Introduction

The obligation to protect human rights is universally accepted – even by those States that in practice breach them. The first part of this course looks at the special situation where human rights are, arguably, under the most extreme threat – during armed conflict, when civil order may have broken down and territory may be occupied by hostile forces, leaving the civilian population particularly vulnerable.

GENERAL READING

There is a vast amount of material available on all aspects of IHL. It is a dynamic field in which there have taken place very significant developments in recent years, particularly with regard to criminal repression of violations of IHL and controls on the types of weapons that may be used in armed conflicts. The books listed below are a few of the recent publications that deal comprehensively with the most essential aspects of IHL. Schwarzenberger is included despite its age because it is a classic on the subject.
In addition, you will find extensive commentaries and analyses of all aspects of IHL in the international law journals available in the library. These are too numerous to refer to, although some articles are mentioned in the course outline. You will also find many exceptionally useful articles in the International Review of the Red Cross (IRRC), which is available, free, in electronic format at the ICRC’s website. This contains some of the very best work on IHL.

- M. Sassòli, A. Bouvier and A. Quintin, How Does Law Protect in War? (3rd ed, 2011) – also contains an excellent bibliography (introductions to each subject are in the shorter volume 1; relevant primary materials are in volumes 2 & 3)
- E. Wilmshurst and S. Breau (eds), Perspectives on the ICRC Study on Customary International Humanitarian Law (2007)
- F. Kalshoven and L. Zegveld, Constraints on the Waging of War (3rd ed, 2001), available on pdf at:
• M. Walzer, Just and Unjust Wars (1977)

WEBSITES
• War Crimes Tribunal for the Former Yugoslavia: http://www.icty.org [3]
• International Criminal Court: http://www.icc-cpi.int/ [4]
• International Court of Justice: http://www.icj-cij.org/ [6]
• For primary materials on IHL, see the ICRC website at: http://www.icrc.org/eng [2], then click on War & Law. All your prayers will be answered.

ABBREVIATIONS
• GCI – 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
• GCII – 1949 Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
• GCIII – 1949 Geneva Convention III Relative to the Treatment of Prisoners of War
• GCIV – 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War
• PII – 1977 Geneva Protocol I Additional to the Geneva Conventions of 12
OUTLINE OF THE COURSE

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

I. INTRODUCTION

- Henckaerts and Doswald-Beck, Ch.32
- F. Hampson, “Fundamental Guarantees”, in: Wilshurst and Breau, Ch.11
- UK Ministry of Defence, Ch.2

IHL as International Law

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

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

Fundamental principles of IHL
• Civilians shall enjoy general protection against military operations
• Attacks are allowed only against military objectives (distinguish between civilian objects and military objectives)
• It is prohibited to cause unnecessary losses or excessive suffering (proportionality)
• Respect, protect and assist the sick and wounded without discrimination
• Captured combatants and civilians in the power of the enemy shall be protected and well treated

**IHL and the soldier’s dilemma**

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

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

*You are the tank gunner. What do you do?*

Walzer, Chs 1 and 2.

**II. SOURCES OF IHL AND ITS HISTORICAL DEVELOPMENT**

• Sassòli, Bouvier and Quintin, Vol.1, Chs. 3-4
• UK Ministry of Defence, Ch.1
• Kalshoven and Zegveld, Chs. 1-2
“Silent enim leges inter arma”

(Cicero, quite a long time ago)

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

(Cardinal Newman, 1864)

**Henry Dunant**

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

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

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

**Status of the Geneva Conventions**

status of the Conventions. (1993) 32 ILM 1159

Role of ICRC

“Common” law of armed conflict? – handle with care


III. SCOPE OF APPLICATION OF IHL

- Sassòli, Bouvier and Quintin, Ch 2. III.
- J. Pejic, “Status of Armed Conflicts”, in: Wilmshurst and Breau, Ch.4
- UK Ministry of Defence, Ch 3
- D. Fleck (ed), The Handbook of Humanitarian Law in Armed Conflicts (1995), Ch 2

When does IHL apply?

