International Humanitarian Law
(Laws 4022)

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Chapter I: Introduction to International Humanitarian Law

- Concept and purpose of International Humanitarian Law
- Historical development and philosophy of IHL
- The distinction between Jus ad Bellum and Jus in Bello
- Sources of IHL
- Fundamental principles of IHL
- International Humanitarian Law and International Human Rights Law
- Scope of application of IHL
- Qualification of armed conflicts

Concept and purpose of International Humanitarian Law

Definition

- International Humanitarian Law (aka, law of war/law of armed conflict/*jus in bello*)
- J*us in bello* as distinct from *jus ad bellum*
- A branch of International Law that governs Situations of Wars and Armed Conflicts

Historical development and philosophy of IHL

- Religious teachings have rules governing war.

-Hindu code of Manu

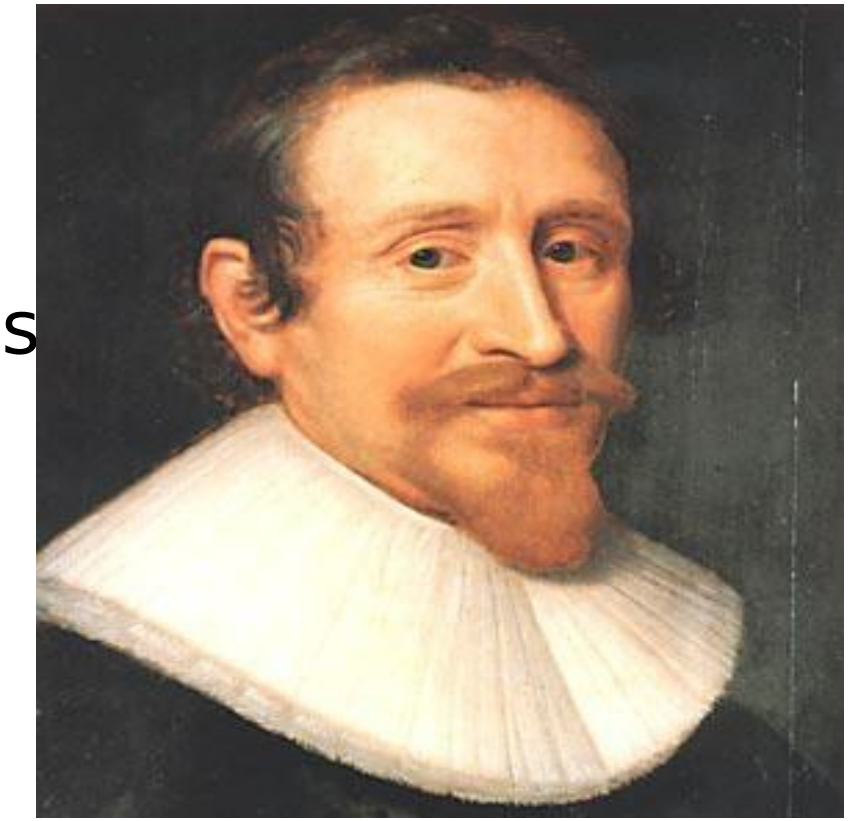
-Christianity

-Islam teaching

-Buddhism

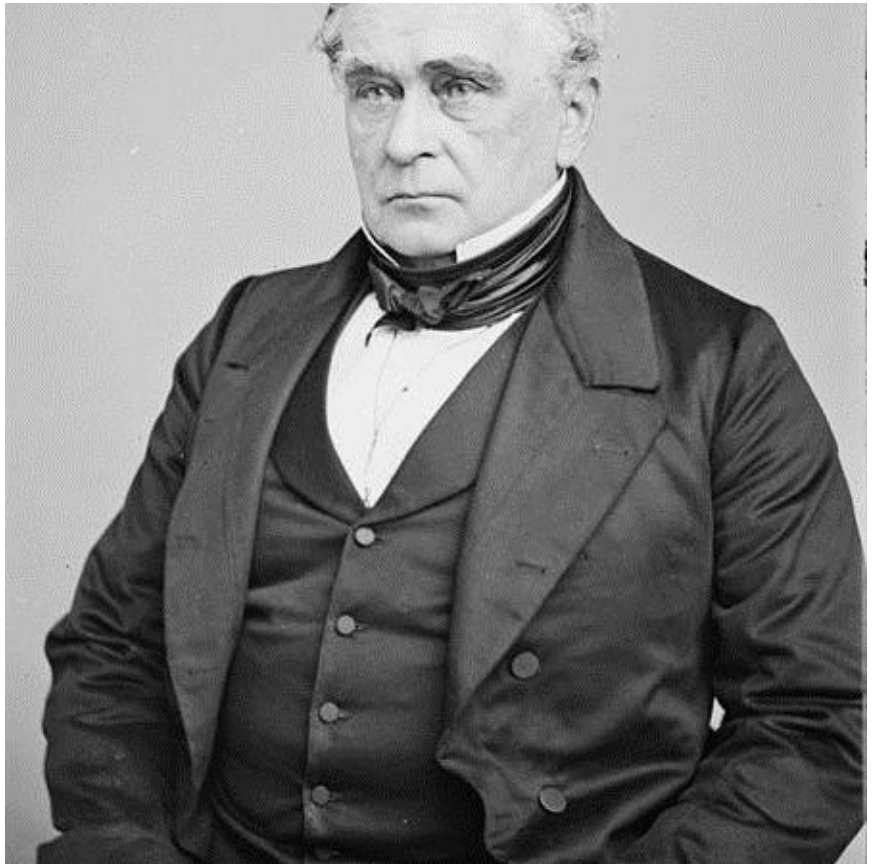
-Philosophers

- Hugo Grotius 1583-1645
- De jure belli ac pacis 1625
- Founded just war theory – jus
- -Jus ad bellum v jus in bello

