

Introduction to International Humanitarian Law

1. Concept and purpose of International Humanitarian Law

- War inevitably results in immeasurable suffering among people and in severe damage to objects
- ❖ The United Nations Charter has expressly dealt with the exceptional circumstances under which states are allowed to use force
- In principle war is prohibited
- But states continue to wage wars!!!

The concern of IHL

- ❖ IHL is mainly concerned with the fate of those *who are not taking part in the conflict*
- sets forth a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict
- restricts the means and methods of warfare

What IHL is?!

- ❖ IHL is part of public international law *which MAINLY governs relations between states*
- It is special as IHL applies to armed conflicts
- But it doesn't regulate whether a state may actually use force
- IHL seeks to mitigate the effects of war
- It limits the choices of means and methods of conducting military operations

Contd.

- IHL obliges the belligerents to spare persons who do not or no longer participate in hostile actions
 - IRRESPECTIVE OF THE LEGALITY OF THE WAR,
WHICH IS THE CONCERN OF THE UN CHARTER
- ❖ SO, IHL does not itself prohibit war

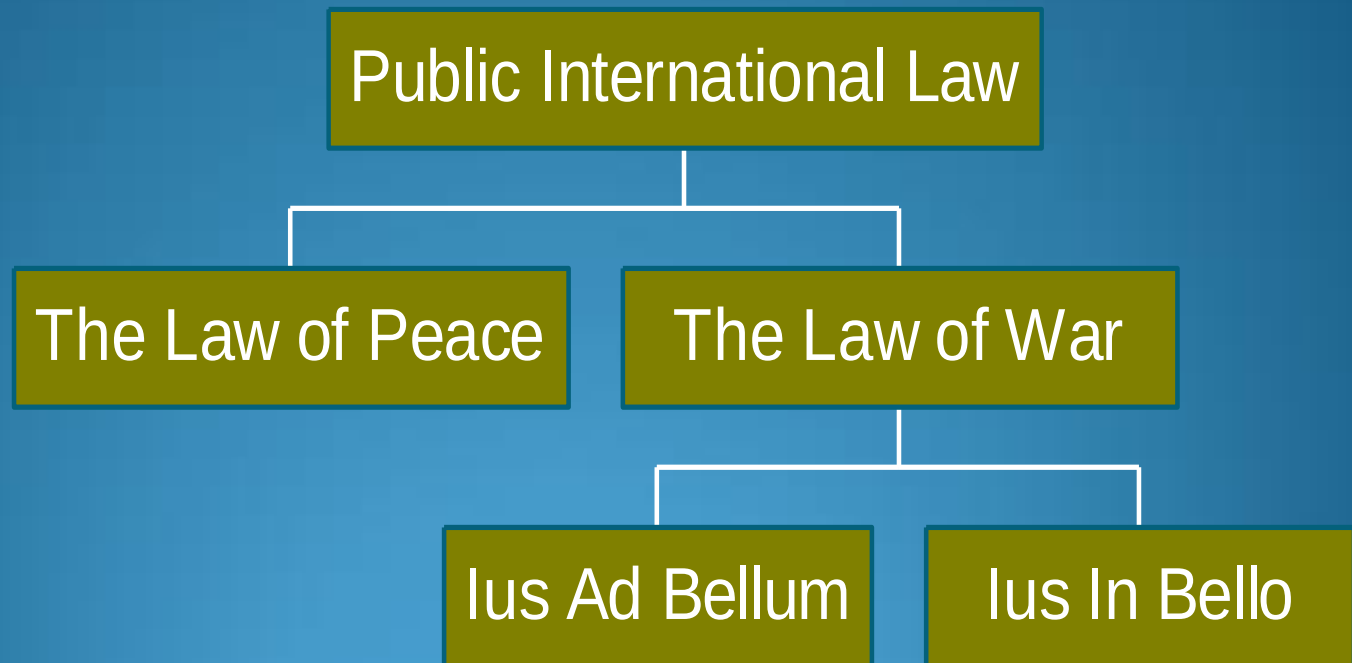
2. The Distinction between *JUS AD BELLUM* *JUS IN BELLO*

- Legality of the use of force
- Humanitarian rules to be respected in warfare

The Distinction between *Ius ad Bellum* & *Ius in Bello*



The Distinction between *Ius ad Bellum* & *Ius in Bello*



The Distinction between *Ius ad Bellum* & *Ius in Bello*

Recognition of :

- ▶ *ius ad bellum*
(the circumstances under which a state is entitled to wage war)

led directly to the development of

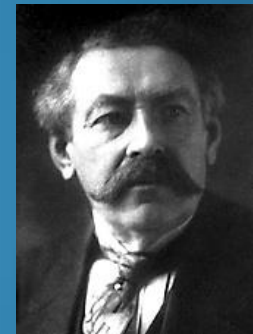
- ▶ *ius in bello*
(the legal regulation of the conduct of the hostilities)

The Distinction between *Ius ad Bellum & Ius in Bello*

- ▶ The Pact of Paris of 1928
[otherwise known as the *Kellogg/Briand Pact*,
General Treaty for the Renunciation of War]
outlawed the use of force between states.

Frank Billings
Kellogg

Aristide
Briand



POST WWII PERIOD

Charter of the United Nations

- ▶ Article 2(4): ‘... refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state.’
- ▶ Art 51 preserves the ‘... inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations. ...’

The Distinction between *Ius ad Bellum* & *Ius in Bello*

Waging of War is tolerated:

- ▶ self defence;
- ▶ collective self-defence;
- ▶ collective security operations authorised by the United Nations.

The Distinction between *Ius ad Bellum* & *Ius in Bello*

More controversial:

- ▶ anticipatory self defence;
- ▶ defence of one's nationals;
- ▶ humanitarian intervention;
and
- ▶ wars of national liberation.

The position of IHL

- Once an armed conflict has commenced, IHL becomes applicable regardless of arguments about *jus ad bellum*
 - So, IHL is autonomous and neutral :
1. **Logical Reason:** IHL is necessary when *the Jus Contra Bellum* has failed to prevent conflict;
 2. **Humanitarian Reason:** The victims of the conflict are not responsible for the violation of the *Jus Contra Bellum*;
 3. **Practical Reason:** The parties to a conflict are never able to agree on responsibility for violation of the *Jus Contra Bellum*.

The Distinction between *Ius ad Bellum* & *Ius in Bello*

Preamble to Additional Protocol I:

‘... the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict.
...’

The Distinction between *Ius ad Bellum* & *Ius in Bello*

➤ Definition of IHL: *Ius in Bello*

- ▶ a branch of public international law,
- ▶ applicable in times of armed conflict,
- ▶ that restricts the right of the parties to the conflict from using the means and methods of warfare of their choice, and
- ▶ that protects persons and property affected by, or liable to be affected by, the conflict.

WHAT IS JUS AD BELLUM?

- ▶ A branch of public international law,
- ▶ that governs the *circumstances under which a state is entitled to use force in its international relations.*

WHAT IS JUS IN BELLO?

▶ IS KNOWN BY DIFFERENT NAMES:

1. International Humanitarian Law;
 2. The Law of Armed Conflict;
 3. The Law of War.
- the legal regulation of the conduct of hostilities

Scope of application of IHL

- PERSONAL scope of application- to which subjects does IHL apply?
- MATERIAL scope of application- in which situations does IHL apply?

PERSONAL scope of application

► to which subjects does IHL apply?

