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International humanitarian law

In addition to prescribing laws governing resort to force (*jus ad bellum*), international law also seeks to regulate the conduct of hostilities (*jus in bello*). These principles cover, for example, the treatment of prisoners of war, civilians in occupied territory, sick and wounded personnel, prohibited methods of warfare and human rights in situations of conflict.[1] This subject was originally termed the laws of war and then the laws of armed conflict. More recently, it has been called international humanitarian law. Although international humanitarian law is primarily derived from a number of international conventions, some of these represent in whole or in part rules of customary international law, and it is possible to say that a number of customary international law principles exist over and above conventional rules,[2] although international humanitarian law

[1] See e.g. Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004; *Les Nouvelles Frontières du Droit International Humanitaire* (ed. J.-F. Flauss), Brussels, 2003; T. Meron, *The Humanization of International Law*, The Hague, 2006; UK Ministry of Defence, *Manual on the Law of Armed Conflict*, Oxford, 2004; L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000; I. Detter, *The Law of War*, 2nd edn, Cambridge, 2000; G. Best, *Humanity in Warfare*, London, 1980, and Best, *War and Law Since 1945*, Oxford, 1994; A. P. V. Rogers, *Law on the Battlefield*, Manchester, 1996; *Handbook of Humanitarian Law in Armed Conflict* (ed. D. Fleck), Oxford, 1995; *Studies and Essays on International Humanitarian Law and Red Cross Principles* (ed. C. Swinarski), Dordrecht, 1984; *The New Humanitarian Law of Armed Conflict* (ed. A. Cassese), Naples, 1979; G. I. A. D. Draper, 'The Geneva Conventions of 1949', 114 HR, p. 59, and Draper 'Implementation and Enforcement of the Geneva Conventions and of the two Additional Protocols', 164 HR, 1979, p. 1; F. Kalshoven, *The Law of Warfare*, Leiden, 1973; M. Bothe, K. Partsch and W. Solf, *New Rules for Victims of Armed Conflict*, The Hague, 1982, and J. Pictet, *Humanitarian Law and the Protection of War Victims*, Dordrecht, 1982. See also *Documents on the Laws of War* (ed. A. Roberts and R. Guelff), 3rd edn, Oxford, 2000; Nguyen Quoc Dinh, P. Daillier and A. Pellet, *Droit International Public*, 7th edn, Paris, 2002, p. 962; T. Meron, 'The Humanisation of Humanitarian Law', 94 AJIL, 2000, p. 239, and C. Rousseau, *Le Droit des Conflits Armés*, Paris, 1983.

[2] See e.g. T. Meron, 'Revival of Customary Humanitarian Law', 99 AJIL, 2005, p. 817, and *Customary International Humanitarian Law* (eds. J.-M. Henckaerts and L. Doswald-Beck), Cambridge, 2005. See also G. H. Aldrich, 'Customary International Humanitarian

is one of the most highly codified parts of international law. Reliance upon relevant customary international law rules is particularly important where one or more of the states involved in a particular conflict is not a party to a pertinent convention. A good example of this relates to the work of the Eritrea–Ethiopia Claims Commission, which noted that since Eritrea did not become a party to the four Geneva Conventions of 1949 until 14 August 2000, the applicable law before that date for relevant claims was customary international humanitarian law.[3] On the other hand, treaty provisions that cannot be said to be part of customary international law[4] will bind only those states that are parties to them. This is particularly important with regard to some provisions deemed controversial by some states contained in Additional Protocols I and II to the Geneva Conventions, 1949. One additional factor that has emerged recently has been the growing convergence between international humanitarian law and international human rights law. This is discussed below.[5]

Development

The law in this area developed from the middle of the nineteenth century. In 1864, as a result of the pioneering work of Henry Dunant,[6] who had been appalled by the brutality of the battle of Solferino five years earlier, the Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field was adopted. This brief instrument was revised in 1906. In 1868 the Declaration of St Petersburg prohibited the use of small explosive or incendiary projectiles. The laws of war were codified at the Hague Conferences of 1899 and 1907.[7]

Law – An Interpretation on Behalf of the International Committee of the Red Cross', 76 BYIL, 2005, p. 503, and J. M. Henckaerts, 'Customary International Humanitarian Law – A Rejoinder to Judge Aldrich', *ibid.*, p. 525.

[3] See e.g. Eritrea–Ethiopia Claims Commission, Partial Award, Prisoners of War, Eritrea's Claim 17, 1 July 2003, paras. 38 ff. It was, however, accepted that the Conventions 'have largely become expressions of customary international law', *ibid.*, para. 40. See also Eritrea–Ethiopia Claims Commission, Partial Award, Civilian Claims, Eritrea's Claims 15, 16, 23 and 27–32, 17 December 2004, para. 28.

[4] As to which, see above, chapter 3, p. 93.

[5] See below, p. 1180.

[6] See e.g. C. Moorehead, *Dunant's Dream*, London, 1998.

[7] See e.g. Green, *Contemporary Law*, chapter 2, and *The Centennial of the First International Peace Conference* (ed. F. Kalshoven), The Hague, 2000. See also Symposium on the Hague Peace Conferences, 94 AJIL, 2000, p. 1. The Nuremberg Tribunal regarded Hague Convention IV and Regulations on the Laws and Customs of War on Land, 1907 as declaratory of customary law: see 41 AJIL, 1947, pp. 172, 248–9. See also the Report of the UN Secretary-General on the Statute for the International Criminal Tribunal for the Former Yugoslavia,

A series of conventions were adopted at these conferences concerning land and naval warfare, which still form the basis of the existing rules. It was emphasised that belligerents remained subject to the law of nations and the use of force against undefended villages and towns was forbidden. It defined those entitled to belligerent status and dealt with the measures to be taken as regards occupied territory. There were also provisions concerning the rights and duties of neutral states and persons in case of war,[8] and an emphatic prohibition on the employment of 'arms, projectiles or material calculated to cause unnecessary suffering'. However, there were inadequate means to implement and enforce such rules with the result that much appeared to depend on reciprocal behaviour, public opinion and the exigencies of morale.[9] A number of conventions in the inter-war period dealt with rules concerning the wounded and sick in armies in the field and prisoners of war.[10] Such agreements were replaced by the Four Geneva 'Red Cross' Conventions of 1949 which dealt respectively with the amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and shipwrecked members of the armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war.[11] The Fourth Convention was an innovation and a significant attempt to protect civilians who, as a result of armed hostilities or occupation, were in the power of a state of which they were not nationals.

The foundation of the Geneva Conventions system is the principle that persons not actively engaged in warfare should be treated humanely.[12] A number of practices ranging from the taking of hostages to torture, illegal

Security Council resolutions 808 (1993) and 823 (1993), S/25704 and 32 ILM, 1993, pp. 1159, 1170, and the Advisory Opinion of the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 258; 110 ILR, p. 163.

[8] See S. C. Neff, *The Rights and Duties of Neutrals*, Manchester, 2000.

[9] Note, however, the Martens Clause in the Preamble to the Hague Convention concerning the Laws and Customs of War on Land, which provided that 'in cases not included in the Regulations . . . the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilised peoples from the laws of humanity and the dictates of the public conscience'.

[10] See e.g. the 1929 Conventions, one revising the 1864 and 1906 instruments on wounded and sick soldiers, the other on the treatment of prisoners of war.

[11] Note that as of May 2008, 194 states are parties to the Geneva Conventions.

[12] See, for example, article 1(2) of Additional Protocol I, 1977, which provides that, 'In case not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.'

executions and reprisals against persons protected by the Conventions are prohibited, while a series of provisions relate to more detailed points, such as the standard of care of prisoners of war and the prohibition of deportations and indiscriminate destruction of property in occupied territory. In 1977, two Additional Protocols to the 1949 Conventions were adopted.[13] These built upon and developed the earlier Conventions. While many provisions may be seen as reflecting customary law, others do not and thus cannot constitute obligations upon states that are not parties to either or both of the Protocols.[14] Protocol III was adopted in 2005 and introduced a third emblem to the two previously recognised ones (the Red Cross and the Red Crescent) in the form of a red diamond within which either a Red Cross or Red Crescent, or another emblem which has been in effective use by a High Contracting Party and was the subject of a communication to the other High Contracting Parties and the International Committee of the Red Cross through the depositary prior to the adoption of this Protocol, may be inserted. This allows in particular for the use of the Israeli Red Magen David (Shield of David) symbol.[15]

The International Court of Justice has noted that the 'Law of the Hague', dealing primarily with inter-state rules governing the use of force or the 'laws and customs of war' as they were traditionally termed, and the 'Law of Geneva', concerning the protection of persons from the effects of armed conflicts, 'have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law'.[16]

The scope of protection under international humanitarian law

The rules of international humanitarian law seek to extend protection to a wide range of persons, but the basic distinction drawn has been between combatants and those who are not involved in actual hostilities. Common

[13] See e.g. Swinarski, *Studies and Essays*, part B, and Draper, 'Implementation and Enforcement'. See also B. Wortley, 'Observations on the Revision of the 1949 Geneva "Red Cross" Conventions', 54 BYIL, 1983, p. 143, and G. Aldrich, 'Prospects for US Ratification of Additional Protocol I to the 1949 Geneva Conventions', 85 AJIL, 1991, p. 1.

[14] For example, article 44 of Protocol I: see below, p. 1173.

[15] The Red Lion and Sun that used to be used by Iran was also included as a Geneva Convention emblem: see e.g. Detter, *Law of War*, p. 293.

[16] See the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 256; 110 ILR, p. 163. The Court also noted that '[t]he provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law', *ibid.*

article 2 of the Geneva Conventions provides that the Conventions '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 recognised by them ... [and] 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'. The rules contained in these Conventions cannot be renounced by those intended to benefit from them, thus precluding the possibility that the power which has control over them may seek to influence the persons concerned to agree to a mitigation of protection.[17]

The wounded and sick

The First Geneva Convention concerns the Wounded and Sick on Land and emphasises that members of the armed forces and organised militias, including those accompanying them where duly authorised,[18] 'shall be respected and protected in all circumstances'. They are to be treated humanely by the party to the conflict into whose power they have fallen on a non-discriminatory basis and any attempts upon their lives or violence to their person is strictly prohibited. Torture or biological experimentation is forbidden, nor are such persons to be wilfully left without medical assistance and care.[19] The wounded and sick of a belligerent who fall into enemy hands are also to be treated as prisoners of war.[20] Further, the parties to a conflict shall take all possible measures to protect the wounded and sick and ensure their adequate care and to 'search for the dead and prevent their being despoiled'.[21] The parties to the conflict are to record as soon as possible the details of any wounded, sick or dead persons of the adversary party and to transmit them to the other side through particular means.[22] This Convention also includes provisions as to medical units and establishments, noting in particular that these should not be

[17] See article 7 of the first three Conventions and article 8 of the fourth. Note that Security Council resolution 1472, adopted under Chapter VII on 28 March 2003, called on 'all parties concerned' to the Iraq conflict of March–April 2003 to abide strictly by their obligations under international law and particularly the Geneva Conventions and the Hague Regulations, 'including those relating to the essential civilian needs of the people of Iraq'.