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

IAC

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

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

PI, Arts.1.3, 1.4, 9
PI, Art 1(4): wars of national liberation also to be treated as IAC

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

NIAC

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

PII, Art 1(1): applies to all ACs that are not IAC “and which take place on the territory of a …Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol”

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

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

Para 70: “…an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”
Furthermore, IHL applies:

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

**Terrorism?**

If no AC, there is no IHL issue

If AC then IHL applies. Following prohibited:

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

**Scope of Application of IHL**

**Personal application**

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

IHL applies as soon as AC starts

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

End of application?

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

Geographical application

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

**IV. NON-INTERNATIONAL ARMED CONFLICTS**

- Sassòli, Bouvier and Quintin, Ch.12
- UK Ministry of Defence, Ch.15
- Kalshoven and Zegfeld, 69-70, 132-139
- McCoubrey, Ch.9
- Piotrowicz, 133-138
- GCI-IV, common Article 3
- PII, Art.4 – fundamental guarantees
- PII, Arts.13-17 – protection of civilian population

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

**V. SOME BASIC CONCEPTS**

Apart from the fundamental principles set out in the INTRODUCTION section, you should be aware of the following aspects of the Geneva Conventions, which are really separate from the actual rights guaranteed by the Conventions:

<table>
<thead>
<tr>
<th>SCOPE</th>
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<tbody>
<tr>
<td>GCs, Art.2; PI, Art.3(1) – apply to declared wars and ACs from the beginning of the conflict</td>
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<tr>
<th>NON-RENUNCIATION OF RIGHTS</th>
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<tr>
<td>GCI-III, Art.7; GCIV, Art.8 – applies to all those in the power of the enemy forces</td>
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<tr>
<th>GRAVE BREACHES</th>
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<tr>
<td>GCI, Art.50; GCII, Art.51; GCIll, Art.130; GCIV, Art.147; PI, Arts.11,85</td>
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<tr>
<td>• especially serious breaches of the law of ACs</td>
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<tr>
<th>DISTINCTION BETWEEN CIVILIANS AND COMBATANTS</th>
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<tr>
<td>• distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible. The same distinction applies to civilian objects and military objectives (see, eg PI, Art.48). Why?</td>
</tr>
</tbody>
</table>
VI. PROTECTION OF COMBATANTS AND PRISONERS OF WAR

Combatants and Prisoner of War Status

- Sassòli, Bouvier and Quintin, Ch.6
- Henckaerts and Doswald-Beck, Ch.33
- A. Rogers, “Combatant Status”, in: Wilmshurst and Breau, Ch.5
- A. Jachec-Neale, “Status and Treatment of prisoners of war and other persons deprived of their liberty”, in: Wilmshurst and Breau, Ch.12
- UK Ministry of Defence, Ch.4 and Ch.8
- Kalshoven and Zegfeld, 58-61, 86-91
- McCoubrey, Ch.6
- Piotrowicz, 120-125

Entitlement to protection

Definition of protected persons ie, those covered by the GCs as combatants or prisoners of war

1907 Hague Regulations Respecting the Laws and Customs of War on Land, Arts. 1-3, 23(f), 29-31

GCIII, Art.4 – POWs – combatants who have fallen into the power of the enemy – who are members of the armed forces; militias and volunteer corps forming part of such armed forces

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

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

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

PI, Arts.43-45

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

Mercenaries and spies

PI, Arts 46-47

Treatment of POWs (GCIII)

General duties

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

US detention of “unlawful belligerents”

US Position:
Protection of the sick, wounded and shipwrecked

- Henckaerts and Doswald-Beck, Ch.34
- A. Bouvier, “Special Aspects of the use of the Red Cross or Red Crescent emblem” (1989) IRRC, No.272, pp438-458
- S. Bugnion, “Towards a comprehensive solution to the question of the emblem” Nov. 2003
- Kalshoven and Zegfeld, 54-58, 117-127
- McCoubrey, Chs. 4 and 5
- Piotrowicz, 118-122
- Sassòli, Bouvier and Quintin, Ch.7
- UK Ministry of Defence, Ch.7

Principal protections for the sick, wounded and shipwrecked

- Obligation of protection and care
  common Art.12 – obligation of respect and protection, humane treatment irrespective of sex, race, nationality, religion, political opinions; special protection of women
  PI, Arts.10, 11, 12
Wounded and sick to be treated as prisoners of war
GCI, Art.14; GCII, Art.16