1. 1. states(parties to the conflict and IHL instruments)
[only to IHL instruments?]
2. 2. Non- state armed groups(parties to the conflict)
[what about to IHL Instruments?]
3. 3. Individuals (belonging to parties to the conflict)
 - Civilians and other protected persons (soldiers and *hors de combat*) (have rights and obligations)
 - Combatants (have rights and obligations)

MATERIAL scope of application

- In what situations does IHL apply?
 - Refers to the nature of the conflict in question.
- 1. International armed conflict and occupation
 - Wars of national liberation (Self-determination)
 - Conflicts between states
- 2. Non- international armed conflicts:
 - 1. Civil war
 - 2. Other non-international armed conflicts
- 3. Peace keeping missions

1. IACs

- *Are situations where two or more states are involved in the use of armed force. The full corpus of IHL is applicable.*
- ▶ ICRC Commentary to Common Art. 2:
- ▶ *'... any difference arising between two States and leading to the **intervention of armed forces** is an armed conflict within the meaning of Article 2, **even if one of the Parties denies the existence of a state of war**. It makes no difference how long the conflict lasts, or how much slaughter takes place.'*

Wars of liberation movement

- AP I to the GC
- refers to armed conflicts when “peoples are fighting against colonial domination and alien occupation and against racist regimes *in the exercise of their right to self-determination*.
 - War against colonial domination and racist regimes
[WAS IMPORTANT IN THE POST WWII PERIOD OF DECOLONIZATION]
- Articles 1(3)& 4 AP I
 - Is an AIC

Non- international armed conflict

- Refers to situations that cannot be included in either of the previous categories
- IHL applies, to a certain extent, in non-international armed conflicts
 - When there is a situation in a state that amounts to an armed conflict , IHL applies
- What is a non- international armed conflict?
- We know what is not a NIAC!

NIAC, Internal disturbances and tensions

- Common Article 3-*“armed conflict not of an international character occurring in the territory of one of the High Contracting Parties.”*
- Article 1(2) AP II- *“This protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature as not being armed conflicts.”*
- And other cases of state of emergency

NAIC

- IHL does not apply. Why not ???
 - those situations of violence do not fit into the legal category of armed conflict and therefore IHL would not apply. They are dealt sometimes by states with internal security operations, which use police and military forces and HRL should be applied.
- Other applicable laws ?

NIAC, Instances

- Civil war
- Civil war is a war between a state and an organized armed group with control over parts of a state territory
- Article 1 AP II
- Other non-international armed conflicts

Some thing less than an *armed conflict*

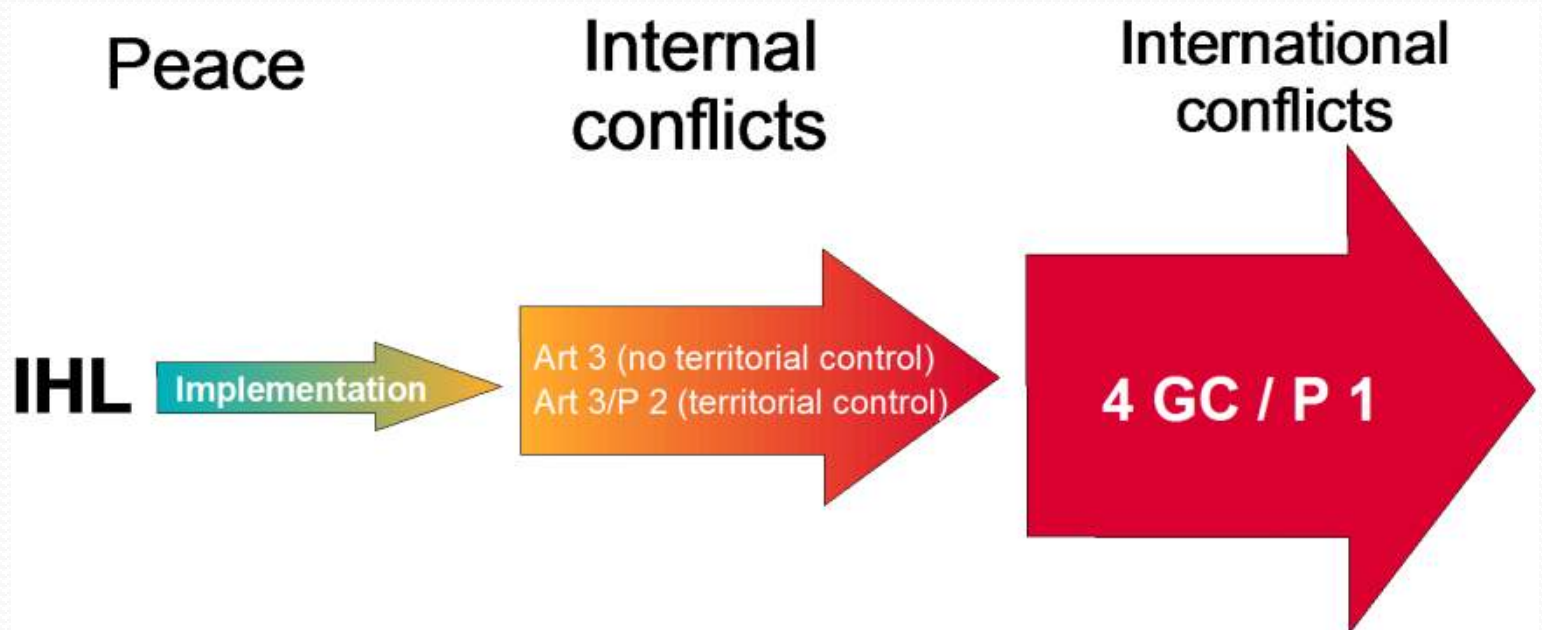
- IHL does not apply; What other laws are applicable?
 - domestic/municipal/national law (including criminal law),
 - international human rights law, and
 - international criminal law are applicable
 - The case of a state of emergency?
 - Some HRL may be derogated. So, what?

Peace time

- IHL does not apply
- With certain exceptions regarding the use of the Red Cross/ Red Crescent emblem
 - Emblems are protected !
 - Activities of IHL implementation

Consequences of qualification

- Two distinct legal regimes:



Qualification of situations

- Never assume that any substantive IHL rule applies before having made the *determination of what kind of situation you are dealing with*
- If in doubt about how to categorize the situation, always assume that the regime giving the most protection is applicable
 - The regime giving the most protection?

Qualify the following situations:

- How do you characterize the following situations?
 - The invasion of Iraq 1991
 - The situation in Iraq 2003
 - The situation in Iraq 2007
 - The situation in Somalia 2007, and up to date
 - The situation in Egypt, Libya ,Tunisia, Syria and Yemen, 2011 and up to date

Fundamental Principles of IHL

□ four core IHL principles:

1. the principle of military necessity
2. the principle of prevention of unnecessary suffering
3. The principle of proportionality
4. the principle of distinction

St. Petersburg Declaration

- Formulated the principles of distinction, military necessity and prevention of unnecessary suffering
 - *That the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men*

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable

1. *Military necessity*

- *Consists in the necessity of those measures which are indispensable for securing the end of the war, and which are lawful according to the modern law and usage of war. [Francis Lieber, 1863]*
- Doing what is necessary to achieve a war aim.
- No more force or greater violence should be used to carry out a military operation than which is necessary in the circumstances.
- Military necessity is what *authorizes military action*
 - *Inextricably linked to two other core principles: unnecessary suffering and proportionality*

Military necessity...

- Allows combatants to *lawfully kill and injure other persons and to damage and destroy property to achieve the anticipated military advantage*
- Combatants *must use the minimum amount of force necessary to achieve a legitimate military objective*
 - *Is the balance between destruction of the enemy and humanity*

But...

