

INTERNATIONAL HUMANITARIAN LAW AS AN EVOLVING FIELD OF LAW

By Dr. Miriam Defensor Santiago¹

DEFINITION AND BACKGROUND

International humanitarian law is a new field of law that governs the use of force, specifically the protection of persons from the effects of armed conflicts. This new field was officially acknowledged by the International Court of Justice in 1996 when it ruled that the Law of the Hague dealing with the laws and customs of war, and the Law of Geneva dealing with the protection of civilians during armed conflict, “have become as closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”² The Court added that “[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law.”³

International humanitarian law developed from the middle of the nineteenth century, with the following milestones:

- 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Crimes in the Field, later revised in 1906.
- 1868 Declaration of St. Petersburg prohibiting the use of small or incendiary projectiles.

¹ Keynote speech at the opening ceremonies of the 2007 Conference on International Humanitarian Law to Mark the 30th Anniversary of the 1977 Additional Protocols, held at Manila on 29 August 2007.

² Advisory Opinion on the *Legality of the Threat on Use of Nuclear Weapons*, 1996 ICJ 256.

³ *Id.*

- 1899 and 1907 Hague Conventions codifying the laws of men.
- 1949 Four Geneva “Red Cross” Conventions.
- 1977 Two Additional Protocols to the Geneva Conventions.

The Four Geneva Conventions

The Four Geneva Conventions consist of the following:

1. The First Geneva Convention concerns the Wounded and Sick on Land.
2. The Second Geneva Convention concerns the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea.
3. The Third Geneva Convention is concerned with prisoners of war, and requires humane treatment in all circumstances.
4. The Fourth Geneva Convention is concerned with the protection of civilians in time of war.

The Two Additional Protocols

The Two Additional Protocols consist of the following:

1. Protocol 1 defines combatants as members of the armed forces of a party to an international armed conflict. Such armed forces consist of all organized armed units under an effective command structure, which enforces compliance with the rules of international law applicable in armed conflict. 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.⁴ Protocol

⁴ Article 43 and Article 44, specifically para. (3).

1 defines a civilian or any person, not a combatant, and provides that in cases of doubt, a person is to be considered a civilian.⁵

2. Protocol 2 also protects civilians, and establishes the International Fact-Finding Commission. Protocol 2 developed the common Article 3 of the Geneva Conventions. It applies by virtue of Article 1 to all non-international armed conflicts which take place in the territory of a state party between its armed forces and dissident armed forces, which have to be under responsible command and exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations, and actually implement Protocol 2.

Two Cardinal Principles of Humanitarian Law

Duly noting the subject matter of both the Hague and the Geneva Conventions, the International Court of Justice in the same case summarized the cardinal principles of humanitarian law, as follows:⁶

- The first principle 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 must consequently never use weapons that are incapable of distinguishing between civilian and military targets.

- The second principle prohibits unnecessary suffering caused on combatants. Weapons that cause unnecessary harm to combatants, or uselessly

⁵ Article 50 para. (1).

⁶ 1996 ICJ Rep 226, 257.

aggravate their suffering, is prohibited. States do not have unlimited freedom of choice of means in the weapons they use.

The Court called the principle of civilian protection and the principle of prohibiting of unnecessary suffering as “intransgressible principles of international humanitarian law.”⁷ As such, these two principles are binding on all states, even including those states that have not ratified the Hague and Geneva Conventions. These two principles are firmly rooted in the “overriding consideration of humanity.”⁸

Geneva Conventions Bind All States

The 1949 Geneva Conventions bind all states. But the 1977 Additional Protocols do not yet have the same status, except if the provisions merely codify existing international customary law. Otherwise, the Protocols bind only the state parties. Certain major military powers, such as the United States, are not party to the First Protocol. The Philippines in 1952 ratified all Four Geneva Conventions, and subsequently in 1986 ratified the 1977 Protocol 1. The Philippines in 1977 signed Protocol 1, but has not yet ratified it, and consequently is not a state party.

In the 1986 *Nicaragua* case,⁹ the International Court of Justice affirmed the universally binding character of the four Geneva Conventions, which all contain common Article 3 concerning “general principles of humanitarian law.” The Court took the view that “the Geneva Conventions are in some respects a

⁷ *Id.*

⁸ *Id.*, at 226, 257, and 262-3.