[18] See article 13. See also UK, *Manual*, chapter 7.

[19] Article 12. See also Green, *Armed Conflict*, chapter 11.

[20] Article 14. Thus the provisions of the Third Geneva Convention will apply to them: see below, p. 1172.

[21] Article 15. [22] Article 16 and see article 122 of the Third Geneva Convention.

attacked,[23] and deals with the recognised emblems (i.e. the Red Cross, the Red Crescent and, after Protocol III, the Red Diamond).[24]

The Second Geneva Convention concerns the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea and is very similar to the First Convention, for instance in its provisions that members of the armed forces and organised militias, including those accompanying them where duly authorised, and who are sick, wounded or shipwrecked are to be treated humanely and cared for on a non-discriminatory basis, and that attempts upon their lives and violence and torture are prohibited.[25] The Convention also provides that hospital ships may in no circumstances be attacked or captured but respected and protected.[26] The provisions in these Conventions were reaffirmed in and supplemented by Protocol I, 1977, Parts I and II. Article 1(4), for example, supplements common article 2 contained in the Conventions and provides that the Protocol is to apply in armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes as enshrined in the UN Charter and the Declaration on Principles of International Law, 1970.

Prisoners of war[27]

The Third Geneva Convention of 1949 is concerned with prisoners of war, and consists of a comprehensive code centred upon the requirement of humane treatment in all circumstances.[28] The definition of prisoners of war in article 4, however, is of particular importance since it has been regarded as the elaboration of combatant status. It covers members of the armed forces of a party to the conflict (as well as members of militias and other volunteer corps forming part of such armed force) and members of

[23] Article 19, even if the personnel of the unit or establishment are armed or otherwise protected, article 22. Chapter IV concerns the treatment of medical personnel.

[24] Chapter VII. [25] Articles 12 and 13. See also Green, *Armed Conflict*, chapter 11.

[26] Chapter III. See, with regard to the use of hospital ships in the Falklands conflict, H. Levie, 'The Falklands Crisis and the Laws of War' in *The Falklands War* (eds. A. R. Coll and A. C. Arend), Boston, 1985, pp. 64, 67–8. Chapter IV deals with medical personnel, Chapter V with medical transports and Chapter VI with the emblem: see above, p. 1170.

[27] See e.g. Dinstein, *Conduct of Hostilities*, pp. 29 ff., and UK, *Manual*, Chapter 8. Note that the Eritrea–Ethiopia Claims Commission in its Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, para. 32, has held that this Convention substantially reflected customary international law.

[28] See also the Regulations annexed to the Hague Convention IV on the Laws and Customs of War on Land, 1907, Section I, Chapter II.

other militias and volunteer corps, including those of organised resistance movements, belonging to a party to the conflict providing the following conditions are fulfilled: (a) being commanded by a person responsible for his subordinates; (b) having a fixed distinctive sign recognisable at a distance; (c) carrying arms openly; (d) conducting operations in accordance with the laws and customs of war.[29] This article reflected the experience of the Second World War, although the extent to which resistance personnel were covered was constrained by the need to comply with the four conditions. Since 1949, the use of guerrillas spread to the Third World and the decolonisation experience. Accordingly, pressures grew to expand the definition of combatants entitled to prisoner of war status to such persons, who as practice demonstrated rarely complied with the four conditions. States facing guerrilla action, whether the colonial powers or others such as Israel, objected. Articles 43 and 44 of Protocol I, 1977, provide that combatants are members of the armed forces of a party to an international armed conflict.[30] Such armed forces consist of all organised armed units under an effective command structure which enforces compliance with the rules of international law applicable in armed conflict. Article 44(3) further notes that 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. When an armed combatant cannot so distinguish himself, the status of combatant may be retained provided that arms are carried openly during each military engagement and during such time as the combatant is visible to the adversary while engaged in a military deployment preceding the launching of an attack. This formulation is clearly controversial and was the subject of many declarations in the vote at the conference producing the draft.[31]

[29] These conditions appear in article 1 of the Hague Regulations and have been regarded as part of customary law: see G. I. A. D. Draper, 'The Status of Combatants and the Question of Guerilla Warfare', 45 BYIL, 1971, pp. 173, 186. See also the *Tadić* case, Judgment of the Appeals Chamber of 15 July 1999, IT-94-1-A; 124 ILR, p. 61.

[30] Article 1(4) of Protocol I includes as international armed conflicts 'armed 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'. Note that there is no provision for prisoner of war status in non-international armed conflicts: see below, p. 1194.

[31] See e.g. H. Verthy, *Guérrilla et Droit Humanitaire*, 2nd edn, Geneva, 1983, and P. Nahlik, 'L'Extension du Statut de Combattant à la Lumière de Protocol I de Genève de 1977', 164 HR, 1979, p. 171. Where a person is a mercenary, there is no right to combatant or prisoner of war status under article 47. See also the International Convention against the Recruitment, Use, Financing and Training of Mercenaries, 1989: Green, *Armed Conflict*,

Article 5 also provides that where there is any doubt as to the status of any person committing a belligerent act and falling into the hands of the enemy, 'such person shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal'.[32] This formulation was changed somewhat in article 45 of Protocol I. This provides that a person who takes part in hostilities and falls into the power of an adverse party 'shall be presumed to be a prisoner of war and therefore shall be protected by the Third Convention'. The term 'unlawful combatant', therefore, refers to a person who fails the tests laid down in articles 43 and 44, after due determination of status, and who would not be entitled to the status of prisoner of war under international humanitarian law. Such a person, who would thus be a civilian, would be protected by the basic humanitarian guarantees laid down in articles 45(3) and 75 of Protocol I and by the general principles of international human rights law in terms of his/her treatment upon capture. However, since such a person would not have the status of a prisoner of war, he would not benefit from the protections afforded by such status and would thus be liable to prosecution under the normal criminal law.[33]

pp. 114 ff. However, such persons remain entitled to the basic humanitarian guarantees provided by Protocol I: see articles 45(3) and 75. See also UK, *Manual*, p. 147.

[32] See also the *British Manual of Military Law*, Part III, *The Law of Land Warfare*, London, 1958, para. 132, note 3, and the US Department of Army, *Law of Land Warfare*, Field Manual 27–10, 1956, para. 71(c), (d) detailing what a competent tribunal might be. In the case of the UK, the competent tribunal would be a board of inquiry convened in accordance with the Prisoner of War Determination of Status Regulations 1958: see UK, *Manual*, p. 150. See as to the question of persons captured by the US in Afghanistan in 2001–2 and elsewhere, and detained at the US military base at Guantanamo Bay, Cuba, *Rasul* v. *Bush* 124 S. Ct. 2686 (2004); US Military Commissions Act 2006, 45 ILM, 2006, p. 1246; and *Hamdan* v. *Rumsfeld* 126 S. Ct. 2749 (2006) and see *Boumediene* v. *Bush* 553 US _ (2008). See also above, chapter 12, p. 658 and chapter 20, p. 1165.

[33] See e.g. A. Cassese, *International Law*, 2nd edn, Oxford, 2005, pp. 409–10, cf. Dinstein, *Conduct of Hostilities*, pp. 29 ff.; M. Finaud, 'L'Abus de la Notion de "Combattant Illégal": Une Atteinte au Droit International Humanitaire', 110 RGDIP, 2006, p. 861, and T. M. Franck, 'Criminals, Combatants, or What – An Examination of the Role of Law in Responding to the Threat of Terror', 98 AJIL, 2005, p. 686. Accordingly, captured Taliban fighters who formed part of the army of Afghanistan at the relevant time would have the status of POWs, while captured Al-Qaida operatives would be subject to relevant national criminal law, including war crimes and crimes against humanity. Note that once a civilian takes part in hostilities, he/she loses the protection of the prohibition of attacks upon him/her: see article 51(3), Protocol I. See also *Public Committee Against Torture in Israel* v. *Government of Israel*, Israeli Supreme Court, 13 December 2006, 101 AJIL, 2007, p. 459, *A and B* v. *State of Israel*, Israeli Supreme Court, 11 June 2008 and D. Kretzmer, 'Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?', 16 EJIL, 2005, p. 171.

The framework of obligations covering prisoners of war is founded upon 'the requirement of treatment of POWs as human beings', while 'At the core of the Convention regime are legal obligations to keep POWs alive and in good health.'[34] Article 13 provides that prisoners of war must at all times be humanely treated and must at all times be protected, particularly against acts of violence or intimidation and against 'insults and public curiosity'.[35] This means that displaying prisoners of war on television in a humiliating fashion confessing to 'crimes' or criticising their own government must be regarded as a breach of the Convention.[36] Measures of reprisal against prisoners of war are prohibited. Article 14 provides that prisoners of war are entitled in all circumstances to respect for their persons and their honour.[37]

Prisoners of war are bound only to divulge their name, date of birth, rank and serial number. Article 17 provides that 'no physical or mental torture, nor any other form of coercion, may be inflicted ... to secure from them information of any kind whatever. Prisoners of war who refuse to answer may not be threatened, insulted, or exposed to unpleasant or disadvantageous treatment of any kind.' Once captured, prisoners of war are to be evacuated as soon as possible to camps situated in an area far enough from the combat zone for them to be out of danger,[38] while article 23 stipulates that 'no prisoner of war may at any time be sent to, or detained in, areas where he may be exposed to the fire of the combat zone, nor may his presence be used to render certain points or areas immune from military operations'.[39] Prisoners of war are subject to the

[34] See the Eritrea–Ethiopia Claims Commission in its Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, paras. 53 and 64, where the Commission declared that 'customary international law, as reflected in Geneva Conventions I and III, absolutely prohibits the killing of POWs, requires the wounded and sick to be collected and cared for, the dead to be collected, and demands prompt and humane evacuation of POWs'. See also Best, *War and Law*, p. 135, and Y. Dinstein, 'Prisoners of War' in *Encyclopaedia of Public International Law* (ed. R. Bernhardt), Amsterdam, 1982, pp. 146, 148.

[35] See also article 11 of Protocol I.

[36] See e.g. the treatment of allied prisoners of war by Iraq in the 1991 Gulf War, *The Economist*, 26 January 1991, p. 24, and in the 2003 Gulf War: see the report of the condemnation by the International Committee of the Red Cross, http://news.bbc.co.uk/1/hi/world/middle_east/2881187.stm.

[37] See also article 75 of Protocol I.

[38] Article 19.

