

International Humanitarian Law

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1 Concept and Sources of International Humanitarian Law

Public international law (PIL) regulates the relations among international subjects: States, international organisations and, to a lesser degree, individuals (whose status as a subject is limited to a particular area of application), as well as other entities, such as the Holy See, by granting rights and imposing obligations. Despite the existence of the obligation to settle disputes peacefully,¹ and the obligation to refrain from the threat or use of force against the territorial integrity or political independence of any State,² armed conflicts are still a reality and in need of international regulation.

International humanitarian law (IHL) is a branch of PIL with the purpose of limiting the use of violence in armed conflict in order to protect those who do not or no longer directly participate in hostilities and to restrict the means and methods of warfare. The main goal of armed conflict is to weaken the military potential of the enemy, which is why IHL seeks to restrict the amount of violence necessary to reach this goal. Hence, IHL is the branch of PIL that indicates not only when armed violence may be used but also how.

However, IHL does not generally prohibit the use of violence, focusing instead on its consequences and the need to protect vulnerable persons. Further, IHL applies irrespective of the rationale behind a conflict. It presumes that the aims of the parties engaging in conflict are rational and do not contradict IHL, so that each party to the conflict must adhere to and is protected by IHL. IHL also does not prohibit belligerents from overcoming the other party to the conflict. Furthermore,

¹Art. 33 UN Charter.

²*Id.*, Art. 2(4).

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the limited possibilities to control the correct implementation of IHL lead to the unfortunate result that the protection of IHL in practice does not benefit all those affected by armed conflict.

IHL accords protection based on the all-important principle of humanity.³ In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice (ICJ) indicated these main principles of IHL:

- protection of the civilian population and objects, implying the distinction of combatants and non-combatants;
- prohibition to cause unnecessary suffering to combatants, providing that the use of weapons is not unlimited.⁴

The full range of basic rules governing armed conflict and protection of its victims comprises the following IHL principles:

- distinction between civilians and combatants;
- prohibition to attack people *hors de combat* (Fr. ‘out of the combat’), incapable of continuing to fight;
- prohibition to inflict unnecessary suffering;
- principle of necessity; and
- principle of proportionality.

The principles and regulations of IHL are embodied in the wide range of sources of IHL, the development of which began several millennia ago, with works such as Sun Tzu’s *The Art of War*,⁵ the Code of Manu,⁶ works of ancient Greece⁷ and Rome,⁸ the Old Testament⁹ or Islamic law¹⁰ and further evolved during the Middle Ages.¹¹ Many others were to follow. During the American Civil War, Professor Francis Lieber, at the behest of Union President Abraham Lincoln, prepared the Lieber Code of 1863, which regulated the conduct of Union forces in battle and paved the way for similar code, culminating in IHL.

The codification of the customs and rules of IHL can be traced back to the nineteenth century, which is rather early in comparison with other areas of PIL. The development of the modern sources of IHL began with the adoption of the First Geneva Convention (GC) for the Amelioration of the Condition of the Wounded in

³‘The principle of humanity stands out on its own in the doctrine of the Red Cross, and all other principles hang from it.’ Pictet (1956), pp. 14–31.

⁴Report of the International Court of Justice 1 August 1996–31 July 1997, General Assembly Official Records, Fifty-Second Session Supplement No. 4 (A/52/4), para. 78.

⁵Tzu (2005), *The Art of War*, fourth century BC.

⁶The Laws of Manu (1991), fourth–second century BC.

⁷See, *The Odyssey*, Bk I, lines 260–3 ed. Lattimore (1965), p. 34.

⁸See, Phillipson (1911), pp. 21–23.

⁹See, *The Book of Deuteronomy*, XX, pp. 19–20.

¹⁰See, Siyar (1966).

¹¹See for example *Corpus juris canonici*, 1500. See, Keen (1965).

Armies in the Field of 1864, many provisions of which derived from existing customary rules and practices.

