treatment of members of organized armed groups and civilians in a non-international armed conflict à *Bamaca Velasquez case*, InterAmerican Commission on Human Rights, 2000.

### Ø Other landmark interpretations on the interrelationship

§ General Comment 6 of the Human Rights Committee (HRCComm) à Positive obligations of states (obligation to take positive steps to safeguard human rights) remain applicable in wartime as well.

§ Art. 21 of the Rome Statute à The jurisprudence of the court, even when dealing with explicit war crimes, technically a matter of IHL, 'must' be consistent with human rights. Also, evidences inconsistent with human rights standards are inadmissible before the court à art. 69(7) of the RS.

§ UN Report on Guantánamo Detainees:

o Although Human Rights bodies may not be good at judging when a situation has escalated to an armed conflict, they do hold prominence in holding the parties to the conflict accountable for violation of IHRL (you may cite the HR mechanisms at this juncture, see #international repression mechanisms)

\*\*\*\*\*

# #5 Principles of International Humanitarian Law

## 5.1. Introduction:

- 'Interpretative compass' in assessing every conduct of parties to an armed conflict - Marco Sassoli, *How Does Law Protect in War* (book).
- Principle of Humanity is a General Principle of Law, Customary IHL and codified in IHL treaties. The other are Customary IHL and codified in treaties.
- Generally agreed that there are 6 principles (variables found in various references).

> Humanity

> Distinction

> Military Necessity

> Proportionality

> Precaution

> Non-discrimination

## 5.2. Principle of Humanity

- The most basic obligation - bedrock of humanitarian law
  - o To prevent unnecessary destruction and suffering in the war
  - o To respect human dignity
  - o To preserve the best of human civilization - culture, religion and environment
- Humanitarian elements are found in various forms universally (see #historical development of IHL)
- The Martens Clause - humanity is the guiding principle to address blind spots in IHL (see #Sources 'General Principles of Law')

Reiterated in *Corfu Channel Case*, ICJ 1949 and *Nuclear Weapons Advisory Opinion*, ICJ 1996 as

'elementary considerations of humanity'

- Common Article III - principle of humanity protects all – civilians, active combatants and *hors de combat*.

(Direct Quotation) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely.

- Fundamental guarantees (art. 75 of AP I and art. 4 of APII): Sweeping protection enjoyed by everyone
- Basic inhuman acts prohibited by CA III and the provision on 'Fundamental Guarantees'

> Murder

> Torture

> Corporal punishment and/or mutilation

> Outrages upon personal dignity

> Hostage-taking

> Execution without prior judgement and outrages upon personal dignity

> Denial of basic fair trial

### 5.3. Principle of Distinction

- Basic notion - selectivity in identification and targeting by the commanders

- **Forms of distinction prevalent in IHL** > Main

- o Between civilian and combatants

- o Between civilian objects and military objectives

> Other relevant distinctions

- o Between IAC and NIAC (because protections are NOT overlapping)

- o Between civilians in the power of the enemy and civilian subject to hostilities
- o Between occupied and non-occupied territory

### · **Distinction between civilian and combatants**

#### **Civilian**

Anyone who does not belong to categories of persons under art 4 A(1) (2) (3) (6) of GCIII: art 50(1) of API

They have no right to participate in hostilities.

May be punished for mere participation in hostilities (loss of protection)

They are protected in one or more of these:

- As long as do not DPH
- As civilians in the hands of the enemy
- Against attacks and effects of hostilities

#### **Combatant**

Members of the categories under article 4 A (1) (3) (6) of GC III: regular armed forces; irregular armed forces (conditional) and *levee en masse* (see below)

Note: civilians can exceptionally be POW, however, they are STILL not regarded as combatants.

They have right to and do participate in hostilities.

May not be punished for mere participation. (however, principles and rules apply)

They are protected when:

- Wounded, sick or shipwrecked (GC I and II)
- Parachuting from aircraft in distress during descent: art 42 of AP1

∞ Fallen into the power of the enemy

∞ **Between civilian objects and military objectives** (CIHL rules 7 – 10)

> A distinction must be maintained between civilian and military objectives AT ALL TIMES

> What is a military objective?

> Art. 52(2) of AP I (also applicable to NIAC) :

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

> Civilian objects - a) objects other than military objectives; b) objects normally dedicated to civilian purposes (such as a place of worship, a house or other dwelling or a school - art. 52(3) of AP I unless used in military operations, which makes them military objectives by 'dual use' as civilian and military objects)

> Civilian objects cannot continually be targeted if and when they seize their role as military objectives.

> *Prosecutor v. Jean Pierre Bemba Gombo Trial*, ICC 2008 - pillage of private properties is prohibited and cannot be justified as a military necessity.

> *Strugar Appeals*, ICTY 2008 - cultural property as civilian objects

(Direct Quotation) the damaged or destroyed property **was not used for military purposes at the time when the acts of hostility directed against these objects took place...** the act was carried out with **the intent to damage** or destroy the property in question.

> *Kordic and Cerkez Appeals*, ICTY 2004 - a) civilian residential areas not to be treated as a single military objective (are inherently indiscriminate attacks) and b) the threshold of military necessity is not just any necessity but 'imperative' military necessity

(Direct Quotation) **Wanton destruction of cities, towns or villages, or devastation not justified by military necessity...** a violation of the laws and customs of war However, the violation in question is more narrowly defined than Article 23(g) of the Hague Regulations, which states that it is especially forbidden "to destroy [...] the enemy's property, unless such destruction [...] is **imperatively demanded by the necessities of war.**"

> *Trial of Lothar Rendulic and others*, IMT - The defence argued that military necessity had to be judged against the Commander's knowledge at the time and not as it later emerges. Military Commander's decisions should not be second guessed even if *ex ante* it turns out their targets were erroneous. This was upheld by the tribunal and is a customary rule.

- **Prohibition against indiscriminate attack (CIHL rules 11 – 13)**

- > Indiscriminate attacks are prohibited.

- > Meaning: These attacks:

- Are not directed against a specific military objective.
    - Cannot be directed against a specific military objective (by employing such means and methods of combat) (for example open firing)
    - Use means and methods whose effects cannot be limited to a single target (for example nuclear weapons, chemical weapons and biological weapons).

#### **5.4. Principle of Military Necessity**

- Litmus test:

- > Maintains distinction between civilian objects and military objectives\*

- > Selectively identifies and targets ONLY military objectives

- > Not just any military necessity (otherwise every violence would be justified as military necessity', the threshold is that of 'imperative military necessity' - that which is required to succeed in a military operation and bring about submission of the enemy at the earliest possible cost - the *Nuremberg Trials* and Hague Regulation 1907, art. 4.

- See above distinction between civilian objects and military objectives (applicable here as it is)

\*the principle of military necessity applies to the distinction between civilian objects and military objectives, NOT to distinction between civilians and combatants. Targeting of civilians can NEVER be justified as a military necessity (only justified if they are DPH, but this is not a military necessity justification).

#### **5.5. Principle of Proportionality**

Proportionality maintains equilibrium between humanitarian considerations and military necessity.

- The proportionality test: art. 51(5)(b) of AP I - prohibition on **an attack**

(Direct quotation) which 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**.

- Simply put- During an attack on (legitimate) military objective, the commander must 'reasonably assess' that collateral damage (unintended/unavoidable loss of civilian lives or/and properties) is lesser than military advantage (which must be direct and concrete)
- Nutshell: the proportionality test is passed if collateral damage < military advantage
- Article 57(2)(a)(iii) of API / rule 14 of Customary IHL/CIHL

(Direct Quotation) **refrain from deciding to launch any attack which 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;

- The above encompasses the principle of precaution (corollary to the principle of proportionality).

Note: Any discussion on principle of proportionality MUST include a brief one on principle of precaution as well, and vice versa (specially for the exams J )

- Violation of principle of proportionality is a grave breach - art. 85(3)(b) of AP I and a war crime in the International Criminal Court - art. 8(2)(b)(iv) of the Rome Statute.
- *Nuclear Weapons Advisory Opinion*, ICJ 1996:

(Direct Quotation) ¶30 States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives.

Hence, legitimacy of a military target is a two-prong test: a) whether it is justified by military necessity; b) even if answer to (a) is yes, whether the attack was proportionate? But if the answer to (a) is no, the second question automatically becomes inapplicable.

- *Mbarushimana Pre-Trial Judgement*, ICC 2011: A disproportionate attack is when (Direct Quotation) ¶¶ ...the targeting of the civilian population is not the aim of the attack but only an incidental consequence thereof.
- *Galic Trial*, ICTY 2003

(Direct Quotation) ¶58 In determining whether an attack was proportionate it is necessary to



examine **whether a reasonably well-informed person in the circumstances of the actual perpetrator, making reasonable use of the information available to him or her, could have expected excessive civilian casualties to result from the attack.**

## 5.6. Principle of Precaution

- Two components:

- > Precaution in attack

- > Precaution in the effects of the attack

- Precaution in attack (Customary IHL rules 15- 21, art. 35 of API (choice of means and methods) and art. 57 of AP I (general precautionary measures to be taken)

- > All feasible precautions must be taken to minimize collateral damage and to assess how to ensure that .

- > Obligation to verify that the targets are military objectives.

- > Taking feasible precautions in choice of means and methods of warfare.

- > If any moment, it becomes apparent that the target is not a military objective, it must be cancelled or suspended.

- > Effective advance warning must be given whenever circumstances permit.

- > When a choice is possible between several military objectives with similar military advantage- selection to be based on minimization of collateral damage.

- Precautions against effects of attack (Customary IHL rules 22-24, art. 58 of AP I) > All feasible precautions must be taken to protect the civilian population against effects of attack.

- > To avoid locating military objectives within or near densely populated areas. However if they are so located, that is not a free pass for the adverse party to commence attack on such localities (*Blaskic Trial*, ICTY 2000)

- > Civilians and civilian objects must be removed from the vicinity of military objectives to the best extent feasible.

- *Fuel Tankers Case*, Federal Court of Justice, Germany, 2010

Facts and the outcome simplified - an airstrike was ordered by a colonel of the German armed forces against two fuel tankers stolen by the Taliban near Kunduz, Afghanistan. It resulted in the deaths of a number of civilians. An investigation was held against the colonel. The Court acquitted him considering these:

- o The colonel was at all times keen to avoid civilian victims and asked his source at least 7 times as to who was present on the ground.
- o He also tallied the source's statement to the video pictures transmitted by the aircrafts. Then he decided to drop the bombs on the fuel tankers. The colonel was acquitted.
- o Regarding choice of weapons, he excluded the use of 2,000-pound bombs and choose 500-pound bombs because the use of the former would affect the nearby farm building.
- Compare the above to the Kunduz Trauma Center case study (See #protection of the sick and wounded) - lack of precaution that resulted in a grossly disproportionate attack .

## **5.7. Principle of non-discrimination**

- Also referred to as prohibition on adverse distinction.
- Recognized distinction in IHL: civilian and combatants; civilian objects and military objectives.
- Adverse distinction - a distinction based on race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status.
- Sources in IHL:

> Common Article III to the Geneva Conventions

> Article 16 of GC III

> Article 13 of GC IV

> Article 75 of AP I

> Article 2 of AP II

- Sources in IHRL:

> Art. 2 of ICCPR and ICESCR respectively

> Art. 4 of ICCPR - non-derogable right

> Art. 2 of Convention on Elimination of Racial Discrimination

> Art. 2 of Convention on the Elimination of Discrimination against Women

· Also, article 1(3) of the UN Charter

· Art. 7(1)(h) of the Rome Statute: Definition of persecution as acts of violence against

(Direct Quotation) ...any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under international law.

· *Geiser Case*, US Court of Appeals for the Third Circuit, 2008: Persecution as a violation of principle of non-discrimination revoked the US citizenship of the appellant, due to his participation in Nazi-sponsored acts of persecution while serving during World War II as an armed guard in a concentration camp. On 2004, his citizenship was revoked and a visa denied to him. The US law denies visa to a person who assists in persecution of any person(s) because of their race, religion, or national origin.

· *Nahimana and Bikindi* judgments of ICTR - hate speech against people of Tutsi ethnicities held as violation of principle of non-discrimination

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## #6 CLASSIFICATION OF ARMED CONFLICTS / NATURE OF ARMED CONFLICTS

### 6.1. Concept of an armed conflict

> This is a non-question because there is no definition of an armed conflict.

> The concept of an armed conflict is understood through its classification

a) International armed conflict

Armed confrontations not rising to IACs- border skirmishes - such as those between India and Pakistan in the 'Line of Control'

Although some experts regard the 2016 'surgical strike' as an IAC - (Geneva Academy RULAC) but controversial.