⁹ *Nicaragua v. United States*, 1986 ICJ Rep 113-14, para. 218.

development, and in other respect no more than an expression, of such principles.”

The Court explained:

Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity” (Corfu Channel, Merits, ICJ Reports 1949, p. 22; paragraph 215 above). The Court may therefore find them applicable to the present dispute, . . .

Prof. Brownlie of Oxford¹⁰ notes that on its own accord, the International Court of Justice used the phrase “general principles of humanitarian law” six times.

OVERLAP WITH INTERNATIONAL HUMAN RIGHTS LAW

Insofar as it incorporates the law of war, international humanitarian law may overlap with international human rights law. Both fields of international law are rapidly evolving, and both share a common foundation in the principle of respect for human dignity.¹¹ This area of overlap between the two fields of law has been formally acknowledged in various ways.

In 1970, the General Assembly passed a resolution which emphasized that fundamental human rights “continue to apply fully in situations of armed conflict.”¹² In 1976, the European Commission on Human Rights ruled in one case that in belligerent operations a state is bound to respect not only the

¹⁰ Ian Brownlie, *Principles of Public International Law*, 6th ed. 538. Oxford University Press: New York, 2003

¹¹ See *Furundzija* case, 121 ILR 213, 271.

¹² GA Res. 2675 (25)

humanitarian law laid down in the Geneva Conventions, but also fundamental human rights.¹³

Subsequently, the Inter-American Commission on Human Rights declared that in situations of internal armed conflict, the two fields of international humanitarian law and international human rights law “must converge and reinforce each other.” It noted that the Geneva Conventions common Article 3, and the Inter-American Convention on Human Rights Article 4, both protect the right to life, and prohibit arbitrary execution. When issues of the right to life arise in combat situations, the issues should not be resolved by applying human rights law alone. In addition, “the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance.”¹⁴

The same Commission in another case similarly declared that there is “an integral linkage between the law of human rights and humanitarian law” because they have a “common nucleus of non-derogable rights and a common purpose of protecting human life and dignity.” Accordingly, “there may be a substantial overlap in the application of these bodies of law.”¹⁵ Prof. Shaw of the University of Leicester describes this as “the overlap between internal armed conflict

¹³ *Cyprus v. Turkey (First and Second Applications)*, Report of the European Commission on Human Rights of 10 July 1976, paras. 509-10.

¹⁴ Report No. 55/97, Case 11.137 and OEA/Ser. L/V/II,98, paras. 153, 160-1.

¹⁵ *Coard v USA*, Case No. 10.951/123 ILR 156, 169.

principles and those of human rights law in situations where the level of domestic violence has reached a degree of intensity and continuity.”¹⁶

The same Commission in 2002 issued precautionary measures, in effect upholding the American Declaration of Human Rights with respect to the detention at Guantanamo Bay of persons captured by the United States in Afghanistan.¹⁷ Both the law of war and human rights laws concurrently apply in cases concerning the treatment of prisoners, as well as the government of occupied territory. Both fields of law apply, for example, to the situation that ensued after Iraq’s illegal invasion of Kuwait. Consequently, in 1990-91, Kuwait and its allies, known as “the coalition,” resorted to force against Iraq. In international law, the coalition’s resort to force was lawful, but the coalition remained bound by the Third Geneva Convention, particularly the obligation not to target civilians, and to treat prisoners of war pursuant to the requirements of that Convention.¹⁸

However, the two fields of international humanitarian law and international human rights law are distinguished from each other in the following ways:¹⁹

- The law of war is more specialized and more detailed.
- Most human rights treaties are limited in their application. For example, the European Convention on Human rights did not apply to the 1995 NATO bombing of Yugoslavia during the Kosovo campaign.²⁰

¹⁶ Malcolm Shaw, *International Law* 5th ed. 1075. Cambridge University Press: Cambridge, UK, 2006.

¹⁷ 41 ILM 532. The US response is found in 41 ILM 1015.

¹⁸ Christopher Greenwood, “The Law of War (International Humanitarian Law)” in M. Evans, ed., *International Law*, 4d ed. Oxford University Press: New York, 2006.

¹⁹ *Id.* at 784.