- Military necessity cannot justify the violation of other rules of IHL
- The very concept of military necessity *is also a limit on military action*
- It includes a limitation on the extent of permissible military action
- only the *weakening of the military potential of an enemy is acceptable in armed conflict*

2. Prevention of unnecessary suffering

- It is prohibited *to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering, AP I, 35.2*
 - ‘superfluous’ injury or ‘unnecessary’ suffering without increasing military advantage
- What injury or suffering can be deemed ‘superfluous’ or ‘unnecessary’?
 - *the test is ‘a harm greater than that unavoidable to achieve legitimate military objectives’, ICJ*
 - *Proportionality between the injury or suffering and the military advantage anticipated*

3. The principle of distinction

- Military necessity is intrinsically linked to the related principle of distinction
 - Article 48 API
 - *the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives*
 - *Attacks must not be directed against civilians and civilian objects*
 - *Two aspects:*
 - *Individuals*
 - *Objects*

4. The principle of proportionality

- Is a necessary consideration in attacks on civilians, not on combatants.
 - But it is not a total prohibition on civilian attacks.
- Care must always be taken when attacking legitimate military targets
- But collateral civilian casualty is unavoidable
- But it must be proportional to the anticipated military advantage

Proportionality...

- The *incidental injury and death* of civilians is addressed through the principle of proportionality
- Belligerents have a responsibility to minimize the potential for proportionality problems
 - remove the civilian population and civilian objects from the vicinity of military objectives, and
 - avoid locating military objectives within or near densely populated areas

CHAPTER TWO

Combatants and Civilians

Lesson topics:

- Combatant status
- Definition of civilians
- Distinction between combatants and civilians

Civilians and combatants

- Civilians
 - Persons who are not combatants
- Combatants-generic term
 - Lawful combatants
 - Unlawful combatants
 - *hors de combat*

Primary and secondary status

Primary status

- Combatant
- *Legitimate target*
- (Immunity for acts of war)
- Civilian:
- *Protected person*
- (Not immunity for acts of war)

Secondary status

- *Hors de combat*
- POW
- *Protected person*
- (Not immunity for acts of war)
- Unlawful combatant
- Detainee (not POW)

Definition of combatant (1)

- Members of the armed forces of States

Art.4 A (1), GC III

Art. 43 (1) and (2), AP I

- Specific exceptions to this rule:

- Medical and religious personnel

Art. 43 (2) AP I and Art. 33 GC III

Definition of combatant (2)

- ▶ Members of resistance movements or guerrilla groups (irregular forces) belonging to a State party to the conflict
 - 1949: Art. 4 A (2) (GC III) : Command structure, visible sign/uniform, visible arms, adherence to IHL
 - 1977: Art. 43 (AP I): Command structure, adherence to IHL. *But* (Art. 44 (3) AP I): must carry arms openly during military attacks and preparation (when visible)

Definition of combatant (3)

- ▶ *Levee en masse- civilians who have taken up arms to resist the invading force*
- ▶ The Hague Declaration, Art. 2:
- ▶ ... the inhabitants of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organise themselves in accordance with Article 1 shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.

Unlawful/unprivileged combatants

- ▶ Describes a person taking a direct part in hostilities *without being entitled to do so*.
- 1. Irregular forces (or saboteurs) outside the scope of POW protection under either
 - 1) Art. 4 A (2) GC III, or
 - 2) Art. 44 (3) AP I
- 2. Civilians who participate in hostilities (except *levée en masse*)
- 3. Spies
- 4. Mercenaries

Spies- do not have POW status

▶ AP I, Art. 46

... any member of the armed forces of a Party to the conflict who falls into the power of an adverse Party while engaging in espionage shall not have the right to the POW and may be treated as a spy.

Mercenaries- do not have combatant and POW status

- AP I, Art. 47

1. A mercenary shall not have the right to be a combatant or a POW.
2. A mercenary is any person who:
 - a. is specially recruited locally or abroad in order to fight in an armed conflict;
 - b. does, in fact, take a direct part in the hostilities;

Are unlawful combatants protected?

- Are they protected under GC III? Why?
- Are they protected under GC IV? Why?
- Art. 45(3) of AP I
- Article 75 of this Protocol- *Fundamental guarantees*
 - *THEY MUST BE TREATED HUMANELY IN ALL CIRCUMSTANCES*

Determination of Status

- It may be difficult to determine the status of detained persons
- The presumption :Art.45 (1), AP I and Art. 5, GC III
 - All captured persons who have taken part in hostilities must be treated as POWs until status is determined, if necessary by a competent tribunal.

Combatant status in NIAC

- Law on NIAC does not deal with combatant, and therefore no POW status
- Members of rebel armed groups/forces remain liable to prosecution under domestic law
- However, any person detained in NIACs must be treated humanely:
 - Common Art.3, GC and Art.4, AP II.

Civilians and civilian population

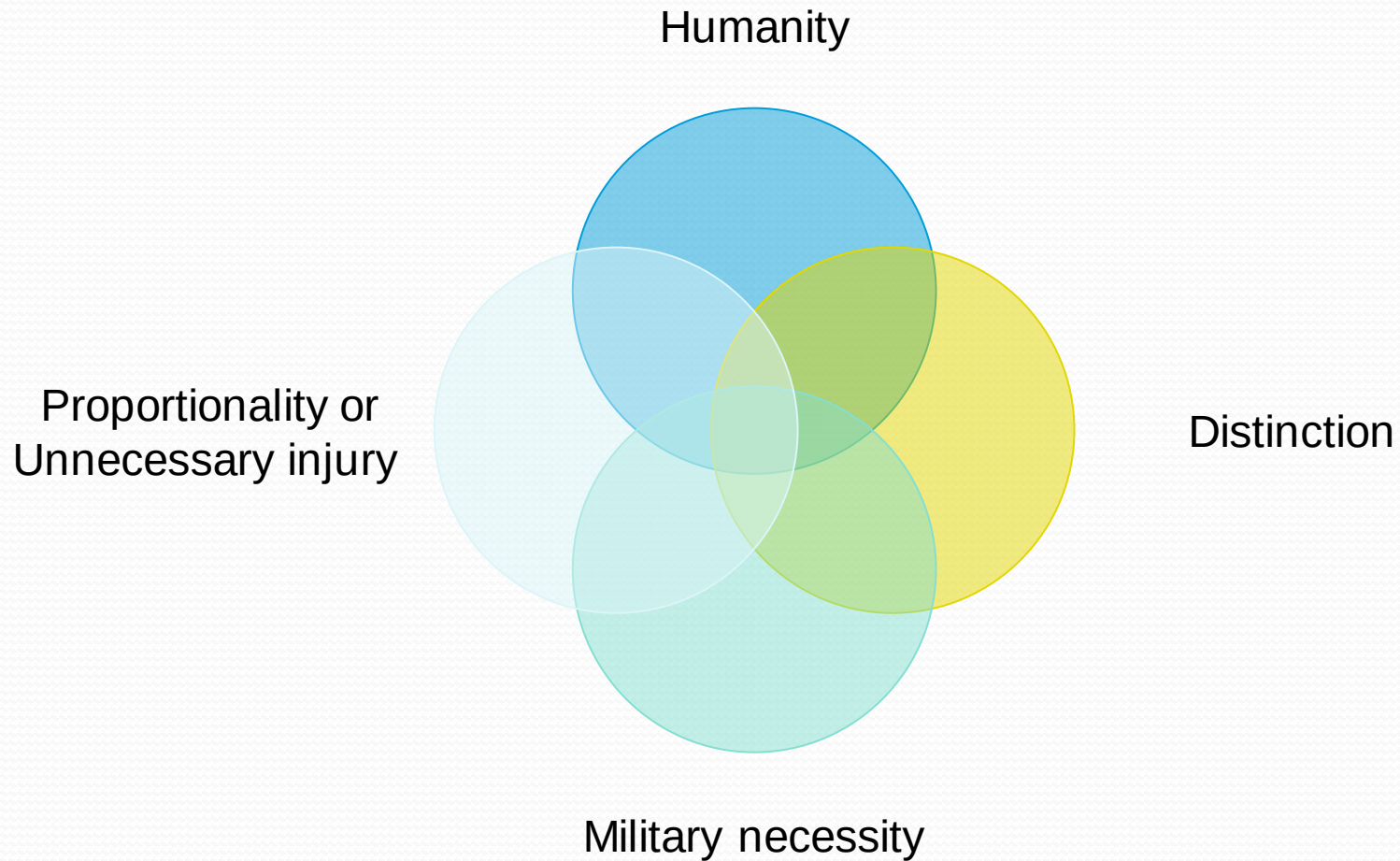
- ▶ Article 50 AP I

- ▶ Art 50. Definition of civilians and civilian population
 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.*
- ▶ A civilian is not a member of the armed forces