## b) Non-international armed conflict

Situations of violence not rising to armed conflicts: i) insurgency in which the insurgent group is not well-organized or sporadic insurgencies; ii) civil unrest; iii) riots; iv) political turbulence (for example the current situation in Kashmir, as of the date)

Note: There is a growing call for recognition of a third category of armed conflict, that contains the trappings of both international and non-international armed conflict called transnational armed conflict (when an armed conflict intensively spills over into a territory of another state or when due to involvement of peace enforcement missions (UN or regional) the territorial boundaries are acutely blurred. (ICRC, *Contemporary Challenges to IHL*, 2015)

### 6.2. Why is the classification relevant?

- > If a situation is neither IAC nor NIAC, it is simply not an armed conflict, as a consequence IHL simply does not apply. The concept of war crimes is inapplicable as well. (Material scope of application of IHL)
- > The legal sphere of IAC and NIAC do not overlap as regards protection and treatment by parties to the conflict of the people in their power, although the rules of combat/conduct of hostilities do 'almost' overlap.
- > The classification thus helps apply the correct sources of law.

### 6.3. Who classifies an armed conflict?

According to the ICRC Commentary to Common Article III, 2016:

- > There is no central authority to classify an armed conflict.
- > Voluntary cognizance by states, supranational organizations, think-tanks, national and international courts.
- > The legal recognition of the parties to the conflict is irrelevant - empirical determination of facts on the grounds matter.

### 6.4. International Armed Conflicts

#### > Declared War - common article 2(1)

- o Common art. 2(1) to the GC - 'the Convention shall apply to all cases of declared war'.
- o Classical times - States used to commence military operation after such declaration (for e.g. the US

declared war on Japan after the *Pearl Harbor* attack)

- o Redundant concept - *ICRC Commentary to Common Article 2*, 2016 Because

- 1) Wars do not have to be declared anymore, as long as the facts on ground establish the war - hence the preference for the term armed conflict over war.

- 2) Declared wars may not be armed conflicts - Donald has quite recently declared wars on North Korea and Iran - not armed conflicts

### > **Use of force/Pictet single-shot theory - common article 2(1)**

- o When a state actually does not invade another's territory, but there are cross-border hostilities (such as aerial bombardments, use of long-range missiles etc.).

- o Level of intensity: unlike NIAC, a single incident is sufficient to trigger IAC - Jean Pictet. However, a few cross-border firings including handguns probably.

- o would not be sufficient - Marco Sassoli (the latter called border skirmishes, for e.g. North Korea – South Korea, India –Pakistan)

note: Geneva Academy RULAC now classifies the 'border skirmishes' between India and Pakistan as IAC (but still controversial)

- o Example of single-shot theory conflicts - US – Japan war began the moment Japan started the aerial and naval attacks in the US base in Pearl Harbor (7 December 1941)

### > **Invasion - common article 2(1)**

- o Incursion of a state's troops into the territory of another without the latter's consent, but the former has not replaced the latter's local administration/government.

- o For example, the Syrian invasion of the US coalition (ongoing), the Turkish invasion of Iraq (ongoing)

- o Invasion occurs with the intent to occupy, such as the Iraqi invasion and subsequent occupation of Kuwait (see #protection of civilians). The transition between incursion and occupation would be a common article 2(1) conflict amounting to invasion.

### > **Total or partial occupation - common article 2(2)**

- o The definition of occupation is actually found in art. 42 of the *Hague Regulation* annexed to *IV Hague Convention*, 1907

(direct quotation) Territory is considered occupied when it is actually placed under the authority of the hostile army.

- o Examples: Israel's occupations of Lebanon, Palestine and Syria (ongoing). > **National liberation wars - art. 1(4) of AP I**

- o (Direct quotation)... armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination

- o Even when the above threshold is met, recognition of national liberation wars as IACs are contingent on the warring armed group making an article 96(3) declaration (AP I) to voluntarily abide by the Protocol I.

- o This provision has only been invoked once by National Democratic Front of Philippines (unsuccessfully, because the Philippines was not a party to AP I at time)

#### > **A NIAC can transform into an IAC (also called internationalized armed conflict)**

- o If a state engages in an armed conflict with another state, not directly, but in proxy through a non-state armed group through 'overall control' (Tadic threshold) or 'effective control' (Nicaragua threshold) (see #sources of IHL).

- o Also referred to as proxy war.

- o For example, Uganda in Congo (*Armed Activities Case*, ICJ 2004); the US in Nicaragua (*Nicaragua Case*, ICJ 1986), Russia in Georgia (ongoing) etc.

### **6.5. Non-international armed conflict**

#### · **Lower-threshold armed conflicts or common article 3 non-international armed conflicts**

The elements to prove (*Tadic Interlocutory Appeals Judgement*, para 70) are:

- > Minimum intensity (of the hostilities)

- > Structural organization (the armed group should be sufficiently organized: command structure and ability to carry out sustained military operations)

Examples: The armed conflict of Nepal (1996 – 2006); the ongoing conflict between the Indian Government and the Communist Party of India – Maoists (the Naxalite conflict).

- **Upper-threshold armed conflicts or the Additional Protocol II non-international armed conflicts**

- > Minimum intensity

- > Structural organization of the OAG

- > Control over a significant part of the territory of a state by an OAG (art. 1 of the AP II)

Example: The armed conflict between National Liberation Army and Colombia (ongoing);

- **Differences between the upper and lower threshold:**

- > The upper threshold requires an additional element: control over territory.

- > The upper threshold NIAC is only relevant in any situation if the state party has ratified/acceded the additional protocol II.

- > NIAC exclusively between organized criminal gangs, covered by CA III but not AP II. For e.g. the NIAC in Mexico between competing drug cartels Sinaloa and Jalisco.

- **Riots and Insurgencies not amounting to NIAC**

- > Not all violent situations between a group of people and their governments amount to a NIAC.

- > Article 8 (2)(d) of Rome Statute - IHL does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.

- > The applicable test is always the lower threshold of CA III.

- > Jurisprudence: objective indicants of intensity - *Boskoski Trials*, ICTY, 2008: (Direct Quotation)

seriousness of attacks and whether there has been an increase in armed clashes, the spread of clashes over territory and over a period of time, any increase in the number of government forces and mobilisation and the distribution of weapons among both parties to the conflict, as well as whether the conflict has attracted the attention of the United Nations Security Council; ... the number of civilians forced to flee from the combat zones... the type of weapons used... in particular the use of heavy weapons, and other military equipment, such as tanks and other heavy vehicles; the blocking or besieging of towns and the heavy shelling of these

towns... the extent of destruction... number of casualties caused by shelling or fighting... the quantity of troops and units deployed... existence and change of front lines between the parties... deployment of government forces to the crisis area; the closure of roads; cease fire orders and agreements...

## 6.6. Distinction between IAC and NIAC

	IAC	NIAC
<b>Applicable Law</b>	Whole of GCs, API, HR, CIHL.  (note: art 1(4), 43 and 44 of AP1 not CIHL)	APII (to state parties), common article 3, CIHL.
<b>Occupation</b>	Existent and regulated in IAC.	No concept of occupation in a NIAC.  OAGs may exercise territorial control replacing local administration (AP II) - not occupation
<b>Temporal scope</b>	Beginning: outset of the conflict  End: 1 year after general close of military operations - art. 6, GC IV and termination of occupation - art. 3(b), AP I	<i>Tadic</i> - until a peaceful settlement (meaningful peace) is achieved. For e.g. Nepal - Comprehensive Peace Accord
<b>Distinction</b>	Recognition of combatant status, i.e. right to participate	No combatant status to members of organized armed

## #7 Protection of the Sick and Wounded

### 7.1. Introduction

· Battle of Solferino >>> International Movement of the Red Cross >>> 1864 Geneva Convention >>> 1949 Geneva Convention (specially I and II) (see #historical development of IHL)\*

\*describe in a nutshell.

· Leading sources of their protection:

> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the



Field 1949 (GC I)

> Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 1949 (GC II)

> Customary IHL - ICRC Customary IHL Study (specially rules 25 – 30)

> AP I (arts. 8 and 9)

7.2. Schematic of the protection under GC I and II

Categories of protection

Sick and wounded	Medical personnel	Medical objects	Persons and organizations involved in humanitarian assistance
IAC: as protected persons.	IAC: as protected persons		
NIAC: as <i>hors de combat</i>	NIAC: implicit protection of medical duties (commentary to CA 3)	Equally protected in both IAC and NIAC	'Right to humanitarian initiative' in NIAC and IAC

7.3. Protection of the sick and wounded

· Guiding Principle: Respect, protection and care for the wounded, sick and shipwrecked, without any adverse distinction

· Specific rules:

> Equal treatment, except medical priorities - art. 12 of both GC I and II; CIHL rule 110

> Duty to evacuate them - art. 15 of GC I; art. 18 of GC II; CIHL rule 109

· Who are the beneficiaries?

> Military personnel- art 13 of GC I and II

> Civilians - AP I art. 8(a) and (b)

> In NIAC, military personnel and civilians as hors de combat - CA 3

- Loss of protection

> Military personnel become able bodied or engage in hostility

> Civilians directly participate in hostility

#### **7.4. Protection of medical personnel**

- **Beneficiaries:**

- Ø Military medical personnel - art. 24-25 of GC I and 36 -37 of GC II

- Ø Civilian medical personnel - art. 20, GC IV and art. 8 of AP I

- Ø Medical personnel provided by a third 'neutral' state or organization - art. 8 of AP I

- **Protection (CIHL rules 25 and 26)**

- Ø On battlefield, may not be attacked for performing medical duties Provided that the duties are in conformity with medical ethics

- Ø If fell in the hands of the enemy, should be immediately repatriated or put to employment to care for prisoners of war

- Ø When under the control of the enemy, right to perform medical missions

- Ø Right to maintain confidentiality about patient relationships (medical privilege)

- **Duties (art. 22 of GC I)**

- Ø No direct participation in hostilities

- Ø Cannot carry arms, except light weapons for self-defense or for the defense of the sick and wounded under their care

Ø Respect for medical ethics

Ø Give care without discrimination

Ø Principle of neutrality

Ø Duty to identify themselves (ID card - Annex II of GC I)

### **7.5. Protection of medical objects**

· Both fixed and mobile medical units, transports and materials are protected against attack. (GC I, art. 19 and 35, Customary IHL rules 28, 29, 30)

· This protection is tantamount to a special protection (GC I, art. 21 and 22):

Ø They cannot be attacked unless they commit outside their humanitarian function that are harmful to the enemy

Ø Even if and when they have lost their protection, it may only cease after a warning has been given and goes unheeded

Ø Even if the protection ceases, they should not be attacked as much as possible.

· Possible constitution of hospital, safety and neutralized zones: CIHL rules 35 and 26 - upon agreement between parties to the conflict (for example, hospital zones were setup during the NIAC in Sri Lanka).

### **7.6. Humanitarian Relief Personnel and Objects (CIHL, rule 31 and 32)**

· Persons engaged in humanitarian relief must be respected and protected.

· They should be allowed unimpeded passage for humanitarian relief operations, including rescue of the sick and wounded.

· Their objects must be respected and protected.