Obligation to search for wounded, dead and missing
GCI, Art.15; GCII, Art.18; PI, Arts.32,33

Obligation to record and pass on information concerning identification of wounded, sick and dead
GCI, Art.16; GCII, Art.19; PI, Art.33

Legal regime for those assisting the sick, wounded and shipwrecked

Civilian organisations and personnel may assist wounded, sick and shipwrecked and are not to be punished for doing so
GCI, Art.18; GCII, Art.21; PI, Art.17

Prohibition of attacks on fixed and mobile medical establishments; ships
GCI, Arts.19-23; GCII, Arts.22-35; PI, Arts.8,9,12-14

Obligation to respect and protect medical transports; hospital ships
GCI, Art.35; GCII, Arts.22-25; PI, Arts.8,22

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

Significance of the Red Cross emblem

The emblem is intended to ensure respect and protection for those using it; hence its use is strictly regulated
GCI, Arts.38-44; GCII, Arts.41-44; PI, Art.18

Prohibition on misuse of the emblem
GCI, Art.53; GCII, Art.45

Additional Protocol III to the Geneva Conventions relating to the Adoption of an Additional Distinctive Emblem 2005

Protection during Non-international Armed Conflicts

Status of Protocol II

General provisions

Field of application

common Art.3 – applies to non-international armed conflicts
PII, Art.1

Principal protections for the sick, wounded and shipwrecked

Obligation to “collect and care for” sick and wounded
common Art.3(2)

Obligation to respect and protect wounded, sick and shipwrecked; search for and collect
PII, Arts.7-8

Legal regime for those assisting the sick, wounded and shipwrecked

Obligation to respect and protect medical personnel
PII, Arts.9-10

Obligation to respect and protect medical units and transports
PII, Art.11

Significance of the Red Cross emblem

Prohibition on misuse of the emblem
PII, Art.12

VII. PROTECTION OF CIVILIANS

Protection of the civilian population

Sassòli, Bouvier and Quintin, Ch.8
Civilian population – GCIV

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

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

Protection of women
• T. Meron, “Rape as a Crime under International Humanitarian Law”, (1993) 87 AJIL 424-428
• Moir, 214-219
• Sassòli, Bouvier and Quintin, Ch.2. II. 1. b)

**Protections against sexual violence**

**GCIV Art.27, second para:**
“Women shall be protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault.”

**PI Art.76.1:**
Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault.

**Common Art.3(1)(c)**
prohibits outrages upon personal dignity, in particular humiliating and degrading treatment

**PII Art.4.2 – prohibits**
(e) outrages upon personal dignity, especially humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault
(f) slavery

**Protections as mothers**

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

**Protections for female detainees and prisoners of war**

• GCIII Art.14, second para:
“Women shall be treated with all the regard due to their sex and shall in all cases benefit by
treatment as favourable as that granted to men.” (female POWs)

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

Protection of Children

- Cohn and Goodwin-Gill, Child Soldiers. The Role of Children in Armed Conflicts (1994)
- Moir, 219-221
Geneva rules have following aims:

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

**Shelter from hostilities**

- **GCIV Art.14**: safety zones for wounded, sick and aged, children under fifteen, pregnant women, mothers of children under seven
- **GCIV Art.50**:
  - Occupying Power to facilitate proper working of all institutions dealing with care and education of children
  - Organize care and education of orphaned children or those separated from their parents (preferably by people with same nationality, language and religion)
  - Evacuations generally prohibited (GCIV Art.49, PI Art.78.1, PII Art.17) because they can be used to promote ethnic cleansing, but permitted in limited cases – GCIV Art.17 allows limited evacuation from besieged areas, of wounded, sick, infirm, elderly, children and maternity cases
- **GCIV Art.51**: Occupying Power cannot compel those under eighteen to work
- **GCIV Arts.24 and 50**: children have right to protection of their cultural environment, education and exercise of religion

**Maintenance of the family unit**

Note restrictions on evacuation, above

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

**Protection during hostilities**
GCIV Art.38.5 – priority for children under fifteen, pregnant women and mothers of children under seven in distribution of relief supplies

PI Art.8: new-born babies treated as “sick or wounded”

PI Art.77 – measures aimed at protection of children

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

PII Art.4.3(c-d)

**Constitution on the Rights of the Child 1989**

Art.38

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

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

**Child Soldiers**

**Convention on the Rights of the Child 1989**

Art.38

2. 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.