- The law of war requires a degree of reciprocity which is not required in human rights law. A law of war treaty applies only among state parties, while a human rights treaty binds all state parties, regardless of what other states do.

ARMED CONFLICTS

International Armed Conflicts

International humanitarian law applies to all armed conflicts, whether international or internal. Thus ruled the International Tribunal on War Crimes in Former Yugoslavia, Appeals Chamber, in the 1995 *Ladic* case.²¹ It gave certain definitions, as follows:

An ***armed conflict*** is a resort to armed force between states; or protracted armed violence between governmental authorities and organized armed groups; or between such groups within a state.²² A more controversial definition is that an armed conflict is “any difference between two States and leading to the intervention of members of the armed forces.”²³ This is not fully supported by state practice, particularly in cases of an isolated incident or exchange of fire.

An ***international armed conflict*** is one that takes place between two or more states. An internal armed conflict becomes an international armed conflict if:²⁴

²⁰ *Bankovic v Belgium and others*, decision of 21 December 2001 by the European Court of Human Rights, 123 ILR 94.

²¹ *Prosecutor v Ladic (Jurisdiction)*, Case No. IT-94-1-AR 72; 105 ILR 453; and 38 ILM 1518 (1999).

²² *Id.* at 488.

²³ Commentary on the Geneva Conventions published by the International Committee of the Red Cross (ICRC).

²⁴ Judgment of 15 July 1999, para. 84.

- Another state intervenes in that conflict through troops, or
- Some of the participants in the internal armed conflict act on behalf of that other State.

The Appeals Chamber went on to declare that an internal armed conflict becomes international, at the moment that a foreign state either directly intervenes within a civil conflict, or exercises “overall control” over a group that is fighting in that conflict. The “control” test requires that the state wields overall control over the group, by exercising two concurrent functions:

1. By equipping and financing the group, and
2. By coordinating or helping in the general planning of its military activity.

The same Appeals Chamber in another case²⁵ discussed the issue of the meaning of armed conflict where the fighting is sporadic, and does not extend to all of the territory of the state concerned. In an international armed conflict, the laws of war would apply in the whole territory of the warring states, until a general conclusion of peace. In an internal armed conflict, the laws of war apply to the whole territory under the control of a party to conflict, until a peaceful settlement is achieved. In both cases, the law of war applies whether or not actual combat takes place in the territory. Thus, a violation of the laws on terms of war may occur, even no fighting is actually taking place.

²⁵ *Kunarac* case, Decision of 12 June 2002, Case No. IT – 96 – 23 and IT – 96 – 23/1, para. 57.

Non-International Armed Conflict

Shaw argues that non-international armed conflicts could range from full-scale civil wars to relatively minor disturbances.²⁶ Fighting in the southern island of Mindanao in the Philippines between the armed forces of the Philippines and the Moro Islamic Liberation Front (MILF) is a non-international armed conflict. The Geneva Conventions under common Article 3 provides a sense of minimum guarantees for those not taking an active part in hostilities, including the sick and wounded. Under common Article 3, as developed by Protocol 2, the following acts are prohibited:

- Violence to life and person, in particular murder, cruel treatment, and torture.
- Hostage-taking
- Outrages upon human dignity, in particular humiliating and degrading treatment.
- Passing of sentences and carrying out of executions in the absence of due process.

Protocol 2 expands common Article 3, by providing in 15 substantive articles more detailed provisions on fundamental guarantees, treatment of the wounded and sick, and civilian protection. But while common Article 3 applies to any armed conflict occurring within a state, Protocol 2 applies only to its state parties. According to Prof. Greenwood of the London School of Economics,

²⁶ Shaw 1072.

Protocol 2 “has a very restricted field of application, confined, in effect to civil wars in which both sides control tracts of territoryIn effect, therefore, there is a scale of internal conflicts and disturbances, with different bodies of law becoming applicable, the higher up the scale one moves.”²⁷ This is the Greenwood scale:

1. Internal disturbances and acts of terrorism which do not amount to an armed conflict. An example was the fighting in Northern Ireland before the ceasefire. Another example is the sporadic clashes between the armed force of the Philippines and the communist New People’s Army (NPA), which is tagged as a terrorist group. These internal disturbances are not subject to the laws of armed conflict. Instead, in the Philippines, they are subject to the 2007 Human Security Act, an antiterror law. The state, but not the rebels, will be subject to the provisions of any human rights treaties to which the state is a party. For example, the Philippines is subject to provisions of such human rights treaties as the two International Covenants on Human Rights, and the Statutes of the International Red Cross and Red Crescent Movement, to which it is a state party.