The idea to adopt a unified approach towards the protection of victims of armed conflict was induced by an initiative of Swiss businessman Henry Dunant, which he laid out in his book *A Memory of Solferino* published in 1862.¹² Dunant narrates the horrors he witnessed during the battle of Solferino of 1859, which opposed French, Italian and Austrian forces in northern Italy. He was most shocked by how wounded soldiers had simply been abandoned on the battlefield. On the spot, he gathered local inhabitants to provide shelter and medical aid for victims of the battle. Dunant subsequently called on States to create a convention and enshrine principles that would ensure legal protection for the wounded.

This initiative eventually culminated in the foundation of the International Committee of the Red Cross (ICRC) in Geneva (1863), which began to promote IHL and organised a conference in view of drafting the First GC in 1864.

This treaty was the beginning of what came to be known as Geneva Law, a body of law designed to protect the victims of armed conflict. In 1868, the Declaration relating to Explosive Projectiles was adopted in Saint Petersburg, fostering the development of Hague Law, built on the principle of reciprocity between belligerent parties. Contrary to Geneva Law, Hague Law combined all provisions related to limitations or prohibitions of specific means and methods of warfare. Later, the international community recognised that the developing body of IHL needed to adapt to the reality of contemporary armed conflicts, and more conventions were adopted. Whereas the Hague Conventions of 1899 and 1907 codified laws and customs of war,¹³ others, such as the Geneva Conventions of 1906 and 1929,¹⁴ were devoted to the amelioration of the conditions of victims of armed conflict.

The sources of modern IHL are the four Geneva Conventions (GCs) of 1949¹⁵ and their three Additional Protocols (APs).¹⁶ The GCs are an extrapolation of the previous provisions of Geneva Law, whereas the first two APs of 1977 cover provisions of Geneva and Hague Law, leading to a convergence of both frameworks. The APs further develop rules of the GCs and adapt IHL to new and unconventional situations of warfare, which, albeit, have become the norm today. The four GCs and Additional Protocol I (AP I) apply to international armed conflict (IAC), which pins States against each other. Additional Protocol II (AP II) regulates the rules of warfare in non-international armed conflict (NIAC), opposing State forces and organised non-State actors or two or more groups of non-State actors.

¹²Dunant (1989).

¹³Hague Conventions II of 1899 and IV of 1907.

¹⁴1906 Geneva Convention on the Wounded and Sick in Armies in the Field, 1929 Geneva Convention on the Treatment of Prisoners of War.

¹⁵1949 Geneva Conventions (GCs): (I) on the Wounded and Sick in the Field, (II) on the Wounded, Sick and Shipwrecked at Sea, (III) on the Treatment of Prisoners of War and (IV) on the Protection of Civilian Persons.

¹⁶1977 Additional Protocols (APs) I, II to the GCs. 2005 AP III to the GCs.

Additional Protocol III of 2005 (AP III) introduces an additional distinctive humanitarian emblem alongside the Red Cross and Red Crescent: the red crystal.

Despite the widespread ratification of these main treaties, customary norms of IHL remain important as they fill the gaps left by treaty law and apply to States that may not have ratified particular conventions. Moreover, customary IHL strengthens the protection of victims in NIAC as the codified rules regulating NIAC are substantially less numerous than those applying to IAC. One of the most general examples of customary IHL is the famous *Martens Clause*, which acts as a sort of umbrella rule and provides that '[. . .] in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience'.¹⁷

2 Application of International Humanitarian Law

IHL applies from the beginning of any armed conflict, whether of international or non-international character. The rules of IHL, however, do not apply to internal disturbances that are marked by serious disruptions of domestic order resulting from isolated or sporadic acts of violence, such as riots, but that do not reach the level of armed conflict. Moreover, provisions of IHL referring to implementation, such as the obligation of disseminating information on the laws of armed conflict, also apply in times of peace.

As regards terminology, the notion of 'war' must be distinguished from that of armed conflict, which is used today in IHL. The term war is an expression of the classic understanding that a state of war only begins with a corresponding declaration. Pictet's Commentary to GC I indicates:

It remains to ascertain what is meant by "armed conflict". The substitution of this much more general expression for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war". A State can always pretend, when it commits a hostile act against another State, that it is not making war, but merely engaging in a police action, or acting in legitimate self-defence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict [. . .], 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. [. . .] If there is only a single wounded person as a result of the conflict, the Convention will have been applied as soon as he has been collected and tended, [. . .].¹⁸

The International Criminal Tribunal for the former Yugoslavia (ICTY) confirmed this reading in the 1995 Tadic case, stating that 'an armed conflict exists

¹⁷Art. 1(2) AP I and the preamble to AP II, at para. 4; This clause was first introduced in 1899 at The Hague Conference and can be found in the preambles to Hague Conventions II, IV and, although only implicitly, in GCs I-IV, Arts. 63/62/142/158 respectively.

