

# International Law and Regimes

## INTERNATIONAL HUMANITARIAN LAW

IVO POSPÍŠIL

# Framework



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- II. Definition of international humanitarian law
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# I. War and its regulation



- Thomas Hobbes - monopolizing violence within the state and its externalization
- Carl Schmitt – The Concept of the Political (politics as the fight of the enemy against the enemy)
- von Clausewitz – war as a continuation of politics by other means

## II. Definition of international humanitarian law



= a set of rules that provide for the conduct in the armed conflicts in order to eliminate suffering and reduce material damage or other negative effects caused by such conflicts

= regulates the rules of engagement and the limitation of the negative consequences of war

= *ius in bello* (regulates rules within a conflict), not *ius ad bellum* (not related to the legality of war as such)

= synonymous terminology: international war law, the law of armed conflicts, the laws and the customs of war

# II. Definition of international humanitarian law



- currently regulates the rules of international and intrastate (internal) conflicts (“civil” wars)
- the first codified part of public international law (!)
- after World War II: the issue of its relation to international human rights law (applies primarily in peace, however in armed conflict some HRs can be legally derogated see, for example, Article 15 of the European Convention for the Protection of Human Rights and Fundamental Freedoms:

*„In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.*

*No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.“*

## II. Definition of international humanitarian law



- HRs also apply during war, but some aspects must be assessed according to the norms of humanitarian law (e.g. the right to life and the issue of deprivation of life – the question of proportionality v. the necessity of war)
- humanitarian law during the war acts as a *lex specialis* towards the HRs (see Pospisil, I. International Armed Conflicts and Human Rights: the view of international institutions and courts. In Pospíšil, Ivo, Zdeněk Kříž, etc. Armed conflicts after the end of the Cold War. Brno: MPÚ 2012, p. 228 – 246)



# III. Development of modern humanitarian law

- Gustav Adolf War Code (1621), rules for Swedish army commanders during the 30-years war
- Jean-Jacques Rousseau – war is not a human-to-human relationship, but a relationship between states, people become enemies like fighting combatants (they can attack each other and get rid of each other's lives, once they lay down their arms, they become human beings again – it has implications up to today's concept of combatants, prisoners of war, relations with civilians, etc.)

# III. Development of modern humanitarian law



## **The Grounds of the Geneva Law (Henry Dunant):**

Convention for the Improvement of the Fate of Wounded in The Field (1864)

founding of the International Committee of the Red Cross (1880)

## **The Grounds of the Hague Law (Francis Lieber):**

Lieber Code

military manuals

St. Petersburg Declaration (1868)

Brussels Declaration (1874)



# III. Development of modern humanitarian law



- **The Hague Conventions** (1899 and 1907)
- **The Geneva Conventions 1929**: Convention for the Protection of the Wounded and Sick, Convention for the Protection of Prisoners of War
- **4 Geneva Conventions** for the Protection of Victims of Armed Conflict, 1949
- **Additional Protocols** to the 1977 Geneva Conventions: Protocol I (consolidating the Geneva and Hague branches of law), Protocol II (regulates the rules of internal, intra-state armed conflicts)

# IV. Structure of international humanitarian law



- **Hague Law**

- rules of conduct of armed operations (rules of participation in hostilities, neutrality, methods of conducting in combat, regulation of means combat)

- **Geneva Law**

- protection of victims of armed conflicts (wounded, prisoners of war, medical personnel, civilians)

- the two parts are gradually converging, interconnected in Protocol I

# V. Specific features and guidelines



- subject of regulation (situation of extreme violence)
- addressees of rules (rights, obligations and their scope vary according to the type of entities – combatants/non-combatants, civilian entities, soldiers/non-officers/officers, etc.)
- method of legal regulation (what is not expressly prohibited does not mean it is allowed)
- sources of law (international treaties and international customs – see the 2005 study of the International Committee of the Red Cross "Customary International Humanitarian Law, Volume I and II – identified 161 customary rules, and unwritten principles of humanity and demands of public conscience)

## V. Specific features and guidelines



- **Principle of humanity**
  - penetrates to all IHL norms
  - subsidiarity in cases not covered by an international treaty (Article 1(2) of Protocol I: *'In cases not covered by this Protocol or other international agreements, civilians and combatants shall remain protected and within the scope of the principles of international law arising from established conventions, the principles of humanity and the requirements of the social conscience.'*)

# V. Specific features and guidelines



- **Principle of military necessity**

- limits violence to the necessary extent – it is the duty of the war parties to use only the kind and amount of force necessary to defeat the enemy in the shortest possible time and with the least possible cost and loss

## **Principle of differentiation**

- the obligation to distinguish between different addressees of norms, between military and civil aims etc.