· Medical personnel of national red cross societies and organizations specially authorized by parties to the conflict are recognized as specially protected medical personnel (AP I art. 8)

### **7.7. Distinctive Emblem**

- The protective use of the distinctive emblem (red cross / crescent / crystal), i.e. means of identification as medical or religious personnel (art. 38 of GC I and AP III)
- How to use?
- Medical personnel as an insignia and in the IDs
- Medical objects as for example hospitals: a) flag on the roof; b) front and back; c) visible from a distance
- Misuse amounts to perfidy, a war crime. (see #prohibited methods of warfare)
- Attack on medical personnel, units and objects is a grave breach. (Arts. 50 and 51 of the GCs respectively).
- Lack of use not a free pass for the parties to the conflict to attack medical personnel and objects

## 7.8. Case Studies

- *The US's Attack on Kunduz Trauma Center, 2015*

Attack on MSF run hospital in Kunduz, Afghanistan: An attack was carried out by United States Special Forces in Afghanistan, under the request of the Afghan forces, over the Médecins Sans Frontières (hereinafter MSF) Trauma Center in Kunduz (hereinafter KTC) in Afghanistan, at night, on October 3, 2015, affecting over a 100 patients and approximately 150 staff members, with a death toll over 30. The attack was apparently an attempt to retake a rebel-held, that is, Taliban controlled territory and the United States claims that the attack was unintended and an outcome of a chain of errors in judgement. Later, the commanders were court martialed in the US. Some of them were fired. Most of them, suspended and given disciplinary action. The chain of errors was as follows:

- a) The attack was rooted in an intelligence information that one of the buildings in the attack radius had Taliban fighters shooting at US helicopters from their windows. There was no follow-up.
- b) The aircraft used in this attack picked up the hospital as the target. MSF had already given the coordinates of this hospital to the Afghan government. The hospital should have been identified as a medical object by the algorithm.
- c) There was no warning. The US claims that it did not know the target was a hospital, otherwise it would have given the effective warning as legally required as but the US should have had the hospital's coordinates from the Afghan government. The US later stated that the communication equipment of the aircraft malfunctioned.

d) The attack went on for hours. In a reasonable person's assessment, there was sufficient time to cancel the operation once it became apparent that the target was misidentified.

e) The US claims it was unable to ascertain whether the retaliatory firing from the building were able-bodied Taliban fighters or guards and medical personnel defending themselves and the sick and wounded. This can happen. However, the choice of means and method of combat in this attack were grossly lopsided in the favor of the US. The US was bombarding the hospital and there were only sporadic retaliations from the building.

f) By the time the attack was cancelled, not only the medical personnel and the sick and wounded suffered casualties (photos of their charred bodies) but also the hospital infrastructure suffered substantial damages.

g) The hospital shut down after this attack. It was the only one serving the sick and wounded of the armed conflict in Kunduz.

∞ *The Rafah Case* (Israel High Court of Justice, 2004)

(Direct Quotation) The petitioners (Physicians for Human Rights) claimed that, when the military operation began, the road from Rafah [in the Gaza Strip occupied by Israel] to Khan Younis was blocked in both directions. Ambulances that evacuated the wounded from Rafah to Khan Younis on that morning did not succeed in returning to Rafah. Therefore, wounded persons remained in the A-Najar hospital. That hospital is not equipped, nor is it sufficiently advanced, to treat the dozens of wounded coming to it. Because of the blocking of the road, the lives of many wounded are in danger. Moreover, when the army allows the evacuation of the wounded from A-Najar hospital in Rafah to hospitals outside Rafah, it allows the evacuation only on the condition that the name and identity number of the wounded person and the license number of the ambulance which is supposed to evacuate him are provided. While the demand for giving the license number of the ambulance can be satisfied, albeit with difficulty, the demand that the name and identity number of the wounded person are provided is an impossible demand. The reason for this is that many of the wounded are not conscious and their identity is not known.

The Court gave relief in six of the seven requests of the petitioner. However, it did not grant them the relief of the entry of Israeli doctors in general and A-Najar Hospital in particular – because of the danger that the doctors will be taken hostage.

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## **#8 Protection of Combatants and Prisoners of War**

### **8.1. Introduction**

- A caveat to remember - All combatants qualify as POW. Not all POW are combatants. (See the schematic below)

- Definition of a combatant: A member of regular or irregular armed force who participates in an international armed conflict and someone who has:

- a) Combatant Status - right to participate in hostility But and on a flip side, can be attack and killed AT ALL TIMES.

- b) Combatant Immunity - upon capture, immunity from being prosecuted for having waged hostility against the enemy

- c) Combatant Privilege - upon capture, the status of Prisoner of War

Note: The term combatant informally used in NIAC. However, the legal term for them would be 'members of organized armed group'.

- Definition of a POW - Generally, a combatant and exceptionally, a civilian who falls into the power of the enemy in the context of an IAC.

- Applicable sources of law:

- > Basic idea to treat the captured enemy can be traced in ancient philosophies as well (see #historical development of IHL)

- > Geneva Convention Relative to the Treatment of Prisoners of War 1949 (GC III) > AP I to the GCs (arts. 43 and 44)

- > CIHL Rules 3, 4 (concept of combatants and armed forces) and 106 (status of POW) (most important ones, at least)

- > IHRL - esp. fair trial standards if and when POW prosecuted at POW camps

## 8.2. Schematic (Prisoners of War)

Prisoners of War

Combatants (Generally)

Civilians (Exceptionally)

Members of regular armed forces: art. 4(A)(1), 4(A)(3) and 4 (B) of GC III	Members of irregular armed force art. 4(A)(2) of GC III	Levee en masse art. 4(A)(6) of GC III	Civilian accompanying armed forces - art. 4(A)(4)  Civilians members of military vessels without better protection - art. 4(A)(5)
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### 8.3. Combatants

- Members of regular armed forces
  - > Party's own armed force
  - > Armed force of a co-belligerent state (or other states that profess allegiance to a party)
  - > Armed forces of the occupied state interned (put to work) by the occupying forces
- Members of irregular armed forces - belonging to a party to an IAC, provided that the following qualifiers are met:
  - > Operating under responsible command
  - > Wearing a fixed distinctive sign (both as a group and individually) (BUT AP I - not always possible to distinguish, ie guerilla warfare, BUT AGAIN, this provision of AP I is not customary law, for example, the US has not ratified AP I, so it will say - for the US to treat a Syrian Kurdish rebel as a combatant, they will have to distinguish themselves from civilians)
  - > Carrying arms openly,
  - > Respecting IHL, and
- *Levee En Masse*:
 

(Direct Quotation - art. 4(A)(6) of GC III) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war

\*The contemporary understanding is that levee en masse are NOT combatants (very difficult concept and

lack of state practice after the World Wars). However, the texts of the GCs (which are pretty outdated as all of us know by now) do not reflect that and label them as combatants. So, to err on the side of the cautions, for exam, we will classify them as combatants.

#### **8.4. Civilians (POWs)**

Ø Civilians accompanying the armed forces, such as civil members of military aircraft, war correspondents, supply contractors BUT they should a) be accompanying the armed force by the latter's consent and b) carry an ID card denoting this situation (annex to GC III)

Ø Members of civilian (including merchant ships) aerial and naval ships IF they are neither protected as sick, wounded or shipwrecked/medical or religious personnel by GC I and II nor as protected civilians (because there is a nationality assessment see #protection of civilians) under GC IV.

#### **8.5. Persons ineligible for POW status**

Ø Spies - even if member of an armed force captured DURING espionage - art. 46 of AP I

Ø Mercenaries - foreign fighters hired by parties to the conflict on contract, to participate in the conflict, but never integrated into their armed groups. Not POW - art. 47 of AP I

#### **8.6. Basic rules regarding treatment of POW (GC III and CIHL)**

Ø Protected as prisoners of war as soon as they fall into the power of the adverse party - art. 5

Ø Can be transferred to another territory, but not to one unwilling or unable to respect the third Geneva Convention - art. 12

Ø Respect for their allegiance towards the power on which they depend; cannot be made to participate in hostilities on behalf of the capturing power

Ø No punishment for participation in hostilities against the capturing power.

Ø Specific rules on their internment in a prisoner of war camp, for example, should be assigned work on the basis on their military rank and abilities; separate quarters for men and women etc.; human living conditions; ICRC's right to visit them - art. 12 – 81

Ø If they commit a crime within a POW camp, there are rules on penal and disciplinary proceedings - arts. 82 – 108.



Ø Limits to punishment when they try to escape (for e.g. cannot shoot to kill) - art. 91 – 94

Ø Have to be repatriated to their country after the end of active hostilities - art. 118.

### 8.7. Case Study:

Ø *Al-Shimari v. CACI*, Court of Appeals for the 4<sup>th</sup> Circuit Court, 2016:

CACI Premier Technology is a private military company hired by the US to render services in the Abu Ghraib prison in Iraq in the context of the US coalition's military operations in the context of a NIAC. It was specifically hired for its 'interrogation expertise'. It was alleged of torturing and ill-treating the Abu Ghraib detainees. CCR (Center for Constitutional Rights) an NGO initiated a federal lawsuit against CACI in the US for the alleged torture and ill-treatments in the broader context of the US's 'war on terror'. Key IHL questions emanating from the court discussions are:

a) Whether the military operations of the US in Iraq were IAC or NIAC?

NIAC à the operation is with the consent of the reigning government of Iraq. Unlike the treatment of Taliban in Guantanamo, who were captured when they were governing Afghanistan, Al – Qaeda members are members of an organized armed group.

b) Related with (a), whether the detainees/victims in the case were combatants or not? Not combatants à the concept inapplicable in NIAC.

However, the tortures and ill-treatments still unjustified under CAT and common article III.

c) What violations of IHL were committed by CACI?

Probation on torture 'is a critical mass of international law'. CACI used electric shocks, beatings, stress positions, forced nudity, sexual assault, and death threats, in addition to the withholding of food, water, and medical care, sensory deprivation, and exposure to extreme temperatures to torture the detainees. These are both violations of CAT and thus ATS (Alien Torture Statute). The ATS also domesticates the concept of war crime prohibited under the Geneva Conventions

d) How far is the US responsible for (c), if the answer is in the affirmative.

The court did not technically refer to the IL concept of state responsibility (or delve into the concept of attribution) but opined that CACI exercised 'actual control' over the Abu Ghraib prison, but were still under the command and control of the US military factually. The final decision on this matter is pending. However,

the Court held that this case warrants a revision of the Federal Immunity Law in the line of responsibilities of both private and public entities.

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# #9 Protection of Civilians

## 9.1. Introduction

- No definition of civilians. Any person in the context of an armed conflict, who is not a combatant is a civilian (or in a NIAC not a member of an organized armed group).
- Concept of civilian and civilian population à art. 50 of AP I (and also CIHL rule 5)

(Direct Quotation) 1) A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian; 2. The civilian population comprises all persons who are civilians. 3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.

- Fundamental differences between civilians and combatants (see #principles of IHL)

## 9.2. Schematic (Nature of protection of civilians)

### Nature of Protection

Protection of persons in the power/hands of the enemy or adverse party to the conflict	Protection against the general effects of hostilities (arts. 35, 50 - 58 of AP 1)
	Overlaps in IAC and NIAC

## IAC (concept of protected persons)

1) GC I and II: Sick, wounded, shipwrecked and medical personnel

**NIAC**

2) GC III: Prisoners of War

CA 3: all civilians

3) GC IV: Civilian belonging to the adverse party, neutral state and occupied territory AP II: all civilians

4) AP I: all civilians including refugees

### 9.3. Protection of civilians from general effects of war

- Consult #principles of IHL

- > Distinction (table) - absolute prohibition on attack on civilians.

- > Proportionality and precaution to minimize civilian collateral damage

- Loss of such protection:

- > If and until the civilians directly participate in hostilities.

- > Meaning of direct participation in hostility: According to ICRC's *Interpretative Guideline on Direct Participation in Hostilities*, 2010 (simplified) acts such as direct interference on military operations and taking up arms, or any activity that is harmful to a party to the conflict, provided that these elements are met:

- o Threshold of harm - must have harmed the party's ability to conduct the military operation as planned

- o Direct causation - the civilian's conduct has a direct nexus with the party's inability to conduct the military operation as planned

- o Belligerent nexus - the civilian must have intended to cause such outcome by commission or omission (establishing his/her belligerence)

- > The legal consequence of DPH: the civilian can be targeted and/or captured; However, if the civilian surrenders and thus halts the DPH, the civilian can no longer be targeted (can still be captured and detained,

though).

**9.4. Protection of civilians who find themselves in the hands of the enemy/adverse party**

- In NIAC: All civilians are protected from a) acts in contravention to CA III and denial of fundamental guarantees (art. 4 of AP II - CIHL) (for list of prohibited acts, see principle of humanity in #principles of IHL)
- In IAC, the concept of protected civilians is applicable - art. 4 of GC IV + arts. 11 and 73 of AP 1

(direct quotation of art. 4 of GC IV) Persons protected by the Convention are those who, at a given moment and, in any manner, whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals. Nationals of a State which is not bound by the Convention are not protected by it. Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.

(simplification of art. 4 of GC IV) protected civilians in the sense of art. 4 of GC IV are: a) civilians of occupied territory; b) alien civilians found in one's own territory; c) alien civilians found in the enemy's territory.

(simplification of art. 11 of AP I): a) any civilian not protected under art. 4 of GC IV if not protected by GC I and II as well, is protected by AP I (for e.g. a person whose nationality is unclear - Israel/Palestine statehood contest) b) refugees and stateless people are protected by art. 73 of AP I.