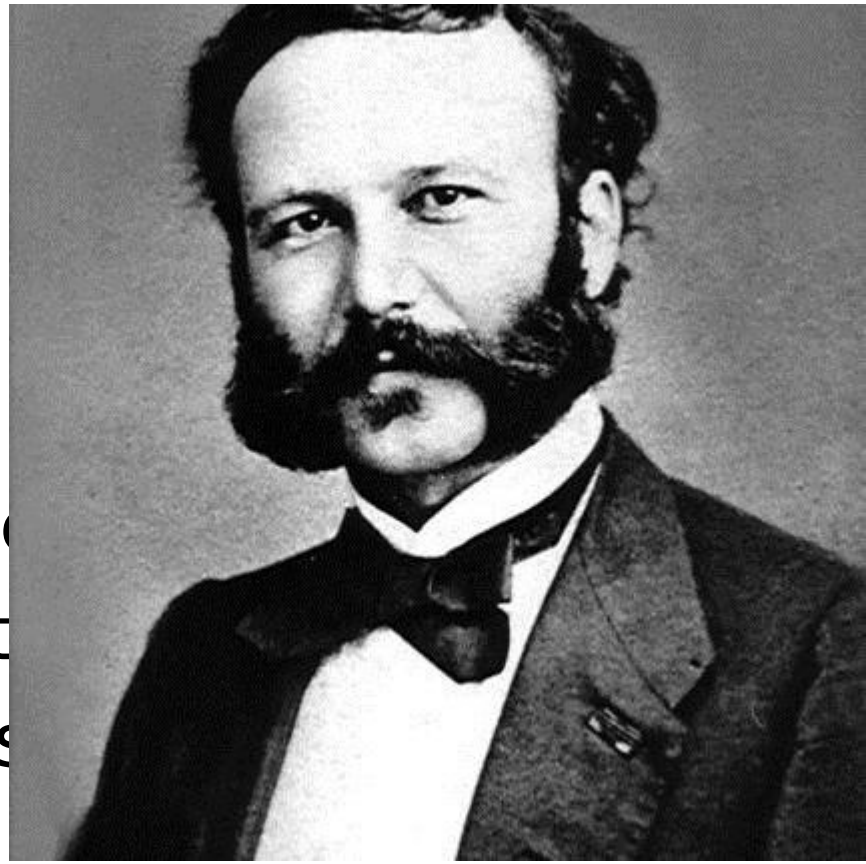


- Francis Lieber 1798-1872

- Lieber Code 1863
- American Civil War
- Contribution—Hague Law



Henri Dunant 1828-1910



- Swiss businessmen
- A Memory of Solferino
- Contribution: 1) the development of G
  2) Est. of an organizat
- Witnessed the plight of 40,000 soldier

Battle of Solferino, Italy 1859

- *“Is there in the world a prince or a monarch who would decline to support the proposed societies, happy to be able to give full assurance to his soldiers that they will be at once properly cared for if they should be wounded?”*(*A Memory of Solferino*, p. 126)



International committee for the relief of the Wounded 1861

- 1864: Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field

›Establishment ICRC

›Dunant: first Nobel Prize, 1901



In summary :three major Epochs

I. Before WWI

-1859-1864, Henri Dunant and Geneva Convention I

-1863 Lieber Code

-1868 St. Petersburg declaration

-1880 Oxford Manual on the law of war in Land

-1899/1907 Hague Conventions

II. Inter-war period

- 1925 Geneva Gas Protocol

Fascists bombarded a prohibited gas called “Mustard gas’’

- 1929 First Geneva Convention on Prisoners of War

III. After WWII

- 1845/48 Nuremberg/Tokyo Tribunals

-1949 Geneva Conventions I-IV

-1977 Additional Protocols I & II

The distinction between Jus ad Bellum and Jus in Bello

- **Jus ad bellum** – governs the law of use of force. Article 2(4) , Chapter VII, UN Chapter, Article 51

"All Members shall **refrain** in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."

- **Jus in bello** – law of war which governs armed conflicts.