¹⁸See Pictet (1952), p. 32.

whenever there is a resort to armed force between States [...]’.¹⁹ However, it is important to remember that this *first shot* rule only applies to situations of IAC, with the exception of certain cases that do not fulfil the criteria of IAC but to which the law regulating IACs nevertheless applies. In this vein, Common Article 2 GCs stipulates that IHL applies ‘to all cases of partial or total occupation of the territory of the High Contracting Party even if the said occupation meets with no resistance’. Article 1(4) AP I stipulates that the Protocol also covers

conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

To trigger an NIAC, the level of intensity of internal violence is required to be higher than in the case of IAC with its *first shot* rule. The ICTY has required ‘protracted armed violence between governmental authorities and organized armed groups or between such groups within a State’²⁰ in order for a situation to reach the level of NIAC. This is because States are very cautious about qualifying a violent confrontation as NIAC due to the range of obligations therefore imposed on them, which would not apply in cases of internal unrest below the threshold of NIAC. Unfortunately, Common Article 3 GCs does not provide indications as to the lowest possible level of armed confrontation required in order for IHL to apply.

Terrorist acts are also covered by the provisions of IHL where they form part of an armed conflict. However, terrorist acts committed outside this context fall outside the scope of IHL. In many instances, classifying the action of terrorists poses difficulties and is highly contested.

The application of IHL ends with the *general close of military operation*.²¹ In the case of NIAC, AP II refers to the ‘end of the armed conflict’²² as the moment when IHL ceases to apply. In practice, contemporary armed conflicts are often protracted crises that may continue to rage for a long time, albeit at lower intensity. Ceasefires are also frequently unstable. Hence, armed conflicts rarely end with *debellatio*, a clear defeat of one side. To stay abreast of these circumstances, IHL continues to apply to direct post-conflict consequences of armed conflict.²³

¹⁹ICTY, Prosecutor v. Tadic, IT-94-1-AR72, Appeals Chamber, Decision 2 October 1995 Part A, para. 70.

²⁰*Ibid.*

²¹GC IV, Art. 6(1) and (2); AP I, Art. 3(b).

²²Art. 2(2) AP II.

²³See Art. 5 GC I, Art. 5 GC III, Art. 6(3) GC IV, Art. 3(b) AP I, Art. 2(2) AP II.

3 International and Non-international Armed Conflict

Historically, PIL developed within the framework of interstate relations. Similarly, IHL was at the beginning not concerned with internal armed conflicts that were assumed to fall under the sovereign domestic jurisdiction of States. After the adoption of AP II in 1977, however, certain NIACs became part of the theatre of conflict regulated by IHL.

IAC is defined in Common Article 2 GCs, as well as Article 1 AP I, and denotes a situation of armed clashes between two or more States, also including occupations,²⁴ as well as wars of national liberation.²⁵

Article 1 AP II defines an NIAC as comprising all types of conflict outside the scope of AP I. The same article further states that such conflict

takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and implement this Protocol.

It is important to note that this definition does not apply to the wider range of situations covered by Common Article 3 GCs. Hence, certain types of internal conflict are only covered by Common Article 3 GCs, not by the narrower scope of AP II. The ICTY has replaced the requirement of a conflict's protracted character by the requirement of intensity. It emphasised that NIACs must reach a sufficiently high degree of organisation and level of violence in order to be identified as such.²⁶

Legal regulation of both types of armed conflict differs in terms of broadness, specialisation and institutional supervision. The law of IAC is codified with specialised rules and well-established international supervision mechanisms, whereas NIAC is much less regulated as existing provisions are of a more general character and the framework lacks institutional supervision.