Persons who are not civilians

- Persons referred to in Article 4 A, (1), (2), (3) and (6) of GC III, and art. 43 AP I are not civilians:
 - Members of the armed forces
 - Members of militias etc.
 - Members of armed forces of a government not recognized by the detaining power
 - Civilians taking up arms against invasion
- Conversely: persons referred to in article 4 A, (4) and (5) GCIII and art.43 (2) AP I are to be treated as civilians
 - Medical personnel and chaplains and other persons accompanying the armed forces or *members of technical crews*

Distinction between combatants and civilians:



Distinction

- WWI: civilian casualties 5%
- WWII: civilian casualties 50%
- Caused by indiscriminate air warfare by both sides
- In order to ensure respect for and protection of the civilian population and civilian objects combatants must distinguish themselves from protected persons

Article 48 AP I

- ▶ Art 48. Basic rule- the principle of 'distinction'
 - *the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.*
 - at all times a combatant must distinguish himself from a protected person.

Abuse of the principle of distinction

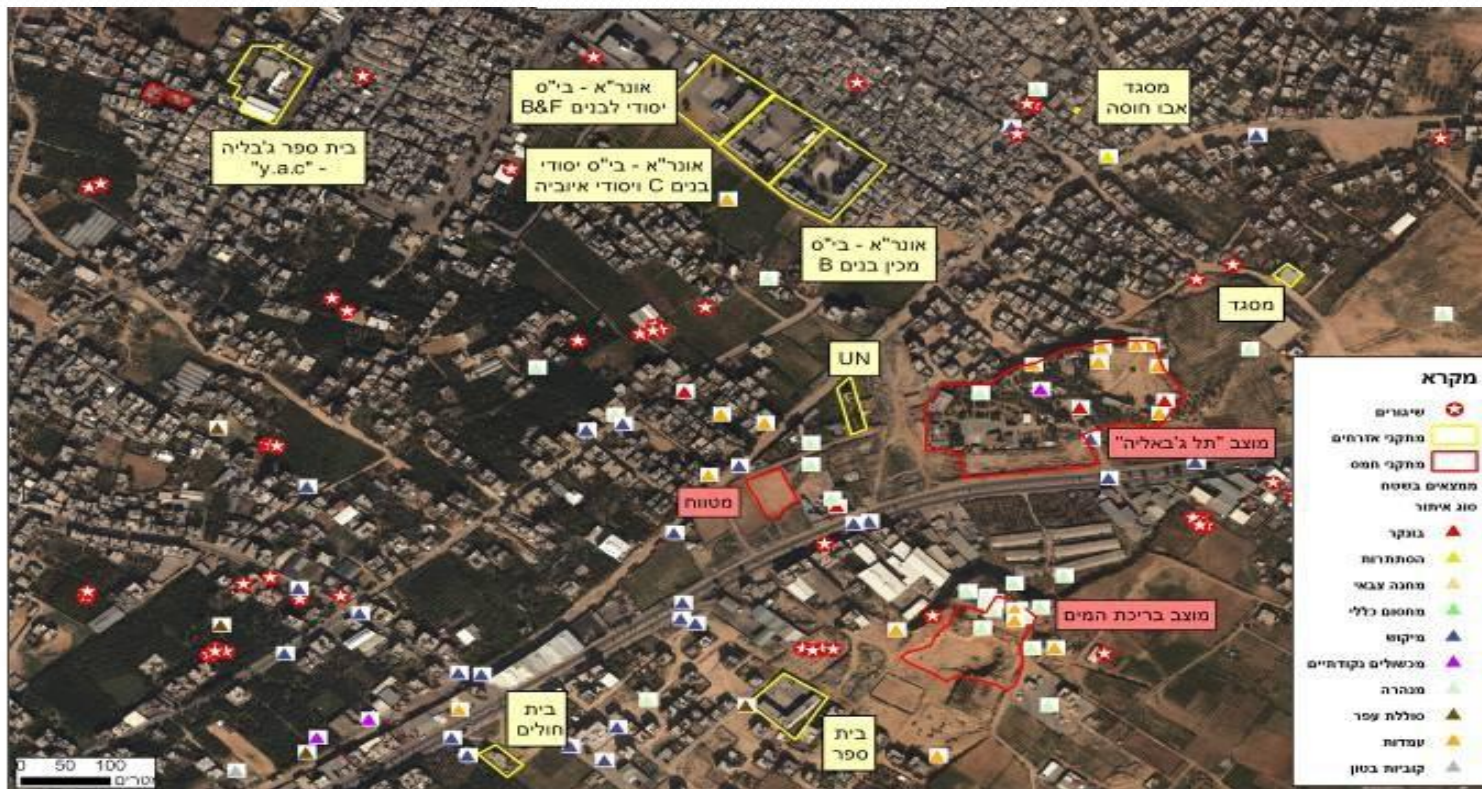
- Firing from civilian areas
- Weapons stores & factories in homes, schools , churches and mosques
- Training bases and military headquarters in civilian areas
- Dressing as civilians
- Recruiting children
- Human shields

Firing from civilian areas



Rockets fired from rooftop

firing points from schools and other protected sites



- Note proximity of firing points from schools and other protected sites

Rocket launcher in Shati refugee camp



- Launcher positioned next to medical center, center for disabled and soccer stadium

Abuses of Distinction

- weapons storage and factories

Weapons storage



Weapons found in Jabalia mosque

Weapons factories



Manufacturing rockets in private house in Northern Gaza

Combatants dressing as civilians



“The commander, shaheed Muhammad Salameh Hilal, head of the mortar shells unit in Saja’iya and a lion of the special unit.”

- ...combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack

Additional Protocol I, 44(3)

Abuses of distinction - recruiting children

The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities, and in particular, they shall refrain from recruiting them into their armed forces

Additional Protocol I, 77(2)

Abuses of distinction - recruiting children



Children in uniform train at a PRC camp (Hamas' PALDF Forum, August 22).

The duty to distinguish

- ▶ Civilian *objects*
- ▶ Military *objectives*
- ▶ Civilian *population*
- ▶ *Combatants*
- ▶ Civilians , civilian population and civilian *objects* can never be objectives of military attack

military objective:

- Article 52(2) of Protocol I:
 - *Attacks shall be limited strictly to military objectives. 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.*
- No list of specific military objectives is provided
- Human beings can categorically come within the ambit of military objectives.

Ingredient that serves to identify a military objective

- an object must fulfill two cumulative criteria in order to qualify as a military objective:
 - (a) by nature, location, purpose or use, *it must make an effective contribution to military action*; and
 - (b) its destruction, capture or neutralization, in the circumstances ruling at the time, *must offer a definite military advantage*.
 - Non- military advantages excluded!
- there is no fixed borderline between civilian objects and military objectives

The definition of military objectives by nature, location, purpose and use

- There need be no ‘direct connection’ with specific combat operations
- The connection between military action and exports, required to finance the war effort, is ‘too remote’
 - Every civilian activity might be construed by the enemy as indirectly sustaining the war effort
- For an object to qualify as a military objective, *there must exist a proximate nexus to military action (or ‘war-fighting’)*

Protection against being targeted

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

Direct Participation in Hostilities

- Art.51 (3) Civilians shall enjoy the protection afforded, unless and for such time as they take a direct part in hostilities.
- NIAC- Common article 3, GCs: Persons taking no active part in the hostilities....

