



## UNIT 9. THE PROTECTION OF THE INDIVIDUAL DURING ARMED CONFLICTS

1. The evolution of International Humanitarian Law.
2. Main contents of International Humanitarian Law.
3. The protection of victims of armed conflicts.

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# 1. THE EVOLUTION OF INTERNATIONAL HUMANITARIAN LAW

- Before the development of Contemporary IL: Resource to war-means of dispute settlement between States. Lawful resource? *Ius ad bellum*.
- Development of norms to limit the manner of conducting hostilities between States (internal conflicts are part of State Sovereignty) at conventional and customary level: IHL (*ius in bello*).
- Codification:
  - Paris Declaration 1856 (Abolition of privateering and *letters of marque*).
  - Creation of ICRC after battle of Solferino (Henry Dunant).
  - Development of Modern IHL through two different branches.
    - the “law of Geneva”: Protection of victims of armed conflict, such as military personnel who are *hors de combat* and civilians who are not or no longer participating in hostilities.
      - ❖ Geneva Convention of 22 August 1864.

- the “law of the Hague”: regulation of the conduct of hostilities and limits means and methods of warfare.
  - ❖ Hague Convention (II) on the Laws and Customs of War on Land, 1899
  - ❖ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.
  - ❖ Hague Declaration (IV,2) concerning Asphyxiating Gases, 1899
  - ❖ Hague Declaration (IV,3) concerning Expanding Bullets, 1899
- Between WW: Conventional development and adaptation of rules of war
  - Geneva Protocol on Asphyxiating or Poisonous Gases, and of Bacteriological Methods, 1925
  - Agreement for the Amelioration of the Death of the Wounded and Sick in Armies in the Field, signed at Geneva on June 27, 1929.
  - Agreement for the treatment of Prisoners of War, Geneva on June 27, 1929.
  - Act establishing the rules to be observed by submarines in time of war with respect to merchant ships, London November 6, 1939.

- Spanish Civil War: Customary application of some rules to internal armed conflicts.
- After WWII: IV Peace Conferences in Geneva 1949: elaboration of treaties regarding the protection of victims of armed conflicts:
  - Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
  - Geneva Convention (II) on Wounded, Sick and Shipwrecked of Armed Forces at Sea, 1949
  - Geneva Convention (III) on Prisoners of War, 1949
  - Geneva Convention (IV) on Civilians, 1949
- Protection of cultural property:
  - Hague Convention for the Protection of Cultural Property, 1954
  - Hague Protocol for the Protection of Cultural Property, 1954
- Increase in internal conflicts and new types of armament: ICRC new international conferences 1977
  - Additional Protocol (I) to the Geneva Conventions, 1977
  - Additional Protocol (II) to the Geneva Conventions, 1977

- Rules regarding means and methods of combat:
  - Problems with religious connotation Red Cross symbols (crescent/red cross):
    - Additional Protocol (III) to the Geneva Conventions, 2005
- Development of IHL: ICRC

# 2. MAIN CONTENTS OF INTERNATIONAL HUMANITARIAN LAW

- ICJ 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons
  - *General Assembly, by its resolution 49/75 K adopted on 15 December 1994, to submit to the Court, for advisory opinion, the following question : “Is the threat or use of nuclear weapons in any circumstance permitted under international law ?”*
  - Principles and rules of international humanitarian law applicable in armed conflict and of the law of neutrality. Two cardinal principles+Martens clause:
    - a) the first being aimed at the distinction between combatants and non-combatants: States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets while
    - (b) according to the second of those principles, unnecessary suffering should not be caused to combatants. It follows that States do not have unlimited freedom of choice in the weapons they use.
    - the Martens Clause, according to which civilians and combatants remained under the protection and authority of the principles of international law derived from established custom, the principles of humanity and the dictates of public conscience.
  - Contemporary understanding: *ius cogens*.

## **2.1. Principle of Distinction.**

- Art. 48 Additional Protocol I "Basic Rule". In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

### **a) The distinction between combatants and civilian population**

#### **i. Combatants' statute**

- Qualification of belligerents:

- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. (art. 1): Members of regular armies of the States.
  - Militias and volunteer corps that meet 4 conditions:
    - ❖ To have at the head person responsible for subordinates.
    - ❖ Distinctive fixed and perceptible at a distance.
    - ❖ To carry arms openly.
    - ❖ To be subject to laws and customs of war.
  - Population of a non-occupied territory that when approaching the enemy spontaneously takes arms to fight the invading troops (as long as it respects laws and customs of war).