Despite the formal differences that characterise both regimes, there is a tendency to reduce the gap in the regulation of IAC and NIAC. The 2005 ICRC study on customary IHL,²⁷ the result of ten years of research, found that 136 (arguably even 141) out of 161 codified rules of IHL also formed part of customary IHL. Although

²⁴Art. 2(1) GC I-IV: '[. . .] the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance'.

²⁵Art. 1(4) AP I: 'The situations referred to in the preceding paragraph include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination [. . .].'

²⁶ICTY, Prosecutor v. Tadic, IT-94-1-AR72, Appeals Chamber, Decision 2 October 1995, Part E, paras. 49 and 60; ICTY, Prosecutor v. Ljube Boškoski and Johan Torčulovski, IT-04-82-T, Judgement 2 July 2008, paras. 177–206.

²⁷International Humanitarian Law (1996), pp. 194–222.

most of them are based on AP I norms that only directly apply to IAC, as norms of custom, they equally apply to NIAC.

From a humanitarian point of view, the protection of the victims of NIAC must equal the one accorded to victims of IAC, especially given that most conflicts in today's world are NIACs. Moreover, according to Common Article 3(4) GCs, the application of these norms to NIAC does not make an NIAC international in character. Even where the parties agree to submit themselves to all of the laws regulating IAC during their struggle, as Common Article 3 (3) GCs encourages them to do, this does not turn an NIAC into an international conflict.

4 Principle of Distinction

The most fundamental principle of IHL, the principle of distinction, mandates that armed conflict must only take place between members of the armed forces of the belligerents and should not affect civilians. This requirement stems from the need to identify who those participating in hostilities can attack as the principle of distinction mandates that only the enemy's military potential may be targeted. Accordingly, persons lawfully participating in the hostilities, referred to as combatants, must be distinguished from persons *hors de combat* (for example, the wounded) and people not involved in the hostilities (civilians²⁸).

The protection of civilians encompasses the obligation to treat them humanely at all times and to protect them especially against all acts of violence or threats thereof, as well as against insults and public curiosity.²⁹ Any State must safeguard civilians under its jurisdiction and refrain from ill-treating them, for example by confiscating their property or hindering their access to food, water, shelter or medical assistance.³⁰

Special groups of civilians requiring particular care are children, women, families, the elderly,³¹ refugees and the displaced.³² Children must be protected from assault, receive care and be prevented from taking part in hostilities (while they are under 15 years of age). They must also not be left on their own and be separated from adults in case of arrest. Further, the death penalty may not be administered to children below the age of 18.³³ Women must be treated equally to men, but due to their objective vulnerability preferential treatment should be afforded. In this vein,

²⁸The definition of civilians is enshrined in Art. 50 AP I, which states 'A civilian is any person who is not a member of armed forces'.

²⁹Art. 27 GC IV.

³⁰See Arts. 13–26 GC IV, Arts. 72–79 AP I, in particular Art. 75.

³¹See Arts. 44, 45 and 49 GC III; Arts. 27(3), 85(2) and 119(2) GC IV.

³²See Arts. 23, 44 GC IV; Art. 70 AP I.

³³See Art. 76 GC IV; Art. 77 AP I.

women are accorded special respect of their sexual integrity³⁴ and due attention in case of pregnancy or nursing.³⁵ Each party to a conflict must facilitate family reunifications wherever possible³⁶ and alleviate other needs by establishing hospitals and safety,³⁷ neutral³⁸ or demilitarised zones.³⁹

The principle of distinction must be observed at all times. However, the ‘civilianization’⁴⁰ of modern armed conflicts is increasingly causing difficulties for the implementation of the principle of distinction. Asymmetric warfare⁴¹ and the emergence of new actors, such as the engagement of private military and security companies,⁴² lead to greater implication of civilians participating in hostilities and result in the loss of their protection from being directly attacked. However, generally, where a person’s status is in doubt, that person shall be considered a civilian.⁴³

A combatant is a person who takes a direct part in the hostilities of an armed conflict⁴⁴ as a member of the armed forces *stricto sensu* (Lat. ‘in the restricted sense’) recognised and identified by the State that controls the armed forces in question according to national law. The definition of combatants *lato sensu* (Lat. ‘in the broad sense’) covers members of a group who fulfil the following requirements⁴⁵:

- being commanded by a person responsible for his subordinates;
- having a fixed distinctive sign recognisable at a distance;
- carrying arms openly;
- conducting operations in accordance with the laws and customs of war.

