



Australian Red Cross Handbook on International Humanitarian Law Mooting

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Disclaimer: *The articles contained within represent the views of the authors and not necessarily those of Australian Red Cross or the departments or organisations they represent. However, we have tried to give a broad and varied collection of views on IHL, its strengths and weaknesses, and its application.*

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Preface

War – and our attempts to regulate it – are as old as humanity itself. From the Ancient Greeks, to Mesopotamia, to the island nations of the Pacific, customary practices reflecting the principles of international humanitarian law (IHL) have existed for millennia.

The last 150 years have seen the modern codification of these ideas. The catalyst for this was Henry Dunant – the founding father of the International Red Cross and Red Crescent Movement (Movement) – who in 1859 witnessed the aftermath of the Battle of Solferino. His subsequent efforts to reduce human suffering on the battlefield ultimately culminated in the adoption of the First Geneva Convention. We now of course have the four Geneva Conventions of 1949 and their three Additional Protocols, which today form the cornerstone of modern-day IHL.

Whilst the laws remain unchanged, modern warfare is shifting at a rapid rate. Protracted armed conflicts continue to rage and cities are becoming battlefields, while technological advancements continue to change the nature of war itself.

The laws themselves remain sound; however understanding and respect for the rights and obligations they prescribe is increasingly challenged. The unique mandate of the Movement to disseminate the laws of war, therefore, is more important today than ever before.

That is why it is critical to engage with the next generation of future legal professionals. As part of this commitment, Australian Red Cross proudly co-hosts the annual IHL Moot Competition with the Australian Law Students' Association and an annual IHL teaching symposium for IHL educators with a range of academic institutions. In addition, this Handbook has been created to assist law students in developing their skills and understanding of IHL and awareness of contemporary IHL issues.

The Handbook provides a compendium of introductory readings on IHL. It includes chapters from some of Australia's foremost IHL experts discussing the sources and principles of IHL, an insight into the personal and professional experiences of Australians working in the field, and a glimpse into a range of contemporary IHL issues. Finally, the Handbook includes tips, tricks and advice for students looking to compete in an IHL moot competition.

I would like to express our gratitude to the many friends and supporters of the Australian Red Cross IHL program who have generously donated their time and expertise to this publication. Thank you for sharing our commitment to encourage Australian law students and their respective tertiary institutions to engage with IHL.

To those reading this Handbook, I hope that it is a practical and accessible introduction to the laws of war, and that it might even inspire you to become part of the next generation of young Australian international humanitarian lawyers and policy makers.



Yvette Zegenhagen
National Manager - International Humanitarian Law
Australian Red Cross

Meet our Contributors

Emily Camins

Emily Camins is a PhD candidate at the University of Western Australia (UWA), where she is also a sessional lecturer and past unit coordinator in international humanitarian law. Her PhD project examines the potential right of individuals to obtain reparations for violations of IHL. Prior to joining academia, Emily worked as a solicitor at the State Solicitor's Office in Western Australia and as the IHL Officer (WA) at Australian Red Cross. She holds a BA/LLB (Hons) from UWA and a Graduate Diploma in International Law from the University of Melbourne. Emily is a past Jessup Mooter and Coach, and past winner of the IHL Moot at both UWA and the Australian Law Students' Association Conference. She regularly judges university mooting competitions. Emily has presented and published several papers on IHL, the most recent of which (entitled 'Needs or Rights? Exploring the limitations of individual reparations for violations of international humanitarian law' (2016) 10 *International Journal of Transitional Justice* 126–145), won the UWA Best Publication Prize 2016 in the field of Social Science. Emily holds an Australian Postgraduate Award and is Chair of the Australian Red Cross IHL Advisory Committee in Western Australia.

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Christopher Chiam is in his sixth (and final) year of the Bachelor of Commerce/Law degree at University of New South Wales. His honours thesis was on the effect of ministerial directions issued under Australian immigration law. He is a keen mooter, having won the ALSA International Humanitarian Law Moot, the ALSA Championship Moot and the Ashurst National Private Law Moot. He was also the editor in charge of Issue 40(4) of the *UNSW Law Journal*, which included a thematic component on 'Cyberspace and the Law'. He is currently a student clerk at Kingsford Legal Centre and a paralegal at Herbert Smith Freehills.