Sources of IHL—Article 38 ICJ Statute

1. Treaties –Hague and Geneva Laws

A. Hague Laws—soldiers perspective

*Washington treaty—Lieber code 1863

*St. Petersburg Declaration 1868

limitations to the use of exploding or inflammable projectiles –400gm

Prohibition of “unnecessary suffering”

*The Hague 1899 and 1907

--1899(disarmament) expanding bullets

--1907 Martens Clause

Many Weapons treaties

- 1993 Chemical Weapons
- 1997 Anti-personel mines



*Geneva Laws—defenceless victims perspective

- GC I-***Amelioration of the Condition of the Wounded in Armies in the Field/ land***
- GC II: ***Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea***
- GC III: ***Treatment of Prisoners of War***
- GC IV: ***Protection of Civilian Persons in Time of War***

Additional Protocols 1977

- Protocol 1: protects victims of international conflicts(IAC)
- Protocol 2: protects victims of internal armed forces(NIAC)
- Protocol 3: ***Adoption of an Additional Distinctive Emblem***









2. Customary International Law

Two elements

I. State practice

II. Opino juris

3. General Principles of IHL

Generally recognized in domestic law(eg distinction)

Emergence from international law

Fundamental Principles of IHL

1. Military Necessity

- ✓No more force or greater violence should be used to carry out a military operation that is necessary.
- ✓ Military necessity is not codified in the 1949 Geneva Conventions or in the additional Protocol l. It does appear in 1907 Hague Regulation Article 23(g),
- ✓The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy;
- ✓it is not possible to attack everything and everyone. *"I wage war against the French arm and not against the French people"*.
- ✓Total war is not allowed. Total war is what we call wanted destruction, unnecessary suffering, which are against the principle of necessity.
- ✓The principle of Necessity was first laid out in connection with the **1868 St. Petersburg**
- ✓Napoleon: 'My *great maximum has always been, in politics and war alike, that every injury done to the enemy, even though permitted by the rules, is excusable only so far as it is absolutely necessary; everything beyond that is criminal.*
- ✓Lieber Code, Article 14: *Measures indispensable for securing the ends of war, and lawful according to the modern law and usages of war.*

2. Humanity

- It is forbidden to inflict suffering, injury or destruction not actually necessary to accomplish a legitimate military purpose.
- Martens Clause after Fyodor Fyodorovich Martens, the Russian delegate at the Hague Peace Conferences in **1899** and was based upon his words:

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.

- Compare article 1(1) AP I
- Martens laid down the following principle for cases not covered by humanitarian law: (...) 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. This, also known as the Martens clause,
- it is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injuries and unnecessary suffering **(API, Art 35.2)**

3. Proportionality

- The **collateral damage** arising from military operations must not be excessive in relation to the direct and concrete military advantage anticipated from such operations.
- Article 51(5)(b) and 57(2)(b) Additional Protocol I
- *Attacks excessive in relation to the concrete and direct military advantage*
- In the battlefield the commander is required to balance human life and military advantages.
- Thus, under IHL not every attack that results in civilian death or injury, or the destruction of a civilian object, is prohibited.
- However, when incidental harm is not possible to avoid, we resort to the principle of proportionality.
- You don't target an entire village because there is a machine gun positioned.
- You don't target an entire building of civilians because there is a high target commander within it.

IV. Distinction

- Military Commanders must distinguish between legitimate military targets & civilian objects including the civilian population
  - AP I-Art 48
  - AP II-Art 13(1)

4. The principle of Precaution

- ✓The principle of precaution entails a duty to avoid or minimize the inflection of incidental death, injury and destruction on persons and objects protected against direct attack.
- ✓The Principle of precaution among others include ;
- ❖The verification of the fact that the target is indeed military objective,
- ❖Choosing the right means and method so as to avoid excessive collateral damage,
- ❖Refraining from attacking if it appears that the likely damage is excessive and collateral,
- ❖Suspending the attack if it appears to be excessive collateral damage and given advanced warnings so that civilians would leave.
- ❖IHL requires an attacker to undertake “feasible precautions” to avoid and/or minimize any incidental loss of civilian life, injury to civilians and damage to civilian objects.
- ❖Parties to a conflict “must do everything feasible to verify that targets are military objectives.

5. Distinction

- Distinction, sometimes referred to **as discrimination,** is the most significant battlefield concept a combatant must observe. So**,** distinction has two aspects, 1. individuals, and 2. objects AP I 48, 44 AP II, 13
- in all armed conflicts, distinction between civilians and combatants shall always be maintained*, distinction remains a duty of every commander and every soldier.*
- *you may not attack everyone as well as you may not attack everything!!*
- **combatants** shall distinguish themselves such as, wear a uniform or a distinctive sign that is recognizable at a distance
- combatants must target only military objectives - distinguish between military objectives and civilian objects, sparing civilian objects.
- **The ICTY** has held to constitute a violation of distinction the act must have been committed willfully, intentionally in the knowledge ... that civilians or civilian property were targeted Prosecutor vs Blaiikic'
- There are certain challenges under the principle of distinction_
- If the aim of the conflict is "ethnic cleansing", the parties will logically and of necessity attack civilians and not combatants.
- If some fighters' aim is no longer to achieve victory, but rather to earn a living by looting or controlling certain economic sectors they will logically attack defenseless civilians instead of combatants.

- Military Commanders must distinguish between legitimate military targets & civilian objects including the civilian population
- AP I-Art 48
- AP II-Art 13(1)

6. Limitation

- The states that parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare.
- It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering
- Limitation: In any armed conflict the right of the Parties to choose methods or means of warfare is not unlimited (API, Art 35.1) •
- "You may not use all means and methods!"