AP I adapts these requirements to the increased need for regulation of national liberation movements and guerrilla warfare. Article 43 AP I states that armed forces of a party to a conflict comprise organised groups and units under the command of that party, even if the latter is represented by a government or an authority not recognised by the opposing party. In order to qualify as armed forces, troops must be subject to an internal disciplinary system, which can ensure compliance with the rules of IHL.

³⁴Art. 27 GC IV.

³⁵See for example Arts. 89 and 132 GC IV, Art. 76(3), AP I Art. 6(4) AP II.

³⁶See Art. 74 AP I.

³⁷See Art. 14 GC IV.

³⁸See Art. 15 GC IV.

³⁹See Art. 60 API.

⁴⁰See Wenger and Mason (2008).

⁴¹For details, see Pfanner (2005).

⁴²For details, see Percy (2012).

⁴³This has been stated by, among others, the ICTY and the International Criminal Court, see: http://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule5.

⁴⁴GC III Art. 4.

⁴⁵Art. 1 Hague Convention IV, Art. 4(A)(2) GC III.

The requirements relating to organisation, responsibility and compliance with the law of armed conflict equally apply to national liberation movements and their forces. Recognising, however, that there are situations in armed conflicts in which combatants cannot be distinguished from other participants to the conflict, due to the nature of the hostilities, they nevertheless retain their combatant status if they carry arms openly (a) during each military engagement and (b) during such time as they are visible to the adversary while engaged in military deployment preceding the launching of an attack in which they are to participate.

Combatant status is also conferred upon inhabitants of non-occupied territory who on approach of an enemy spontaneously take up arms to resist the invading forces. This is also the case where defensive forces have not had time to constitute themselves as regular armed units, provided they carry arms openly and respect the laws and customs of war (*levée en masse*). All other persons do not have the right to kill combatants and can therefore not lawfully participate in hostilities the way combatants do.

Combatants do not lose their status under IHL even if they violate the law of armed conflict, unless they fail to distinguish themselves from the civilian population.

Combatants captured by enemy forces are accorded prisoner of war (POW) status. The belligerent party detaining POWs has full jurisdiction over them. The captured is a prisoner of a capturing State. It is under an obligation to respect the rights accorded to POWs in GC III. POWs must at all times be treated humanely⁴⁶ and may not be prosecuted for mere participation in hostilities. Becoming a POW is not a punishment but entails preventing combatants from further participation in the armed conflict. If in doubt about whether someone is to be granted POW status, this is presumed to be the case until the person's real status has been determined. POW status is also granted to persons accompanying armed forces, including those belonging to non-combat groups such as aircraft/ship crews or war correspondents. However, spies and mercenaries do not receive POW status when captured.

The two major categories of defenceless persons in IHL are persons *hors de combat* and civilians. The amount of protection applicable to them varies but does not depend on whether they had earlier taken part in hostilities or not. Civilians who take a direct part in hostilities may be targeted by combatants. The ICRC's *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*⁴⁷ provides details on when civilians may be qualified as directly participating. Belligerent parties have the right to make sure that POWs do not rejoin the battle. As they are not considered military targets, their protection stems from the basic principle of distinction.

⁴⁶Art. 13 GC III.

⁴⁷See Melzer (2009); <http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf>.

5 Means and Methods of Warfare

The definition of *means* of warfare within the scope of IHL encompasses weapons and weapons systems or platforms employed for the purposes of attack, as well as, more generally, all equipment used during the conduct of hostilities. *Methods* of warfare denote the conduct of hostilities and concern the way in which the means are used. Such methods include tactical or strategic ways of conducting hostilities, not related to any specific weapons and which are intended to overwhelm or surprise and ultimately weaken the enemy. The laws of IHL governing means and methods of warfare contain two types of norms: general principles banning certain effects and specific rules addressing particular weapons or methods.