Protection against indiscriminate attacks

- Art.51 (4) Indiscriminate attacks are prohibited
- Indiscriminate attacks are:
 - ❑ attacks which are not directed at a specific military objective
 - ❑ the employment of indiscriminate means and method of combat

Instances of indiscriminate attack

- indiscriminate attacks include:
- To fire blindly without clear idea of the target
- To release random bombs
- To release bombs when visibility is bad (night, high altitudes, weather, etc.)
- To release bombs over areas with both military and civilian installations

CHAPTER THREE

Protection of Prisoners of War

Content

- Definition of POW
- Different categories of POWs
- Protection of POWs
- Duties of POWs
- Repatriation of POWs
- NIAC and POWs status

Who is POW

- As a rule, POWs are *members of the armed forces or combatants of one of the parties to the conflict who fall into the hands of the adverse party* during an international armed conflict
- Additional persons who enjoy POW status
- Members of National Liberation Movements (if they satisfy the **art 43 of AP I** requirements),
 - ▶ Civilian members of ship and aircraft crews; and
 - ▶ War correspondents

POWs...

- ▶ *Levée en masse*;
- ▶ Members of medical services and chapelains granted special status:
 - ▶ They could be retained by the adverse party only *in so far as the state of health, the spiritual needs and the number of prisoners of war require*
- ▶ Diplomatic Representatives of the adverse party cannot be made POWs and must be allowed to return to their own countries.
(Iraq / Kuwait invasion / 1990)
- ▶ Neutral diplomats accompanying adverse party may not be made POWs, but may be ordered to leave the combat area.

Conditions to be a POW

- REGULAR ARMED FORCES- Must distinguish themselves from the civilian population
- MEMBERS OF RESISTANCE MOVEMENT- Four requirements:
 1. Must be under a responsible command
 2. Must use distinctive emblem
 3. Carry arms openly
 4. Respect laws and customs of war
- a *levee en masse*- Two requirements:
 1. carry arms openly and,
 2. respect international humanitarian law

Does a combatant always enjoy POW status?

- No
- Some circumstances under which a combatant may be denied a POW status(Additional Protocol I)
 - If they fail to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack
 - Combatants engaged in espionage
 - Mercenaries
- ANY PROTECTION TO THIS CATEGORY OF PERSONS?

Protection and Treatment of POWs

- The fundamental provision for the treatment of prisoners of war is *prisoners of war shall at all times be treated humanely* (Art 13 of Geneva Convention III)
- Because the sole purpose for the internment of POWs **is not to punish them**, but to **hinder their direct participation in hostilities**, and / or, **to protect them**
- Any measures of reprisal against prisoners of war are forbidden without exception
- POWs enjoy their right *from the time they are captured until they are repatriated*

Repatriation of POWs

- The rationale behind the confinement of POWs
- The confinement must cease as soon as the reason for captivity ends
- So, POWs must be released and repatriated without delay
- Three categories for repatriation:
 1. Severely wounded and sick must be repatriated without delay – as soon as they are fit to travel;
 2. All other prisoners of war must be released and repatriated **'without delay after the cessation of active hostilities'** (art 118 of GC III)-a *de facto* situation
 - no armistice and peace treaty is important; the factual cessation of the hostility is enough

Repatriation....

3. Without waiting for the armed conflict to end, the parties to the conflict should repatriate POWs on humanitarian grounds, possibly in a reciprocal basis by means of exchange of prisoners.
- What if POWs are not happy with the repatriation?

NIAC

- The law applicable in NIAC does not foresee a combatant's privilege
 - the right to participate in hostilities and impunity for lawful acts of hostility is not recognized
- Common Article 3 and AP II:
- Parties to an internal conflict are under no obligation to set their prisoners free during or after hostilities
- If they do so, it will be entirely at their discretion or under special agreements



Chapter Four

Protection of the Wounded, sick and shipwrecked

IHL basic categories:

- Persons who do not take a direct part in hostilities
- Persons who have ceased to take a direct part in hostilities
- Persons who take a direct part in hostilities



Who is "protected" under IHL?

- Persons who do not take a direct part in hostilities

- civilian

- ✓ civilian persons
- ✓ wounded and sick
- ✓ detainees or internees
- (medical and religious personnel)
- (humanitarian personnel)
- (special protection for vulnerable persons)

- military

- (medical and religious personnel)

... and are in the power or the hands of the adverse Party

Who is "protected" under IHL?

- Persons who have ceased to take direct part in hostilities (*hors de combat*)

- military

- ✓ wounded, sick and shipwrecked
- ✓ captured, detained or interned

... and are in the power or the hands of the adverse Party

Who is "protected" under IHL?

"Protected persons" under the Geneva Conventions

- | | |
|---------------------------------------|----------------|
| ■ wounded and sick | → GC I, AP I |
| ■ wounded, sick and shipwrecked | → GC II, AP I |
| ■ prisoners of war | → GC III, AP I |
| ■ civilians in the power of the enemy | → GC IV, AP I |

Who is "protected" under IHL ?

International AC

- civilians (in the power of the enemy)
- wounded, sick and shipwrecked
- prisoners of war

Non-international AC

- "persons who do not take a direct part or who have ceased to take part in hostilities"
- "persons deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained"

Who is "protected" under IHL?

Other persons enjoying specific protection

- medical and religious personnel
- women and children
- humanitarian relief personnel
- UN personnel in PK missions

→ GC I/II, AP I/II

→ GC III/IV, AP I/II

→ AP I / UN Convention (1994)

→ UN Convention (1994)

Wounded, sick and shipwrecked



Definition of the Wounded

- What is meant by a wounded or sick combatant ?
- No attempt has ever been made in the GC
- Nor has there ever been any definition of the degree of severity of a wound or a sickness entitling the wounded or sick combatant to respect .

ICRC commentary

- The meaning of the words wounded and sick is a matter of common sense and good faith..... They cover:
 - ❖ combatants who have fallen by reason of a wound or sickness of **any kind** or
 - ❖ Who have ceased to fight and laid down their arms as a consequence of **what they themselves think about their health.**



*Who are the categories of
wounded, sick and
shipwrecked persons ?*

The wounded, sick and shipwrecked

GC I/II, Art. 13 (1) (2) (3)

- ▶ Member of the armed forces, groups and units which are under a command responsible to a Party (except medical and religious personnel)
 - ▶▶ regular armed forces
 - ▶▶ irregular armed forces (militias and members of other volunteer corps)
 - ▶▶ regular armed forces who profess allegiance to a government/authority not recognized by the Detaining Power

GC I/II, Art. 13 (4) (5) (6)

- Persons who accompany the armed forces without actually being member thereof such as
 - ✓ civil members of military aircraft crews
 - ✓ War correspondents
 - ✓ Supply contractors
 - ✓ Member of labour units or
 - ✓ Of services responsible for the welfare of the armed forces

Provided that they have received authorization from the armed forces which they accompany

Continue... ..

- Members of crews
 - Inhabitants of a non-occupied territory Not all but
 - ✓ spontaneously take up arms to resist the invading forces
 - ✓ Without having had time to form themselves into regular armed units
- provided that carry arms openly and respect the law and customs of war

The wounded, sick and shipwrecked

Additional Protocol I

"persons, whether military or civilian, who, because of trauma, disease or other physical or mental disorder or disability, are in need of medical assistance or care and who refrain from any act of hostility."

- Both GC I and II give us similar definition and obligation under Art.12 and 13..... except the scope of application...