2. Armed conflict, during which common Article 3 will apply to both government and rebel forces. The government will continue to be bound by any applicable human rights treaties.

3. An internal armed conflict, where rebels acquire sufficient control of territory to meet the requirements of Protocol 2. Both Protocol 2 and common

²⁷ Greenwood in Evans 807-08.

Article 3 will apply to both sides in the conflict. The government will continue to be bound by applicable human rights treaties.

4. An international armed conflict, when another state intervenes on either side of the conflict. All the Four Geneva Conventions apply. Protocol 1 applies, if the states concerned are parties, when the fighting involves the intervening states.

There have been cases, where a conflict contained both international and internal elements.²⁸ For example, in the *Tadic* case,²⁹ the International Criminal Tribunal for the Former Yugoslavia held that the fighting in Bosnia-Herzegovina contained both elements:

1. It was an international conflict between Bosnia-Herzegovina and the Federal Republic of Yugoslavia.

2. It was a non-international conflict between the government of Bosnia-Herzegovina and the Bosnian Serb forces.

Another example was the Vietnam war:

1. It was an international conflict between the United States and North Vietnam.

2. It was a non-international conflict between South Vietnam and the Viet Cong.

²⁸ Greenwood in Evans 808.

²⁹ *Prosecutor v. Tadic (Jurisdiction)*, 105 ILR 486-45 (1995).

ISSUES IN ARMED CONFLICTS

This section is based on Greenwood's identification and discussion of the following issues:

When Law of War Applies³⁰

The law of war applies to any armed conflict between two or more states, whether or not the parties regard themselves as being in a state of war. The law of war also applies to UN military operations, where the Security Council authorizes action by a state on a group of states, as in the 1990-91 Kuwait conflict. But it is uncertain whether the law of war applies, when a UN peacekeeping force becomes involved in the fighting, as in the 1992-95 Bosnian hostilities, notwithstanding a recent UN directive requiring UN peacekeeping forces to observe the basic principles of the law of war.³¹

State practice seems to indicate that the law of war does not apply to fighting between a state and a terrorist organization, or in military operations by the United States against the Al-Qaeda terrorist movement, following the terrorist attacks of 11 September 2001 in New York. There is no armed conflict, because Al Qaeda is not a state, but, Greenwood says, "is no more than an underground terrorist movement where recourse to violence is criminal."³² However, under the UN Charter Article 51, the US was entitled to take military operations in self-

³⁰ Greenwood in Evans 808.

³¹ "Secretary-General's Bulletin on Observance by UN Forces of International Humanitarian Law," in A. Roberts and R. Guelff, *Documents on the Law of War* 3d ed. 721. Oxford University Press: Oxford, 2000.

³² Greenwood in Evans 808.

defense. By contrast, the US fighting in Afghanistan was an armed conflict, and the laws of war applied, because Afghanistan is a state. Paradoxically, while the US argues that the laws of war apply in its military operations against Al-Qaeda, the US also argues that Al-Qaeda detainees are combatants, but are not entitled to the status of prisoners of war.

Distinction Between Combatants and Civilians³³

Only lawful combatants are entitled to take part in hostilities, and, if captured, to be treated as prisoners of war (POWs). But combatants are legitimate targets. By contrast, civilians taking direct part in hostilities became unlawful combatants and are largely unprotected by the laws of armed conflict. Unlawful combatants cannot claim POW status. They can be tried and punished for their belligerent acts.

The 1907 Hague Regulations on Land Warfare Articles 1 and 2; and the 1949 Geneva POW Convention Article 4; laid down different standards for members of the regular armed forces on the one hand, and irregular combatants on the other hand. But in both cases, almost all irregulars fell outside the test determining who are lawful combatants.