Discussion Type Questions

- Can you state what Fyodor Martens clause, or commonly referred to as „Martens Clause“ says? What it the significance of this principle?
- What are the principles formulated in St. Petersburg Declaration?
- Discuss the principle of proportionality seeking to balance the interest dictated by considerations of military need and by the requirements of humanity.

International Human Rights Law v. International Humanitarian Law



- Wall opinion
- Nuclear Weapons Opinion

IHRL versus IHL

IHRL	IHL
✓Broad scope	Narrow scope
✓Primarily in peacetime	Armed conflict
✓Primarily binds States	It binds States and non-state entities
✓State-individual	State/non-state versus individuals
of	
✓Open-ended norms	Specific provisions
✓Rights to *all*	Specific protection
✓Mainly territorial	Territorial / extra-territorial
✓Elaborate monitoring	Minimal enforcement

What if the two norms contradicts?

- Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory in **2004(ICJ Wall Opinion para 106): three options:**
- *‘(…) some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.’*

Three options:

1. Some rights exclusively matters of IHL
   - *Use of red cross, red crescent*
2. Some are exclusively matters of HRL
   - *Freedom of expression, freedom of assembly*
3. Others may be matters of both branches of law
   - Solution?
   - *lexspecialis*
   - *complementarity*

Lex Specialis derogate lex generalis

1996 ICJ Nuclear Weapons Opinion, para 25

- *'The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable **lex specialis**, namely, the **law applicable in armed conflict** which is designed to regulate the conduct of hostilities'*

Is IHL lex specialis, or IHRL?

3. Approaches

1. ICJ approach – lex specialis, Wall Opinion para 106
2. Complementarity or harmonious approach—UN HRC GC 31, para 11
3. Interpretative Approach—Prof. Marco Sassoli, lex specialis derogate legi general's depends on a particular circumstances.

Ex. Fair trail standards under Art 75(8) AP should be ruled in light of IHRL norms.

Questions

1) Combatant X is detained during an international armed conflict. He challenges this decision. What is the *lex specialis*:

- ›GC III stipulates that POW may be detained until the cessation of hostilities without POWs having the right to challenge that decision;
- ›Article 9(4) ICCPR provides everyone who has been detained the right to a proceeding to challenge this decision.

2) Combatant X from armed opposition group Q is detained by the state authorities. What is his protection:

›Common Article3 prohibits the passing of sentences and the carrying out of executions without previous judgement(…);

›Article14 ICCPR grants everyone the right to a fair and

Scope of IHL

- Applicable to all armed conflicts even if war is not declared Art 2(1) GC
- Covers the laws of war—weapons treaties and protocols
- Qualification of conflict
- **Material scope**: what does IHL regulate? Armed conflicts—IAC v NIAC
- **Personal scope**: whom are bound? Parties to an armed conflict, combatants

Qualifications of armed conflicts- thorny exercise

1) International Armed Conflict(IAC)

- International armed conflicts are conflicts between states.
- They are inter-state armed conflicts,
- Which is when one state engages in armed conflict with another state. Also when partial or total occupation of one state by another regarded as IAC

A) -Common article 2 of GC

- '(…) *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 them.'*

So, when does the war starts?(see Emily Crawford p.52-54)

1.First shot theory—conflict exists whenever resort to armed force(see ICRC view and Tadic case)

2. Intense fighting –boarder conflicts with high intensity

IAC applies to

B) Occupation

- *‘(…) also apply to all cases of total or partial occupation of the territory of a High Contracting party.’*

Wall Opinion *ICJ para 78: (…) territory is considered occupied when it is actually placed under the authority of the hostile army, and the occupation extends only to the territory where such authority has been established and can be exercised. (…)’*

c) CAR– AP I art 1(4) The applicable law is AP I

*-**C**olonial domination*

*-**A**lien occupation*

*-**R**acist regime(Self determination)*

Non-International Armed Conflicts(NIAC)

- NIAC are generally armed conflicts taking place within the boundaries of one country between the government forces and nongovernment armed groups (rebels) or among rebels themselves.
- There is no other states participation in the conflict.
- Thus, they are sometimes referred to as internal armed conflicts or civil war .

GC common Art 3

*'In the case of **armed conflict not of an international character** occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:*

*(1) 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, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.*

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular humiliating and degrading treatment;

(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. (…)

3. Internationalized Armed Conflicts

- The notion of internationalized armed conflicts is not clear but it is understood.
- armed conflicts sharing the feature of both international and non-intentional armed conflicts.
- It is also understood as conflicts originally non intentional (internal) in nature but that have taken a different form because of the involvement of other States in support of any of the groups fighting
- Example, the conflicts in the Balkans). James G. Stewart states the term internationalized armed conflict includes war between two internal factions both of which are backed by different States; direct hostilities between two foreign States that militarily intervene in an armed conflict in support of opposing sides; and when a state sending its troops directly in an internal armed conflict siding with one of the parties to what purely an internal armed conflict.
- war involving a foreign intervention in support of an insurgent group fighting an established government.
- The overall control would include coordinating, financing, organizing, equipping activities. Nicaragua case

ICTY Prosecutor v. Tadic, IT-94-1-T, Judgment 7 May 1997, para 561

- 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.