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

See also PI Art.77(2)

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

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

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

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

Punishment of breaches

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

VIII. PROTECTION OF CULTURAL PROPERTY
Sassòli, Bouvier and Quintin, Ch.9. II. 9. b) aa)

Henckaerts and Doswald-Beck, Ch.12

Kalshoven and Zegveld, 48-51, 175-180

S. Nahlik, “La protection des biens culturels en temps cas de conflit armé”, (1967) 120 (1) Recueil des Cours 61-163


Principal Laws

- Hague Regulations 1907, Art 27

1954 Convention

Art 1 – definition of cultural property

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

Type of protection – general or special

Art 2 – general protection: to safeguard and respect

Art 3: safeguarding – obligation to prepare during peace time for safeguarding of cultural property
Art 4 – respect

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

Art 5 – general obligation of occupying power to support competent national authorities in protecting cultural property

Art 6 – distinctive marking – Dutch Ministry of Defence

Art 18 – applies to international conflicts but cf Art 19 – parties to civil war must apply at least those parts of the Convention on respect for cultural property (see Art 4).

Art 8 – special protection for limited number of refuges intended to shelter movable cultural property during conflict, as well as centres of significance – has not worked – hence adoption of 1999 protocol.

Art 11 – withdrawal off immunity

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

1999 Protocol

- supplements 1954 Convention, which remains in force
- changes to system of general protection
- retains definition of cultural property
- new system of ‘enhanced’ protection (instead of special protection)
- applies to international and civil wars (Art 22)
Art 6 – respect for cultural property – more difficult to justify attacks on cultural property – waiver under Art 4(2) of Convention subject to conditions:

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

Art 7 – precautions in attack – obligations to minimize risk to cultural property

Art 8 – precautions against effects of hostilities – as far as possible,

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

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

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

Enhanced Protection

Art 10 – criteria for qualification for enhanced protection

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

Art 24 – Committee for the Protection of Cultural property in the Event of Armed Conflict – places qualifying properties on a special List.

Art 12 – obligation not to attack properties with enhanced protection; nor to use them or their immediate surroundings in support of military action
Art 13(1)(b) – loss of status where property has by its use become a military objective; property may be attacked subject to conditions set out in Art 13(2).

Criminal Responsibility and Jurisdiction

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

- making CP under EP object of attack
- using CP under EP or its immediate surroundings in support of military action
- extensive destruction or appropriation of CP
- making protected CP the object of attack
- theft, pillage or misappropriation or vandalism of protected CP

IX. METHODS AND MEANS OF COMBAT

- Sassòli, Bouvier and Quintin, Ch.9
- Henckaerts and Doswald-Beck, Ch.20
- UK Ministry of Defence, Ch.s 5 and 6
- Kalshoven and Zegveld, 40-48, 91-96, 155-175
- McCoubrey, Ch.8
- Piotrowicz, 129-133
- W. Frelick, “Specific Methods of Warfare”, in: Wilmshurst and Breau, Ch.9
- S. Haines, “Weapons, Means and Methods of Warfare”, in: Wilmshurst and Breau, Ch.10

HAGUE CONVENTION NO.IV (1907), ARTS.22-28

- right of the belligerent to adopt means of injuring the enemy is not unlimited (Art.22)
- obligation to avoid causing unnecessary suffering (Art.23(e))
In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited (Art.35(1))

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (Art.35(2))

The civilian population must be protected against the effects of hostilities: obligation to distinguish between civilian and military objectives: PI, Art.48

The civilian population, as well as individual civilians, shall not be the object of attack: PI, Art.51(2)

Definition of military objectives: PI, Art.52(2) – see also Art.52(3)

Civilian objectives are not to be made the object of attacks: PI, Art.52(1)