- 1949 Geneva Conventions: Combatants-protected persons (wounded or sick in campaign/wounded, sick and shipwrecked of AFP at sea/held by the enemy as POWs): Art. 13 I & II Convention and art. 4 A III Convention.
  - Belligerents of the 1907 Hague Regulations but broadening the 2nd category to include partisan fighters.
  - Additional categories:
    - ❖ Members of regular armed forces who profess allegiance to a Government or an authority not recognized by the Detaining Power.
    - ❖ Persons who accompany the armed forces without actually being members thereof, such as civil members of military aircraft crews, war correspondents, supply contractors, members of labor 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.
    - ❖ Members of crews, including masters, pilots and apprentices of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favorable treatment under any other provisions in IL.
- Additional Protocol I: art. 43 y 44
  - Art 43: all organized **armed forces**, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party.
  - Art. 44 Combatants and prisoners of war



## ***ii. Civilian Population***

- Civilian population is composed of “civilian persons”. Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals.
- Negative definition: Art. 50 Additional Protocol I “any person who does not belong to one of the categories of persons referred to in...”
  - Members of the Armed Forces parties to the conflict.
  - Members of militias and volunteer corps, including organized resistance movements, and who qualify as combatants.
  - Regular armed forces members following instructions from a government or authority not recognized by the detaining power.
  - Population of an occupied territory who spontaneously take up arms to defend themselves.
  - Members of the Armed Forces as defined in Additional Prot. I (including guerrillas).
- International case law: inclusion of *non-combatants* and “*hors de combat*”
  - when:
    - In power adverse party.
    - Clearly expressing surrender.
    - Unconscious or incapacitated in any way - wounded, sickness - unable to defend himself.
  - Provided that: he/she refrains from hostile acts.

- Problems of practical application: In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
  - Civilian population ≠ civilian person
    - Civilian population does not participate in combat.
    - Civilian persons may accompany the Armed Forces and even be linked, and participate in combat).
- IV Geneva Convention: minimum protection of civilians in time of war extended by Additional Protocols I and II.
  - General protection against dangers military operations.
  - They shall not be the object of attack.
  - Prohibition of acts or threats of violence whose main purpose is to terrorize the population.

### ***iii. Military objectives and civilian objects***

- Geneva Conventions do not address the issue and only Convention IV contains some (insufficient) provisions:
  - Civilian hospitals organized to provide assistance.
  - Prohibition of destruction of property except for military necessity.
- Additional Protocol I: protection of civilian objects.
  - Obligation to distinguish between civilian objects (negative definition) and military objectives (art. 52). Limitation of attacks to military objectives:

- 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.
- Special protection to:
  - Cultural objects and places of worship (art. 53):
    - ❖ Prohibition of hostile acts against historical monuments, works of art or places of worship, cultural or spiritual heritage of peoples.
    - ❖ Use them in support of military effort.
    - ❖ Committing acts of reprisal against property.
    - ❖ 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict and Additional Protocols of 1954 and 1999.
  - Protection of objects indispensable to the survival of the civilian population (art. 54) as a guarantee against famine (foodstuffs, crops, agricultural areas that produce them, livestock, drinking water installations and reserves, irrigation works). Exception: exclusive use for the subsistence of the Armed Forces or in direct support of military action.
  - Works or installations containing dangerous forces (dams, dykes, nuclear power plants), when the attack may cause their release (art. 56).

## ***2.2. The principle of proportionality***

- Art. 35 Additional Protocol: fundamental rules means and methods of warfare: codification of prior customary international law and, at the same time, progressive development of international humanitarian law.
- The principle of proportionality prohibits attacks against military objectives which are “expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated”
  - The “concrete and direct” military advantage is to be understood as not hypothetical, not speculative or of indirect nature. In that sense, the advantage should be substantial and relatively close – excluding political, economic and other non-military advantages. An advantage that wouldn’t be immediately obvious or would only manifest itself in the long term, would not be sufficient. The anticipated military advantage must be expected to result from the attack and not from the entire military campaign.
  - The “excessive” nature of an attack cannot be understood by reference to a simple numerical threshold (e.g. number of civilian casualties or damaged civilian objects). In principle, one would have to take into account the military value of a target and weigh it against the expected incidental harm.
  - The military advantage gained from an attack should be the one anticipated at the time of the attack. In other words, military commanders can only be required to base their assessment on the facts they had before launching an attack.