[39] Thus the reported Iraqi practice during the 1991 Gulf War of sending allied prisoners of war to strategic sites in order to create a 'human shield' to deter allied attacks was clearly a violation of the Convention: see e.g. *The Economist*, 26 January 1991, p. 24. See also UKMIL, 62 BYIL, 1991, pp. 678 ff.

laws and orders of the state detaining them.[40] They may be punished for disciplinary offences and tried for offences committed before capture, for example for war crimes. They may also be tried for offences committed before capture against the law of the state holding them.[41] Other provisions of this Convention deal with medical treatment, religious activities, discipline, labour and relations with the exterior. Article 118 provides that prisoners of war shall be released and repatriated without delay after the cessation of hostilities. The Convention on prisoners of war applies only to international armed conflicts,[42] but article 3 (which is common to the four Conventions) provides that as a minimum 'persons ... including members of armed forces, who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely'.

Protection of civilians and occupation

The Fourth Geneva Convention is concerned with the protection of civilians in time of war and builds upon the Hague Regulations (attached to Hague Convention IV on the Law and Customs of War on Land, 1907).[43] This Geneva Convention, which marked an extension to the pre-1949 rules, is limited under article 4 to those persons, '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'. The Convention comes into operation immediately upon the outbreak of hostilities or the start of an occupation and ends at the general close of military operations.[44] Under article 50(1) of Protocol I, 1977, a civilian is defined as any person not a combatant,[45]

[40] Article 82, Geneva Convention III.

[41] Articles 82 and 85. See Green, *Armed Conflict*, p. 210. See also *US* v. *Noriega* 746 F. Supp. 1506, 1529 (1990); 99 ILR, pp. 143, 171.

[42] See below, p. 1190.

[43] See e.g. Green, *Armed Conflict*, chapters 12 and 15; UK, *Manual*, Chapters 9 and 11; E. Benvenisti, *The International Law of Occupation*, Princeton, 2004 (with new preface), and S. Wills, 'Occupation Law and Multi-National Operations: Problems and Perspectives', 77 BYIL, 2006, p. 256. The Hague Regulations have become part of customary international law: see *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 172; 129 ILR, pp. 37, 91.

[44] Article 6.

[45] As defined in article 4 of the Third Geneva Convention, 1949 and article 43, Protocol I, 1977, above, p. 1172. Note, however, the obligation contained in the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, 25 May 2000, to ensure that children under the age of eighteen do not take part in hostilities.

and in cases of doubt a person is to be considered a civilian. The Fourth Convention provides a highly developed set of rules for the protection of such civilians, including the right to respect for person, honour, convictions and religious practices and the prohibition of torture and other cruel, inhuman or degrading treatment, hostage-taking and reprisals.[46] The wounded and sick are the object of particular protection and respect[47] and there are various judicial guarantees as to due process.[48]

The protection of civilians in occupied territories is covered in section III of Part III of the Fourth Geneva Convention,[49] but what precisely occupied territory is may be open to dispute.[50] Article 42 of the Hague Regulations provides that territory is to be considered as occupied 'when it is actually placed under the authority of the hostile army' and that the occupation only extends to the territory 'where such authority has been established and can be exercised',[51] while article 2(2) of the Convention provides that it is to 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 resistance'. The International Court in the *Democratic Republic of the Congo* v. *Uganda* case[52] noted that in order to determine whether a state whose forces are present on the territory of another state is an occupying power, one must examine whether there is sufficient evidence to demonstrate that the said authority was in fact established and exercised by the intervening state in the areas in question. The Court understood this to mean in practice in that case that Ugandan forces in the Congo were stationed there in particular areas and that they had substituted their own authority for that of the Congolese government.

The military occupation of enemy territory is termed 'belligerent occupation' and international law establishes a legal framework concerning the legal relations of occupier and occupied. There are two key conditions for the establishment of an occupation in this sense, first, that the former government is no longer capable of publicly exercising its authority in

[46] See articles 27–34. The rights of aliens in the territory of a party to a conflict are covered in articles 35–46.

[47] Article 16.

[48] See articles 71–6. See also article 75 of Protocol I, 1977.

[49] See also the Hague Regulations, Section III.

[50] Iraqi-occupied Kuwait in 1990–1 was, of course, a prime example of the situation covered by this Convention: see e.g. Security Council resolution 674 (1990).

[51] See the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 167 and *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 229, reaffirming article 42 as part of customary international law.

[52] ICJ Reports, 2005, pp. 168, 230.

the area in question and, secondly, that the occupying power is in a position to substitute its own authority for that of the former government.[53] An occupation will cease as soon as the occupying power is forced out or evacuates the area.[54] Article 43 of the Hague Regulations provides the essential framework of the law of occupation. It notes that, 'The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.'[55] This establishes several key elements. First, only 'authority' and not sovereignty passes to the occupier.[56] The former government retains sovereignty and may be deprived of it only with its consent. Secondly, the basis of authority of the occupier lies in effective control. Thirdly, the occupier has both the obligation and the right to maintain public order in the occupied territory. Fourthly, the existing laws of the territory must be preserved as far as possible.

The situation with regard to the West Bank of Jordan (sometimes known as Judaea and Samaria), for example, demonstrates the problems that may arise. Israel has argued that since the West Bank has never been

[53] See e.g. UK, *Manual*, p. 275.

[54] *Ibid.*, p. 277. See also *R* v. *Civil Aviation Authority* [2006] EWHC 2465 (Admin), at para. 15; 132 ILR, p. 713, noting that 'The state of Israel has withdrawn from Gaza [in 2005] so that it is not an occupied Palestinian Territory.' Note that Israel handed over certain powers with regard to parts of the West Bank to the Palestinian Authority following the Oslo agreements of 1993: see generally J. Crawford, *The Creation of States*, 2nd edn, 2006, pp. 442 ff.; *New Political Entities in Public and Private International Law* (eds. A. Shapira and M. Tabory), The Hague, 1999; E. Benvenisti, 'The Israeli–Palestinian Declaration of Principles: A Framework for Future Settlement', 4 EJIL, 1993, p. 542, and P. Malanczuk, 'Some Basic Aspects of the Agreements Between Israel and the PLO from the Perspective of International Law', 7 EJIL, 1996, p. 485. Since one assumes that the Palestinian Authority is not an occupying power, the fact that Israel is not in effective day-to-day control over the whole area must impact upon its responsibilities, but it is unlikely that this has affected its legal status as such as belligerent occupant.

[55] Note that the International Court has emphasised that 'international humanitarian law contains provisions enabling account to be taken of military exigencies in certain circumstances' and that 'the military exigencies contemplated by these texts may be invoked in occupied territories even after the general close of the military operations that lead to their occupation', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 192. See also M. Sassòli, 'Legislation and Maintenance of Public Order and Civil Life by Occupying Powers', 16 EJIL, 2005, p. 661.

[56] See e.g. *Prefecture of Voiotia* v. *Germany (Distomo Massacre)*, Court of Cassation, Greece, 4 May 2000, 129 ILR, pp. 514, 519 and *Mara'abe* v. *The Prime Minister of Israel*, Israel Supreme Court, 15 September 2005, 129 ILR, pp. 241, 252. See also Benvenisti, *International Law of Occupation*, pp. 5-6, and UK, *Manual*, p. 278.

recognised internationally as Jordanian territory,[57] it cannot therefore be regarded as its territory to which the Convention would apply. In other words, to recognise that the Convention applies formally would be tantamount to recognition of Jordanian sovereignty over the disputed land.[58] However, the International Court has stated that the Convention 'is applicable in any occupied territory in the event of an armed conflict arising between two or more High Contracting Parties' so that with regard to the Israel/Palestine territories question, 'the Convention is applicable in the Palestinian territories which before the conflict lay to the east of the Green Line [i.e. the 1949 armistice line] and which, during that conflict, were occupied by Israel, there being no need for any enquiry into the precise legal status of those territories'.[59] The Eritrea–Ethiopia Claims Commission has pointed out that 'These protections [provided by international humanitarian law] should not be cast into doubt because the belligerents dispute the status of territory ... respecting international protections in such situations does not prejudice the status of the territory'.[60] Further, the Commission emphasised that 'neither text [the Hague Regulations and the Fourth Geneva Convention] suggests that only territory the title of which is clear and uncontested can be occupied territory'.[61]

[57] It was annexed by the Kingdom of Transjordan, as it then was, in 1949 at the conclusion of the Israeli War of Independence, but this annexation was recognised only by the UK and Pakistan. See e.g. A. Gerson, *Israel, the West Bank and International Law*, London, 1978.

[58] Note that Israel does observe the Convention *de facto*: see e.g. *Mara'abe* v. *The Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 253. This was noted by the International Court in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 174. See also D. Kretzmer, *The Occupation of Justice*, New York, 2002; M. Shamgar, 'The Observance of International Law in the Administered Territories', *Israel Yearbook on Human Rights*, 1977, p. 262; T. Meron, 'West Bank and Gaza', *ibid.*, 1979, p. 108; F. Fleiner-Gerster and H. Meyer, 'New Developments in Humanitarian Law', 34 ICLQ, 1985, p. 267, and E. Cohen, *Human Rights in the Israeli-Occupied Territories*, Manchester, 1985.

[59] *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 177. It should be noted that Israel has long asserted that it applies the humanitarian parts of the Convention to the occupied territories: see e.g. Shamgar, 'Observance of International Law in the Administered Territories'; and Meron, 'West Bank and Gaza', and *Mara'abe* v. *The Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 252–3. See also M. N. Shaw, 'Territorial Administration by Non-Territorial Sovereigns' in *The Shifting Allocation of Authority in International Law* (eds. Y. Shany and T. Broudie), Oxford, 2008, pp. 369, 385 ff.

[60] Partial Award, Central Front, Ethiopia's Claim 2, 28 April 2004, para. 28.

[61] *Ibid.*, para. 29. Note that article 4 of Protocol I provides that, 'The application of the Conventions and of this Protocol, as well as the conclusion of the agreements provided for therein, shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Conventions and this Protocol shall affect the legal status of the territory in question.'