Hence, Protocol 1 tried to assimilate regular and irregular forces. It no longer specifies the manner in which combatants must distinguish themselves from civilians, and has abandoned the requirement of a fixed, distinctive sign. The

³³ Greenwood in Evans 787-90.

duty of a combatant to distinguish himself from civilians arises only during an attack, or a military operation preparatory to an attack.³⁴

The controversial provision of Protocol 1 is found in the second sentence of Article 44 para. 3, under which an armed combatant who cannot distinguish himself from a civilian, retains his status as a combatant, provided that he carries his arms openly during each military engagement, and when he is visible to the adversary, while engaged in military deployment preceding the launching of an attack. This second sentence was one of the reasons why the United States has refused to ratify Protocol 1. The US argues that this second sentence seriously undermines civilian protection, by excessive accommodation of the guerilla.

Greenwood takes the view that the effects of the second sentence have been overstated, explaining:³⁵ “The basic rule remains that stated in the first sentence of Article 44 (3); the lower standard in the second sentence applies only in the exceptional case when a combatant *cannot* distinguish himself in the normal manner.” States continue to be bound by the stricter rule under the Hague Regulation and the Geneva POW Convention. But only state parties are bound by Protocol 1. Thus, there are two different standards of what constitutes lawful combatancy.

Since neither the US nor Afghanistan are parties to the 1977 Protocols, the Afghanistan conflict was governed by the 1949 Geneva POW Convention. The

³⁴ Article 44 para. (3).

³⁵ Greenwood in Evans 789.

US President determined that Al-Qaeda and Taliban fighters were combatants, but did not qualify as lawful combatants, and were not entitled to POW status. Hence, the US continues to detain such persons or unlawful combatants, provoking intense controversy.

Lawful Targets³⁶

The question of who or what is a legitimate subject has been called the most important question in the law of war. The answer involves two actual principles:

- The *principle of distinction* between combatants and other military targets which are lawful targets; and civilian people and objects which are not lawful targets.
- The *principle of proportionality* which prohibits an attack on military objectives, if an attack is likely to cause civilian casualties or excessive damage, in relation to the concrete and direct military advantage which the attack is expected to produce. The principle of proportionality is part of international customary law.

Protocol 1 Article 51 para (2) expressly prohibits attacks designed to spread terror among the civilian populations. This prohibition applies to guerilla operations, such as the planting of a car bomb. It also applies to large-scale aerial bombardment. Protocol 1 Article 52 para (2) provides:

Protocol 1 Article 52 para (2) provides this definition:
Insofar as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use **make**

³⁶ *Id.* at 790-95

an effective contribution to military action and where total or partial destruction, capture or neutralization, **in the circumstances ruling at the time**, offers a definite military advantage. (Emphasis added.)

When objects have “dual use” for both civilians and the military, it has to apply the test as laid down above. In the 1990-91 Kuwait conflict, the coalition treated Iraq’s power stations as legitimate targets, because they were making an effective contribution to Iraqi military action.

The principle of proportionality requires a commander to balance the likely civilian casualties and property damage, including collateral damage, against the concrete and direct military advantage to be gained from an attack. Protocol 1 Article 57 draws out of the two principles of distinction and proportionality, certain important duties of the commander. Perhaps the most important duty is for the commander to choose weapons and methods that will be most likely to avoid or reduce incidental civilian losses. Protocol 1 Article 58 further imposes the duty to protect civilians under his control from enemy attacks.

Weapons Limitations³⁷

Greenwood has identified the general principles governing the choice of methods and means of warfare based on the Hague Regulations and Protocol 1, thus:

³⁷ Greenwood in Evans 795-801.

- ***The unnecessary suffering principle***, prohibiting methods or means causing unnecessary suffering or superfluous injury. This is the most important principle, because it authorizes ban on particular categories of weapons.³⁸

- ***The discrimination principle***, prohibiting methods or means which cannot be directed against a specific military damage, thus likely to strike civilians. This principle was violated when in 1991 Iraq used Scud missiles against Saudi Arabia and Israel.

- ***The treachery or perfidy principle***, prohibiting certain treacherous methods of warfare. One example is the use of the Red Cross emblem to hide military operations. Another example is combatants feigning civilian status.