- Customary IL: Limitation of methods and means of armed conflict+prohibition of the use of weapons, projectiles, materials and methods of warfare of such a nature as to cause superfluous injury or unnecessary suffering
- Development: Prohibition of the use of methods or means of warfare that are designed to cause, or may be expected to cause, widespread, long-term and severe damage to the natural environment.
- Art. 36 API: Future standard (new weapons).

**a) Limitations of means for armed conflict**

**i. Conventional weapons**

- ICJ: The prohibition of unlimited use of weapons has existed for more than a century and a half.
- Development of the prohibitions:
  - Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868: Renunciation of the use of weapons that would needlessly aggravate the suffering of men placed hors de combat, or would make their death inevitable, as contrary to the laws of humanity (any projectile weighing less than 400 grams and explosive or loaded with explosive or flammable materials).
  - Hague Conventions 1899:
    - Declaration (IV,2) concerning Asphyxiating Gases. The Hague, 29 July 1899.
    - Declaration (IV,3) concerning Expanding Bullets. The Hague, 29 July 1899.

- Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
  - General principle of law: limitation of means and methods.
  - Particular limitations: Art. 23 Regulations
    - ❖ To employ poison or poisoned weapons;
    - ❖ To employ arms, projectiles, or material calculated to cause unnecessary suffering;
- Convention (VIII) relative to the Laying of Automatic Submarine Contact Mines. The Hague, 18 October 1907: Prohibition of laying unanchored submarine contact mines (art. 2) and conditions for anchoring.
- 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. Geneva, 10 October 1980. General provisions prohibition of weapons that cause excessive injury or unnecessary suffering or affect civilians indiscriminately. Specific prohibitions in Protocols:
  - CCW Protocol (I) on Non-Detectable Fragments, 1980
  - CCW Protocol (II) prohibiting Mines, Booby-Traps and Other Devices, 1980+CCW Protocol (II) prohibiting Mines, Booby-Traps and Other Devices, amended, 1996
  - CCW Protocol (III) prohibiting Incendiary Weapons, 1980
  - CCW Protocol (IV) on Blinding Laser Weapons, 1995

- CCW Protocol (V) on Explosive Remnants of War, 2003
- Anti-Personnel Mine Ban Convention, 1997
- Convention on Cluster Munitions, 2008
- Contemporary IL: scope of application Convention and Protocols to internal armed conflicts.

*ii. Weapons of mass destruction*

- WMD: are chemical, bacteriological and nuclear weapons which by definition are not used against a specific military target, but over a wide area with devastating effects (people, infrastructure, environment).
- Development of prohibitions:
  - End IWW: Conference for the Supervision of the International Trade in Arms and Ammunition: Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925.
  - GA Resolution 2826 (XXVI), 16/12/1971 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction.
  - GA Resolution 37/98, 1982
    - A-D: Prohibition on chemical and bacteriological weapons
    - D: on Interim Procedures to Preserve the Authority of the 1925 Geneva Protocol: SG Investigation Mechanism on Chemical Weapons Use.

- The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (the Chemical Weapons Convention or CWC), 1992: Organisation for the Prohibition of Chemical Weapons (OPCW).
- 1994: GA Advisory opinion of ICJ *“Is the threat or use of nuclear weapons in any circumstance permitted under international law ?”*
  - Legality of the threat or use of nuclear weapons.
  - Legality of the threat or use of nuclear weapons in armed conflict.

**b) Limitations of methods for armed conflict**

➤ Part III Additional Protocol: Methods and means of warfare

- Basic rule art. 35: It is prohibited to employ (...) methods of warfare of a nature to cause superfluous injury or unnecessary suffering. 3. It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.
- Art. 37: Prohibition of perfidy: Distinction from stratagem.
- Art. 38: Prohibition of misuse of recognized emblems or signs of nationality: Red Cross, UN...and misuse of other internationally recognized emblems, signs, protective signs (parliament flag and cultural property emblem).
- Art. 39: Prohibition of the use of flags, emblems, insignia, military uniforms of neutral or non-party States, as well as those of the adverse parties during attacks.