- '562 -The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the **intensity of the conflict** and the **organization of the parties to the conflict**.
- Intensity: number, duration, intensity of individual confrontations, type of weapons and other military equipment used,
- Organization: existence of a command structure, disciplinary rules within the group, existence of headquarters.

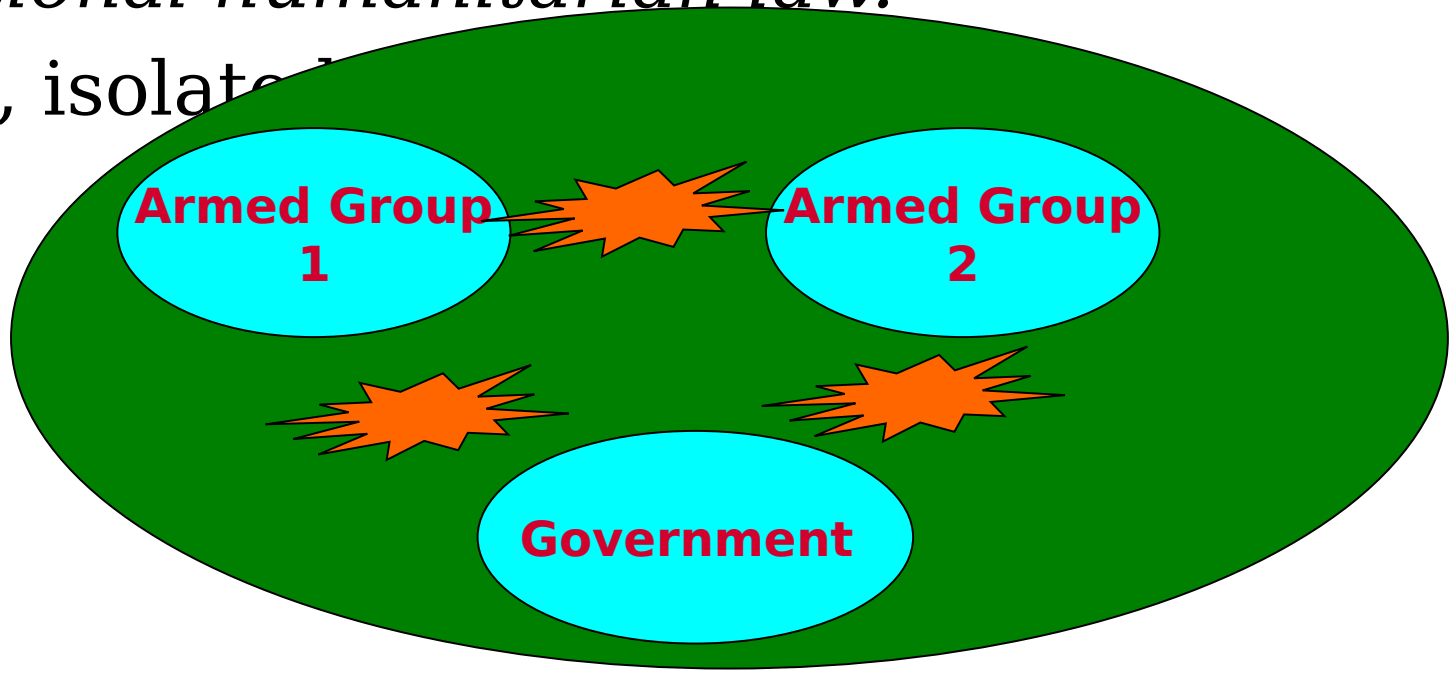
AP II—higher threshold than common Article 3

- *Dissident armed forces/ opponent or other organized armed group*
- *Responsible command*
- *Which exercise such control over territory so as to enable them to*
- *Carry out sustained and concerted military operations and to implement this Protocol*