∞ **Basic rules regarding protection of civilians on occupied and non-occupied territory**

	<b>Non-occupied territory</b>	<b>Occupied territory (Part III, section III of GC IV)</b>
	Can be detained for criminal proceedings	Similar.
<b>Detention</b>	Can be interned (put to work) for security reasons - art. 42 of GC IV but only if absolutely necessary.	Except, internment
<b>Trial</b>	On a regularly constituted court (Art. 75 of AP I)	On a regularly constituted court, except if specifically mentioned in the martial law of the occupying power.

<b>ICRC visits</b>	Right to visit – same.	
<b>Review of detention</b>	Twice every year.	Every six months.
<b>Safety, security and health</b>	Fundamental guarantees + IHRL	Occupying force has to take positive actions to maintain and in fact improve these.
<b>Right to leave</b>	Aliens have right to leave.	Local people of occupied territory have no right to leave.
<b>Transfer</b>	Cannot be transferred to a power that does not respect GC IV.	Cannot be transferred outside occupied territory.
<b>Private property</b>	Only pillage is prohibited.	Temporary requisition and destruction for security interest permitted (proportionality applies in the latter).

## 9.5. Specially protected civilians

### 9.5.1. Refugees and Stateless Persons during Armed Conflict

Ø Definition: (direct quotation - art. 1 of 1951 Refugee Convention) A “**refugee**” is a person who owing to a well-founded fear of being persecuted for reasons of race, religion nationality, membership of a particular social group or political opinion, is outside the country of his or her nationality and is unable, or owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside the country of his or her former habitual residence, is unable or, owing to such fear is unwilling to return to it. (1951 Refugee Convention)

> Definition of a stateless person (direct quotation - art. 1 of 1954 Convention on Status of Stateless Persons) A “**stateless person**” is a person not considered to be a national by any State under the operation of its law.[1]

> Protected civilians: art. 73 of AP I in IAC and CA III (principle of nondiscrimination) in NIAC

> International Refugee Law and IHRL also apply.

> Examples: Fact-Finding Mission on Myanmar (the Rakhine conflict) established by the Human Rights Council - also addresses Bangladesh and its treatment of Rohingya refugees in its territory and the principle of non-refoulement that is binding on Bangladesh as CIL.

### **9.5.2. Journalists**

> Civilians within the meaning of article 50(1) of AP I (also applicable to NIAC as CIHL rule 5)

> Could be POW if war correspondents accompanying armed forces with their approval (art. 4(A)(4) of GC III.

> Specific protection/special protection: those engaged in 'dangerous professional mission in areas of conflict' are specially protected - art. 79 (2) of AP I. The protection has two layers:

- o Do not lose their status as specially protected journalist UNLESS they do any act adversely affecting their status (principles of journalism apply - accuracy and credibility of information)

- o Even when they lose their special protection, they cannot be objects of attack UNLESS they directly participate in hostilities (see above protection from effects of hostilities)

- o If captured and detained, entitled to fundamental guarantees (IAC - art.75 of AP I and NIAC - art. 4 of AP II as CIHL)

> Criminal responsibility:

- o bear criminal responsibility for killing or injuring members of the opposing force or for causing damage or destruction to property;

- o may be tried for breaches of IHL and other international crimes;

#### **Ø Commentary to AP I (art. 79)**

(Direct Quotation) A distinction is drawn in IHL between accredited or authorised journalists who accompany the armed forces and those who are independent of armed forces. War correspondents are persons who accompany the armed forces of a party to the conflict and who have been authorised to do so by that party. Their rights and obligations are set out in the section on civilians accompanying the armed forces above. Journalists who operate independently of the armed forces are entitled to the protections applicable to civilians provided that they take no action adversely affecting their status as civilians. This term is wider than simply taking a direct part in hostilities and may therefore include acts such as espionage or hindering operations.

### 9.5.3. Children (with special focus on the issue of child soldiers)

Ø (Direct Quotation) art. 38 of the **Convention on the Rights of the Child** :

§ States Parties undertake to respect and to ensure respect for rules of International Humanitarian Law applicable to them in armed conflicts which are relevant to the child.

§ States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.

§ States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.

§ In accordance with their obligations under International Humanitarian Law to protect the civilian population in armed conflicts, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Ø (Direct Quotation) ILO Convention 182 on Worst Forms of Child Labour

Article 3. For the purposes of this Convention, the term the worst forms of child labour comprises:

all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and serfdom and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; [...]

Ø Overview on the prohibition on recruitment

§ Under AP I and II and the CRC à 15 years of age

§ Under Optional Protocol II to the CRC à 18 years of age for direct participation in hostilities and for compulsory recruitment à but states may accept voluntary enrolment into military unlike organized armed groups.

> Rights and obligations of child soldiers

- qualify as combatants
- are entitled to carry out attacks on the adverse party;

- may lawfully be the subject of attack for such time as they take a direct part in the hostilities;
- bear no criminal responsibility for killing or injuring members of the opposing force or for causing damage or destruction to property;
- may be tried before a fair and regular trial for breaches of IHL and other international crimes subject to special provisions relating to their age; and
- if captured, interned or detained:
  - o benefit from the special protection applicable to children, whether or not they are entitled to be treated as PW
  - o are entitled to fundamental guarantees of humane treatment.

Child Soldiers who are part of armed groups and who would not, if they were adults, be entitled to combatant status:

- are not entitled to carry out attacks on the adverse party;
- may lawfully be the subject of attack during such time as they are taking a direct part in the hostilities;
- bear criminal responsibility for killing or injuring members of the opposing force or for causing damage or destruction to property, subject to special provisions relating to their age;
- may be tried before a fair and regular trial for breaches of IHL and other international crimes subject to special provisions relating to age; and
- if captured:
  - o are not entitled to PW status but benefit from the special protection applicable to children; (art. 77 of AP I) and
  - o are entitled to fundamental guarantees of humane treatment. > See #War Crimes - child soldiers of Nepal

> *Lubanga Trial Judgement*, ICC 2012 - the term active participation in hostilities broader than direct participation in hostilities. For example, enlisting children for sexual purposes amounts to active participation in hostilities, equally prohibited in IHL and ICL - difference between conscription and recruitment of child soldiers. Also, Lubanga was held responsible for the sexual exploitation of child soldiers not committed by



him, but by his subordinates.

\*\*\*\*\*

## **#10 War Crimes in the NIAC in Nepal and Grave Breach of the GCs**

Not exactly a chapter included in the course but tend to get asked in the board exams. Good to cover all the bases.

Following are excerpts from a yet unpublished article © Yugichha Sangroula.

### **Part I: The NIAC in Nepal**

#### ***Maoist Insurgency People's War Political Conflict Armed conflict in Nepal (1996-2006)***

Maoist Insurgency is the popular pseudonym for the conflict, although situation in Nepal elevated from an insurgency [2] to a NIAC in February 1996. The distinction is a quite relevant as IHL would be inapplicable to a mere Maoist Insurgency, falling short of an armed conflict and governed by IHRL and domestic law. The author attributes the continued usage of the pseudonym and the misclassification to the denial machinery [3] that took hold during the conflict and stymied the application of the Geneva Conventions and customary IHL (hereafter CIHL). Likewise, the euphemistic label of 'People's War' and the anti-euphemistic label of Maoist Insurgency takes away from the fact that there were two parties to the conflict, and hostilities were waged and violations of IHL were committed by both the parties to the conflict, despite shifting of blames. [4] Finally, the characterization of the armed conflict as 'political conflict' was semantically and empirically incorrect, as held by the Supreme Court of Nepal in a writ petition made by the conflict victims contesting such characterization.[5]

#### ***The Maoists - Party to a conflict or a terrorist group?***

Listing the CPM-M as a terrorist group Terrorist and Disruptive Activities Ordinance (TADO) and later the Terrorist and Disruptive Activities Act (TADA)[6] may have had national security implications but did not create a third category other than those of combatants and civilians for the purpose of IHL. This was upheld by the Supreme Court of Nepal in a decision stating that proclaimed terrorists cannot be subject to torture or arbitrary detention in violation of IHRL and IHL, in the name of security imperative.[7] Hence, even as proclaimed terrorists, the Maoists continued to have rights and duties as combatants under IHL. It should also be mentioned that terrorism is not a category but a prohibited method of warfare under IHL that both state and non-state actors are capable of – such as hostage taking and indiscriminate bombardments.[8]

#### ***Was Nepal in a proxy war with India?***

The conflict as a proxy war is a speculation and rhetoric at the best as the degree of India's 'alleged' influence over the Maoists never went beyond financial aid, irregular tactical trainings[9], supply of weapons[10] and shelter to the top leaders. The Maoist echelons retained control throughout conflict, even while operating from India, thus the civil war never actually transformed into a proxy war between India and Nepal.

### ***Why the conflict is regarded as an internal or non-international armed conflict***

There is no express treaty definition for a NIAC under the Geneva Conventions, however the Tadic threshold[11], is a generally uncontested source for what amounts to a common article 3 (hereinafter CA3) to the Geneva Conventions standard of NIAC. The Tadic threshold alludes to two requisite elements for a NIAC - (minimum) intensity and organization (of the non-state armed group).

#### *Factual determination of Intensity*

The Maoist insurgency transformed into an armed conflict in February 1996 following the Maoists' systematic attacks on police stations in Rolpa, Rukum and Sindhuli as counteractions to Government operations to extract and eliminate the Maoist movement.[12] The intensity of the conflict was gradually progressive, including: 1) first phase (February 1996 – 23 November 2001) that witnessed Maoist-extraction operations by the Police[13] and counter-operations including destruction or capture of police stations, administrative buildings, land grabbing and targeted killing of police by the Maoists.[14] Generally, mere deployment of police force against insurgents may not satisfy the threshold of intensity[15] but the systematic violence by the police did in the case of Nepal. 2) Second phase (24 November 2001 – January 2005) that included declaration of emergency, army deployment and formation of 'Unified command of the Army'. [16] 3) Third phase (1 February 2005 to 21 November 2006)[17] that witnessed a transformation in the relationship between former actors of the conflict, that is, the political parties and the Maoists from adversarial to congenial following the 12 Point SPA Agreement[18] and expansion of the hostilities to almost 75 districts and resort to more violent tactics by security forces such as mortar shelling of civilian areas.[19]

#### *Factual Determination of the (Structural) organization of the Maoists*

High intensity violence by insurgents or any other armed gangs who are not structurally organized does not amount to an armed conflict; there needs to be a hierarchy and a real chain of command within the armed group and the ability to sustain military operations.[20] The Maoists possessed such requisite structural organization to be a party to a conflict for following reasons: a) a chain of command based on political leadership reflected in their being the third largest political party in the 1991 elections[21], based on the ideological front of Prachanda Path, further enhanced by the formation of People's Liberation Army (hereinafter PLA) in 2001[22]; b) an armada of around 5000-7000 active combatants[23] that used effective Guerrilla warfare tactics[24]; c) an armoury sustained by rudimentary weapons, but also self-manufactured

and imported guns and explosives[25] and semiautomatic SLRs and rocket launchers looted from the Army.  
[26]

The Maoists even demonstrated a degree of control in about 6 districts dubbed as 'the red zone' including Rolpa and Rukum[27] which also included a 'people's court'[28] but without effectively replacing the Government administration[29], unlike in some other NIACs such as the Charles Taylor forces in western Liberia and the FARC in western Colombia[30]. Notwithstanding this, their influence in the Red Zone is highly indicative of their organization as a party to the conflict.

### ***End of the conflict and Jus Post Bellum***

A NIAC ends with 'dissolution of organized armed group, or a peace agreement without real risk of resumption'.[31] In the case of Nepal, the NIAC ended in 21 November 2006 with the adoption of a Comprehensive Peace Accord (CPA). However, the CPA did not completely terminate the application of IHL – some *jus post bellum*[32] obligations remained operative, including residual obligations of releasing conflict detainees[33], clearing landmines and explosive remnants of war[34], returning grabbed lands[35] and by voluntary undertaking of the parties, disarmament of the armed Maoist combatants.[36] Some IHL obligation including disclosure of information of missing persons[37] and investigation and prosecution of war crimes remain eminent till this day.

### ***War crimes of the Armed Conflict***

#### ***Definition of war crime***

A war crime is a crime 'committed during an armed conflict...and has a nexus with the conflict.[38] For any act to be a war crime, the armed conflict should have a substantial role in the perpetrator's decision to commit the crime.[39] For example, a member of an OAG, who is a compulsive stealer, pickpocketing people in the street (not a war crime) versus the same person pillaging civilians' home during a campaign of intimidation (a war crime). Not all violations of IHL are war crimes.[40] For example, catcalling civilians violates IHL but is not serious enough to be labelled a war crime. It should also be noted that although the paper is elaborative on war crimes, facts discussed below may also constitute crimes against humanity that deserve a separate discussion but is beyond the scope of this paper.