The main principle of IHL in this regard limits the rights of the parties to the conflict to choose such means or methods.⁴⁸ This restriction is based on the main principles of IHL, the distinction of civilian and military objectives, prohibition to cause unnecessary suffering and the principle of proportionality. Some methods of warfare are always prohibited, whereas others are forbidden only if the result of their use would violate these principles. Likewise, the use of certain means, namely weapons, is prohibited under any circumstances due to their inherent characteristics, whereas others may be used, subject to limitations. Such restrictions are listed in the GCs and their Aps, as well as other international instruments. Certain methods of warfare directly contradicting the principles of IHL are considered grave breaches of the law of armed conflict and war crimes. Article 85 AP I provides a non-exhaustive list of such methods.

6 Legal Status and Protection of Humanitarian Workers

IHL ensures protection of humanitarian workers, which derives from the purpose of their activity during armed conflict and the key elements of their work—independence and neutrality. The GCs and their APs distinguish between two main groups of humanitarian workers—those affiliated with the International Red Cross and Red Crescent Movement and those working within independent humanitarian organisations.

Legal protection of Red Cross and Red Crescent Movement affiliates is due to the medical aid they provide to the sick and wounded, combatants as well as civilians. To this end, IHL mandates the use of the Red Cross, Red Crescent and Red Crystal emblems and prescribes special attention by States parties towards them. The emblems may only be used as protective signs by medical services of regular armed forces,⁴⁹ National Red Cross and Red Crescent Societies,⁵⁰ civilian

⁴⁸Art. 35 AP I.

⁴⁹Art. 38 GC I.

⁵⁰Art. 26, 42, 44 CG I.

hospitals and other medical facilities recognised as such by the government and authorised to display the emblems as protective symbol.⁵¹ The emblems may also serve to mark persons as well as vehicles or other machinery of impartial international humanitarian organisations,⁵² so long as they remain under the control of the parties to the conflict. The GCs and their APs demand that States legislate on the authorisation of these emblems.

IHL also provides protection to medical personnel, administrative support staff and religious attendants who work to protect the wounded, sick and shipwrecked⁵³:

- Personnel is not to be attacked on the battlefield and must be allowed to perform its medical or religious duties.⁵⁴
- Fallen into the hands of the adverse party, medical and religious personnel are not to be considered POWs and may only be detained if they are to take care of POWs held by the respective State party.⁵⁵

GCs I and IV provide protection to civilians caring for sick and wounded combatants and/or civilians.⁵⁶ AP I further expands the category of persons (permanent or temporary personnel, military or civilian) protected by virtue of their medical or religious functions.⁵⁷ Aid societies are granted the same protection if they meet the requirements laid out in the Conventions.⁵⁸

Humanitarian workers affiliated with independent humanitarian organisations that deploy humanitarian assistance may act in armed conflict under the protection of IHL.⁵⁹ The ICJ defined humanitarian assistance in the Nicaragua case as

[a]n essential feature of truly humanitarian aid is that it is given “without discrimination” of any kind. In the view of the Court, if the provision of “humanitarian assistance” is to escape condemnations as an intervention in the internal affairs of Nicaragua, not only must it be limited to the purposes hallowed in the practice of the Red Cross, namely “to prevent suffering”, and “to protect life and health and ensure respect for the human being”; it must also, and above all, be given without discrimination to all in need in Nicaragua. ...⁶⁰

The legal protection that humanitarian workers are accorded under IHL includes protection from attack and mistreatment while in the hands of the opposing party. The scope of protection depends upon the applicable IHL provisions pertaining to the nature of the conflict. As civilians, humanitarian workers benefit from the

⁵¹Art. 18 GC IV.

⁵²Art. 9 AP I.

⁵³Arts 24 and 25 GC I; Arts. 36 and 37 GC III.

⁵⁴See Arts. 24–27 GC I; Arts. 36 and 37 GC II; Arts. 15–20 AP I; Art. 9 AP II.

⁵⁵See Arts. 28 and 30 GC I; Art. 37 GC II; Art. 33 GC III.

⁵⁶See Art. 18 GC I, Art. 20(1) GC IV.

⁵⁷See Art. 8(c) and (d) AP I.

⁵⁸See Arts. 26 and 27 GC I; Art. 25 and 36 GC II; Art. 9(2) AP I.