Article 47 provides that persons protected under the Convention cannot be deprived in any case or in any manner whatsoever of the benefits contained in the Convention by any change introduced as a result of the occupation nor by any agreement between the authorities of the occupied territory and the occupying power nor by any annexation by the latter of the whole or part of the occupied territory. Article 49 prohibits 'individual or mass forcible transfers' as well as deportations of protected persons from the occupied territory regardless of motive, while the occupying power 'shall not deport or transfer parts of its own civilian population into the territory it occupies'.[62] Other provisions refer to the prohibition of forced work or conscription of protected persons, and the prohibition of the destruction of real or personal property except where rendered absolutely necessary by military operations, and of any alteration of the status of public or judicial officials.[63] The occupying power also has the responsibility to ensure that the local population has adequate food and medical supplies and, if not, to facilitate relief schemes.[64] Article 70 provides that protected persons shall not be arrested, prosecuted or convicted for acts committed or opinions expressed before the occupation, apart from breaches of the laws of war.[65]

In addition to the traditional rules of humanitarian law, international human rights law is now seen as in principle applicable to occupation situations. The International Court interpreted article 43 of the Hague Regulations to include 'the duty to secure respect for the applicable rules of international human rights law and international humanitarian law, to protect the inhabitants of the occupied territory against acts of violence, and not to tolerate such violence by any third state'.[66] Further, the Court has stated that the protection offered by human rights conventions

[62] The International Court has stated that this provision prohibits 'any measures taken by an occupying power in order to organize or encourage transfers of parts of its own population into the occupied territory' and that 'the Israeli settlements in the Occupied Palestinian Territory (including East Jerusalem) have been established in breach of international law', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 183–4. See also criticisms of Israel's policy of building settlements in territories it has occupied since 1967, UKMIL, 54 BYIL, 1983, pp. 538–9. Note also Kretzmer, *Occupation of Justice*, chapter 5.

[63] Articles 51, 53 and 54. Article 64 stipulates that penal laws remain in force, unless a threat to the occupier's security, while existing tribunals continue to function. See also Security Council resolution 1472 (2003) concerning the March–April 2003 military operation by coalition forces in Iraq.

[64] Articles 55, 56, 59 and 60.

[65] Section IV consists of regulations for the treatment of internees.

[66] *Democratic Republic of the Congo* v. *Uganda*, ICJ Reports, 2005, pp. 168, 231 and 242 ff.

does not cease in case of armed conflict, unless there has been a relevant derogation permitted by the convention in question. The Court has also emphasised that many human rights treaties apply to the conduct of states parties where the state is exercising jurisdiction on foreign territory[67] and that in such cases the matter will fall to be determined by the applicable *lex specialis*, that is international humanitarian law.[68] In *Democratic Republic of Congo* v. *Uganda* the Court reaffirmed that 'international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory", particularly in occupied territories'.[69] It was concluded that Uganda was internationally responsible for various violations of international human rights law and international humanitarian law, including those committed by virtue of failing to comply with its obligations as an occupying power.[70]

As part of this general approach, the Court has noted that the principle of self-determination applies to the Palestinian people,[71] and that the construction by Israel of a separation barrier (sometimes termed a wall or a fence) between its territory and the occupied West Bank was unlawful to the extent that it was situated within the occupied territories.[72]

[67] *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 178 ff. See also Wills, 'Occupation Law', pp. 265 ff.

[68] *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 240.

[69] ICJ Reports, 2005, pp. 168, 242–3. A series of international human rights instruments was listed as being applicable with regard to the Congo situation, including the International Covenants on Human Rights, the Convention on the Rights of the Child and the African Charter on Human and Peoples' Rights, *ibid.*, pp. 243–4.

[70] *Ibid.*, pp. 244–5. Reference was also made to the violation of Article 47 of the Hague Regulations and Article 33 of the Fourth Geneva Convention and of the African Charter on Human and Peoples' Rights with regard to the exploitation of the natural resources of Congo, *ibid.*, pp. 252 ff.

[71] The Court relied primarily upon the terms of the Israeli–Palestinian Interim Agreement, 1995 and the reference therein to the 'legitimate rights' of the Palestinian people, which the Court held included the right to self-determination 'as the General Assembly has moreover recognized on a number of occasions (see, for example, resolution 58/163 of 22 December 2003)', *Construction of a Wall*, ICJ Reports, 2004, pp. 136, 183.

[72] This was partly because the Court saw this as creating a fait accompli on the ground which might become permanent and would then be tantamount to *de facto* annexation, and partly because it was seen as severely impeding the exercise by the Palestinian people of its right to self-determination, *ibid.*, p. 184. The Court also noted that it appeared that the construction of the wall was contrary to provisions in the Hague Regulations and the Fourth Geneva Convention concerning requisition of property and liberty of movement, *ibid.*, pp. 185 ff. Israel's argument was that the construction of the barrier commenced after a series of suicide car bombings within its territory emanating from the occupied territories and that the barrier was a temporary security measure, *ibid.*, p. 182. See generally the articles on the case collected in 'Agora', 99 AJIL, 2005, p. 1.

Further, although an occupying power can plead military exigencies and the requirements of national security or public order in the framework of the international law of occupation, the route of the wall could not be so justified.[73]

The Israeli Supreme Court in a judgment rendered shortly before the International Court's advisory opinion emphasised that the authority of a military commander to order the construction of each segment of the separation barrier could not be founded upon political as distinct from military considerations and that the barrier could not be motivated by annexation wishes nor in order to draw a political border. Such military authority was inherently temporary since belligerent occupation was inherently temporary.[74] In a further case, decided one year after the International Court's advisory opinion, the Israeli Supreme Court referred to the balance to be drawn between the legitimate security needs of the state, its military forces and of persons present in the occupied area in question on the one hand, and the human rights of the local population derived from international humanitarian law on the other.[75] The Court also proceeded on the assumption that the international conventions on human rights applied in the area.[76] In addressing the question as to how to achieve what was termed the 'delicate balance' between military necessity and humanitarian considerations, the Court referred to the application of general principles of law, one of these being the principle of proportionality. This principle was based on three sub-tests, the first being a call for a fit between goal and means, the second calling for the application of the least harmful means in such a situation, and the third being that the damage caused to an individual by the means employed must be of appropriate proportion to the benefit stemming from it.[77] Each segment of the route of the barrier had to be assessed in the light of the impact upon the Palestinian residents and whether any impingement was proportional.[78]

[73] ICJ Reports, 2004, pp. 192 and 193.

[74] *Beit Sourik* v. *Government of Israel*, Israeli Supreme Court, 30 June 2004, 129 ILR, pp. 189, 205–6.

[75] *Mara'abe* v. *Prime Minister of Israel*, Israeli Supreme Court, 15 September 2005, 129 ILR, pp. 241, 264–5. See also Y. Shany, 'Capacities and Inadequacies: A Look at the Two Separation Barrier Cases', 38 *Israel Law Review*, 2005, p. 230.

[76] *Mara'abe* 129 ILR, pp. 241, 266, but without formally deciding the matter, *ibid.*

[77] *Ibid.*, pp. 266 and 268, reaffirming the decision in *Beit Sourik* v. *Government of Israel*, Israeli Supreme Court, 30 June 2004, 129 ILR, pp. 189, 215 ff.

[78] *Mara'abe* 129, ILR, pp. 241, 286. The Court held that the route of the barrier in the area in question in the case had to be reconsidered as it was not shown that the least injurious means test had been satisfied, *ibid.*, pp. 316 ff. The effect of this would be to reduce the size of the fenced-in enclave projecting into the West Bank. Note that the Court explained that the difference between its judgment and the advisory opinion of the International Court stemmed from the difference in facts laid before the two courts, particularly the paucity of facts relating to the security–military necessity to erect the fence arising from the phenomenon of suicide bombing inside Israel put before the International Court, *ibid.*, pp. 287–8.

In relation to the application of international human rights treaties outside the territory of the state concerned, the UK Manual of the Law of Armed Conflict concluded that: 'Where the occupying power is a party to the European Convention on Human Rights the standards of that Convention may, depending on the circumstances, be applicable in the occupied territories.'[79]

Moving further beyond the traditional and passive approach with regard to the law of occupation,[80] the Security Council adopted resolution 1483 (2003) after the coalition military action against Iraq, reaffirming the position of the UK and US as occupying powers in Iraq under international law but placing upon them (and the Coalition Provisional Authority, which included other states) a range of other powers and responsibilities over and above the international law relating to occupation.[81] These included the obligation 'to promote the welfare of the Iraqi people through the effective administration of the territory, including . . . the creation of conditions in which the Iraqi people can freely determine their own political future' and the relevance of the establishment of an internationally recognised, representative government of Iraq. In addition,

[79] At p. 282. See also *Al-Skeini* v. *Secretary of State for Defence* [2007] UKHL 26; 133 ILR, p. 693, where the House of Lords held that the European Convention applied to British military detention facilities but not to soldiers on patrol in Iraq, and *Al-Jedda* v. *Secretary of State for Defence* [2007] UKHL 58, where the House of Lords held that a binding Security Council resolution authorising the maintenance of public order had precedence over the terms of article 5 of the European Convention. See also *Coard* v. *United States*, Report No. 109/99, 29 September 1999; 123 ILR, p. 156, for the view expressed by the Inter-American Commission on Human Rights that the US was bound by relevant rules of humanitarian law and human rights law in the Grenada intervention.

[80] Note the problems posed by long-lasting occupations and the tension between the traditional law of minimal interference with local life and the need to cope with societal changes: see e.g. A. Roberts, 'Prolonged Military Occupation: The Israeli-Occupied Territories Since 1967', 84 AJIL, 1990, p. 44, and Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', 100 AJIL, 2006, p. 580.

[81] See generally 'Iraq: Law of Occupation', House of Commons Research Paper 03/51, 2 June 2003; E. Benvenisti, 'Water Conflicts During the Occupation of Iraq', 97 AJIL, 2003, p. 860; M. Hmoud, 'The Use of Force Against Iraq: Occupation and Security Council Resolution 1483', 36 *Cornell International Law Journal*, 2004, p. 435, and D. Scheffer, 'Beyond Occupation Law', 97 AJIL, 2003, p. 842.

a Special Representative for Iraq was appointed, whose functions included the promotion of human rights.

The conduct of hostilities[82]

International law, in addition to seeking to protect victims of armed conflicts, also tries to constrain the conduct of military operations in a humanitarian fashion. In analysing the rules contained in the 'Law of the Hague', it is important to bear in mind the delicate balance to be maintained between military necessity and humanitarian considerations. A principle of long standing, if not always honoured in practice, is the requirement to protect civilians against the effects of hostilities. As far as the civilian population is concerned during hostilities,[83] the basic rule (sometimes termed the principle of distinction)[84] formulated in article 48 of Protocol I is that the parties to the conflict must at all times distinguish between such population and combatants and between civilian and military objectives and must direct their operations only against military objectives.[85] Military objectives are limited in article 52(2) to 'those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage'. There is thus a principle of proportionality to be considered. Judge Higgins, for example, in referring to this principle, noted that 'even a legitimate target may not be attacked if the collateral civilian casualties would be disproportionate to the specific military gain from the attack'.[86] Issues have arisen particularly with regard to so-called 'dual use' objects such as bridges, roads and power stations,[87] and care must be taken to

[82] See e.g. Dinstein, *Conduct of Hostilities*; UK, *Manual*, chapter 5; Green, *Armed Conflict*, chapters 7 (land), 8 (maritime) and 9 (air). See also Rogers, *Law on the Battlefield*, and Best, *War and Law*, pp. 253 ff. As to armed conflicts at sea, see also *The San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (ed. L. Doswald-Beck), Cambridge, 1995.