#### ***Common Article 3 war crimes***

CA3, applicable to NIAC, is so innate to the rubric of IHL as it encompasses the fundamental considerations of humanity.[41] The provision protects both civilians and combatants *hors de combat* (out of combat)[42]. However, it should be noted that CA3 is generally understood to apply to situations when people are in the hands/power of a party to the conflict and not to situations of hostilities.[43]

## *Explicit War Crimes under CA3*

### *Murder (including intentional or reckless death)*

The security forces reportedly murdered civilian Maoist sympathizers[44] and in some occasions fabricated evidence to pass these off as crossfires or encounters of Maoists[45]. In one incident, no attempt was made to verify the identity of the suspects in their power.[46] Apparently, rape followed by murder to silence civilian victims have also occurred.[47] Acts of beating until death[48] and death under clandestine circumstances also amount to murders[49] and so do killing Maoist combatants who are *hors de combat*. [50] On the flipside, the Maoists have also reportedly murdered civilians, remarkably journalists[51] and teacher[52]. They have also reportedly murdered security forces *hors de combat*. [53]

### *Mutilation of body parts (not justified by strict medial grounds) [54]*

The most horrific mutilations were allegedly perpetrated by the Maoists in the name of People's Court (*Jana Karbahi*) that included ritualistic mutilations of 'male civilians by breaking their bones, skinning them alive, cutting off tongues, ears, lips and nose, gouging out eyes, hammering their teeth, cutting then into half by the waist... and burning them to death.' [55]

### *Torture or other cruel treatments*

Security forces have been alleged of routinely torturing civilians Maoist suspects[56] and Maoist supporters, especially teachers.[57] Maoist combatants *hors de combat* by detention were allegedly tortured for extracting information.[58] Reports reveal that medical officers in Maharajgunj 'were ordered to keep detainees alive so that they could continually be tortured.' [59]

Maoists reportedly also routinely tortured civilians abductees and security forces *hors de combat*. [60]

### *Outrages on personal dignity*

Alleged facts include torture, violence before murder, rape and other sexual abuses by both Maoists and the security forces, disrespectful treatment dead bodies[61], indecent disposal of dead bodies[62] and indecent cremation of dead bodies[63], among others.

### *Passing sentence or executions without prior judgement/not pronounced by regularly constituted court/without affording judicial guarantees*

An emblematic example would be the *Doramba execution* of 19 Maoists by security forces who were apparently *hors de combat* by surrender. [64] Denial of post-mortems to people dying under the power of the security forces also constituted denial of judicial guarantee. [65] With regard to the Maoists, their *Jana*

*Karbahi* often fell below<sup>[66]</sup> the IHL standards of judicial guarantee<sup>[67]</sup> as executions were routinely carried out in the name of *Jana Karbahi*.<sup>[68]</sup>

#### *Multiple war crimes in a single conduct*

These include rape and murder<sup>[69]</sup>; unlawful detention and murder<sup>[70]</sup>; unlawful detention and enforced disappearance<sup>[71]</sup>; unlawful detention, murder and outrage on the dignity of a dead body;<sup>[72]</sup> unlawful detention and torture<sup>[73]</sup> among other. An emblematic case that constitutes war crimes of outrage upon personal dignity, torture and murder, is as described:

On 12 February 2004, [the then] Royal Nepal Army soldiers dragged a 17-year-old schoolgirl, Subhadra Chaulagain, from her house in the middle of the night. She was questioned outside over a period of several hours, and finally shot in the head and stomach at point blank range and in front of her father. The soldiers kicked her body and then proceeded to brutally beat her father, leaving him for dead.<sup>[74]</sup>

#### *Sexual assault as a compounded war crime under CA 3*

Sexual assault may constitute multiple war crimes under CA 3 – torture, cruel inhuman degrading treatment, outrage on personal dignity and sometimes even mutilation.<sup>[75]</sup> OHCHR has documented over 100 case studies<sup>[76]</sup> and the TRC has received around 300 compliant of sexual assault<sup>[77]</sup> by both the parties to the conflict, but many sexual assaults still remain unreported due to a lack of sound investigation mechanism and the social stigma and threats attached with reporting sexual violence.<sup>[78]</sup>

#### *Implicit war crimes under CA3*

##### *Perfidy*

Wearing enemy uniform would amount to perfidy under CA3 because the provision covers both own troop and adverse troop.<sup>[79]</sup> A known case of perfidy in the armed conflict was the *Doramba execution*, during which the Nepal Army reportedly ‘pretended to be Maoists’ in order to foil a Maoists meeting.<sup>[80]</sup>

#### *War crime against members of your own armed group?*

Examples of this emerging war crime include sexually abusing members of your own armed force<sup>[81]</sup> or even murdering them for defecting to the enemy side. There is little documentation of this particular war crime in Nepal due to its novelty and thus requires a separate study.

Other explicit and implicit war crimes under CA3 that could have been committed during the armed conflict include hostage taking<sup>[82]</sup>, pillaging or destroying medical facilities or transportations engaged in providing

medical care to the sick and wounded[83] and obstructing humanitarian organizations and their workers after providing consent to operate.[84]

### ***Customary IHL war crimes***

#### *Attacking individual civilians or civilian population [85]*

Security forces have appeared to attack civilians, especially Maoist sympathizers especially during campaigns such as Kilo Sierra II and Cordon[86] while the Maoists seem to have also carried out targeted killings of civilians, especially teachers,[87] school children[88], journalists and human rights defenders.[89]

#### *Target on civilian objects*

While the security forces are reportedly responsible for conducts such as 'burning an entire village at Khara, Rukum'[90], the Maoists seem to have been responsible for most of this war crime as they reportedly destroyed a total of 5138 civilian infrastructures including administration buildings, police posts, schools, roads and bridges, drinking water systems, electric powerhouses, telecom towers, radio stations, buses and food stores, among others.[91]

#### *Making non-military objective religious or cultural objects the object of attack[92]*

The most exemplary case study includes destruction of the Tansen and Malgalsen palaces by the Maoists[93] - the former also deemed a UNESCO world heritage site.[94]

#### *Civilian displacement not justified by security or military necessity imperatives [95]*

Civilian displacements as a consequence of pillage of land, houses and properties[96] that took place in the conflict are war crimes of civilian displacement by the virtue of direct causation. However, not all mass displacement that took place in the conflict were forced civilian displacements and thus war crimes.[97]

#### *More civilian casualties as collateral damage than required by military necessity*

An emblematic case study is the *Sharada Secondary School Incident*, that resulted in 4 student casualties and 5 injuries when security forces open fired at the school with an intention to kill the present Maoists. [98] Such incidents were a consequence of target non-verification that is a violation of principle of precaution and is a war crime in and by itself.[99]

#### *Conscription or recruitment of children below the age of 15[100]*

While the security forces reportedly used children as messengers, spies or informants, acts short of

conscription or recruitment as child soldiers[101], the Maoists actively recruited child soldiers throughout the conflict[102]. 1996 documented cases of such recruitment have surfaced in the aftermaths of the conflict, with 475 children being below the age of 15 when so recruited.

#### *Reprisal upon civilian population[103]*

An emblematic case study in this regard is the *Khara Massacre* in which

[An] inexperienced young inspector responsible for the operation, angry about the shooting of his officer, ordered the execution of at least seventeen local men, including one fifteen-year-old boy. The police burned down 25 houses, 35 animal sheds, and five grain warehouses and grinding mills. It later turned out that almost all the victims were Nepali Congress Party supporters.[104]

#### *Use of legal weapons with an indiscriminate effect*

Prohibited weapons such as chemical or biological weapons were as such not used in the armed conflict in Nepal, which was rather fought with small arms and ammunitions. While manufacturing, importing and looting of arms and explosives by the Maoists would be punishable under the Arms Act[105] and the Explosives Act[106], use of such weapons are not prohibited in IHL, unless the manner of their use is indiscriminate, for example, open firing at a school in Achham that killed two minor[107] and using explosives[108] and landmines[109] to blast public utilities used by civilians.

Since Nepal was not (as is not, to this date) a party to the Ottawa Convention (on Antipersonnel mines) and the Conventional Weapons Convention and its Protocols, use of mines and explosive remnants of war used in the Nepalese armed conflict were not *per se* illegal. However, haphazard placing of these mines in civilian areas remained prohibited under CIHL [110] whose violation resulted in vast civilian amputations/casualties[111] including those of children.[112] The landmines and ERW used in Nepal were rather traditional and caused superfluous injury and unnecessary suffering even when used against combatants[113] which constitutes a war crime in and by itself.

#### *Pillage[114]*

Nearly 40,000 people had their movable and immovable property arbitrarily seized[115] in the conflict. While security forces occasionally pillaged money and other properties during security operations[116], the Maoists perpetrated land grabbing *en masse* in the pretext of anti-feudalism and land redistribution. Such land grabbing is a recognized form of pillage[117]and was recognized by the Supreme Court of Nepal as a violation of humanitarian law.[118]

#### ***Enforced Disappearance as a composite war crime (combination of many war crimes listed above)*** **[119]**



It is regarded that 'the very virtue of a person gone missing is a violation of IHL'[120]. Enforced disappearance is a composite crime involving several or all of these war crimes – abduction, unlawful detention including secret detention, torture and murder.[121] The National Human Rights Commission of Nepal (hereinafter NHRC) has reported at least 1619 cases of conflict-related disappearances, 1,234 of which is attributed to the security forces and 331 to the Maoists, (54 remain unidentified).[122] Only exceptionally, people who went missing during the conflict have surfaced as not having been forcefully disappeared.[123] While the government has refuted allegations of enforced disappearances[124], the Supreme Court has taken cognizance of available facts and thus ordered to set up a separate Commissions to investigate allegations of enforced disappearance.[125]

### *Other violations*

Other violations that may have taken place are - attack on medical and religion personnel and objects[126], making non-defended localities and demilitarized zones the object of attack[127], causing superfluous injury or unnecessary suffering to combatants or civilians DPH[128], medical experiment not justified by health imperatives, seizing property of the adverse party not required by military necessity[129], denial of quarter[130], collective punishments[131] and attack on objects indispensable to survival.[132]

## **Part II: Grave Breach of the Geneva Conventions**

### **Introduction**

- The definition would include the following elements:
  - > A violation of IHL that is serious in nature - a war crime
  - > Not just any war crime
    - o Denial of the most significant rights of protected persons in IHL
    - o in the context of an IAC
- The concept does not exist in NIAC - Common Article III would be the equivalent in gravity, but not quite the same (below)
- Any crime amounting to grave breach would trigger universal jurisdiction (art. 50, 51, 130 and 147 of the GCs respectively) + the state parties to the GCs have an obligation to criminalize grave breach 'specifically as such' in their domestic law



For example: The *Geneva Conventions Act* 1960 of India and the *Draft Geneva Conventions Act* of Nepal both include provisions criminalizing grave breach of the GCs

(No such obligation exists as regards any other war crime even if states voluntarily criminalize serious violations of IHL in their domestic law)

Grave Breaches common to the four Geneva Conventions (arts. 50, 51, 130 and 147 respectively)	1.	Willful killing
	2.	Torture and other inhuman treatments
	3.	Biological experiments
	4.	Causing serious injury to body and health
	5.	Wanton destruction of properties not justified by military necessity (this one not contained in GC III though)
Grave breaches common to III and IV GCs (art. 130 and 147 respectively)	1.	Compelling a POW or protected civilian to serve in the armed forces of the hostile power
	2.	depriving either of the above of right to fair trial
Grave breaches exclusively mentioned in GC IV (art. 147)	1.	Unlawful deportation or transfer of protected civilians
	2.	Unlawful confinement of protected civilians
	3.	Hostage-taking of protected civilian

1. Making a civilian or civilian population an object of attack
2. Launching an indiscriminate attack on civilian population and/or objects
3. Launching an attack on dangerous installations
4. Attacking an hors de combat
5. Perfidious use of distinctive emblem
6. Attacking undefended or demilitarized zones

Grave breach of AP I

(Art 85)

Among others

∞ *Prosecution of Osvaldo Romo Mena*, Appeals Court of Santiago, Chile, 1994 à No amnesty for grave breaches of the GCs

(direct quotation) ¶12 ...such offences as constitute grave breaches of the Convention are imprescriptible and unamenable to amnesty; the ten-year prescription of legal action in respect of the crimes provided for in Article 94 of the Penal Code cannot apply, nor is it appropriate to apply amnesty as a way of extinguishing criminal liability. Any attempt by a State to tamper with the criminality of and consequent liability for acts which infringe the laws of war and the rights of persons in wartime is beyond the State's competence while it is a Party to the Geneva Conventions on humanitarian law. Such an attempt would be more serious still if it sought to cover up not only individual liability but also that of agents of the State or public officials, since that would be tantamount to self-absolution which is repugnant to every basic notion of justice for respecting human rights and international common and treaty human rights law; it would also infringe the basic values and principles of our own constitutional legislation.