⁵⁹See Common Art. 3 GCs; GC I-III Art. 9, GC IV Art. 10; GC IV Art. 59, 61.

⁶⁰ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Judgement, ICJ Rep. 1986, para. 243.

principle of distinction, applicable both in IAC and NIAC. Violation of this principle constitutes a war crime.⁶¹ Unfortunately, in practice, humanitarian workers travelling with armed escorts risk being identified with armed groups and become more vulnerable to possible attacks.

7 Access to Humanitarian Relief During Armed Conflict

The notion of access to humanitarian relief is not defined in IHL. It is generally understood as the right to receive international protection and relief from an impartial humanitarian relief operation. Such action is subject to the consent of the State or parties concerned and does not prescribe coercive measures in the event of refusal, however unwarranted.⁶²

The main legal basis for a right to access to humanitarian relief is a customary rule of IHL, which states that '[t]he parties to the conflict must allow and facilitate rapid and unimpeded passage of humanitarian relief for civilians in need, which is impartial in character and conducted without any adverse distinction, subject to their right of control'.⁶³ The application of other legal grounds depends on the nature of the armed conflict in question. During IAC, the provisions of the GCs and AP I apply. Article 23 GC IV stipulates that States must 'allow the free passage of all consignments of medical and hospital stores intended only for civilians and the free passage of all consignments of essential foodstuffs, clothing and tonics intended for children under fifteen, expectant mothers and maternity cases'. The belligerents must also ensure rapid and unimpeded passage of all relief consignments, equipment and personnel.⁶⁴ While the provisions of GC IV are somewhat limited regarding vulnerable groups or types of goods and supplies, AP I applies to the entire civilian population. It is forbidden to delay forwarding consignments and diverting them from the purpose for which they are intended under AP I. However, certain exceptions for the benefit of the population or urgent necessity are allowed.⁶⁵ Parties to the conflict are also obliged to take positive action to protect relief consignments and to facilitate their rapid distribution, as well as to encourage and facilitate effective international coordination of relief action.⁶⁶

In times of occupation, the occupying power must either ensure that the civilian population receives essential supplies or accept relief from external actors.⁶⁷

⁶¹Rome Statute of the International Criminal Court, A/CONF.183/9, 17 July 1998 and also reprinted in ILM, Vol. 37, 1998, Art. 8(2)(b)(iii).

⁶²A definition formulated by OCHA: <http://www.who.int/hac/about/reliefweb-aug2008.pdf>.

⁶³Rule No. 55 in Henkaerts (2005).

⁶⁴See Art. 70(2) AP I.

⁶⁵Art. 70 (3)(c) AP I.

⁶⁶Art. 70 (4) and (5) AP I.

⁶⁷Art. 59 (1) GC IV.

AP II does not pronounce on access to humanitarian assistance for NIAC.⁶⁸ However, the ensuing legal gap between IAC and NIAC regarding this issue is closed by customary rules, including the requirement to respect and protect humanitarian assistance personnel and objects and to ensure free movement of authorised humanitarian assistance personnel.⁶⁹

Both AP I and II require consent of the parties concerned to humanitarian relief.⁷⁰ Such consent, however, may not be withheld arbitrarily,⁷¹ and a refusal must be based on valid reasons. Where a lack of relief would amount to hunger and starvation, a party's refusal to accept relief is invalid and may amount to a war crime.⁷² In NIAC, the consent of non-State armed groups is not officially required. However, in practice, consent of these actors becomes relevant for implementation of relief efforts where non-State armed groups control or operate in the territory concerned.

8 Responsibility for Breaches of International Humanitarian Law

IHL not only regulates the conduct of belligerent parties in conflict. It also sets obligations and provides mechanisms to implement and enforce its provisions. Common Article 1 GCs stipulates that States must respect the Convention at all times. States also have an obligation to suppress violations of IHL. The GCs and AP I list the most serious violations, which should be punished as grave breaches of IHL.⁷³ Serious infringements listed amount to war crimes. War crimes were first defined in the London Charter,⁷⁴ which established the post-World War II Nuremberg Tribunal in its annex, which stated that

violations shall include, but not be limited to murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.⁷⁵

⁶⁸Art. 18 (2) AP II.