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Jonathan Crowe is Professor of Law at Bond University. His main research interests lie in the fields of legal philosophy, constitutional law and theory, international humanitarian law and dispute resolution. He is the author or editor of five books and more than seventy-five book chapters and journal articles on a range of legal and philosophical issues. His work has appeared in numerous leading international and Australian journals, including the *Modern Law Review*, the *Oxford Journal of Legal Studies*, the *Melbourne University Law Review*, the *Sydney Law Review*, the *Melbourne Journal of International Law* and the *Australian Journal of Legal Philosophy*. He is the co-author of Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) and a long-standing member of the Australian Red Cross IHL Advisory Committee in Queensland.

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Catherine Drummond is an Associate in Public International Law and International Arbitration at Freshfields Bruckhaus Deringer, based in Paris. She advises and represents clients in relation to disputes before international courts and tribunals, including the International Court of Justice, European Court of Human Rights, the International Criminal Court, the United Nations Human Rights Committee and arbitral tribunals. Catherine regularly lectures in international law and dispute settlement. She has also provided advice in relation to the negotiation and implementation of the Arms Trade Treaty, provided training to the Australian Defence Forces, acted as associate to the President of the Queensland Court of Appeal and interned with the United Nations International Criminal Tribunal for Rwanda. Catherine completed a dual Bachelor of Laws and Arts (Peace and Conflict Studies and International Relations) at the University of Queensland, and a Masters of Law specialising in public international law at the University of Cambridge, where she was the Whewell Scholar in International Law and a General Sir John Monash Scholar.

Tara Gutman

Tara Gutman is IHL Legal Adviser - Government Relations in the International Humanitarian Law program at Australian Red Cross, a role concerned with supporting the Australian Government to implement IHL. Recently, in this role, Tara curated an original photographic exhibition, *Culture Under Attack*, funded by the Attorney-General's Department on the protection of cultural property in armed conflict. Her previous roles include Visiting Professional at the International Criminal Court, Legal Consultant to the Khmer Rouge Trials Taskforce, Visiting Scholar at George Washington University, In-House Legal and Business Affairs Executive at Beyond International and Solicitor at King & Wood Mallesons. Tara has taught international law in Washington DC, the Royal School of Judges in Phnom Penh and guest lectures at John Hopkins University and the Australian National University. Recent publications include: *Introduction to the International Humanitarian Law Framework for Protecting Cultural Property in Armed Conflict: Australian Red Cross' Perspective* (December 8, 2016) RUMLAE Research Paper No. 17-07: <https://ssrn.com/abstract=2959088>; The Guardian, 30 June 2017, 'Destruction of Mosul's Great Mosque holds a heritage lesson for Australia'.

Chris Hanna

Chris Hanna is a member of the Australian Red Cross IHL Advisory Committee in the ACT. He was admitted as a barrister and solicitor of the Supreme Court of Victoria in 1992 and practised as a military lawyer since that time. He served in the Royal Australian Air Force (RAAF) during the period 1990 to 2018 and has recently transferred to RAAF reserve holding the rank of Air Commodore. His last role in the RAAF was a Director General Australian Defence Force Legal Services. He holds a Bachelor of Laws with honours from the University of Tasmania and a Master of International Law from the University of Sydney. The views expressed in this chapter are his own and do not necessarily reflect the views of the RAAF, Australian Defence Force or the Department of Defence.

Georgia Hinds

Georgia Hinds is the Regional Legal Adviser for the ICRC Regional Delegation in the Pacific where she advises countries in the Pacific region on becoming a party to and implementing international humanitarian law treaties. Previously, Georgia was a Legal Officer in the Office of International Law, Australian Attorney-General's Department, advising the Australian

Government on international humanitarian law and international criminal law. Georgia also practised as a solicitor for over four years, working in Singapore, Brisbane and Sydney. Georgia holds a Master of Laws in International Law (Distinction) from the Australian National University, a Bachelor of Laws (Hons) and a Bachelor of Arts from Griffith University and is admitted as solicitor of the Supreme Court of Queensland and the High Court of Australia.