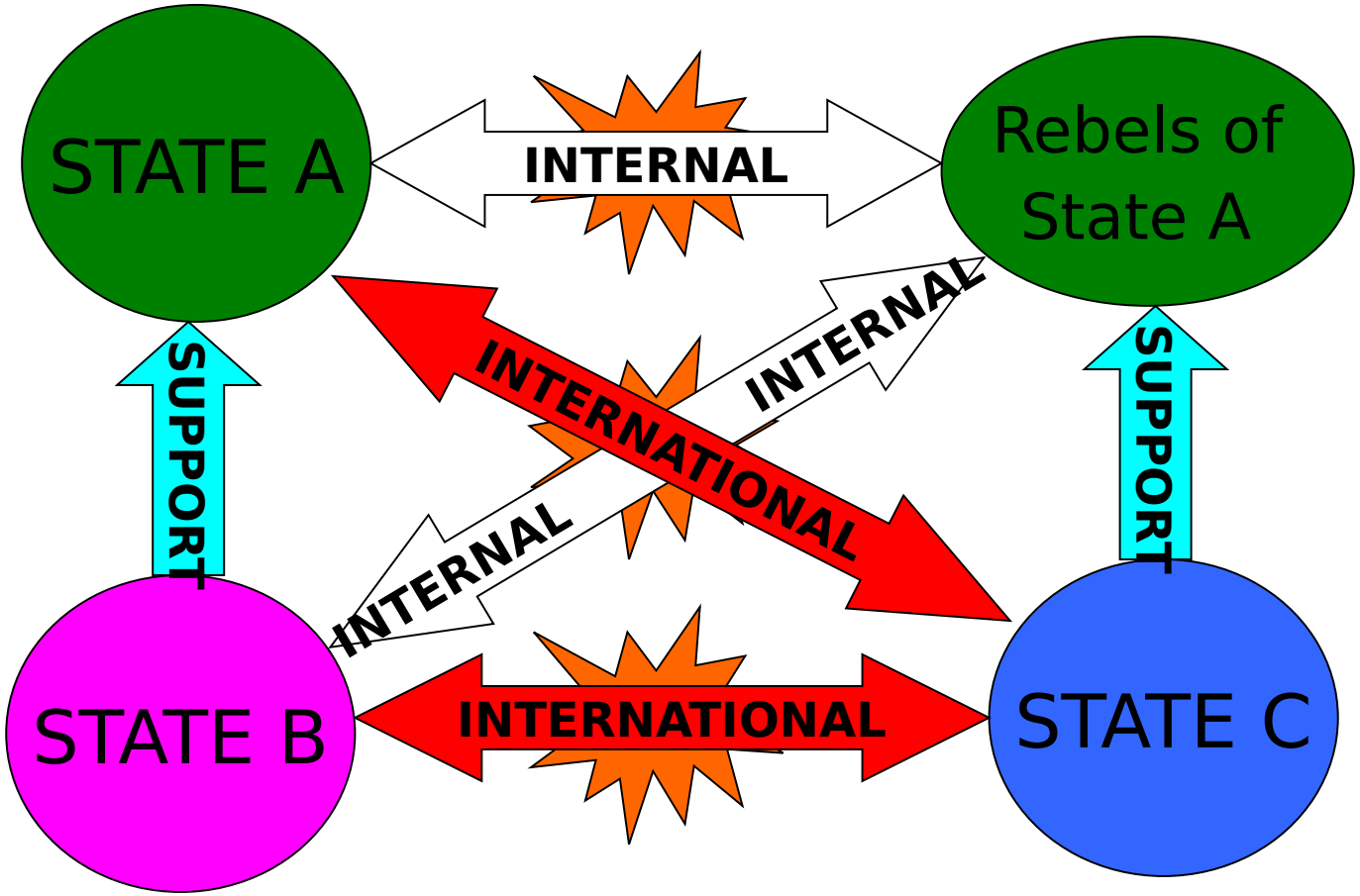
Note NIACs

- *These criteria (…) are used for the purpose, as a minimum, of **distinguishing an armed conflict from banditry, unorganized and short-lived insurrections**, or **terrorist activities**, which are not subject to international humanitarian law.*
- ›Not a NIAC: riots, isolate