[83] Apart from the provisions protecting the inhabitants of occupied territories under the Fourth Geneva Convention. See also Security Council resolution 1674 (2006) on the Protection of Civilians in Armed Conflicts, and Security Council Presidential Statement of 27 May 2008, 5/PRST/2008/18.

[84] See e.g. Dinstein, *Conduct of Hostilities*, p. 55.

[85] *Ibid.*, chapter 4.

[86] Dissenting Opinion, *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports, 1996, pp. 226, 587; 110 ILR, pp. 163, 536.

[87] Note that in the Eritrea–Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, 19 December 2005, paras. 113 ff., it was held that article 52(2) constituted a statement of customary international law. Whether an aerial attack on a power station fell within the term 'military advantage' could only be understood in the context of military operations between the parties as a whole and not simply in the context of a simple attack, *ibid.* See also UK, *Manual*, pp. 55 ff.

interpret these so that such objects are not indiscriminately attacked on the one hand, while ensuring that, on the other, such objects or facilities are not used by opposing military forces in an attempt to secure immunity from attack, with the inevitable result that civilians may be endangered.[88] Much will depend upon whether the military circumstances are such that they fall within the definition provided in article 52(2). This will require a balancing of military need and civilian endangerment.

Article 51 provides that the civilian population as such, as well as individual civilians, 'shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.'[89] Additionally, indiscriminate attacks[90] are prohibited.[91] Article 57 provides that in the conduct of military operations, 'constant care shall be taken to spare the civilian population, civilians and civilian objects'.

Although reprisals involving the use of force are now prohibited in international law (unless they can be brought within the framework of

[88] See, as to the Kosovo conflict 1999, e.g. J. A. Burger, 'International Humanitarian Law and the Kosovo Crisis', 82 *International Review of the Red Cross*, 2000, p. 129; P. Rowe, 'Kosovo 1999: The Air Campaign', *ibid.*, p. 147, and W. J. Fenrick, 'Targeting and Proportionality during the NATO Bombing Campaign Against Yugoslavia', 12 EJIL, 2001, p. 489. See also the Review of the NATO Bombing Campaign Against the Federal Republic of Yugoslavia by a review committee of the International Criminal Tribunal for the Former Yugoslavia recommending that no investigation be commenced by the Office of the Prosecutor: see www.un.org/icty/pressreal/nato061300.htm, and the attempt to bring aspects of the bombing campaign before the European Court of Human Rights: see *Banković* v. *Belgium*, Judgment of 12 December 2001, 133 ILR, p. 94.

[89] See e.g. the Eritrea–Ethiopia Claims Commission, Partial Award, Western Front, Aerial Bombardment and Related Claims, Eritrea's Claims 1, 3, 5, 9–13, 14, 21, 25 and 26, 19 December 2005, para. 27.

[90] These are defined in article 51(4) as: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by Protocol I; and consequently in each such case are of a nature to strike military objectives and civilians or civilian objects without distinction.

[91] See 21(5) *UN Chronicle*, 1984, p. 3 with regard to an appeal by the UN Secretary-General to Iran and Iraq to refrain from attacks on civilian targets. See also Security Council resolution 540 (1983). The above provisions apply to the use by Iraq in the 1991 Gulf War of missiles deliberately fired at civilian targets. The firing of missiles at Israeli and Saudi Arabian cities in early 1991 constituted, of course, an act of aggression against a state not a party to that conflict: see e.g. *The Economist*, 26 January 1991, p. 21.

self-defence),[92] belligerent reprisals during an armed conflict may in certain circumstances be legitimate. Their purpose is to ensure the termination of the prior unlawful act which precipitated the reprisal and a return to legality. They must be proportionate to the prior illegal act.[93] Modern law, however, has restricted their application. Reprisals against prisoners of war are prohibited by article 13 of the Third Geneva Convention, while article 52 of Protocol I provides that civilian objects are not to be the object of attack or of reprisals.[94] Civilian objects are all objects which are not military objectives as defined in article 52(2).[95] Cultural objects and places of worship are also protected,[96] as are objects deemed indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, so long as they are not used as sustenance solely for the armed forces or in direct support of military action.[97] Attacks are also prohibited against works or installations containing dangerous forces, namely dams, dykes and nuclear generating stations.[98]

The right of the parties to an armed conflict to choose methods of warfare is not unconstrained.[99] The preamble of the St Petersburg Declaration of 1868, banning explosives or inflammatory projectiles below 400 grammes in weight, emphasises that the 'only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy', while article 48 of Protocol I provides that a distinction must at all times be drawn between civilians and combatants. Article 22 of the Hague Regulations points out that the 'right of

[92] See above, chapter 20, p. 1131.

[93] See e.g. Green, *Armed Conflict*, p. 123; C. J. Greenwood, 'Reprisals and Reciprocity in the New Law of Armed Conflict' in *Armed Conflict in the New Law* (ed. M. A. Meyer), London, 1989, p. 227, and F. Kalshoven, *Belligerent Reprisals*, Leiden, 1971.

[94] Similarly wounded, sick, shipwrecked, medical and missing persons; also protected against reprisal are the natural environment and works or installations containing dangerous forces: see articles 20 and 53–6.

[95] See above, p. 1176.

[96] See article 53. See also the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, 1954 together with the First Protocol, 1954 and the Second Protocol, 1999. The protections as to cultural property are subject to 'military necessity': see article 4 of the 1954 Convention and articles 6 and 7 of the 1999 Protocol. Under articles 3 and 22 of the Protocol, protection is extended to non-international armed conflicts: see R. O'Keefe, *The Protection of Cultural Property in Armed Conflict*, Cambridge, 2006, and below, p. 1194.

[97] Article 54. [98] Article 56.

[99] See UK, *Manual*, chapter 6, and Dinstein, *Conduct of Hostilities*, chapter 3.

belligerents to adopt means of injuring the enemy is not unlimited',[100] while article 23(e) stipulates that it is especially prohibited to 'employ arms, projectiles or material calculated to cause unnecessary suffering'.[101] Quite how one may define such weapons is rather controversial and can only be determined in the light of actual state practice.[102] The balance between military necessity and humanitarian considerations is relevant here. The International Court in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*[103] summarised the situation in the following authoritative way:

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

The Court emphasised that the fundamental rules flowing from these principles bound all states, whether or not they had ratified the Hague and Geneva Conventions, since they constituted 'intransgressible principles of international customary law'.[104] At the heart of such rules and principles lies the 'overriding consideration of humanity'.[105] Whether the

[100] This is repeated in virtually identical terms in article 35, Protocol I.

[101] See article 35(2) of Protocol I and the Preamble to the 1980 Convention on Conventional Weapons: see M. N. Shaw, 'The United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1981', 9 *Review of International Studies*, 1983, p. 109 at p. 113. Note that 'employment of poisonous weapons or other weapons calculated to cause unnecessary suffering' is stated to be a violation of the laws and customs of war by article 3(a) of the Statute of the International Criminal Tribunal for the Former Yugoslavia: see Report of the UN Secretary-General, S/25704 and Security Council resolution 827 (1993), and see also article 20(d)e of the Draft Code of Crimes against the Peace and Security of Mankind, Report of the International Law Commission on the Work of its Forty-eighth Session, 1996, A/51/10, pp. 111–12.

[102] See e.g. the United States Department of the Army, *Field Manual, The Law of Land Warfare*, FM 27–10, 1956, p. 18, and regarding the UK, *The Law of War on Land*, Part III of the *Manual of Military Law*, 1958, p. 41.

[103] ICJ Reports, 1996, pp. 226, 257; 110 ILR, p. 163. [104] *Ibid.*

[105] ICJ Reports, 1996, pp. 226, 257 and 262–3. See also the *Corfu Channel* case, ICJ Reports, 1949, pp. 4, 22; 16 AD, p. 155.

actual possession or threat or use of nuclear weapons would be regarded as illegal in international law has been a highly controversial question,[106] although there is no doubt that such weapons fall within the general application of international humanitarian law.[107] The International Court has emphasised that, in examining the legality of any particular situation, the principles regulating the resort to force, including the right to self-defence, need to be coupled with the requirement to consider also the norms governing the means and methods of warfare itself. Accordingly, the types of weapons used and the way in which they are used are also part of the legal equation in analysing the legitimacy of any use of force in international law.[108] The Court analysed state practice and concluded that nuclear weapons were not prohibited either specifically or by express provision.[109] Nor were they prohibited by analogy with poisoned gases prohibited under the Second Hague Declaration of 1899, article 23(a) of the Hague Regulations of 1907 and the Geneva Protocol of 1925.[110] Nor were they prohibited by the series of treaties[111] concerning the acquisition,

[106] See e.g. *Shimoda* v. *Japan* 32 ILR, p. 626.

[107] *Ibid.*, pp. 259–61. See e.g. *International Law, the International Court of Justice and Nuclear Weapons* (eds. L. Boisson de Chazournes and P. Sands), Cambridge, 1999; D. Akande, 'Nuclear Weapons, Unclear Law?', 68 BYIL, 1997, p. 165; *Nuclear Weapons and International Law* (ed. I. Pogany), Aldershot, 1987; Green, *Armed Conflict*, pp. 128 ff., and Green, 'Nuclear Weapons and the Law of Armed Conflict', 17 *Denver Journal of International Law and Policy*, 1988, p. 1; N. Singh and E. McWhinney, *Nuclear Weapons and Contemporary International Law*, Dordrecht, 1988; G. Schwarzenberger, *Legality of Nuclear Weapons*, London, 1957, and H. Meyrowitz, 'Les Armes Nucléaires et le Droit de la Guerre' in *Humanitarian Law of Armed Conflict: Challenges* (eds. A. J. M. Delissen and G. J. Tanja), Dordrecht, 1991.

[108] The Court emphasised, for example, that 'a use of force that is proportionate under the law of self-defence, must, in order to be lawful, also meet the requirements of the law applicable in armed conflict', ICJ Reports, 1996, pp. 226, 245; 110 ILR, p. 163. The Court also pointed to the applicability of the principle of neutrality to all international armed conflicts, irrespective of the type of weaponry used, ICJ Reports, 1996, p. 261. See also the *Nicaragua* case, ICJ Reports, 1986, pp. 3, 112; 76 ILR, pp. 349, 446.

[109] ICJ Reports, 1986, p. 247.

[110] *Ibid.*, p. 248. Nor by treaties concerning other weapons of mass destruction such as the Bacteriological Weapons Treaty, 1972 and the Chemical Weapons Treaty, 1993, *ibid.*, pp. 248–9.