Nuclear Weapons

- See the articles cited in Sassòli, Bouvier and Quintin, Ch.9. III. 2. g)
- Kalshoven and Zegveld, 169-172
- Piotrowicz, 152-158
- Legality of the Threat or Use by a State of Nuclear Weapons in Armed Conflict (Advisory Opinion) (Nuclear
- Para.97: “…in view of the present state of international law viewed as a whole…the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.”
Anti-personnel Landmines

- See the articles cited in Sassòli, Bouvier and Quintin, Ch.9. III. 2. c) aa)
- Kalshoven and Zegveld, 155-169
- Piotrowicz, 140-152

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

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

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

Cluster Bombs

Convention on Cluster Munitions 2008

Protection of the Environment

- Specific rules
- GCIV, Arts.53, 147
  PI, Arts.35-36, 51-52, 54-58
– applies mostly to international ACs but see Art.19

- **Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972**, Art. 2; in force 1975. (1972) 11 *ILM* 309


  - Art. 3 – General restrictions on the use, of mines, booby-traps and other devices
  - Art. 10 – Removal of minefields, mined areas, mines, booby-traps and other devices and international cooperation


  - Art. 5 Destruction of anti-personnel mines in mined areas

- **Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons** (1996) 35 *ILM* 809, paras 35-36, 74-98

**Individual Responsibility for Environmental Harm**

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


Article 20(g): ‘in the case of armed conflict, using methods or means of warfare not justified by military necessity with the intent to cause widespread, long-term and severe damage to the natural environment and thereby gravely prejudice the health or survival of the population and such damage occurs’
• deemed to be an offence for which there would be individual responsibility at international law

**ICC Statute**

Certain war crimes for which individual responsibility exists:

Arts.8.2.a.iv, 8.2.b.ii,iv, v, ix, 8.2.b.xvii-xviii, 8.2.b.xx (international conflicts)

Art.8.2.

For the purpose of this Statute, “war crimes” means:

(a.iv) Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly;

(b.ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;

(iv) Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated;

(v) Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

(ix) Intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives;

(xvii) Employing poison or poisoned weapons;

(xviii) Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices;

(xx) Employing weapons, projectiles and material and methods of warfare which are of a
nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an annex to this Statute, by an amendment in accordance with the relevant provisions set forth in articles 121 and 123…

X. DISPLACED PERSONS AND IHL

- Sassòli, Bouvier and Quintin, Ch.8. III.
- Henckaerts and Doswald-Beck, Ch.38
- R. Piotrowicz, “Displacement and Displaced Persons”, in: Wilmshurst and Breau, Ch.13
- G. Goodwin-Gill and J. McAdam, The Refugee in International Law (3rd ed, 2007), Ch.1
- A. Helton, The Price of Indifference (2002), Ch.3
Introduction: who are refugees?

Situations that cause refugees:

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

Aim of the lecture: to look

i. at the protection of those who were refugees prior to an armed conflict after it commences; and

ii. those who become refugees as a consequence of an armed conflict.

Definition of a refugee:

Convention Relating to the Status of Refugees 1951

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

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

OAU: Convention on the Specific Aspects of Refugee Problems in Africa 1969
Art 1 (1) – as above

Art 1(2)

The term ‘refugee’ shall also apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part of the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.

**Principle of non-refoulement**

*Refugees Convention*, Art 33(1):

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

**Geneva Conventions**

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

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

Internally Displaced Persons

• not a separate category under IHL

Guiding Principles on Internally Displaced Persons

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

Definition (para 2):

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

Role of ICRC and UNHCR

European Union law

Temporary Protection

Art 2 – establishes obligation for Member States to allow aliens to stay on their territory (initially for one year):

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

**Subsidiary Protection**

*Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection*

- in force since 20 October 2004

Persons subject to real risk of serious harm if returned to their country of origin, but who do not qualify as refugees (under Refugees Convention) are entitled to subsidiary protection.