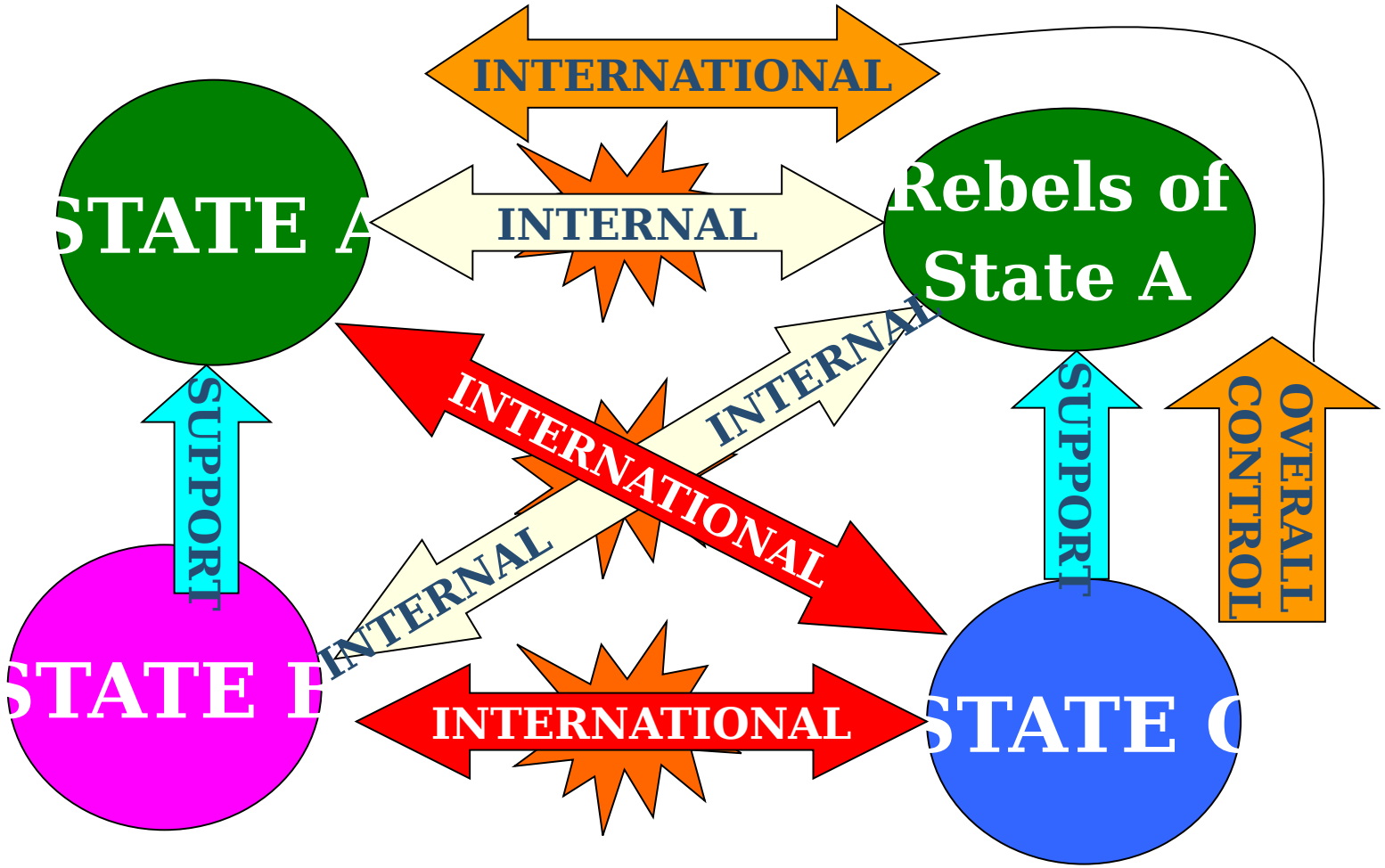
-NIAC Common Art



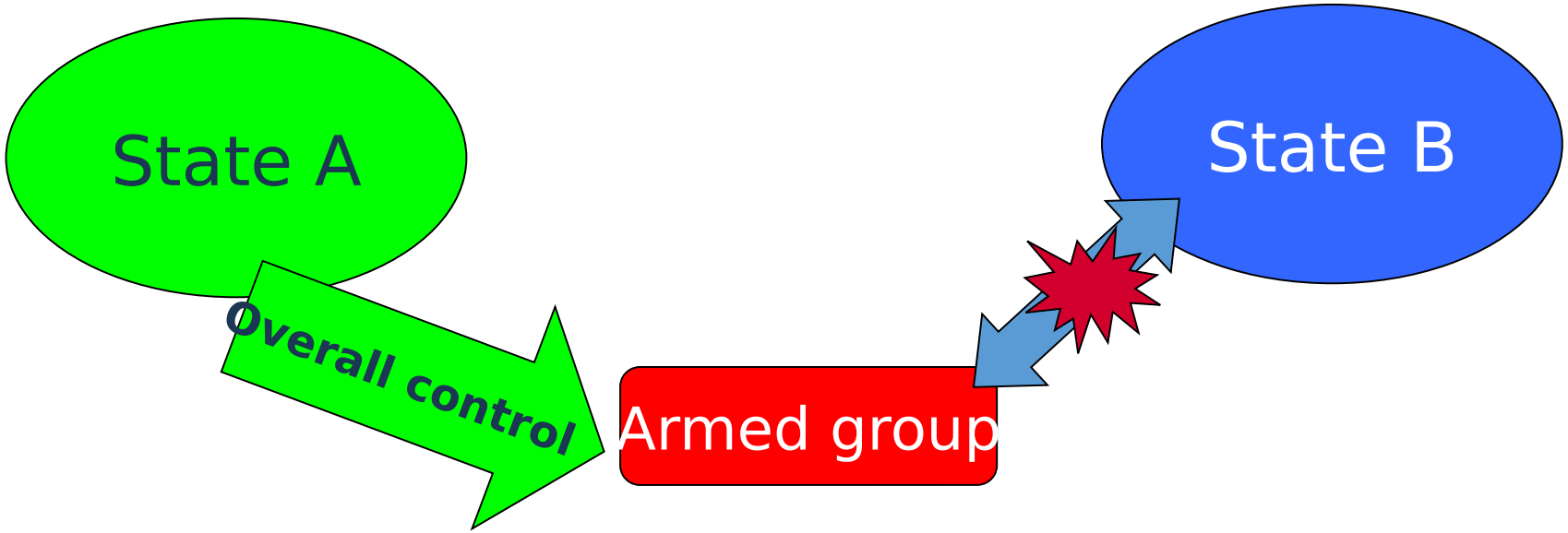
Scope of application: conséquence of a forgien intervention in a NIAC



CONSEQUENCES OF A FOREIGN INTERVENTION IN AN INTERNAL ARMED CONFLICT



FOREIGN INTERVENTION IN NIAC



Financing
Training
Equipment
Operational support

+

Organisation
Coordination or
Planification

Consequences : NIAC IAC IHL in IAC applies

Level of support ?