# V. Specific features and guidelines



- **Principle of proportionality**

- prohibits the disproportionate collateral damages on civilians and objects exceeding the military advantage obtained

## **Principle of equal obligations of war parties**

- parties are obliged to comply with the IHL regardless of whether they are aggressors or victims (classification of the conflict as offensive, defensive, just, limited, total, etc. does not affect the implementation of the rules of humanitarian law)

# VI. Definition of armed conflict



## A) International Armed Conflict

Common Article 2 of the Geneva Conventions:

*„....the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.*

*The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.*

*Although one of the Powers in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.“*

## VI. Definition of armed conflict



- the concept has been extended by Article 1(1) Protocol I even to the **national liberation war**, when on the one of the conflicting parties it is not the state, but the national liberation movement:

*".....means armed conflicts in which nations fight colonial rule and foreign occupation and against racist regimes to exercise their right to self-determination."*

IHL is applied as soon as armed hostilities effectively begin (whenever armed forces are used)



# VI. Definition of armed conflict



## **B) Internal (intrastate) armed conflict**

Article 3 of the Geneva Conventions:

*“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions“*

Protocol II (narrower definition of internal conflict):

conflict occurring in the territory of a Contracting Party between its armed forces and dissident (opposition) armed forces (internal hostilities must be carried out by armed force and with the intensity required by the deployment of military forces, the opposition must be collectively organised, their armed forces must be under command)

# VI. Definition of armed conflict



- ICTY Tadic judgment (1996) (broader definition of internal conflict):
  - prolonged armed violence between government troops and organized armed forces or between such groups within the State

# VI. Definition of armed conflict



## **C) Mixed armed conflicts**

reality after 1990 - disintegration of states, internal conflicts transformed into international conflicts (ICTY Tadic judgment - the need to separate the different stages of the conflict)

leads to fragmentation of rules according to the nature of the conflict and war parties

# VII. Rules applicable to international armed conflict



## **A) Who is involved in the conflict:**

members of the armed forces (combatants)

- have a commander in charge of the subordinates,
- wear a fixed recognition mark visible at a distance,
- carry a gun openly,

they observe the laws and the customs of war

## **combatants**

- kill and harm persons and destroy and damage objects and material
- if their acts of violence do not infringe international humanitarian law, their conduct is recognized as the exercise of authority and does not give way to criminal liability
- on the other hand they are legitimate targets of an enemy attack, if injured or captured, have the rights of prisoners of war

# VII. Rules applicable to international armed conflict



## Persons **not regarded as combatants**:

**spies** (secretly or under a false identity collect or try to collect information in the operational territory of the other party)

**mercenaries** (Article 47 of Protocol I), a person who:

- (a) is specially recruited locally or abroad in order to fight in an armed conflict;
- (b) does, in fact, take a direct part in the hostilities;
- (c) is motivated to take part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that Party;
- (d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;
- (e) is not a member of the armed forces of a Party to the conflict; and
- (f) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed forces.

# VII. Rules applicable to international armed conflict



## **non-combatants**

- military medical personnel and chaplains (Article 43(2) of Protocol I)
- do not have the right to participate in hostilities, must not be the targets of an attack, may carry a weapon only for their own defense, if captured, has to be returned to the other party

## **civilians**

- regulated by the Fourth Geneva Convention and Protocol I (Part IV. Civilian Population)

# VII. Rules applicable to international armed conflict



## **B) How to fight (prohibited methods of combat):**

prohibition of attacks on civilians and civil objects (Article 52(1) of Protocol I)

prohibition of indiscriminate attacks (Article 51(4) of Protocol I)

prohibition of the use of civilians as living shields (Article 51(7) of Protocol I)

killing or injuring a person excluded from combat

prohibition of the declaration that prisoners of war will not be taken

perfidy v. permitted war trick

ban on looting

prohibition of starvation of civilians, prohibition of attacks on supply equipment

prohibition of damage to the environment and cultural monuments

prohibition of attacks on dams, nuclear power plants and other facilities

# VII. Rules applicable to international armed conflict



**C) What to fight with** (regulation of combat means and weapons)

Conventional Weapons v Weapons of Mass Destruction (WMD)

prohibition of chemical weapons (Convention on the Prohibition and Destruction of Chemical Weapons, 1993)

prohibition of biological weapons (Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological and Toxin Weapons and their Destruction, 1972),

limitation of nuclear weapons (MSD Advisory Opinion on the Legality of Threat and Use of Nuclear Weapons, 1996)