GC I applies on land

GC II applies on sea (Naval force)

- Under GC II, the term `Shipwreck means from any cause and includes forced landing at sea by or from aircraft



Article 12 of GC ... says such
groups of persons ... shall be
respected and **protected**

What do you mean by
respect and protect ?

What do you mean by Respect and protect ? ICRC commentary ...

The Word ..respect means

- ❖ to spare, not to attack

Where as .. Protect means

- ❖ to come to someone defence,
- ❖ To lend help and support

Hence these words made it unlawful for an enemy to attack, kill, ill-treat or in any way harm a fallen and unarmed soldier

... Paragraph 2

- Puts **treatment and care** to the wounded and sick in addition to respect and protect
- ❖ The wounded and sick must be given a **medical care** as **their condition requires**

this paragraph begins by laying down that **adverse distinctions** are prohibited

... Paragraph 3 ...

- This paragraph has an effect to strengthen the principle of the equality of treatment of the wounded
- It indicates the only reasons which can justify priority in the order of treatment
Namely reasons of medical urgency

The wounded, sick and shipwrecked

- ▶ Whenever circumstances permit, a duty to
 - ▶ search for and collect the wounded and sick (without delay)
 - ▶ protect them against pillage and ill-treatment
 - ▶ ensure their adequate medical care and attention required by their condition
- ▶ Search for the dead, prevent their being despoiled, and decently dispose of them.

The wounded, sick and shipwrecked

- Parties to the conflict has an obligation of recording and forwarding of information , in respect of each wounded, sick and shipwrecked
- What is rational behind this obligation ?
 - ✓ *to assist his identification*
 - ✓ *for families of the missing should be relieved of their painful uncertainty as soon as this is physically possible.*

What are the elements of identification ? ICRC Commentary

.....

- The provision states as ...these records should, if possible, include but addition may be include to the list such as .
- ✓ Photographs
- ✓ Body measurements or
- ✓ Description of teeth or
- ✓ Special features which the families of the individuals concerned may be expected to know

Chapter Five

Protection of Civilian

Customary law & the Hague Regulations

- the general principle that *the civilian population shall be immune from the effects of hostilities* is above all based on customary law
- attack or bombardment of towns, villages, dwellings or buildings which are undefended is prohibited
- officer in command of an attacking force must, before commencing a bombardment, except in cases of assault, *do all in his power to warn the authorities*

the civilian population and civilian objects are immune from attack

- in sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art science, or charitable purpose, historical monuments, and hospitals *provided they are not being used at the time for military purposos*
- the pillage of town or place even when taken by assaults is prohibited

Situation leading to suspension or removal of the immunity

- Taking a direct part in hostilities
- Art . 51.3 of AP I
- Civilians are protected against direct attack unless and for such time as they directly participate in hostilities
- The notion of DPH refers to **specific acts carried out by individuals as part of the conduct of hostilities** between parties to an armed conflict

DPH as a specific act

- ▶ Individual participation may be 'direct' or 'indirect';
- ▶ Intent is insufficient for a civilian to lose protected status;
- ▶ Notion must be interpreted synonymously in both IACs and NIACs.
- The hostilities may be either international or non-international.

DPH- Meaning

- The *Commentary to Protocol I* provides some clarification:
 - *direct participation means “acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”*
 - *Direct participation “implies a direct causal relationship between the activity engaged in and the harm done to the enemy at the time and the place where the activity takes place.”*

Constitutive elements of DPH

the ICRC report

- In order to qualify as DPH, a specific act must meet the following cumulative criteria:
 1. The act must be **likely to adversely affect** the military operations **to inflict death, injury, or destruction**(threshold of harm)
 2. There must be a **direct causal link** between the **act** and the **harm** likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (**direct causation**), and
 3. The act must be **specifically designed to directly** cause the required threshold of harm in support of a party to the conflict and to the detriment of another (**belligerent nexus**)

I. Threshold of harm

- Acts reaching the required threshold of harm can only amount to DPH if they additionally satisfy the requirements of 'direct causation and 'belligerent nexus'
- The qualification as DPH does **not require the materialisation of the harm**
 - Attempts meet this criterion
- Merely the **objective likelihood** – harm that may reasonably be expected to result from an act in the prevailing circumstances
 - *What about an attack against the civilian population?*

II. Direct causation

- ▶ Indirect participation does not lead to loss of protection
 - contribution to '**general war effort**' – production of weapons - or '**war sustaining activities**' – political, economic and media activities and support ?
- ▶ There must be a **sufficiently close causal relation between the act and the resulting harm**
- ▶ – the harm in question must be brought about in one causal step
- ▶ The causal relationship between the employment of the means and the ensuing harm remains direct regardless of temporal or geographical proximity

III. Belligerent nexus

- An act must also be specifically designed ***in support of a party to an armed conflict and to the detriment of another*** ;
- belligerent nexus relates to **the objective purpose of the act**
 - As a general rule, harm caused in individual self-defence or defence of others against violence are excluded
- there must be a belligerent nexus between the civilian's act and the resultant harm [armed conflict]
- The purpose must be clearly to support a party to the conflict

Temporal scope of the loss and regain of protection

- the suspension of protection lasts exactly as long as the corresponding civilian engagement in direct participation in hostilities
- civilians lose and regain protection against direct attack in parallel with the intervals of their engagement in DPH (***‘revolving door’ of civilian protection***)

Consequences of regaining civilian protection

- IHL neither prohibits nor privileges civilian DPH
- When civilians cease to directly participate in hostilities, or when they cease to assume their continuous combat function, they regain full civilian protection against direct attack,
- but they ***are not exempted from prosecution*** for violations of domestic and international law they might have committed

Chapter Six

The Conduct of Hostilities, and Means and Methods of Warfare

Conduct of Hostilities: General

When a commander / combatant is conducting hostilities he will have to ask himself three questions before he proceeds with the attack:

- ▶ Might civilians be affected?
- ▶ Is the target a legitimate military objective?;
- ▶ Is the attack proportionate?

Conduct of Hostilities: General

These questions might be translated in the need to acknowledge the following fundamental principles of IHL:

- ▶ principle of distinction’;
- ▶ ‘militarily necessity’;
- ▶ ‘proportionality’.

Principle of Military Necessity

St Petersburg Declaration of 1868:

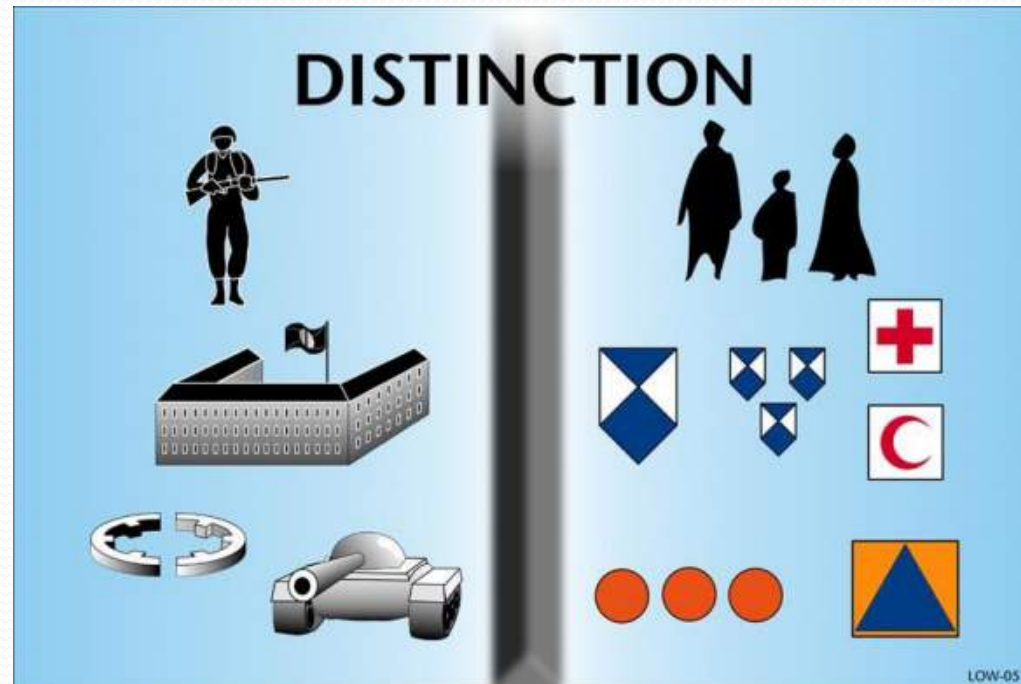
‘the only legitimate object which States should endeavour to accomplish during war *is to weaken the military forces of the enemy*

Principle of Distinction

Basic Rule stated in Article 48 of AP I:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.'