In addition to these three general principles, Greenwood says that there is an emerging principle prohibiting method and means affecting the environment. In his view, “this principle exists, as yet, only in treaty law and is not part of customary international law.”³⁹ Examples of treaty law are:

- 1977 Environmental Modification Treaty (ENMOD Treaty) banning “environmental modification techniques having widespread, long-lasting or severe effects on the means of destruction, damage, or injury.”

- Protocol 1 Articles 35 para (3) and 55, prohibiting “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the national environment.

³⁸ Greenwood’s list of banned weapons is found in Evans 797-98.

³⁹ Greenwood in Evans 795.

- 2003 Protocol on Explosive Remnants of War, to the Convention on Certain Conventional Weapons.

The most controversial issue in weaponry is the use of nuclear weapons. There is no treaty, law or customary law banning nuclear weapons. Existing treaties on nuclear weapons such as the Test Ban Treaty and the Nuclear Non-Proliferation Treaty, do not impose a ban, but merely impose restrictions on the possession or deployment of nuclear weapons. General Assembly resolutions condemning the use of nuclear weapons are not binding, and do not give rise to a rule of international customary law.

In its 1996 Advisory Opinion on *Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice ruled:

A threat or use of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

A threat or use of nuclear weapons should also be compatible with the requirements of international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons .

...⁴⁰

It follows from the above-mentioned requirements (quoted above) that the threat or use of nuclear weapons would generally be contrary to the rule of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the element of fact at its disposal, the Court cannot conclude definitely whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.⁴¹

⁴⁰ 1995 ICJ Rep 226, paras. 105 (2)(C) and (D).

⁴¹ Id. at para, 105 (2) (E).

It appears that the use of nuclear weapons is unlawful, except possibly in self-defense. In any case, the use of nuclear weapons is governed by the three principles of unnecessary suffering, discrimination, and treachery. Most importantly, it should comply with the test of proportionality.

War Victims⁴²

International humanitarian law requires protection for three groups of war victims: POWs; civilians; and the wounded, sick, and shipwrecked.

The first group of victims, the POWs, are protected by the 1949 Geneva POW Convention. The general principle consists of the following features:

- A POW is neither a criminal nor a hostage.
- He or she is detained following capture, for the sole purpose of preventing him or her from rejoining the enemy's armed forces.
- He or she should not be kept in a military or civil prison, but in a POW camp.

POWs should not be ill-treated, murdered, tortured, abused, or exposed to insults or public curiosity. There are recent examples of POW ill-treatment. One example was the Kuwait conflict, when Iraq physically ill-treated captured Kuwaiti and coalition personnel, and compelled them to appear on TV. Another example was the 1991 and 2003 Iraq conflicts, when coalition states in their turn **allowed TV to show footage of identifiable** Iraq POWs. Another example was

⁴² Greenwood in Evans 801-806.

the Yugoslavia conflict, when POWs were forced to perform dangerous tasks, such as collecting bodies and equipment under fire.

The second group of victims are the civilians, who are protected by the Fourth Geneva Convention. The standard for treatment of civilians is broadly the same as that for POWs. One recent example of a violation was the Yugoslav conflict, when ethnic groups were detained wholesale. Treatment of civilians is governed not only by the Fourth Convention, but also by international customary law governing occupied territory. This law of belligerent occupation contains the following features:⁴³

- The law of belligerent occupation applies when territory is in fact seized by the armed forces of one state during a conflict with another, even where the invading state asserts that it has a better claim to the territory. In 1967, Jordan and Egypt seized the West Bank and Gaza Strip. Hence, the law of belligerent occupation prevailed. Israel protested, on the ground that Jordan and Egypt had no valid claim to these territories before 1967. States universally rejected Israel's position on that issue. The law of belligerent occupation also applied during 1982 Falkland Islands conflict, when Argentina occupied the Islands for ten weeks. But apparently, the law of belligerent occupation did not apply in 1974, when Turkey installed a military presence in northern Cyprus.

- The Fourth Convention and the rules on belligerent occupation apply, even if the occupying state tries to annex or change the status of occupied

⁴³ Greenwood at Evans 805-06.

territory. One example of such continuing application of the rules was Kuwait, even though Iraq tried to annex it. Another example was East Jerusalem and the Golan Heights, even after Israel annexed them. Another example is the Gaza Strip, from where Israel withdrew in 2005, but continues to exercise control over its borders, ports, and air space.