[111] E.g. the Peace Treaties of 10 February 1947; the Austrian State Treaty, 1955; the Nuclear Test Ban Treaty, 1963; the Outer Space Treaty, 1967; the Treaty of Tlatelolco of 14 February 1967 on the Prohibition of Nuclear Weapons in Latin America; the Nuclear Non-Proliferation Treaty, 1968 (extended indefinitely in 1995); the Treaty on the Prohibition of the Emplacement of Nuclear Weapons on the Ocean Floor and Sub-soil, 1971; Treaty of Rarotongo of 6 August 1985 on the Nuclear Weapons-Free Zone of the South Pacific; the Treaty of Final Settlement with Respect to Germany, 1990; the Treaty on the South East Asia Nuclear Weapon-Free Zone, 1995 and the Treaty on an African Nuclear Weapon-Free Zone, 1996.

manufacture, deployment and testing of nuclear weapons and the treaties concerning the ban on such weapons in certain areas of the world.[112] Nor were nuclear weapons prohibited as a consequence of a series of General Assembly resolutions, which taken together fell short of establishing the necessary *opinio juris* for the creation of a new rule to that effect.[113] In so far as the principles of international humanitarian law were concerned, the Court, beyond noting their applicability, could reach no conclusion. The Court felt unable to determine whether the principle of neutrality or the principles of international humanitarian law or indeed the norm of self-defence prohibited the threat or use of nuclear weapons.[114] This rather weak conclusion, however, should be seen in the context of continuing efforts to ban all nuclear weapons testing, the increasing number of treaties prohibiting such weapons in specific geographical areas and the commitment given in 1995 by the five declared nuclear weapons states not to use such weapons against non-nuclear weapons states that are parties to the Nuclear Non-Proliferation Treaty.[115] Nevertheless, it does seem clear that the possession of nuclear weapons and their use *in extremis* and in strict accordance with the criteria governing the right to self-defence are not prohibited under international law.[116]

A number of specific bans on particular weapons has been imposed.[117] Examples would include small projectiles under the St Petersburg formula of 1868, dum-dum bullets under the Hague Declaration of 1899 and asphyxiating and deleterious gases under the Hague Declaration of 1899 and the 1925 Geneva Protocol.[118] Under the 1980 Conventional Weapons Treaty,[119] Protocol I, 1980, it is prohibited to use weapons that cannot be detected by X-rays, while Protocol II, 1980 (minimally amended in 1996), prohibits the use of mines and booby-traps against civilians, Protocol III, 1980, the use of incendiary devices against civilians or against military objectives located within a concentration of civilians where the attack is by

[112] ICJ Reports, 1996, pp. 226, 248–53; 110 ILR, p. 163. [113] ICJ Reports, 1996, pp. 254–5.

[114] *Ibid.*, pp. 262–3 and 266. [115] See Security Council resolution 984 (1995).

[116] See also the UK, *Manual*, pp. 117 ff., and the US *The Law of Land Warfare*, 1956, s. 35.

[117] See e.g. Green, *Armed Conflict*, pp. 133 ff.

[118] See also e.g. the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological Weapons and the 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and Their Destruction. See 21(3) *UN Chronicle*, 1984, p. 3 with regard to the use of chemical weapons in the Iran–Iraq war.

[119] See Shaw, 'Conventional Weapons'. Note article 1 was amended in 2001.

air-delivered incendiary weapons, Protocol IV, 1995, the use of blinding laser weapons and Protocol V, 2003, concerns the explosive remnants of war. In 1997, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was adopted.[120]

Article 35(3) of Additional Protocol I to the 1949 Conventions provides that 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.[121] Article 55 further states that care is to be taken in warfare to protect the natural environment against such damage, which may prejudice the health or survival of the population, while noting also that attacks against the natural environment by way of reprisals are prohibited. The Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, 1977 prohibits such activities having widespread, long-lasting or severe effects as the means of destruction, damage or injury to any other state party.

Armed conflicts: international and internal

The rules of international humanitarian law apply to armed conflicts. Accordingly, no formal declaration of war is required in order for the Conventions to apply. The concept of 'armed conflict' is not defined in the Conventions or Protocols, although it has been noted that 'any difference arising between states and leading to the intervention of members of the armed forces is an armed conflict' and 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state'.[122]

[120] Note the adoption on 30 May 2008 of a Convention banning the use, stockpiling, production and transfer of cluster munitions.

[121] See, for example, the deliberate spillage of vast quantities of oil into the Persian Gulf by Iraq during the 1991 Gulf War: see *The Economist*, 2 February 1991, p. 20. See also Green, *Armed Conflict*, p. 138, and Rogers, *Law of the Battlefield*, chapter 6.

[122] J. Pictet, *Commentary on the Geneva Conventions of 12 August 1949*, Geneva, 1952, vol. I, p. 29. In the *Tadić* case, IT-94-1, Decision on Jurisdiction, para. 70; 105 ILR, pp. 453, 488, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia stated that, 'an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organised armed groups or between such groups within a state'.

A distinction has historically been drawn between international and non-international armed conflicts,[123] founded upon the difference between inter-state relations, which was the proper focus for international law, and intra-state matters which traditionally fell within the domestic jurisdiction of states and were thus in principle impervious to international legal regulation. However, this difference has been breaking down in recent decades. In the sphere of humanitarian law, this can be seen in the gradual application of such rules to internal armed conflicts.[124] The notion of an armed conflict itself was raised before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia in its decision on jurisdictional issues in the *Tadić* case.[125] It was claimed that no armed conflict as such existed in the Former Yugoslavia with respect to the circumstances of the instant case since the concept of armed conflict covered only the precise time and place of actual hostilities and the events alleged before the Tribunal did not take place during hostilities. The Appeals Chamber of the Tribunal correctly refused to accept a narrow geographical and temporal definition of armed conflicts, whether international or internal. It was stated that:[126]

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.

This definition arose in the specific context of the Former Yugoslavia, where it was unclear whether an international or a non-international armed conflict or some kind of mixture of the two was involved. This was important to clarify since it would have had an effect upon the relevant applicable law. The Security Council did not as such classify the nature of the conflict, simply condemning widespread violations of international humanitarian law, including mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians and deliberate attacks upon non-combatants, and calling for the cessation.[127] The Appeals Chamber

[123] See e.g. Green, *Armed Conflict*, chapter 3. [124] See further below, p. 1194.

[125] Case No. IT-94-1-AR 72; 105 ILR, pp. 453, 486 ff. [126] *Ibid.*, p. 488.

[127] See e.g. Security Council resolution 771 (1992). See also C. Gray, 'Bosnia and Herzegovina: Civil War or Inter-State Conflict? Characterisation and Consequences', 67 BYIL, 1996, p. 155.

concluded that 'the conflicts in the former Yugoslavia have both internal and international aspects'.[128] Since such conflicts could be classified differently according to time and place, a particularly complex situation was created. However, many of the difficulties that this would have created were mitigated by an acceptance of the evolving application of humanitarian law to internal armed conflicts.[129] This development has arisen partly because of the increasing frequency of internal conflicts and partly because of the increasing brutality in their conduct. The growing interdependence of states in the modern world makes it more and more difficult for third states and international organisations to ignore civil conflicts, especially in view of the scope and insistence of modern communications, while the evolution of international human rights law has contributed to the end of the belief and norm that whatever occurs within other states is the concern of no other state or person.[130] Accordingly, the international community is now more willing to demand the application of international humanitarian law to internal conflicts.[131] In the *Tadić* case, the Appeals Chamber (in considering jurisdictional issues) concluded that article 3 of its Statute, which gave it jurisdiction over 'violations of the laws or customs of war',[132] provided it with such jurisdiction 'regardless of whether they occurred within an internal or an international armed conflict'.[133] In its decision, the Appeals Chamber noted that,

> It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside

[128] Case No. IT-94-1-AR; 105 ILR, pp. 453, 494. [129] *Ibid.*, pp. 495 ff.

[130] See e.g. General Assembly resolutions 2444 (XXV) and 2675 (XXV), adopted in 1970 unanimously.

[131] See e.g. Security Council resolutions 788 (1992), 972 (1995) and 1001 (1995) with regard to the Liberian civil war; Security Council resolutions 794 (1992) and 814 (1993) with regard to Somalia; Security Council resolution 993 (1993) with regard to Georgia and resolution 1193 (1998) with regard to Afghanistan.

[132] An historic term now subsumed within the concept of international humanitarian law. Article 3 states that such violations shall include, but not be limited to, the employment of poisonous weapons or other weapons calculated to cause unnecessary suffering; wanton destruction of cities, towns or villages or devastation not justified by military necessity; attack or bombardment of undefended towns, villages or buildings; seizure of or destruction or wilful damage done to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science; and plunder of public or private property.

[133] Case No. IT-94-1-AR 72; 105 ILR, pp. 453, 504. See also the *Furundžija* case, Case No. IT-95-17/1 (decision of Trial Chamber II, 10 December 1998); 121 ILR, pp. 213, 253–4.

> an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[134]

The Appeals Chamber concluded that until 19 May 1992 with the open involvement of the Federal Yugoslav Army, the conflict in Bosnia had been international, but the question arose as to the situation when this army was withdrawn at that date. The Chamber examined the legal criteria for establishing when, in an armed conflict which is *prima facie* internal, armed forces may be regarded as acting on behalf of a foreign power thus turning the conflict into an international one. The Chamber examined article 4 of the Third Geneva Convention which defines prisoner of war status[135] and noted that states have in practice accepted that belligerents may use paramilitary units and other irregulars in the conduct of hostilities only on the condition that those belligerents are prepared to take responsibility for any infringements committed by such forces. In order for irregulars to qualify as lawful combatants, control over them by a party to an international armed conflict was required and thus a relationship of dependence and allegiance. Accordingly, the term 'belonging to a party to the conflict' used in article 4 implicitly refers to a test of control.[136]

In order to determine the meaning of 'control', the decision of the International Court in the *Nicaragua* case was examined[137] and rejected, the Appeals Chamber preferring a rather weaker test, concluding that in order to attribute the acts of a military or paramilitary group to a state, it must be proved that the state wields overall control over the group, not only by equipping and financing the group, but also by co-ordinating or helping in the general planning of its military activity. However, it was not necessary that, in addition, the state should also issue, either to the head

[134] Judgment of 15 July 1999, para. 84; 124 ILR, p. 96. [135] See above, p. 1172.

[136] Judgment of 15 July 1999, paras. 94 and 95; 124 ILR, p. 100.

[137] In that case it was held that in order to establish the responsibility of the US over the 'Contra' rebels, it was necessary to show that the state was not only in effective control of a military or paramilitary group, but also that there was effective control of the specific operation in the course of which breaches may have been committed. In order to establish that the US was responsible for 'acts contrary to human rights and humanitarian law' allegedly perpetrated by the Nicaraguan Contras, it was necessary to prove that the US had specifically 'directed or enforced' the perpetration of those acts: see ICJ Reports, 1986, pp. 14, 64–5; 76 ILR, p. 349. The International Court in the *Genocide Convention (Bosnia v. Serbia)* case, ICJ Reports, 2007, reaffirmed its decision in the *Nicaragua* case on this point and distinguished the *Tadić* case: see above, chapter 14, p. 791.

or to members of the group, instructions for the commission of specific acts contrary to international law.[138]

Accordingly, the line between international and internal armed conflicts may be drawn at the point at which it can be shown that a foreign state is either directly intervening within a civil conflict or exercising 'overall control' over a group that is fighting in that conflict.