Principle of Distinction



Principle of Distinction

Precautionary measure in attack (art 57 of AP I):

- ▶ prior verification;
 - ▶ cancel attack if the target is not military
- ▶ When a choice is possible, the objective causing least danger to civilian population must be selected.
- ▶ all feasible precautions in the choice of means and methods of combat;
- ▶ refrain from attacks *which may cause incidental harm to civilians*;
- ▶ advance warning to civilians;

Principle of Distinction

Precautionary measures against the effects of attacks

(art 18 of GC IV and art 58 of AP I):

- ▶ Attempt to remove civilians from the vicinity of military targets;
- ▶ Avoid locating military objectives within or near densely populated areas;
- ▶ Take all other necessary precautions

Principle of Distinction

Rule 1 of ICRC's *Study on Customary IHL*:

‘The parties to the Conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants

A norm or custom applicable in both IAC and NIAC.

Military Necessity

- Military necessity acknowledges that military forces in planning military actions aim, ultimately, at victory.
- VICTORY , presumably, is the purpose of armed conflict.
- However, while victory is a legitimate objective in terms of the laws of war it is not the only relevant law of war.

Military Necessity

St Petersburg Declaration of 1868:

'the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; the employment of such arms would, therefore, be contrary to the laws of humanity

Military Necessity

Constraints are placed on reliance on military necessity:

- ▶ attack must aim at, and contribute to, the military defeat of the enemy – that is, the attack must be aimed at a military object
- ▶ if not so aimed or not so contributing, the attack cannot be justified by military necessity because it has no justifiable military purpose;
- ▶ military necessity cannot justify violations of other rules of IHL.

Military Necessity

- *The greater the military advantage anticipated, the larger the amount of 'incidental / collateral damage' – often civilian casualties – will be 'justified' or 'necessary'.*
- Elasticity / flexibility of 'Military Necessity'.

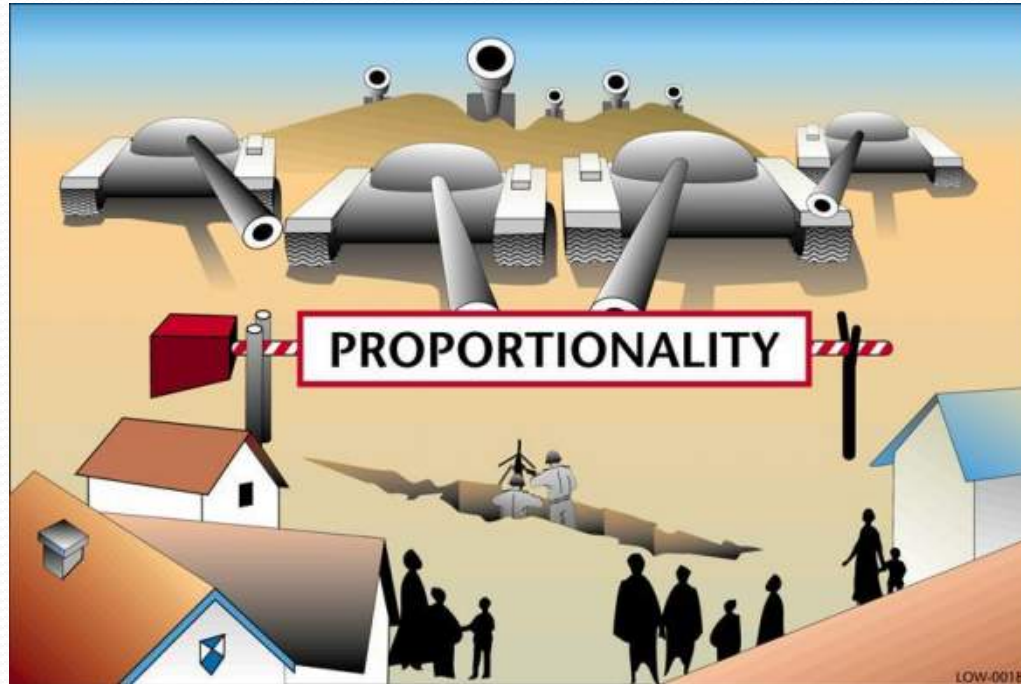
Military Necessity

- The greater the necessity, the more suffering appears to be justified.
- Indeed, even in the *Advisory Opinion on the Legality of the Use of Nuclear Weapons* the majority of judges in the ICJ left open the possibility that *a State might be able to justify its use of nuclear weapons where the very survival of the State was under serious*

Proportionality

- Even if the target is a 'legitimate military target', *the attack must not be excessive in relation to the concrete and direct military advantage anticipated*
 - it must be 'proportionate'.
- 'Proportionality' not specifically defined in IHL instruments.
- The rule of proportionality is an attempt to balance the conflicting military and humanitarian interests ... and is most evident in connection with the reduction of incidental damage caused by military operations.

Proportionality



Proportionality

Galic (2003):

‘ ... The basic obligation to spare civilians and civilian objects as much as possible must guide the attacking party when considering the proportionality of an attack. 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 casualties to result from the attack.’

Proportionality

Thus, the attack must not cause superfluous injury or unnecessary suffering.

... an 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 is prohibited.
[art 51(5)(b) of AP II].

Proportionality

- Again, an element of elasticity / flexibility.
 - The greater the military advantage anticipated, the larger the amount of ‘incidental damage’ will be ‘justified’ or ‘necessary’.
- (ICJ in *Nuclear Weapons Advisory Opinion*)

Means and Methods of Warfare

- ▶ Means of Warfare:
weapons used
- ▶ Methods of Warfare:
military tactics employed

Means of Warfare: General Principle

St Petersburg Declaration of 1868:

‘the progress of civilisation should have the effect of alleviating as much as possible the calamities of war; the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy; for this purpose it is sufficient to disable the greatest possible number of men; *this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; the employment of such arms would, therefore, be contrary to the laws of humanity.*’

Prohibition Against Specific Weapons

Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:



‘The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the object of attack and consequently *never use weapons that are incapable of distinguishing between civilian and military targets*. According to the second principle, *it is prohibited to cause unnecessary suffering to combatants*; it is accordingly *prohibited to use weapons causing them such harm or uselessly aggravating their suffering*. In application of that second principle, *states do not have unlimited freedom of choice of means in the weapons they use*.’