\*\*\*\*

## #11 National Implementation of IHL

### 11.1. Introduction

Implementation of IHL:

- o Respect IHL
- Compliance with IHL during war time

- Dissemination in peace time
- o Protect IHL
- Prevention of its violation
- Repression of its violation (accountability mechanisms)

International Implementation:

- o Body of applicable rules (IHL as a branch of international law)
- o International Repression Mechanisms (ad hoc criminal tribunals, the ICC, among others)

National Implementation

- o Domestic Law
- o Domestic policies
- o National institutions
- Judiciary
- Other institutions such as truth commissions, National IHL committee, among others

## **11.2. Summary**

1. Obligation to respect and protect the Geneva Conventions
2. Ratification of IHL treaties
3. Domestication of the Geneva Conventions
4. Translation of the Geneva Conventions
5. Dissemination of the Geneva Conventions
6. National IHL Committee

7. Judiciary

8. National Red Cross Societies

## 1. Obligation to Respect and Protect the Geneva Conventions

Common Article 1 to the 1949 Geneva Conventions: Obligation to Respect and Protect the Conventions (and therefore the basic notions of IHL)

- Applies equally in war time and peace time

- Applies to both state and non-state actors

- ∞ States have some 'latitude' when it comes to choosing measures to ensure respect for the Conventions. However, these specific measures are a must (2016 Commentary to Common Article 1 of the 1949 Geneva Conventions)

> **Instruction within armed forces:** States are required to disseminate the Conventions as widely as possible in their respective countries and, in particular, to include the study thereof in their programmes of military instruction.

> **Rules of application:** States are required to communicate to one another official translations of the Conventions, as well as laws and regulations they may adopt to ensure their application.

> **Suppression of breaches:** States are required to search for, prosecute or extradite alleged perpetrators of grave breaches 'regardless of their nationality' and to enact any necessary legislation in this respect. They are further required to suppress all other breaches of the Conventions.

> **Abuses of the emblem:** The High Contracting Parties are required, if their legislation is not already adequate, to take measures necessary for the prevention and repression, at all times, of abuses of the emblem.

## 2. Ratification of IHL Treaties

Nepal is a party to nine IHL treaties, including the four GCs and its third optional Protocol, as described in the schematic below:

Treaty	Signature	Ratification /Accession
The (Four) Geneva Conventions	-	7 February 1964
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction	19 January 1993	18 December 1997
Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, 1925	No	No
Biological Weapons Convention	10 April 1972	10 November 2016
Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict [133]	8 September 2000	3 January 2007
Third Additional Protocol to the Geneva Conventions	14 March 2006	No
Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention. The Hague, 14 May 1954	No	No
Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict. The Hague, 26 March 1999	No	No
1977 Two Protocols additional to the four 1949 Geneva Conventions (Protocol I) and non- international (Protocol II) armed conflicts	No	No
Conventional Weapons Convention and its additional protocol (including mine and explosive remnants of war protocol)	No	No

1997 Convention on the prohibition of the use, stockpiling, production and transfer of anti- personnel mines and on their destruction (Ottawa convention)	No	No
1998 Rome Statute of the International Criminal Court [134]	No	No
Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction	No	No
Convention on the Prohibition of the Use of Nuclear Weapons	20 September 2017	No

You do not need to know all of the above. Most importantly, Nepal has ratified (1964) the Conventions and the third Additional Protocol, but not the first and second. Also try to remember a few that Nepal may want to consider ratifying, such as the Conventional Weapons Convention and the Rome Statute.

### 3. Domestication of the Geneva Conventions

- Domestication of treaties: transformation of treaties into domestic laws, including statutory or case law.
  - One of the tripartite 'peacetime' obligations under the Geneva Convention.
- 1) Obligation to domesticate (but not mandatory to introduce a *Geneva Conventions Act per se*)
  - 2) Obligation to penalize grave breach of the Conventions (arts. 50, 51, 130 and 147 of the GCs respectively and art. 85 of AP1) and other violations of the Conventions (art. 49, 50, 129 and 146 of the GCs respectively)
  - 3) Obligation to punish the misuse of distinctive emblem (art 54 of GC I; art. 55 of GC II)
- Methods of domestication of the Geneva Conventions:
    - 1) Enacting a national implementation legislation. For example, the Geneva Conventions Act, 1960 (India) and the Draft Geneva Conventions Bill (Nepal).
    - 2) Including provisions of the GCs within existing domestic legislations. For example, the prohibition on enforced disappearance within the Muluki Criminal Code

3) Harmonizing existing domestic legislations and case law with the spirit and the provisions of the Geneva Convention. For example, the recognition of the notion of Prisoner of War in the Army Act 2006 (Nepal).

- The Geneva Conventions are self-executing treaties
- Self-executing treaties: held as primary laws and can be directly invoked in domestic courts.
- Not mandatory to have a national implementation legislation
- Nothing in the GCs mention that the High Contracting Parties are required to have a national implementation legislation.
- Importance of national implementation legislations (even though not mandatory)
- Enhances the compliance of the GCs
- Makes post-conflict justice smoother
- Deters war criminals from seeking safe haven on a state's territory.

#### **4. Translation of the Geneva Conventions**

- State parties have an obligation to (art. 48, 49, 128 and 145 of the GCs respectively)
- translate the Geneva Conventions in their official languages and
- communicate (or deposit) the translation to the Swiss Federal Council (the depository of the Geneva Conventions).
- Nepal has translated the Geneva Conventions into Nepali, in cooperation with the ICRC.
- Apart from the Geneva Conventions, these materials have also been translated into Nepali:
- International Humanitarian Law: A Comprehensive Study by Tirtharaj Wanta
- IHL: Frequently Asked Questions by ICRC

#### **5. Dissemination of the Geneva Conventions**

- The primary obligation lies with the States. According to art. 144 of GC IV:

- Dissemination should take place in both war and peace time
- It should be as wide as possible
- It should be nuanced for: a) military programs b) civil instruction (so as to cover the entire population)
- In the time of war, people responsible to 'protect' the others, must possess the text of the Conventions and be specially instructed about its provisions.
- Measures taken in Nepal:
  - Inclusion of the primary notions of IHL in police and military basic and advanced trainings
  - Development of human rights cells
  - Participation in trainings and workshops held by INGOs such as the ICRC and IIHL (International Institute of Humanitarian Law)
  - Development of National IHL Committee
- Organizations such as ICRC conduct dissemination of the GCs and other sources of IHL as a part of their organizational mandate. Some of the key achievements of the ICRC include:
  - Comprehensive FAQs and Factsheets on IHL
  - Commentaries to the Four Geneva Conventions and their Additional Protocol (the first two Conventions were recently updated in 2016 and 2017 to reflect the recent development in IHL)
  - Development of the Customary IHL Database
  - Collaboration and partnership with Universities
    - o Moot Courts, such as Henry Dunant Memorial Moot Court Competition
    - o Training packages, such as South Asia Teaching Session (SATS)

## **6. The Role of National IHL Committees in Implementation of IHL**

- The GCs does not expressly require the creation of a national IHL committees



- The idea was conceptualized and proposed by the ICRC.
- There are 112 National IHL Committees or equivalent national bodies in the world.
- The National IHL Committee of Nepal was formulated in 2007.
- The characteristics of such Committees are:
  - o To serve as advisory bodies to their governments on matters pertaining to IHL.
  - o To facilitate inclusion of IHL into national laws wherever necessary
  - o To disseminate IHL among those with government responsibilities
  - o To facilitate effective implementation of IHL within national law and policy framework.
  - o Generally, these committees do not have decision-making power, nor are they entrusted with judicial or semi-judicial functions.
- 7. The Role of national courts (see #IHL repression mechanism)
- 8. The Role of National Red Cross Societies (see #IOs and IHL)

## **#12 Repression Mechanisms and IHL (Repression of violations of IHL)**

### **12.1. Introduction to IHL Repression Mechanisms:**

- Criminalization or criminal repression of the violations of IHL (also includes mechanisms aiding in criminal investigations.
- Obliging states to criminalize state and individual behaviours contrary to IHL
- Most of such repression mechanisms are contained in International Criminal Law, some in Human Rights and transitional justice

### **12.2. International Repression Mechanisms**

#### **A. International Military Tribunal and the Nuremberg Principles**

- Purpose: Prosecution of Nazi war criminals
- Trials were carried out in Nuremberg Germany, between 1945 – 1949
- 24 individuals were indicted, and 10 death sentences were carried out, including top ranking officials of the Nazi Secret State Police, Gestapo and the Government, the Third Reich
- The prosecutors and the judges were mostly US nationals and was hugely controversial
- The findings aided in the development of the Genocide Convention (1948) and the Geneva Conventions (1949)
- The trials were based on London Charter of the International Military Tribunal (IMT), 1945. The crimes under the jurisdiction of the tribunal were:
  - o Crimes against peace (aggression)
  - o War crimes
  - o Crimes against humanity
- A follow-up series of trials took place in Nuremberg during the same period, known as the Doctors Trial (for medical experimentation on civilians, mostly the Jews during the Holocaust)
- The major contribution of the IMT comes in form of the Nuremberg Principles, summarized below:
  - o Head of State and responsible government officials cannot justify an international crime as a conduct done in official capacity.
  - o Such international crimes generate individual criminal responsibility
  - o Superior order cannot be a defence in international criminal law
  - o A person charged with international crimes has a right to fair trial

## **B. International Military Tribunal of the Far East (IMTFE)**

- Popularly known as the Tokyo Trials
- Held between 29 April 1946 and 12 November 1948 in Tokyo

- 29 military commanders and political leaders of the Imperial Japan were indicted:
- aggression or crimes against peace (class A)
- war crime (class B)
- crimes against humanity (class C)
- Was based on the Charter of the International Military Tribunal for the Far East
- The proceedings followed the model of the Nuremberg Trials

### **C. Ad hoc tribunals created under the aegis of UN Security Council**

Such mandate of the UNSC emanates from article 39 of the UN Charter which provides the

UNSC to determine:

- > When a situation amounts to threat to peace, breach of peace or act of aggression
- > Decide on measures to repress them

#### **1. International Criminal Tribunal for Rwanda (ICTR)**

- Established by the UNSC through resolution 955 in November 1994
- The resolution was a response to the Rwandan genocide between April and July 1994, that saw murder, rape and persecution of more than 800,000 Tutsis and moderate Hutus by the Hutu government of Rwanda in the context of a non-international armed conflict that lasted around 100 days.
- The resolution was politically prompted by the failed United Nations Assistance Mission for Rwanda.
- The seat of the trial chamber of the court is Arusha, Tanzania and the Appeals Chamber is the Hague, the Netherlands.
- Key features of the Charter of the ICTR are:
  - o Material crimes under the jurisdiction of the court:
    - > Genocide

> Crimes against humanity

> War crimes: violation of common article 3 to the Geneva Conventions and Additional Protocol I

- o Concurrent jurisdiction with national courts - a case may not be tried in both ICTR and national courts of Rwanda. However, ICTR had the power to request a case *sub judice* in Rwandan national courts to be deferred to it.

- o Principle of individual criminal responsibility

- o Provision on rights of the accused

- o Rules of evidence and procedure

- Key achievements of the ICTR:

- o *The trial of Jean-Paul Akayesu* (1998) - ICTR became the first international tribunal to interpret the definition of genocide provided under the 1948 Genocide Convention and defined 'rape as means of Genocide'

- o *The trial of Jean Kambanda* (1998) - ICTR became the first international tribunal since Nuremberg to issue a judgement against a former head of state

- o *The trial of Ferdinand Nahimana* - ICTR became the first international tribunal to elaborate on the doctrine of superior responsibility as applicable to civilians, where civilians inciting hate speech and genocide were held criminally responsible for such conducts.