- Prohibition of methods by the requiring minimum humanitarian treatment: prohibition of giving no quarter ([art. 40](#): ordering or threatening no survivors, or conducting the attack for that purpose); hors de combat attacks ([art. 41](#)); attacks on aircraft occupants in distress ([art. 42](#) parachute attacks, or no opportunity to surrender).
- GA Res. 31/72, 10/12/1976: Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques.

### **2.3. Principle of precaution**

- Parties to the conflict must respect the principle of precaution. There are two types of precautions under IHL:
  - “precautions in attack” (Precautions to be taken when carrying out the attack).
    - Choose the military objective;
    - Respect proportionality;
    - Take precautions when choosing means and methods;
    - Give effective advance warning;
    - Cancel or suspend when needed.
  - “Passive precautions” or “precautions against the effects of attacks” (Precautions to be taken to protect the population under the control of the party to the conflict against the effects of attacks):

- Avoid locating military objectives within or near densely populated areas;
- Remove the civilian population and civilian objects under their control from the vicinity of military objectives;
- Take all other necessary precautionary measures (such as building shelters, establishing alert systems and evacuation procedures, etc.).

# 3. THE PROTECTION OF VICTIMS OF ARMED CONFLICTS

## ***3.1. Protection of victims.***

- Protection of the civilian population: IV Geneva Convention of 1949 + the Additional Protocols of 1977. Unequal protection of victims according to the type of armed conflict.
- BUT Armed violence may evolve over time. For instance, a situation that begins as a situation of violence below the threshold of IHL may evolve into a NIAC. This will occur when an organized armed group is formed and the violence intensifies. A NIAC may also evolve into an IAC, and vice-versa

### ***a) Provisions applicable in international armed conflicts (IAC).***

#### ***i. Geneva Conventions of 1949***

- Scope of application: International armed conflicts (pp. of effectiveness) with speciality in case of multilateral conflict in which not all States are parties to the Conventions:
  - Cases of declared war or any other armed conflict between two or more High Contracting Parties.
  - All cases of total or partial occupation of the territory High Contracting Party (with or without military resistance)
- Special rules on temporal validity of the application:

- I Convention I: until the protected persons are definitively repatriated.
- III Convention: From the time they fall into the power until they are effectively liberated and repatriated.
- IV Convention: From the beginning of the conflict or occupation until the general cessation of military operations (in occupied territory, until one year after the cessation).
- Combatants' protection (I-II-III Conventions):
  - the status of "combatant" exists only in IAC: "combatant's privilege":
    - right to participate directly in hostilities on behalf of a party to an IAC
    - immunity against prosecution for lawful acts of war.
  - RESPECT AND PROTECT: The wounded, sick and shipwrecked must be respected and protected in all circumstances and wherever they are.
    - Respects implies a negative obligation, namely to refrain from attack, abuse or any other act likely to cause danger and injury. This obligation applies not only to the armed forces, but also to the civilian population.
    - Protect Implies a positive obligation to shield the persons in question from harm, and to proactively safeguard their rights. They must be searched for, collected, and treated humanely.
    - In addition, medical treatment must be provided without adverse distinction. Only medical grounds can determine the priority of treatment which is given to a patient.

- prisoner of war status in case of falling into enemy hands. III Convention & Additional Protocols+special agreements to improve their situation.
- Civilian Population: IV Convention
  - Obligation to respect the human person and basic fundamental rights (art. 27).
  - Specific measures:
    - designation of sanitary and security zones and localities;
    - designation of neutralized zones;
    - prohibition of attacks on civilian hospitals;
    - prohibition of human shields;
    - prohibition of extermination and suffering;
    - prohibition of collective punishment;
    - prohibition of reprisals....
- ii. Additional Protocol I
- Scope of application: Armed conflicts in which peoples are fighting against colonial domination and foreign occupation, and against racist regimes, in exercise of the right to self-determination.
  - General rule start/end application: from the beginning of any of the situations until the general end of operations (or end of occupation) except for persons whose release, repatriation or resettlement occurs later.

- Victims' protection regime: Broad protection regime :
  - Improved protection under Conventions I and II.
  - The prisoner of war status is updated.
  - With respect to the civilian population, it does not treat them as a whole, but rather:
    - Establishes minimum standard for all persons (art. 75) which rests on 3 ideas:
      - ❖ General considerations: humane treatment in all circumstances, without discrimination.
      - ❖ Prohibition of attacks on life and dignity (homicide, torture, corporal punishment, mutilation); prohibition of attacks on personal dignity (humiliating treatment, forced prostitution, indecent assault); hostage-taking; collective punishment; and threats of such acts.