Art 15 – defines serious harm to include “serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict”

**Enforcement**

**ICTY Statute**

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

**ICC Statute**

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

**XI. COLLECTIVE SECURITY OPERATIONS AND IHL**

- Sassòli, Bouvier and Quintin, Ch.13. VIII. 5. and the sources cited there
- UK Ministry of Defence, Ch.14

**Introduction**

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

**Types of CSO**

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

UN “peace” operations

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

Ius ad bellum and ius in bello

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

Application of IHL to UN forces

- *Secretary-General’s Bulletin*, 6 August 1999
- Section 1 – scope – rules in the Bulletin apply to:
  - UN forces “in situations of armed conflict”
  - actively engaged as combatants
  - to extent and for duration of the engagement
  - in enforcement actions
  - peacekeeping operations where force permitted in self-defence
- Section 5 – protection of the civilian population
- Section 6 – means and methods of combat
- Section 7 – treatment of civilians and persons hors de combat
- Section 8 – treatment of detained persons
- Section 9 – protection of the wounded, the sick and medical and relief personnel
Application of IHL to CSOs under UN mandate but not UN command

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

Application of IHL to CSOs operating without UN mandate

- subject to IHL

Distinction between international armed conflicts and non-international armed conflicts

  - “common” law of armed conflicts (paras 126-7)
    - Protection of civilians from hostilities, especially indiscriminate attacks
    - Protection of civilian objects, especially cultural property
    - Protection of those no longer taking an active part in hostilities
    - Prohibition of certain means of warfare
    - Prohibition of certain methods of conducting hostilities
- Henckaerts and Doswald-Beck, Customary International Humanitarian Law

Distinction between armed conflict and occupation

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

Obligations under human rights law

- Legality of the threat or use of nuclear weapons, Advisory Opinion, 8 July 1996, paras 24-5 [See Case No. 62, ICJ, Nuclear Weapons Advisory Opinion]
- Legal consequences of the construction of a wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004, para 109 [See Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory]
XII. CRIMINAL REPRESSION OF BREACHES OF IHL

- Nuremberg tribunal
- Individual responsibility under the Geneva Conventions
- ICTY
- ICTR
- ICC

The establishment of individual criminal responsibility and its evolution in the context of armed conflict

- Werle – extensive discussion of the whole subject
- Sassòli, Bouvier and Quintin, Ch.13, section X
- Henckaerts and Doswald-Beck, Chs 43 and 44
- C. Garraway, “War Crimes”, in: Wilshurst and Breau (eds), Ch.15
- UK Ministry of Defence, Ch.16
- Cassese, esp. Chs.3-5, 18-19
- Kalshoven and Zegveld, Ch.6
- Piotrowicz, “Crime and punishment, or the establishment of a true international court of justice”, (1998) 72
- Australian Law Journal 844-850
- Piotrowicz and Kaye, Ch.9
- Schwarzenberger, Chs.38-44
Nürnberg Charter 1945

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

Art.6

a. Crimes Against Peace: namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing.

b. War Crimes: namely, violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.

c. Crimes Against Humanity: namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

Art.8

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

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

78 United Nations Treaty Series 277

**Article VI:** Persons committing genocide or any of the other acts enumerated in Article III (conspiracy to commit, direct and public incitement to commit, attempt to commit, complicity in) shall be punished, whether they are constitutionally responsible rulers, public officials or private individuals.

Art.II – genocide includes:

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

2. Geneva Conventions of 12 August 1949

- established notion of grave breaches of international humanitarian law for which there is individual responsibility and duty of States to punish – States have criminal jurisdiction:
**GCI, Art.49**: obligation to ensure effective penal sanctions for grave breaches

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

3. **Eichmann Case**

1961 vol.36 *International Law Reports* 5

4. **Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984**

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

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

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

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

5. **International Criminal Tribunal for the Former Yugoslavia**

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


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

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

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

(ii) Annex

**Art.2:** power to prosecute for ordering or committing grave breaches of Geneva Conventions (see Art.2 (a-h))

**Art.3:** power to prosecute war crimes

**Art.4:** power to prosecute genocide

**Art.5:** power to prosecute crimes against humanity

**Art.7(1):** individual responsibility for crimes mentioned in Arts.2-5

**Art.7(3):** responsibility of superiors

**Art.7(4):** superior orders not a defence – possible mitigation


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

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

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

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

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

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

8. Tadic Case (Tadic IT-94-1)

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

(1996) 35 ILM 32

(1997) 36 ILM 908

http://www.un.org/icty/tadic/trialc2/judgement/tad-sj970714e.pdf [18]


9. International Criminal Tribunal for Rwanda

[See Case No. 230, UN, Statute of the ICTR]
10. International Criminal Court

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


In force since 2002. The UK is a party.