⁶⁹Rules No. 31, 32; Rule No. 55, See Art. 70(2) AP I.

⁷⁰Art. 70 (1) AP I, Art. 18 (2) AP II.

⁷¹Art. 23 GC IV, Art. 70 (3) AP I.

⁷²Art. 54 AP I, Art. 14 AP II.

⁷³See Art. 49 and 50 GC I, Art. 50 and 51 GC II, Art. 129 and 130 GC III, Art. 146 and 147 GC IV, Art. 85 AP I.

⁷⁴See also Rome Statute of International Criminal Court, See Art. 70(2) AP I, Art. 8 where the definition is wider—in addition listing all the possible offences listed in the GCs and AP I.

⁷⁵The London Charter, Art. 6(b).

This list is not exhaustive and leaves room for other infringements, such as executing a spy without trial or disregarding an offer to surrender. War crimes do not require widespread or systematic commission, so that any single act may constitute a war crime, given that it is directly linked with a situation of armed conflict.

As IHL itself neither proscribes penalties nor establishes criminal procedure mechanisms, States have to address war crimes at the national level. The principle of *aut dedere aut judicare* (Lat. ‘extradite or prosecute’) requires the initiative to prosecute possible offenders to be given to the other related State.⁷⁶

States parties to the Geneva Conventions should also start criminal or disciplinary proceedings for infringements below the level of war crimes. Since national proceedings can only go ahead when national laws criminalise such acts, States should already enact corresponding legislation in times of peace.⁷⁷

According to the GCs, every State has the obligation to join the search for persons alleged to have committed, or to have ordered, grave breaches of IHL and shall bring such persons to justice before its own courts, regardless of their nationality.⁷⁸ This is an obligation under the principle of universal jurisdiction, which has evolved as a mean to avoid immunity of offenders. However, a risk of possible negative consequences should be kept in mind when exercising universal jurisdiction. Unbridled universal jurisdiction could challenge the global legal order and deprive individuals of their rights when used in a politically motivated manner or for vexatious purposes.⁷⁹

At the international level, States are responsible for actions committed by their armed forces.⁸⁰ Therefore, States must require their military commanders to prevent or suppress breaches of IHL and keep control of their subordinates.⁸¹ The fact that a breach of the GCs or of AP I or II is committed by a subordinate does not exempt his superiors from penal or disciplinary responsibility if they had reason to know that he was going to commit such a breach and did not take preventive measures.⁸² Subordinates bear the responsibility for related consequences but may claim extenuating circumstances.

The concept of grave breaches of IHL does not apply to NIACs. However, international instruments,⁸³ judicial decisions⁸⁴ and the literature imply that serious

⁷⁶In general, criminal law of a State applies only to acts committed within its territory or by its own nationals.

⁷⁷Art. 49 GC I, Art. 50 GC II, Art. 129 GC III, Art. 146 GC IV, Art. 80 AP I.

⁷⁸Art. 49 (2), Art. 50 (2) GC II, Art. 129 (2), GC III, Art. 146 (2) GC IV.

⁷⁹Bassiouni (2008), p. 153.

⁸⁰Art. 91 AP I.

⁸¹Art. 87 AP I.

⁸²Art. 86 (2) AP I.

⁸³ICTY Statute, UN Doc. S/RES/827 (May 25, 1993), Interpretation of Art. 3 in ICTY, Prosecutor v. Tadic, IT-94-1-AR72, Appeals Chamber, Decision 2 October 1995 Part A, para. 70; UN Statute of ICTR, UN Doc. S/RES/955 (November 8, 1994) Art. 4; Rome Statute of the International Criminal Court, Art. 70 (3)(c) AP I, Art. 8(2)(c), 8(2)(e).

⁸⁴ICTY, Prosecutor v. Tadic, IT-94-1-AR72, Appeals Chamber, Decision 2 October 1995 Part A, para. 70 and more cases listed in Sassòli et al. (2011), p. 60.

violations of the law on NIAC is covered by customary norms of IHL, which are equal in scope to the rules of the GCs and AP I.

Most importantly, the international community has taken steps to establish international judicial bodies with the mandate to prosecute individuals for war crimes and other international crimes. This topic is discussed in the next chapter.

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