***b) Provisions applicable in non international armed conflicts (NIAC)***

***i. The Geneva Conventions of 1949 (common art. 3)***

- Scope of application: Broad definition of NIAC
  - AC that does not involve two or more States and the conflict arises in a State party to the Conventions (in a third State no unilateral declaration of application is contemplated- nothing prevents it).

- Protection of persons not taking direct part in hostilities: Protection victims less than that of victims in IAC.
  - No combatant status in NIAC: The fact that there is no status of combatant (and hence **no combatant privilege**) in situations of NIAC does not mean that the fighting forces of the parties to a NIAC are civilians. In NIAC, the fighting members of a non-State party are commonly referred to as “fighters”.
    - State armed forces: in NIACs, members of the State armed forces are not protected against attack and may be targeted at all times (provided that the other rules governing the conduct of hostilities are respected).
    - Non-State parties: The “fighters” that are sufficiently embedded into the armed wing of the non-State party can be targeted at all times, provided that they are assigned a **continuous combat function**. People supporting or otherwise associated with the non-State party to the conflict (e.g. those carrying out political or administrative functions) remain civilians.

*ii. Additional Protocol II*

- Scope of application: Narrowing of the definition of internal armed conflict:
  - Armed conflicts not covered by Protocol I and taking place on the territory of a State Party between its armed forces and dissident armed forces or organized armed groups (under responsible command) exercise control over part of the territory enabling them to conduct sustained and concerted military operations, and to implement the Protocol.
  - Critic: Fragmentation regime internal armed conflict.
  - Start/End Rule: from the beginning of hostilities until the end of the conflict, or until the persons subject to deprivation of liberty or restriction as a consequence of the conflict have seen the end of such deprivation.
- Victims' protection: Development and complement of common art. 3, but only in the new type of internal armed conflict:
  - Inclusion of the civilian population, together with civilians, in the protection.
  - Protection of property indispensable for survival, works and installations containing dangerous forces, cultural property and places of worship, prohibition of forced displacement, activities of relief societies.
  - Fundamental guarantees:



- Prohibited conducts: Prohibition of attacks on life and dignity (murder, cruel treatment, torture, mutilation); collective punishments; hostage-taking; acts of terrorism; attacks on personal dignity (humiliating and degrading treatment, rape, forced prostitution, indecent assault); slavery and slave trade; pillage; threats to perform such acts.
- Special regime for the protection of children, regulation of the rights of persons deprived of their liberty, the rights of wounded, sick and shipwrecked persons, and medical and religious personnel.

### **3.2- The implementation of International Humanitarian Law.**

➤ Adoption of Conventions and Additional Protocols: Cold War.

#### **a. *The Geneva Conventions of 1949***

➤ Guarantees for the application of the Conventions:

- All parties undertake to disseminate the texts and incorporate their study in military and, if possible, civilian training programs.
- The parties undertake to communicate national laws and regulations to ensure their application.
- In case of non-compliance: international responsibility of the State/international responsibility of the individual.

- Distinction between "grave breaches" (war crimes) and "other breaches" (Conventions and Protocol I):
  - Regarding "grave breaches" or "war crimes" (both types of responsibilities coexist):
    - ❖ Search for persons accused of having committed or having ordered the commission of any of the "grave breaches".
    - ❖ Bring them before its own courts, regardless of their nationality.
    - ❖ To adopt the necessary legislative measures to determine the appropriate penal sanctions to be applied to persons who have committed or have given orders to commit the "grave breaches" set forth in each of the Conventions and in Protocol I.
  - As regards acts contrary to the remaining provisions of each of the four Geneva Conventions and Protocol I: to take "necessary" or "appropriate" measures to ensure that all acts contrary to those provisions cease.

**b) Additional Protocols I & II of 1977**

- No improvement in the situation of application and repression.
  - Protocol I: grave breaches for individual criminal responsibility although "war crimes" are taken up again but subject to national jurisdiction.
  - Protocol II: No mention of grave breaches or criminal responsibility.

- Persecution in domestic courts left situations in impunity: jurisdiction of international tribunals to try international crimes (certain acts or omissions committed by individuals that were particularly odious because they were contrary to the standards of civilization). International criminal responsibility of individuals.



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