## 2. International Criminal Tribunal for (Former) Yugoslavia (ICTY)

- Established by the UNSC in February 1993 through Resolution 827

- Established to prosecute serious crimes committed during the Yugoslav Wars (1991-2001), a series of international armed conflicts, including: a) the Croatian War of Independence; b) the Bosnian War; c) the Kosovo War; d) the Presevo Insurgency and e) the Macedonia Insurgency

- The seat of the court is located at the Hague, the Netherlands

- Key features of the ICTY Statute:

- o Material crimes under the jurisdiction of the court:

> Genocide

> Crimes against humanity

> War crimes:

- grave breaches of the 1949 Geneva Conventions

- violations of the laws and customs of war

- o Concurrent jurisdiction with national courts - a case may not be tried in both ICTY and national courts of Rwanda. However, ICTY had primacy over national courts.

- o Principle of individual criminal responsibility

- o Provision on rights of the accused

- o Rules of evidence and procedure

- Key achievements of the ICTY:

- o *The Tadic Case*: ICTY became the first international tribunal to elaborately define when does a non-international armed conflict transform into an international armed conflict by laying down the 'overall control test'

- o *The Celebici Case*: Testimony of the survivors of the genocide in Srebrenica became vital documentary evidence. The court elaborated on various forms of torture and other inhuman and degrading treatment.

- o *The Martić Case*: Intense bombing of a densely populated civilian area was held as an indiscriminate attack. The court elaborated on the prohibition on use of indiscriminate means and methods of warfare.

### 3. UN Mechanism for International Criminal Tribunals (MICT)

- Created to carry out the residual functions of ICTR and ICTY that have already completed their trials and appeals.

- The residual functions include: a) enforcement of sentences; b) locating and trying the remaining fugitives still wanted by the ICTR.

### **D. International Criminal Court (ICC) Development of the ICC**

- Established in 1998 following the adoption of the Rome Statute or the Statute of the International Criminal Court
- The call for the ICC can be traced back to the 19<sup>th</sup> century à Gustave Moynier, co-founder of the ICRC lobbied for a universal court to try war criminals.
- The evolution of the ICC can further be attributed to:
  - o The Nuremberg Principles and the Pinochet Trial
  - o Caucus of 60 like-minded states in Rome in 1994
  - o The then UN Secretary General Kofi Annan and the International Law Commission
  - o The relative success of the ICTY and ICTR

§ The ICC came into force in 2005.

### *Special Features of the ICC*

1. Permanence: It is the first permanent international court having jurisdiction over serious international crimes (In contrast to ad hoc criminal tribunals such as the ICTY and the ICTR)

2. Complementarity (or the Principle of Complementarity)

> The jurisdiction of the court is complementary to the national criminal jurisdiction -)exhaustion of domestic remedies required for a case to be admissible in the ICC.

> Also called 'positive complementarity'

> Source: the Preamble, arts. 1 and 17 of the Rome Statute

> Admissibility test: if no national investigation and prosecution has taken place or if it appears that the local State is unwilling or unable to investigate or prosecute THEN the case is admissible in ICC.

3. The aspiration of Universal Jurisdiction

> The ultimate objective of the ICC is to be ratified/acceded by every State around the world so that serious crimes under its jurisdiction can be repressed through the ICC if states fail to take any action.

> Territorial or Personal Jurisdiction still applies in the ICC, meaning the court does not have a universal jurisdiction. Meaning, the Court has jurisdiction over serious crimes listed in point 4 IF ONE of the following situations exists (article 12 of the Rome Statute):

- a) Such crime is committed in the territory of a state party to the ICC
- b) Such crime is committed by a person who is a national of the state party to the ICC

Note: However, in the crime of aggression, both (a) and (b) need to be present.

#### 4. Vast material jurisdiction (serious international crimes defined as such by the Court) (arts. 5, 6, 7, 8)

> Genocide

> Crimes against humanity

> War crimes (in both international and non-international armed conflicts)

> Aggression (criminalization of violation of the principle of territorial sovereignty)

#### 5. Various mechanisms to be activated

There are four ways in which a situation may be introduced at the ICC (arts. 12-15 of the Rome Statute)

> Referral by a state party

- Self-referral
- Third-party state referral

> Referral by the United Nations Security Council

> On the initiation of the Prosecutor of the ICC (also called *proprio motu*)

> Through an ad hoc declaration by a non-state party to the ICC

#### 6. No official capacity immunity (art. 27):

> Zero tolerance on war crimes and other serious international crimes

> An accused cannot make a defence that 'certain conducts were committed as a part of their official responsibility'

## 7. Two modes of criminal responsibility

> Individual criminal responsibility (art. 25): Liability for conducts such as direct or indirect perpetration, order, solicitation, among others.

> Command responsibility (art. 28): Responsibility of a commander (both civilian and military) for the crimes of their subordinates.

## 8. Witness and Victim safeguards (art. 68)

> Witness protection program

> Victim assistance program

- Victim trust fund

- Victim reparation program

## 9. Member assistance and opportunities:

> Courtroom services to the parties of the statute (for example Sierra Leone was provided such services in the trial of Charles Taylor)

> Career prospects in the ICC for state party nationals

## 10. Yardstick for fair trial

As an international judicial institution, the standards of fair trial are taken very seriously.

> Standard of proof is strictly complied with.

> Evidences that do not comply with human rights standards are inadmissible

> Prosecution has to produce both implicating and exonerating evidence.

> There is no death penalty and the maximum sentence is 30 years.



## 11. Scope for withdrawal (art. 127)

> State parties can withdraw from the Rome Statute and therefore from the ICC anytime - voluntarism in joining and leaving the Court.

> The crimes occurring before the withdrawal comes into effect remain under the jurisdiction of the ICC.

### *Interrelationship between the ICC and the United Nations Security Council*

#### > **The Al-Bashir Arrest Warrant Controversy**

- On 31 March 2005, the UN Security Council adopted resolution: resolution 1593 referring the situation in Darfur, Sudan to the ICC (power vested on it by art. 13(2) of the Rome Statute). Sudan is not a party to the Rome Statute. But UNSC referral is on contingent on a state being a party to the State.

- UNSC has a power to define a situation as a threat to international peace and security and take hard enforcement actions under Chapter VII.

- On the basis of the resolution 1593, the Pretrial Chamber of the Court issued the first international arrest warrant against Al Bashir, the President of Sudan (WAS - very recently removed from the position in April 2019). The warrant called upon Bashir to voluntary surrender/Sudan to surrender him to the ICC/ all the state parties of the ICC to handover Bashir to the ICC should he travel there/all non-state parties to voluntary surrender him to the ICC should he travel there. This went unexecuted. On 12 July 2010, a second warrant was issued.

- In March 2017, Jordan hosted the 28th summit of the League of Arab States. Al Bashir attended it. Jordan, even as a state party to the ICC, did not arrest and hand over Al Bashir to the ICC. It claimed that his diplomatic immunity prevented them from executing the arrest.

- The PTC considered whether Jordan was in violation of the Rome Statute. This case following legal considerations before the ICC:

- o What is the legal effect of a UNSC resolution?

- o Does the diplomatic immunity exception apply in this case?

- o African Union has stated that 'no serving Head of the State or Head of the Government shall be required to appear before any international court or tribunal during their term of office' - what is the consequence of this statement.

- Among other things, the PTC observed the following: Sudan and Jordan both were obligated to cooperate with the ICC by the virtue of the UNSC resolution 1593 in and by itself. But Jordan, also as a state party to the ICC. Thus, in this case, Bashir's immunity stood waived - charged with Genocide and crime against humanity (*jus cogens* prohibition)

- This position of the PTC has been subject to severe backlashes - African Union threatened mass withdrawal from the ICC. Dapo Akande - the decision goes against the legislative intent of the state parties, who while negotiating the text of art. 27 and 98 of the RS, did not intend to empower the PTC in this manner.

Ø Does UNSC have unfettered power vis a vis the ICC? (experts from unpublished article © Yugichha Sangroula

- While it is true that the Statute empowers the Council to refer cases to the ICC[135] and modify the personal jurisdiction of the Court, there are several buffers to the abuse of power: a) it cannot alter the material jurisdiction of the Court[136]; b) it can backdate temporal jurisdiction of the court to any period after the entry into force of the Statute but not before 1 July 2002 as confirmed in the *Abu Garda* case[137]; c) UNSC referred cases also have to undergo the court procedures of admissibility as demonstrated by the cases of *Gaddafi and Al-Senussi*:[138] d) It cannot veto investigations initiated by party referrals or *proprio motu* by the Prosecutor.[139]

- While it is also true that the Statute empowers the Council to defer ICC investigations or prosecutions for a renewable period of 12 months[140] (which theoretically could be for an indefinite amount of time[141]) such deferrals are logically valid only for situations referred to the ICC by the Council itself[142] and not all the situations under the Court's investigation.

(Moreover, the UNSC's repeated attempt to refer the situation in Syria to the ICC has failed due to the vetoes by Russia and China à hence the UNSC does not have unfettered power vis a vis the ICC)

## **E. Human Rights Mechanisms**

- A UNGA approved independent investigation mechanism, as instituted for the situation in Syria
- OHCHR fact-finding mission, as recently conducted in Myanmar;
- Human Rights Council (HRC) country mandated special rapporteur, as created in Cambodia and Eritrea;
- HRC inquiry procedure, as used in Occupied Palestine;
- International Fact-Finding Commission, as used in Ukraine

- Individual Complain Mechanism under the Human Rights Commission (more than 10 communications pertaining to the conflict era of Nepal have been entertained and recommendations have been provided to the Government of Nepal)

- Truth and Reconciliation Commissions:

- o Transitional justice is a corollary of human rights

- o A pioneer (although controversial) is the Truth Commission of South Africa

- o Two such commissions exist in Nepal:

- > The Truth and Reconciliation Commission (TRC)

- > Commission for Investigation of Enforced Disappearance

### **12.3. Domestic Mechanisms**

- Special Courts and Hybrid Courts

- Hybrid-) mandated by international law, for example UNSC resolutions, however, administration of the courts also require domestic legislations in the concerned national jurisdiction .

- For example:

- o Special Court of Sierra Leone

- > has jurisdiction over all violations of Sierra Leonean law and international humanitarian law (IHL) committed since 30 November 1996

- > Primacy over the national courts of Sierra Leone.

- > Seated in Freetown, the Hague and New York

- > Famous for the trials of Charles Taylor, the former President of Liberia

- o Special Tribunal for Lebanon

- o Special Chambers of the East Timor

- o the Extraordinary Chambers of Cambodia

Note: Nepal has drafted a bill on a special court to try violations of IHL and HR that occurred during the armed conflict in Nepal.

## ∞ Domestic Courts

> *Rajendra Dhakal v. Government of Nepal* >> The Supreme Court of Nepal observed that although enforced disappearance is neither a crime in the national law of Nepal, nor has Nepal ratified or acceded to the Convention on Protection of All Persons from Enforced Disappearance, the latter embodies customary international law (at least the definition) and thus cases of enforced disappearance can be admitted as such by the general courts of Nepal and the investigating authorities have the duty to register the FIRs made by the family of the missing.

> *Raja Ram Dhakal et al v. His Majesty's Government et al*, WN 2942, 2059 (2002): The Supreme Court directed the Government to enact the national implementing legislation to domesticate the Geneva Conventions.

> *Devi Sunwar v. District Police Office Kavre et al*, WN 0641, 2063 (2013) (The *Maina Sunwar Case*): In the morning of February 17, 2004 soldiers arrested 15-year-old Maina Sunuwar from her home. When her friends and relatives went to the Lamidanda barracks the following day and demanded her release, the army denied having arrested her. In April 2004, the army told Maina's mother, Devi Sunuwar, that her daughter was dead. The Supreme Court of Nepal ruled that Maina Sunwar was subjected to arbitrary detention and torture leading to her death by omission, amounting to an act of murder. The arbitrary detention, torture and the murder were a violation of IHRL and IHL.

> *Govinda Bandi et al v Attorney General Mukti Pradhan* , WN 0740 of 2069 (2012): Regarding the case withdrawals by the then Attorney General Pradhan against Maoist accused of war crimes such as murder of journalist Dekendra Thapa. The court ruled that the attempts to withdraw such cases is an obstruction of justice not justified by the constitutional rights of Attorney General, and that sweeping withdrawals of conflict-era case would amount to *de facto* amnesty against the spirit of transitional justice, IHL and the Comprehensive Peace Accord.

> *The Kumar Lama Trial* (2015): The Kumar Lama trials in the UK cemented the notion that foreign courts could activate universal jurisdiction under the Convention against Torture and invoke the principle of extradite or prosecute, in matters regarding torture committed during an armed conflict.