Means of Warfare: General Principle

Hague Regulations of 1907:

- 22 The right of belligerents to adopt means of injuring the enemy is not unlimited.
- 23 ... it is especially forbidden:
 - a) to employ poison or poisoned weapons;
 - e) to employ arms, projectiles, or material calculated to cause unnecessary suffering
 - *a harm greater than that unavoidable to achieve legitimate military objectives*
 - suffering without really increasing military advantage

Means of Warfare: General Principle

Additional Protocol I of 1977: Art. 35

- ▶ In any armed conflict, the right of the Parties to the conflict to choose methods and means of warfare is not unlimited [art 35(1) of AP I];
- ▶ 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) of AP I]*;

Means of Warfare: General Principle

- The general principles aim at the prohibition of weapons causing 'superfluous injury and unnecessary suffering'.
- In practice, the application of these principles is always a compromise between military necessity and humanity.
- The use of a weapon will not be justified in terms of military utility *if its utility is minimal* or because *its utility is considerably outweighed by the suffering it causes*.

Prohibition Against Specific Weapons

[Hague Declaration 3 of 1899];

- ▶ ‘The contracting Parties agree to abstain from the use of *bullets which expand or flatten easily in the human body*, such as bullets with a hard envelope which does not entirely cover the core or is pierced with incisions’
- ▶ WHY?

Prohibition Against Specific Weapons

- ▶ Geneva Protocol for the Prohibition of the Use in War of Poisonous or Other Gases and of Bacteriological Methods of Warfare (1925);
- ▶ WHY?



Prohibition Against Specific Weapons

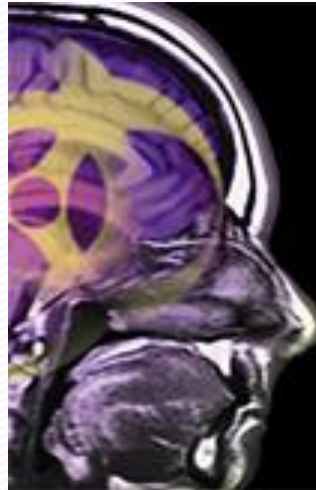
- ▶ Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and Underwater (1963);
- ▶ Treaty on the Non-proliferation of Nuclear Weapons (1968);
- ▶ Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof (1971);
- ▶ IS THE USE OF NUCLEAR WEAPONS PROHIBITED?

Prohibition Against Specific Weapons



Prohibition Against Specific Weapons

- ▶ Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and Their Destruction (1972):



Prohibition Against Specific Weapons

- ▶ En-Mod Convention (Convention on the prohibition of the military or other hostile use of environmental modification techniques (1977);



Prohibition Against Specific Weapons

► Conventional Weapons Convention (1981)

Protocol I: non-detectable fragments;

Protocol II: mines, booby-traps and other devices;

Protocol III: incendiary weapons;

Protocol IV: blinding laser weapons;

Protocol V: explosive remnants of war (28/11/03);

Prohibition Against Specific Weapons

- ▶ Convention on the Prohibition of the Development, production, Stockpiling and Use of Chemical Weapons and Their Destruction (1993);

Art 1:

Each State Party ... undertakes never under any circumstances:

- a) to develop, produce, otherwise acquire, stockpile, or retain chemical weapons, or transfer, directly or indirectly, chemical weapons to anyone;
- b) to use chemical weapons;
- c) to engage in any military preparations to use chemical weapons;
- d) to assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under this Convention.

Prohibition Against Specific Weapons

- ▶ Cluster Munitions Convention (2008);

Because of the massive number of submunitions released (up to 644 per munition), their inaccuracy and high failure rate, cluster munitions have resulted in vast amounts of explosive debris.

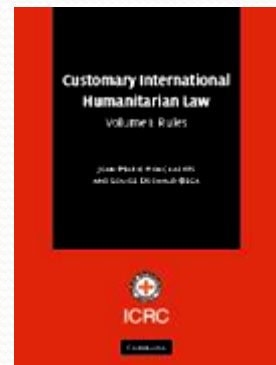


Prohibition Against Specific Weapons

Underlying IHL principles have become customary:

- The use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering is prohibited.
- The use of weapons which are by nature indiscriminate is prohibited.

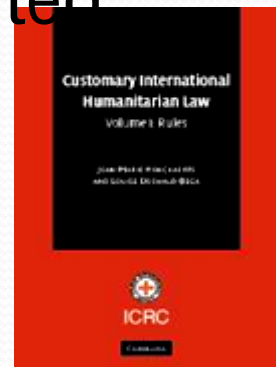
Rules 70 and 71 of the ICRC's
Study on Customary IHL



Prohibition Against Specific Weapons

many of the more specific prohibitions:

- ▶ The use of poison or poisoned weapons is prohibited [Rule 72];
- ▶ The use of biological weapons is prohibited [Rule 73];
- ▶ The use of chemical weapons is prohibited [Rule 74];
- ▶ The use of herbicides ... is prohibited if they ... [Rule 76];



Prohibition Against Specific Weapons

As have many of the more specific prohibitions:

- ▶ The use of bullets which expand or flatten easily in the human body is prohibited [Rule 77];
- ▶ The use of bullets which explode within the human body is prohibited [Rule 78];
- ▶ The use of weapons the primary purpose of which is to injure by fragments which are not detectable by X-rays in the human body is prohibited [Rule 79];
- ▶ The use of laser weapons that are specifically designed for their sole combat function or as one of their combat functions, to cause permanent blindness to unenhanced vision is prohibited [Rule 86];



Methods of Warfare: General Principle

- Methods of warfare refers to any tactical or strategic procedure aimed at overcoming or weakening the enemy.
- Limitations or prohibitions on methods are premised on three principles:
 - ▶ The choice of methods of warfare is not unlimited [art 22 of Regs. of HC; art 35(1) of AP I];
 - ▶ The use of methods causing unnecessary suffering or superfluous injury is forbidden [art 23(e) of Regs. of HC; art 35(2) of AP I];
 - ▶ The only legitimate object of war is to weaken the military forces of the enemy [preamble to St Petersburg Declaration].

Methods of Warfare

Thus contemporary IHL forbids the following methods of warfare:

- ▶ Use of terror [art 51(2) of API; art 13 of AP II]
- ▶ Use of famine [art 54 of AP I; art 14 of AP II];
- ▶ Reprisals against protected persons and objects [arts 46/47/13(3)/33 of GCs; arts 20 and 41 – 56 of AP I];
- ▶ Pillage [art 15 of GC I; art 18 of GC II; arts 13 and 33 of GC IV; art 4 of AP I];
- ▶ Taking of hostages [art 3 common to GCs; art 34 of GC IV; art 75 of AP I];
- ▶ Enforced enrolment of protected persons [art 130 of GC III; art 51 of GC IV];
- ▶ Deportations [art 49 of GC IV; art 17 of AP II].

Methods of Warfare: Ruses of War

Ruses of war are intended to mislead an adversary or to induce him to act recklessly.

Examples of ruses of war are:

- ▶ Camouflage;
- ▶ Misinformation;
- ▶ Surprises;
- ▶ Ambushes.

Ruses of war are legal:

- ▶ Ruses of war and the employment of measures necessary for obtaining information about the enemy and the country are considered permissible [art 24 of Regs of HC].
- ▶ Art 37(2) of AP I.

Methods of Warfare: Perfidy, Art 37API

Perfidy is an act that invites the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of IHL, with the intent to betray that confidence.

Examples of perfidy are:

- ▶ Feigning an intent to negotiate under a flag of truce;
- ▶ Feigning surrender;
- ▶ Feigning incapacitation by wounds or sickness;
- ▶ Feigning civilian or non-combatant status;
- ▶ Feigning protective status by the use of signs, emblems or uniforms
Making improper use of the emblem of the red cross or red crescent.



- Perfidy is illegal:

- ▶ To make improper use of the flag of truce, of the national flag or of the military insignia and uniform of the enemy, as well as the distinctive badges of the Geneva Convention [art 23(f) of Regs. of HC].
- ▶ Art 37(1) of AP I.

Violations of Means and Methods of Warfare

Serious violations of IHL constitute war crimes,
It terms of:

- ▶ Treaty Law;
- ▶ Customary IHL.