- **How do we assess the level of Intervention/support?**

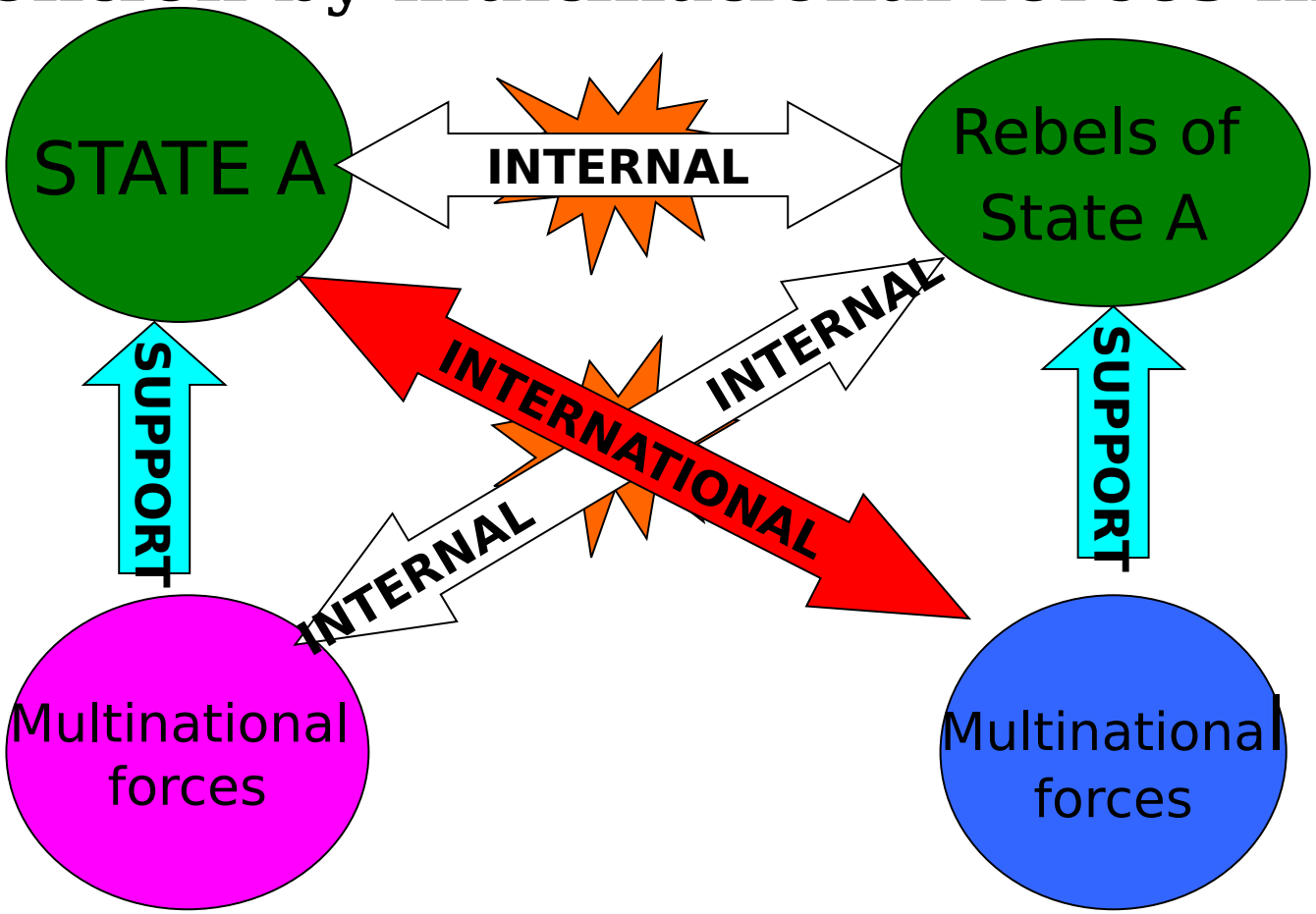
A.Effective control—Nicaragua Test para , higher threshold –paras 86, 109 & 115

-No direct and critical support of US to Contras.

-High threshold

--Genocide Case 2007 –resort to Nicargua test ,

Scope of application: consequences of an intervention by multinational forces in a NIAC



Complications

- Many conflicts cannot be neatly categorized:

›Fighting may spill across national borders

›Armed group may be fighting in one state but be based in other

›Government may support one of the parties to a civil war in another state

- From IAC to NIAC –from common Article 2 to common Article 3 - (Iraq, Afghanistan –*NB article Bellal in reading materials for this lecture*)
- From NIAC to IAC –from common Article 3 to common Article 2 - (Lebanon, Georgia, Colombia, Ukraine?)

More complications...

- Dual status conflicts (Afghanistan, Lybia, former Yugoslavia (Tadic))

›Lybia:

- IAC with states participating militarily (SC Resolution 1973)
- NIAC where Lybia was fighting a non-state armed group (Common Article 3 and AP II)

Crawford's classification

›Internationalized armed conflicts

- Military intervention by foreign state
- Other state meddles-

>Transnational Armed conflicts—when NIAC involves the territory of many state

Question

- Syria : the nature of the conflict?

http://www.rulac.org/browse/countries/syria



Model questions

Qualification of armed conflict

Note, we have seen international humanitarian law applies in situation of armed conflict. The first thing that we have to determine would be qualification of the situation. But, what we classify the situation of conflict ?

- To figure out the applicable law
- To put sanction
- For humanitarian action
- Rights , privileges and obligations