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# #13 Means and Methods of Warfare

## Introduction

- Methods of warfare - military tactics and strategies
- Means of warfare - weapons and weapon delivery system

## Prohibited Methods of Warfare

### 1. Indiscriminate attacks

- Three forms (Customary IHL, rule 12)
  - Ø Are not directed at a specific military objective
  - Ø Cannot be directed at a specific military objective
  - Ø In a) nature or b) effect cannot be limited to a specific military objective
- A single city, town, village with a concentration of civilian or civilian objects cannot be treated as a single military objective. (Customary IHL, rule 13)

### 2. Denial of quarter

- Meaning 4 refusal to spare or show mercy to those a) manifestly unable to defend themselves or b) who clearly express their intention to surrender.
- It is a grave breach of the Geneva Conventions
- Forms
  - Ø Order that there shall be no survivor (AP I, art. 40; AP II art. 4)
  - Ø Attack against *persons hors de combat* (Customary IHL, rule 47)
    - A person in the hands of the enemy
    - A person sick, wounded or shipwrecked

- A person who has clearly expressed willingness to surrender

Ø Attacks against persons parachuting from an aircraft in distress (Customary IHL, rule 48)

### 3. Perfidy

- Meaning

Ø Deceitful killing of an adversary using illegal ruses of war

Ø Meaning of ruses of war 4 techniques that mislead the adversary, such as use of spies, camouflages, false radio signals and communication, dummy guns etc.

Ø Specific meaning 4 faking a protected status under IHL to mislead the enemy

- Forms

Ø The improper use of the white flag of truce is prohibited. (CIHL, rule 58)

Ø The improper use of the distinctive emblems of the Geneva Conventions. (CIHL, rule 59)

Ø The use of the United Nations emblem and uniform by those not authorized by the organization. (CIHL, rule 60)

Ø Use of flags and emblems, insignia and uniforms of the enemy and neutral states. (CIHL, rules 62 and 63)

Ø Inviting the enemy in the pretext of concluding an agreement followed by surprise attack (CIHL, rule 64)

### 4. Starvation Tactics (AP I, art. 54)

- Attack on foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation work is prohibited.

- Anything that endangers the sustenance of civilian population is prohibited.

### 5. Reprisal

- **Meaning** - revenge exacted in an illegal manner
- Civilians and civilian population should not be the objects of reprisals (intentional violation of principles

of IHL would automatically become acts of reprisals)

- *Kupreskic Case* (2000): Some military manuals recognize exceptional grounds for 'belligerent reprisal' (which again, cannot be exacted against civilians) the elements for which include:

- > Purpose: action against prior violation of IHL by the adversary

- > Measure of last resort

- > Proportionality

- > Decision at the highest level of government

- > Termination: as soon as the enemy complies with IHL

## **6. Damage to the natural environment**

- Prohibition on attack unless a part of it constitutes a military objective (CIHL, rule 43)

- Principle of proportionality remains applicable.

- Nothing shall cause (AP I, art. 55)

- > widespread, long-term and severe damage to the natural environment

- > prejudicial to the health or survival of a population.

## **7. Targeting dangerous installations**

- Objects such as dams, dykes and nuclear electrical generating installations cannot be objects of attack. (AP I, art. 56)

- An attack on their vicinity must weigh the proportionality in attack and necessary precautions have to be taken to minimize release of dangerous forces and consequent severe losses among the civilian population. (CIHL, rule 42)

## **8. Pillage**

- Meaning - violent acquisition of movable public or private properties belonging to the enemy state, wounded, sick, shipwrecked or prisoners of war.

- Pillage of cultural properties is prohibited. (CIHL, rule 40)
- Personal property of sick, wounded and shipwrecked cannot be pillaged. (CIHL, rule 109)
- Pillage of personal property of persons deprived of their liberty is prohibited. (CIHL, rule 122)
  - Also referred to as plunder or spoliation.

## 9. Causing Impediments in Humanitarian Assistance

- Rapid and unimpeded passage of all relief consignments, equipment and personnel must be allowed (AP I, art. 70)
- Free passage for, children under 15 and expectant mothers, of

> medical consignments

> hospital stores

> essential foodstuffs, clothing (GC IV, art. 23)

## 10. Requisition in occupied territories

- Private properties of civilians in occupied territories, except war materials, cannot be captured by the occupier. (Hague Regulation 1907, arts. 46 and 53)
- Properties of the enemy captured by the occupier, even when war materials, cannot be permanent in nature (because occupation is supposed to be temporary)

## B. Prohibited or Limited Means of Warfare

#Separate notes.

1.

2. An active revolt or uprising. 'Insurgency', *Oxford Dictionary* available at <https://en.oxforddictionaries.com/definition/insurgency>, accessed on 1 August 2018.

3. See above section '*because our brushing has taught us to be vigilant*' in Part I of the paper.



4. 'Deuba defends army, police mobilised during armed conflict', *The Himalayan Times*, 3 June 2016.
5. *Suman Adhikari et al v Government of Nepal*, WN 0032, 2070 (2013) (unofficial translation).
6. Human Rights Watch (n 76), p.2.
7. *Jayakishor Labh v District Police Offic Dhanusha*, WN 063-WO-0681, 2063 (2006) (unofficial translation)
8. *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts* (AP I), 8 June 1977, 1125 UNTS 3, art. 51; *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts* (AP II), 8 June 1977, 1125 UNTS 609, art. 13(2).
9. Saubhagya Shah, 'A Himalayan Red Herring? Maoist Revolution in the Shadow of the Legal Raj' in Micheal Hutt (dd), *Himalayan People's War – Nepal's Maoist Rebellion*, Hurst and Company, London, 2004, pp. 192224.
10. Ibid.
11. *Tadic* (n 77).
12. Moeed W. Yusuf, *Insurgency and Counterinsurgency in South Asia*, Foundation Books, New Delhi, pp. 190-3.
13. Such as whereas Operation Kilo Sierra II and Operation Cordon. Ibid, p. 190-3.
14. Ibid.
15. Commentary to common article 3 (n 49), para. 431.
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39. *Ibid.*

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42. Provided that the person abstains from hostile acts and attempts to escape. Rule 47: Attack on Persons *Hors De Combat*. CIHL (n 3), rule 47.

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52. *Sushil Pyakurel et al v Prime Minister Jhalanath Khanal et al*, WN 1094 cited in Govinda Bandi

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53. International Crisis Group (n 125), p. 14.

54. Commentary to Common Article 3 (n 49), paras. 606-7.

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56. See for detail, *Ang Dorje Sherpa v Nepal*, Human Rights Committee Communication No. 2077/2011, UN Doc. CCPR/C/115/D/2077/2011 (2011).

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58. Nepal Conflict Report (n 98), p. 20.

59. Ibid, p. 10.

60. International Crisis Group (n 125), p. 14.

61. Rule 113: Treatment of the Dead. CIHL (n 3), rule 113.

62. Case Study of Ujjwal Kumar Shrestha in ICJ (n 127), p.9.

63. Case of Maina Sunwar. *Devi Sunwar v. District Police Office Kavre et al*, WN 0641, 2063 (2013).

64. Human Rights Watch (n 96), p. 24.

65. Ibid, p. 32.

66. Interview with Pushpa Kamal Dahal, *alias* Prachanda, BBC News, 13 February 2006.

67. Their legitimacy under domestic law is questionable but they are compatible with the IHL obligation of the non-state actor party to the conflict to respect and protect IHL .To give effect to the provision of common article 3, regularly constituted courts in the sense of OAG courts are ones that are constituted in accordance with the laws of the armed groups. Commentary to Common Article 3 (n 49), p. 692.

68. The Maoists also murdered their captives; for example, three teachers, Muktinath Adhikari, Kedar Ghimire and Arjun Ghimire, were each allegedly executed after abduction in separate incidents in Lamjung District in 2002. Nepal Conflict Report (n 98), p. 17.

69. Case study of Reena Rasaili. Human Rights Watch and Advocacy Forum, *Adding Salt to Injury*, 2011, p. 17.
70. *Maina Sunwar* Case (n 144) cited in Bandi (n 41), p. 86.
71. *Mukunda Sedhai v Nepal*, Human Rights Committee Communication No. 1865/2009, UN Doc. CCPR/C/108/D/1865/2009 (2009).
72. Case study of Sahid Ullah Dewan. Human Rights Watch and Advocacy Forum (n 145), p.29.
73. *Yubaraj Giri v. Nepal*, Human Rights Committee Communication No. 1761/2008, CCPR/C/101/D/1761/2008 (2008).
74. *Subhadra Chaulagain v. Nepal*, Communication No. 1761/2008, CCPR/C/101/D/1761/2008.
75. Commentary to Common Article 3 (n 46), p. 698.
76. *Nepal Conflict Report* (n 98), p. 23.
77. Dewan Rai, 'TRC records 295 complaints on sexual assault', *The Kathmandu Post*, 2 December 2016.
78. See Human Rights Watch, *Silenced and Forgotten: Survivors of Nepal's Conflict-Era Sexual Violence*, 2014.
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80. Human Rights Watch, 'Unlawful killings and Summary Executions by Nepali Security Forces' available at <http://pantheon.hrw.org/reports/2004/nepal1004/4.htm>, accessed on 1 August 2018.
81. The ICC *Ntaganda* decision on the confirmation of charges qualifies rape and sexual slavery of child soldiers committed by members of same group as war crimes. *Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Bosco Ntaganda*, ICC-01/04-02/06-309 (2014) paras. 76–82.
82. As explicitly mentioned in the Common Article 3 to the Geneva Conventions.
83. It derives from the obligation to care for the sick and the wounded. Commentary to CA3(n 49), para. 770.
84. *Ibid.*

85. Rule 6: Civilians' Loss of Protection from attack. CIHL(n 3), rule 6.
86. Thapa (n 37), p.169.
87. International Crisis Group (n 125), p.13.
88. See Human Rights Watch (n 96), p.118
89. International Crisis Group (n 130), p.12.
90. Ibid, p. 13.
91. Upreti (n 7), pp. 277-8.
92. Rule 38: attacks against cultural property. CIHL (n 3), rule 39.
93. Kai Weise, 'Conflict and heritage destruction', *The Himalayan Times*, 8 July 2017.
94. 'The Medieval Town of Tansen' available at <https://whc.unesco.org/en/tentativelists/5262/>, accessed on 10 August 2018.
95. Rule 129: the act of displacement. CIHL (n 3), rule 129.
96. See below war crime of 'pillage'.
97. Mercy Corps (n 103), p. 75.
98. 'Case no. 272, Civil War in Nepal' in Sassoli et. al (n 7), p. 2411.
99. Rule 16: Target Verification. CIHL (n 3), rule 16.
100. Rule 136: recruitment of child soldiers. CIHL (n 3), rule 136.
101. See generally, UNSG, 'Report of the Secretary-General on children and armed conflict in Nepal,' UN Doc. S/2006/1007, 20 December 2006.
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115. *Bhojraj Timilsina et al v. Nepal Congress Party et al*, WN 2063-WO-0920 (2006) in Bandi (n 39), p.132.
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123. 'Armed Conflict victim returns home after 18 years', *The Himalayan Times*, 1 May 2017.

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125. Ibid.

126. Rule 25: medical personnel. CIHL (n 3), rule 25.

127. Rules 36: demilitarized zones and rule 37: open towns and non-defended localities. CIHL (n 3), rules 36-7.

128. AP I (n 84), art. 35.

129. Rule 50: Destruction and seizure of property of an adversary. CIHL (n 3), rule 50.

130. Rule 15: precautions in attack. Ibid, rule 15.

131. Rule 103: collective punishments. Ibid, rule 103.

132. Rule 54: Attacks against Objects Indispensable to the Survival of the Civilian Population. Ibid, rule 54.

133. Is listed as such by the ICRC and arguably both an IHL and IHRL treaty. See ICRC, 'What treaties make up IHL' available at <https://www.icrc.org/en/document/what-treaties-make-ihl-what-customary-ihl>, accessed on 20 August 2018.

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137. *Prosecutor v. Bahr Idriss Abu Garda*, No. ICC-02/05-02/09-1, Decision on the Prosecutor's Application under Article 58, Pre-Trial Chamber I, 7 May 2009, para. 2.



138. *Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi*, No. ICC-01/11-01/11-466-Red, Decision on the admissibility of the case against Abdullah Al-Senussi, Pre-Trial Chamber I, 11 October 2013.

139. This is a reasonable interference based on the Statute's language within arts. 15-16.

140. Rome Statute (n 304), art. 16.

141. Trifftere r(n 313), p. 779.

142. Ibid.