- The Hague Regulations Art. 43 requires the occupying power, “unless absolutely prevented,” to respect the laws and customs of the territory. Thus, it prohibits the occupying power to make a wholesale change in existing laws, unless such laws are flagrantly contrary to international law. One example was the Nazi laws contrary to international law, which were later changed wholesale by the allies at the start of 1945.

- The Hague Regulations are now international customary law, with respect to treatment of property in occupied territory. However, these rules are complicated and are often violated.

Today, all states are UN members. Hence, the Security Council has mandatory power under the UN Charter Chapter 7 to bind all states under a new rule, even if it may exceed the law of belligerent occupation. One example was the 2003 Security Council directive to occupying states to take certain actions in Iraq.

HUMANITARIAN LAW ENFORCEMENT

Although there is no international police force and there is no network of courts with compulsory jurisdiction, international humanitarian law can be enforced by several methods:

- *The method of appointing a Protecting Power* to protect the nationals of one party to the conflict under the control of the other state. But both states must consent to the appointment. One example was the Second World War, when Sweden and Switzerland performed this role. Since consent is essential, this method has been virtually unused since 1945.

- *The method under Protocol 1 of calling on the International Fact-Finding Commission* to inquire into grave breaches of the Geneva Conventions and Protocol 1, and thereafter to use its good offices to achieve the “restoration of an attitude of respect” for these instruments. The Commission can publish its findings, but its jurisdiction is limited, and it has no power to impose any kind of penalty.

- *The method of placing war crimes under universal jurisdiction.* It is not a defense to claim that the defendant acted under superior orders, nor that the defendant acted out of military necessity. Those on the winning side are hardly charged in war crime trials, but they are subject to the jurisdiction of their own state for crimes under its own criminal law or military law.

In the 1990s, the Security Council established separate international tribunals with jurisdiction to try war crimes in former Yugoslavia, Rwanda, and

Sierra Leone. This growing trend toward international criminal proceedings continued with the 1998 Rome Statute, which established the International Criminal Court, with jurisdiction over war crimes and grave breaches of the Geneva Convention. The Philippines signed in 2000 the Rome Statute, but has not ratified it, because the Office of the President refuses to transmit it to the Senate for ratification.

- *The method of requiring parties to the conflict to accept an offer by the International Committee of the Red Cross (ICRC), or another competent humanitarian organization, to assume the humanitarian functions of the protecting power.* This method depends on the ability of ICRC to persuade a state to accept its offer.

- *The method under the 1907 Fourth Hague Convention Article 3 of holding a state liable for compensation* to other states and to individuals who have suffered loss as a result of the violation of international humanitarian law by the forces of that state. In 1991, the Security Council used this method, by confirming that Iraq was liable to compensate victims of its violations of international law, arising out of the invasion of Kuwait. The Council established a Compensation Commission with power to make awards, which were paid out of a fund financed by a levy on Iraqi oil sales.

This method was also used by Ethiopia and Eritria after their conflict in 1998-2002. They agreed to create a Commission which determined, by binding

arbitration, claims for violation of international humanitarian law. Accordingly, the Commission issued awards for ill-treatment of POWs and civilians.

- ***The method of adopting UN resolutions*** to secure compliance with international humanitarian law. This method was used during the Iran-Iraq war and the Yugoslavia conflict.

- ***The method of subjecting states engaged in armed conflict to scrutiny by, and pressure from, third parties.*** This is a parallel method to the method under the Geneva Conventions and Protocol 1 of monitoring compliance with the law through certain formal mechanisms.

#

Red Cross Guidelines

In 1978, the ICRC published a guide to the legal rules in September-October 1978 *International Review of the Red Cross* 247. In 1989, ICRC also published a statement on non-international armed conflicts in September-October 1989 *International Review of the Red Cross* 404.

Main References:

1. Ian Brownlie, *Principles of Public International Law* 6th ed. Oxford University Press: New York, 2003.
2. Christopher Greenwood, “The Law of War (International Humanitarian Law)” in Malcolm Evans, ed., *International Law* 2d ed. Oxford University Press: New York, 2006.

3. Malcolm Shaw, *International Law* 5th ed. Cambridge University Press:
Cambridge, UK, 2006.