# VII. Rules applicable to international armed conflict



## **D) Who does not fight (war neutrality)**

**simple neutrality** (Convention on the Rights and Obligations of Neutral Powers and Persons in a Ground War, 1907):

- the right to territorial integrity and to maintain relations with the parties in conflict
- obligation to refrain from participating in the conflict (even indirect), obligation of equal access to both parties
- in the event of an attack on its territory, it has the right to use armed force without losing the status of neutral power
- obligations bind only the State, not private persons (citizens or legal entities registered in that State, who can provide any assistance to the fighting parties and the State is not obliged to prevent them from doing so)
- can provide mediation or good service to the fighting parties

**permanent neutrality (recognised v. guaranteed)**

## VIII. Protection of victims



- Definition: person who, in armed conflict, for any reason, has come under the control of an enemy power (wounded and sick, medical personnel, prisoners of war)
- Sources: the Geneva Conventions and the two Additional Protocols contain very detailed rules
- Common features: obligation to respect victims, protect victims, duty of human treatment, prohibition of discrimination

# VIII. Protection of victims



## **A) Wounded and sick** - rights and obligations:

prohibition of any attack on their lives, prohibition of torture, biological experimentation (prohibition of subjecting persons to any procedure that is not caused by a negative medical condition, such as bodily mutilation, medical experiments, the collection of tissues and organs for transplantation, the exception is the donation of blood and skin on a voluntary basis)

persons must not be left without medical assistance and on the non-discriminatory grounds (own soldiers must be given the same care as the enemy)

the parties in conflict shall have an obligation to negotiate, whenever circumstances permit, a ceasefire and local agreements for the collection, exchange and transport of wounded, obligation to register the wounded and sick,

detailed arrangements for burials (Article 17 of the First Geneva Convention, Article 20 of the Second Geneva Convention)

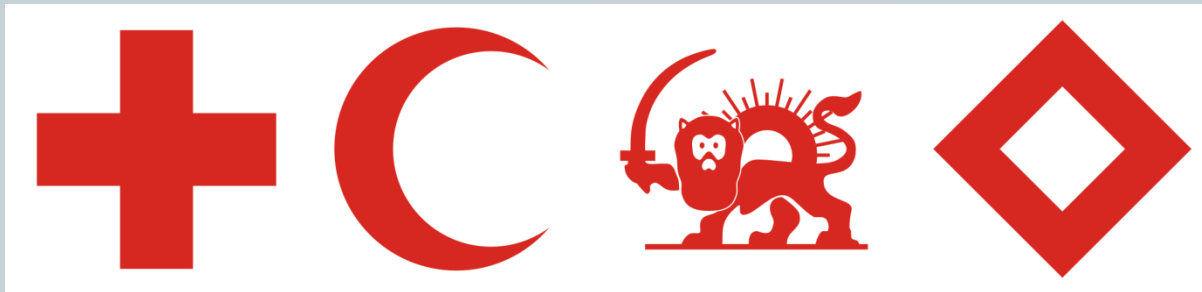
# VIII. Protection of victims



**B) Medical personnel** (first Geneva Convention – only as part of the armed forces, Protocol I also refers to civilian personnel)

Identification: recognition signs (red cross in white field, red moon, red lion and sun in white field, red crystal in white field (since 2005: Additional Protocol III))

# VIII. Protection of victims



# VIII. Protection of victims



## **Rights and obligations:**

must be respected and protected in all circumstances,

if captured, must not be detained but returned to the other side of the conflict, except if the state of health and the number of prisoners of war so require (such detained personnel are not considered prisoners of war, they must be allowed to carry out their mission, i.e. medical functions for the benefit of prisoners)

# VIII. Protection of victims



## **Prisoners of war**

the Third Geneva Convention on the Treatment of Prisoners of War and Protocol I (Article 44):