The Appeals Chamber in the *Kunarac* case 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. The Chamber held that the laws of war would apply in the whole territory of the warring states or, in the case of internal armed conflicts, the whole territory under the control of a party to the conflict, whether or not actual combat takes place there, and continued to apply until a general conclusion of peace or, in the case of internal armed conflicts, a peaceful settlement is achieved. A violation of the laws or customs of war may therefore occur at a time when and in a place where no fighting is actually taking place.[139]

Non-international armed conflict[140]

Although the 1949 Geneva Conventions were concerned with international armed conflicts, common article 3 did provide in cases of non-international armed conflicts occurring in the territory of one of the parties a series of minimum guarantees for protecting those not taking an active part in hostilities, including the sick and wounded.[141] Precisely where this article applied was difficult to define in all cases. Non-international armed conflicts could, it may be argued, range from full-scale civil wars to relatively minor disturbances. This poses problems for the state in question which may not appreciate the political implications of the application of the Geneva Conventions, and the lack of the reciprocity element due to the absence of another state adds to the problems of enforcement.

138 Judgment of 15 July 1999, paras. 131 and 145; 124 ILR, pp. 116 and 121.

139 Decision of 12 June 2002, Case No. IT-96-23 and IT-96-23/1, para. 57.

140 See e.g. UK, *Manual*, chapter 15; L. Moir, *The Law of Internal Armed Conflict*, Cambridge, 2002; Green, *Armed Conflict*, chapter 19, and T. Meron, *Human Rights in Internal Strife*, Cambridge, 1987. See also ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts*, Geneva, 2008.

141 Note that the Court in the *Nicaragua* case, ICJ Reports, 1986, pp. 3, 114; 76 ILR, pp. 349, 448, declared that common article 3 also applied to international armed conflicts as a 'minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts'.

Common article 3 lists the following as the minimum safeguards:

1. Persons taking no active part in hostilities to be treated humanely without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth.

   To this end the following are prohibited:

   a) violence to life and person, in particular murder, cruel treatment and torture;
   b) hostage-taking;
   c) outrages upon human dignity, in particular humiliating and degrading treatment;
   d) the passing of sentences and the carrying out of executions in the absence of due process.

2. The wounded and the sick are to be cared for.

Common article 3[142] was developed by Protocol II, 1977,[143] which 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. The latter 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 II. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts.[144] The Protocol lists a series of fundamental guarantees and other provisions calling for the

142 The International Court in the *Nicaragua* case stated that the rules contained in common article 3 reflected 'elementary considerations of humanity', ICJ Reports, 1986, pp. 14, 114; 76 ILR, p. 349. See also the *Tadić* case, Case No. IT-94-1-AR; 105 ILR, pp. 453, 506.

143 Note, of course, that by article 1(4) of Protocol I, 1977, international armed conflicts are now deemed to include armed conflicts in which peoples are fighting against colonial domination, alien occupation and racist regimes: see D. Forsyth, 'Legal Management of International War', 72 AJIL, 1978, p. 272. Article 96(3), Protocol I, requires the authority representing such peoples to make a special declaration undertaking to apply the Geneva Conventions and Protocol I. The UK made a declaration on ratification of Protocol I to the effect that it would not be bound by any such special declaration unless the UK has expressly recognised that it has been made by a body 'which is genuinely an authority representing a people engaged in an armed conflict': see UK, *Manual*, p. 384. Note also the UK view that 'a high level of intensity of military operations' is required regarding Protocol I so that the Northern Ireland situation, for example, would not have been covered: see 941 HC Deb., col. 237.

144 See article 1(2), Protocol II and see article 8(2)d of the Rome Statute of the International Criminal Court, 1998. Article 8(2)e of the Rome Statute lists a series of acts which if committed in internal armed conflicts are considered war crimes.

protection of non-combatants.[145] In particular, one may note the prohibitions on violence to the life, health and physical and mental well-being of persons, including torture; collective punishment; hostage-taking; acts of terrorism; outrages upon personal dignity, including rape and enforced prostitution; and pillage.[146] Further provisions cover the protection of children;[147] the protection of civilians, including the prohibition of attacks on works or installations containing dangerous forces that might cause severe losses among civilians;[148] the treatment of civilians, including their displacement;[149] and the treatment of prisoners and detainees,[150] and the wounded and sick.[151]

The Appeals Chamber in its decision on jurisdiction in the *Tadić* case noted that international legal rules had developed to regulate internal armed conflict for a number of reasons, including the frequency of civil wars, the increasing cruelty of internal armed conflicts, the large-scale nature of civil strife making third-party involvement more likely and the growth of international human rights law. Thus the distinction between inter-state and civil wars was losing its value so far as human beings were concerned.[152] Indeed, one of the major themes of international humanitarian law has been the growing move towards the rules of human rights law and vice versa.[153] There is a common foundation in the principle of respect for human dignity.[154]

[145] Note that in non-international armed conflicts the domestic law of the state in which the conflict is taking place continues to apply and that a captured rebel is not entitled to POW status. However, persons captured from either the government or rebel or opposition side are entitled to humane treatment: see e.g. UK, *Manual*, pp. 387 ff.

[146] See article 4. [147] Article 6. [148] Article 15. [149] Article 17. [150] Article 5.

[151] Article 10. Note that the International Criminal Tribunal for Rwanda has jurisdiction to try violations of common article 3 and Protocol II. These are defined in article 4 of its Statute as including: '(a) Violence to life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (b) Collective punishments; (c) Taking of hostages; (d) Acts of terrorism; (e) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) Pillage; (g) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilised peoples; and (h) Threats to commit any of the foregoing acts.'

[152] Case No. IT-94-1-AR; 105 ILR, pp. 453, 505 ff. But see Moir, *Internal Armed Conflict*, pp. 188 ff., and Meron, 'The Continuing Role of Custom in the Formation of International Humanitarian Law', 90 AJIL, 1996, pp. 238, 242–3.

[153] See e.g. Moir, *Internal Armed Conflict*, chapter 5, and R. Provost, *International Human Rights and Humanitarian Law*, Cambridge, 2002. See also above, p. 1180.

[154] See the *Furundžija* case, 121 ILR, pp. 213, 271.

The principles governing internal armed conflicts in humanitarian law are becoming more extensive, while the principles of international human rights law are also rapidly evolving, particularly with regard to the fundamental non-derogable rights which cannot be breached even in times of public emergency.[155] This area of overlap was recognised in 1970 in General Assembly resolution 2675 (XXV) which emphasised that fundamental human rights 'continue to apply fully in situations of armed conflict', while the European Commission on Human Rights in the *Cyprus v. Turkey (First and Second Applications)* case declared that in belligerent operations a state was bound to respect not only the humanitarian law laid down in the Geneva Conventions but also fundamental human rights.[156]

The Inter-American Commission of Human Rights in the *La Tablada* case against Argentina noted that the most difficult aspect of common article 3 related to its application at the blurred line at the lower end separating it from especially violent internal disturbances.[157] It was in situations of internal armed conflict that international humanitarian law and international human rights law 'most converge and reinforce each other', so that, for example, common article 3 and article 4 of the Inter-American Convention on Human Rights both protected the right to life and prohibited arbitrary execution. However, there are difficulties in resorting simply to human rights law when issues of the right to life arise in combat situations. Accordingly, 'the Commission must necessarily look to and apply definitional standards and relevant rules of humanitarian law as sources of authoritative guidance in its resolution' of such issues.[158]

The Commission returned to the issue in *Coard* v. *USA* and noted that there was 'an integral linkage between the law of human rights and the humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity", and there may be a substantial overlap in the application of these bodies of law'.[159]

However, in addition to the overlap between internal armed conflict principles and those of human rights law in situations where the level of

[155] See e.g. article 15 of the European Convention on Human Rights, 1950; article 4 of the International Covenant on Civil and Political Rights, 1966; and article 27 of the Inter-American Convention on Human Rights, 1969. See also above, chapters 6 and 7.

[156] Report of the Commission of 10 July 1976, paras. 509–10.

[157] Report No. 55/97, Case 11.137 and OEA/Ser.L/V/II.98, para. 153.

[158] *Ibid.*, paras. 160–1. [159] Case No. 10.951; 123 ILR, pp. 156, 169 (footnote omitted).

domestic violence has reached a degree of intensity and continuity, there exists an area of civil conflict which is not covered by humanitarian law since it falls below the necessary threshold of common article 3 and Protocol II.[160] Moves have been underway to bridge the gap between this and the application of international human rights law.[161] The International Committee of the Red Cross has been considering the elaboration of a new declaration on internal strife. In addition, a Declaration of Minimum Humanitarian Standards was adopted by a group of experts in 1990.[162] This Declaration emphasises the prohibition of violence to the life, health and physical and mental well-being of persons, including murder, torture and rape; collective punishment; hostage-taking; practising, permitting or tolerating the involuntary disappearance of individuals; pillage; deliberate deprivation of access to necessary food, drinking water and medicine, and threats or incitement to commit any of these acts.[163] In addition, the Declaration provides *inter alia* that persons deprived of their liberty should be held in recognised places of detention (article 4); that acts or threats of violence to spread terror are prohibited (article 6); that all human beings have the inherent right to life (article 8); that children are to be protected so that, for example, children under fifteen years of age should not be permitted to join armed groups or forces (article 10); that the wounded and sick should be cared for (article 12) and medical, religious and other humanitarian personnel should be protected and assisted (article 14).[164]

[160] See A. Hay, 'The ICRC and International Humanitarian Issues', *International Review of the Red Cross*, Jan–Feb 1984, p. 3. See also T. Meron, 'Towards a Humanitarian Declaration on Internal Strife', 78 AJIL, 1984, p. 859; Meron, *Human Rights in Internal Strife*, and Meron, 'On the Inadequate Reach of Humanitarian and Human Rights Law and the Need for a New Instrument', 77 AJIL, 1983, p. 589, and T. Meron and A. Rosas, 'A Declaration of Minimum Humanitarian Standards', 85 AJIL, 1991, p. 375.

[161] As to international human rights law, see generally above, chapter 6. Problems centre upon the situation where humanitarian law does not apply since the threshold criteria for applicability have not been reached; where the state in question is not a party to the relevant instrument; where derogation from the specified standards is involved as a consequence of the declaration of a state of emergency, and where the party concerned is not a government: see A. Eide, A. Rosas and T. Meron, 'Combating Lawlessness in Gray Zone Conflicts Through Minimum Humanitarian Standards', 89 AJIL, 1995, pp. 215, 217.