Principal features

Jurisdiction:

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

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

Individual responsibility

Art.25(2): ‘A person who commits a crime within the jurisdiction of the Court shall be individually responsible and liable for punishment in accordance with this Statute.’
Art.25(3): acts which give rise to responsibility

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

Art.27: no immunity for Heads of State or Government

Art.28: responsibility of commanders
commanders also responsible where those under their authority commit crime and they knew, or should have known, about it.

Art.31(d): exclusion of criminal responsibility

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

Superior orders

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

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

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

Art.6 – genocide – same definition as above

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

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

Art.8 – *War Crimes*

International armed conflicts - includes

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

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

Case law of international tribunals on the crime of rape

*Prosecutor v Akayesu*

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

*Prosecutor v Furundžija*

Case No. IT-95-17/1-T, Judgment of 10 December 1998

See especially paras 165-189

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

**XIII. IMPLEMENTATION OF IHL**

- Sassòli, Bouvier and Quintin, Ch.13
- Henckaerts and Doswald-Beck, Chs 40-41
- D. Turns, “Implementation and Compliance”, in Wilmshurst and Breau (eds), Ch.14
What is IMPLEMENTATION of IHL?

– distinction between enforcement (including reprisals and criminal prosecutions) and implementation

Ways of Implementation

– Dissemination (armed forces, police, in universities and civil society)
– Translation
– Transformation into domestic law
– Legislation for application
– Training of personnel
– Practical measures

GC common Article 1

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

See also PI, Art.1

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

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

**Role of ICRC Advisory Services**

- Implementation
- Assistance in implementation
- Repression of war crimes
- Support to national committees
- Comments on draft laws

**Who can implement IHL?**

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

**Measures to be taken in peacetime**

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

**Protecting Powers**

- Safeguard interests of Parties by checking and scrutinising application of GCs (GCI-
III, Art.8, GCIV, Art.9)

- Lend good offices to help settle disagreements between Parties (GCI-III, Art.11, GCIV, Art.12)
- Visit prisoners of war and civilian internees (GCI-II Art.126, GCIV Art.143)

**Role of ICRC**

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

**Implementation in NIACs**

GC Art.3

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

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

PII, Art.19

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

**Non-Legal factors that might contribute to respect for IHL**

- Military interest
- Public opinion
• Ethical and religious considerations

CONCLUSION

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

(Macaulay, 1831)

Who is closer to reality – Macaulay or Dunant? And who is closer to the truth?

After all that:

• What are the legal arguments for and against the bombing of Hiroshima and Nagasaki?
• The destruction of Warsaw and Dresden? Can one distinguish between the two on the grounds that Dresden was located in the aggressor state?
• Can a combatant lawfully shoot a civilian? Can a civilian lawfully shoot a combatant?
• Was Saddam Hussein a prisoner of war?
• Can you ever lawfully get children to serve in the armed forces?

XIV. IHL AND HUMAN RIGHTS LAW

• Sassoli, Bouvier and Quintin, Ch.14
• Doswald-Beck and Vite, “International Humanitarian Law and Human Rights Law”, (1993) IRRC No.293, 94-119
• Green, Essays on the Modern Law of War (2nd ed, 1999), Ch. XII
The protection of human rights during armed conflicts is not the monopoly of IHL.

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

i. fields of application
ii. types of right protected
iii. implementation mechanisms

Fields of application

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

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

Implementation

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

Bankovic and Others v Belgium and 16 other Contracting States [See Case No. 227, ECHR, Bankovic and Others v. Belgium and 16 Other States]

2002 European Court of Human Rights

Application no. 52207/99

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), 9 July 2004 [See Case No. 123, ICJ/Israel, Separation Wall/Security Fence in the Occupied Palestinian Territory]


[21]

esp. paras 102-113; 123-137