*„Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.“*

# VIII. Protection of victims



## **Rights and obligations:**

- the obligation to identify the prisoner for the purposes of registration and treatment (the prisoner is obliged to indicate only the name, surname, rank, date of birth, registry number or similar number),  
prohibition to engage in physical or mental torment in order to obtain information,  
a ban on removal of identity cards,  
the right to keep personal belongings, even if they belong to official equipment, accommodation under the same conditions as members of own armed forces,  
water supply, food supply, regular medical examination once a month  
can be subjected to forced labor (authorised activities – camp management, agriculture, industry, transport of a non-military nature, commercial and artistic activities, domestic services, public services of a non-military nature, must not be subjected to work degrading to a member of the armed forces, work dangerous and harmful to health – for example, mine removal), not petty officers (supervisory activities only) and officers



# VIII. Protection of victims



- right of contact with the outside world: to the correspondence (at least two letters per month), which may be inspected but not detained
- punishing according to the principle of assimilation (according to the rules applicable to the armed forces of the state holding the prisoners), only before a military court that guarantees independence and impartiality, disciplinary penalties can only be imposed by an officer (camp commander)
- end of captivity
  - liberation, successful escape (have the right to try to escape, if re-captured, the must not be punished for prior escape, punishable for repeated unsuccessful escape)
  - death (rules of burial)
  - repatriation (exchange agreement, obligation to repatriate seriously ill and severely wounded, obligation of immediate repatriation after the end of active hostility, regardless of the conclusion of a peace treaty)

# VIII. Protection of victims



## **Civilians** (the Fourth Geneva Convention and Protocol I)

### **Generally:**

- no hostage-taking
- prohibition of pressure in order to obtain information

### **Protection of foreigners in the territory of opposing parties:**

to WWI the right of a foreigner to leave the territory of the party in conflict at any time, in both WWI and WWII every foreigner was considered a potential recruit of an enemy power – practice led to extensive internment of foreigners

reaction in the Geneva Convention: foreigners are authorized to leave the territory at any time, with two exceptions – if the security of the party in the conflict so requires and if the foreigner himself so requests and internment is necessary (protection of foreigners from lynching)

foreigners may be ordered to work under the same conditions as own citizens (hostile aliens cannot be ordered to work directly related to combat operations)

confiscation of their private property is prohibited

# VIII. Protection of victims



## **Protection of civilians in the occupied territories:**

- the fundamental duty is to maintain public order, the maintenance of criminal and civil law, the occupying Power may adopt its own criminal standards, which must not have retroactive effect (the death penalty can be imposed for acts where the law of the occupied State allowed so)
- the Occupying Power must not change the demographic structure of the occupied territory (prohibition of deportations, prohibition of the movement of its own population to occupied territory)
- civilians must not be forced to serve in the armed forces, they can be subjected to forced labor

# VIII. Protection of victims



- confiscation of property: regulated only by the **Convention respecting the Laws and Customs of War on Land** of 1907 (private property may not be confiscated)
- obligation to supply the population with food and medicines (Article 55 of the Convention) as well as other means necessary for survival (Article 69 of Protocol I)
- internment may only be accepted as punishment for an act committed with the intention of harming the Occupying Power or if the Occupying Power deems it necessary for urgent security reasons (the rights of interned civilians are similar to those of prisoners of war)

# IX. Rules applicable in internal armed conflict



- unwillingness of states to regulate domestic conflicts under international law (changes after WW II)
- Common Article 3 of the Geneva Conventions – lists which rules applicable to international conflicts also apply in internal conflicts
- Moreover, Protocol II – detailed arrangements for internal conflicts (lack of delimitation of the parties to the conflict, modification of combat means and methods of conducting combat), provides that it concerns only conflicts in the territories of the Contracting Parties between the government armed forces and dissident forces
- customary law – summarized in the ICTY Tadic judgment (broader definition of internal conflict, application of a wide range of rules for international conflict as part of customary law)
- tendency to approximate the rules in force in international and internal conflicts

# IX. Rules applicable in internal armed conflict



## **Specifics of regulation:**

- absence of war parties
- does not distinguish between combatants/non-combatants/civilians (members of the parties in conflict are not granted immunity, they can be punished for their actions under national criminal law, they cannot have the status of prisoners of war, they are subject to internment rules as civilians)