[162] This was reprinted in the Report of the UN Sub-Commission: see E/CN.4/1995/116 (1995) and UN Commission on Human Rights resolution 1995/29 and E/CN.4/1995/81 and 116. See also T. Meron and A. Rosas, 'Current Development: A Declaration of Minimum Humanitarian Standards', 85 AJIL, 1991, pp. 375, 375–7.

[163] Article 3.

[164] See also the Declaration for the Protection of War Victims, 1993, A/48/742, Annex.

Enforcement of humanitarian law[165]

Parties to the 1949 Geneva Conventions and to Protocol I, 1977, undertake to respect and to ensure respect for the instrument in question,[166] and to disseminate knowledge of the principles contained therein.[167] A variety of enforcement methods also exist, although the use of reprisals has been prohibited.[168] One of the means of implementation is the concept of the Protecting Power, appointed to look after the interests of nationals of one party to a conflict under the control of the other, whether as prisoners of war or occupied civilians.[169] Sweden and Switzerland performed this role during the Second World War. Such a Power must ensure that compliance with the relevant provisions has been effected and that the system acts as a form of guarantee for the protected person as well as a channel of communication for him with the state of which he is a national. The drawback of this system is its dependence upon the consent of the parties involved. Not only must the Protecting Power be prepared to act in that capacity, but both the state of which the protected person is a national and the state holding such persons must give their consent for the system to operate.[170] Since the role is so central to the enforcement and working of humanitarian law, it is a disadvantage for it to be subject to state sovereignty and consent. It only requires the holding state to refuse its co-operation for this structure of implementation to be greatly weakened, leaving only reliance upon voluntary operations. This has occurred on a number of occasions, for example the Chinese refusal to consent to the appointment of a Protecting Power with regard to its conflict with India in 1962, and the Indian refusal, of 1971 and subsequently, with regard to Pakistani prisoners of war in its charge.[171] Protocol I also provides for an International Fact-Finding Commission for competence to inquire into grave breaches[172] of the Geneva Conventions and that Protocol or other

[165] See e.g. UK, *Manual*, chapter 16, and Best, *War and Law*, pp. 370 ff.

[166] Common article 1.

[167] See e.g. articles 127 and 144 of the Third and Fourth Geneva Conventions, article 83 of Protocol I and article 19 of Protocol II.

[168] See e.g. articles 20 and 51(6) of Protocol I.

[169] See e.g. Draper, 'Implementation and Enforcement', pp. 13 ff.

[170] See articles 8, 8, 8 and 9 of the Four Geneva Conventions, 1949, respectively.

[171] Note that the system did operate in the Falklands conflict, with Switzerland acting as the Protecting Power of the UK and Brazil as the Protecting Power of Argentina: see e.g. Levie, 'Falklands Crisis', pp. 68–9.

[172] See articles 50, 51, 130 and 147 of the four 1949 Conventions respectively and article 85 of Protocol I, 1977. A Commission of Experts was established in 1992 to investigate violations of international humanitarian law in the territory of the Former Yugoslavia:

serious violations, and to facilitate through its good offices the 'restoration of an attitude of respect' for these instruments.[173] The parties to a conflict may themselves, of course, establish an ad hoc inquiry into alleged violations of humanitarian law.[174]

It is, of course, also the case that breaches of international law in this field may constitute war crimes or crimes against humanity or even genocide for which universal jurisdiction is provided.[175] Article 6 of the Charter of the Nuremberg Tribunal, 1945, for example, includes as war crimes for which there is to be individual responsibility the murder, ill-treatment or deportation to slave labour of the civilian population of an occupied territory; the ill-treatment of prisoners of war; the killing of hostages and the wanton destruction of cities, towns and villages.[176]

A great deal of valuable work in the sphere of humanitarian law has been accomplished by the International Red Cross.[177] This indispensable organisation consists of the International Committee of the Red Cross (ICRC), over 100 national Red Cross (or Red Crescent) societies with a League co-ordinating their activities, and conferences of all these elements every four years. The ICRC is the most active body and has a wide-ranging series of functions to perform, including working for the application of the Geneva Conventions and acting in natural and man-made disasters. It has operated in a large number of states, visiting prisoners of war[178] and otherwise functioning to ensure the implementation of humanitarian law.[179] It operates in both international and internal armed conflict

see Security Council resolution 780 (1992). See also the Report of the Commission of 27 May 1994, S/1994/674.

173 Article 90, Protocol I, 1977.

174 Articles 52, 53, 132 and 149 of the four 1949 Conventions respectively.

175 See e.g. Draper, 'Implementation and Enforcement', pp. 35 ff. Note also that grave breaches are to be the subject of sanction.

176 See further, with regard to the statutes of the various war crimes tribunals, above, chapters 8 and 12. Note also the UN Compensation Commission dealing with compensation for victims of Iraq's invasion of Kuwait in 1990, above, chapter 18, p. 1045.

177 See e.g. G. Willemin and R. Heacock, *The International Committee of the Red Cross*, The Hague, 1984, and D. Forsythe, 'The Red Cross as Transnational Movement', 30 *International Organisation*, 1967, p. 607. See also Best, *War and Law*, pp. 347 ff.

178 See e.g. articles 126 and 142 of the Third and Fourth Geneva Conventions respectively.

179 The International Court in the *Construction of a Wall* case, ICJ Reports, 2004, pp. 136, 175–6; 129 ILR, pp. 37, 94, referred to the 'special position' of the ICRC with regard to the Fourth Geneva Convention, while the Eritrea–Ethiopia Claims Commission in the Partial Award, Prisoners of War, Ethiopia's Claim 4, 1 July 2003, paras. 58 and 61–2, noted that the ICRC had been assigned significant responsibilities in a number of articles of the Third Geneva Convention (with which it was concerned) both as 'a humanitarian organization providing relief and as an organization providing necessary and vital external scrutiny of

situations. One of the largest operations it has undertaken since 1948 related to the Nigerian civil war, and in that conflict nearly twenty of its personnel were killed on duty. The ICRC has since been deeply involved in the Yugoslav situation and indeed, in 1992, contrary to its usual confidentiality approach, it felt impelled to speak out publicly against the grave breaches of humanitarian law taking place. The organisation has also been involved in Somalia (where its activities included visiting detainees held by the UN forces), Rwanda, Afghanistan, Sri Lanka[180] and in Iraq. Due to circumstances, the ICRC must act with tact and discretion and in many cases states refuse their co-operation. It performed a valuable function in the exchange of prisoners after the 1967 and 1973 Middle East wars, although for several years Israel did not accept the ICRC role regarding the Arab territories it occupied.[181]

Conclusion

The ICRC formulated the following principles as a guide to the relevant legal rules:

1. Persons *hors de combat* and those who do not take a direct part in hostilities are entitled to respect for their lives and physical and moral integrity. They shall in all circumstances be protected and treated humanely without any adverse distinctions.
2. It is forbidden to kill or injure an enemy who surrenders or who is *hors de combat*.
3. The wounded and sick shall be collected and cared for by the party to the conflict which has them in its power. Protection also covers medical personnel, establishments, transports and *matériel*. The emblem of the red cross (red crescent, red lion and sun) is the sign of such protection and must be respected.
4. Captured combatants and civilians under the authority of an adverse party are entitled to respect for their lives, dignity, personal rights and convictions. They shall be protected against all acts of violence and

the treatment of POWs' and further emphasised that the provisions requiring scrutiny of the treatment of, and access to, POWs had become part of customary international law.

180 See e.g. *Challenges of the Nineties: ICRC Special Report on Activities 1990–1995*, Geneva, 1995. Between 1990 and 1994, over half a million prisoners in over sixty countries were visited by ICRC delegates, *ibid.*

181 See generally *Annual Report of the ICRC*, 1982. See also 'Action by the ICRC in the Event of Breaches of International Humanitarian Law', *International Review of the Red Cross*, March–April 1981, p. 1.

reprisals. They shall have the right to correspond with their families and to receive relief.

5. Everyone shall be entitled to benefit from fundamental judicial guarantees. No one shall be held responsible for an act he has not committed. No one shall be subjected to physical or mental torture, corporal punishment or cruel or degrading treatment.
6. Parties to a conflict and members of their armed forces do not have an unlimited choice of methods and means of warfare. It is prohibited to employ weapons or methods of warfare of a nature to cause unnecessary losses or excessive suffering.
7. Parties to a conflict shall at all times distinguish between the civilian population and combatants in order to spare civilian population and property. Neither the civilian populations as such nor civilian persons shall be the object for attack. Attacks shall be directed solely against military objectives.[182]

In addition, the ICRC has published the following statement with regard to non-international armed conflicts:

A. General Rules

1. The obligation to distinguish between combatants and civilians is a general rule applicable in non-international armed conflicts. It prohibits indiscriminate attacks.
2. The prohibition of attacks against the civilian population as such or against individual civilians is a general rule applicable in non-international armed conflicts. Acts of violence intended primarily to spread terror among the civilian population are also prohibited.
3. The prohibition of superfluous injury or unnecessary suffering is a general rule applicable in non-international armed conflicts. It prohibits, in particular, the use of means of warfare which uselessly aggravate the sufferings of disabled men or render their death inevitable.
4. The prohibition to kill, injure or capture an adversary by resort to perfidy is a general rule applicable in non-international armed conflicts; in a non-international armed conflict, acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord protection under the rules of international law applicable in non-international armed conflicts, with intent to betray that confidence, shall constitute perfidy.

[182] See *International Review of the Red Cross*, Sept.–Oct. 1978, p. 247. See also Green, *Armed Conflict*, pp. 355–6.

5. The obligation to respect and protect medical and religious personnel and medical units and transports in the conduct of military operations is a general rule applicable in non-international armed conflicts.
6. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition of attacks on dwellings and other installations which are used only by the civilian population.
7. The general rule prohibiting attacks against the civilian population implies, as a corollary, the prohibition to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population.
8. The general rule to distinguish between combatants and civilians and the prohibition of attack against the civilian population as such or against individual civilians implies, in order to be effective, that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.[183]

Suggestions for further reading

I. Detter, *The Law of War*, 2nd edn, Cambridge, 2000
Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge, 2004
L. Green, *The Contemporary Law of Armed Conflict*, 2nd edn, Manchester, 2000
UK Ministry of Defence, *Manual on the Law of Armed Conflict*, Oxford, 2004

[183] See *International Review of the Red Cross*, Sept.–Oct. 1989, p. 404. See also Green, *Armed Conflict*, p. 356. Part B of this Declaration dealing with Prohibitions and Restrictions on the Use of Certain Weapons has been omitted. It may be found at the above references.