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Fauve Kurnadi is Legal Adviser – Academic and Private Sector Engagement in the International Humanitarian Law program at Australian Red Cross. With a view to promoting respect and understanding for the laws of war, Fauve has primary responsibility for the program's engagement with academic circles, university students, private sector stakeholders and law firms within Australia. Fauve is also a volunteer humanitarian observer and conducts immigration detention monitoring visits for the Australian Red Cross Immigration Detention Monitoring Program. Prior to this role, she worked as the Australian Red Cross IHL Coordinator for Queensland. Fauve has also worked as a Registered Migration Agent, providing migration services and legal assistance to migrants and refugees. Fauve holds a Bachelor of Laws and a Bachelor of Arts from the University of Queensland and a Master of Public and International Law from the University of Melbourne. Fauve was admitted as a Legal Practitioner to the Supreme Court of Queensland in 2013.

Angus Macinnis

Angus Macinnis is a solicitor at StevensVuaran Lawyers in Sydney who practises in commercial dispute resolution with a focus on employment and safety law, and who has coached intervarsity moot teams at the University of Technology, Sydney and at the Sydney Law School of the University of Notre Dame Australia. The quality of the students with whom Angus has been fortunate enough to work over the years is demonstrated by the fact that teams he has coached have been good enough (despite his coaching) to win the Sir Harry Gibbs National Mooting Competition (twice) and the International Maritime Law Arbitration Moot. Some of these individual students have also been recognised with best speaker honours in the International Maritime Law Arbitration Moot (twice), the Sir Harry Gibbs National Mooting Competition, and (jointly) the Willem C. Vis International Commercial Arbitration Moot.

Eve Massingham

Dr Eve Massingham is the Regional Legal Adviser for the Nairobi Regional Delegation of the International Committee of the Red Cross. Eve has worked for ten years in the field of international humanitarian law with the International Red Cross and Red Crescent Movement, including in the Australian Red Cross IHL program, and has published a number of book chapters and articles on international humanitarian law. Eve holds a PhD from the University of Queensland, an LLM (Distinction) from King's College London, a Master of International Development from Deakin University, an LLB (Hons) from Queensland University of Technology and a Graduate Diploma of Legal Practice. She is admitted to practise law in Queensland and New South Wales and earlier in her career worked as a solicitor in private practice and as an Associate at the Federal Court of Australia. Eve has also spent a short period of time at the International Criminal Court and has served as an Australian Army Reserve Officer.

Tim McCormack

Professor Tim McCormack is Dean of the Faculty of Law at the University of Tasmania and Professorial Fellow at Melbourne Law School. He is also the Special Adviser on International Humanitarian Law to the Prosecutor of the International Criminal Court in The Hague, inaugural DFAT Visiting Legal Fellow (appointed jointly with Associate Professor Anthea Roberts from ANU), and the 2018 New Zealand Law Foundation Distinguished Visiting Fellow. Tim previously held the following positions: Charles Stockton Distinguished Scholar-in-Residence at the US Naval War College in Newport, Rhode Island (2015-16); James Barr Ames Visiting Professor at Harvard Law School (2015-16); member of the International Group of Experts to draft the Tallinn Manual on the International Law Applicable to Cyber Operations, Tallinn (2014-16); international observer to Phase II of the Turkel Commission of Enquiry into Israel's Mechanisms for Investigating Alleged Violations of IHL, Jerusalem (2011- 2013); *amicus curiae* on International Law issues for the trial of Slobodan Milosevic, The Hague (2002-06); Foundation Australian Red Cross Professor of International Humanitarian Law, Melbourne Law School (1996-2010). Tim is a member of Australian Red Cross's National Committee on International Humanitarian Law.

Jane Munro

Jane Munro is the National Coordinator – Movement Engagement, at Australian Red Cross where her work involves coordinating Australian Red Cross' engagement with the international components of the International Red Cross Red Crescent Movement. She has previously worked as an Adviser on IHL for Australian Red Cross, where her work included conducting training on IHL for key stakeholders in Australia and overseas, including members of defence forces, as well as conducting research and producing publications on issues in IHL. Jane has previously worked for the International Committee of the Red Cross at its headquarters in Geneva focusing on policy related to sexual violence in armed conflict and the protection of health care during armed conflict. She has worked in the field in Mongolia and Samoa, and has published in the area of International Criminal Law. Jane holds a Bachelor of Laws (Hons) and a Bachelor of Arts from the University of Queensland, and a Master of Laws in Public International Law from the University of Melbourne. She was admitted as a lawyer to the Supreme Court of Queensland in 2011.

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Dr Melanie O'Brien is a Senior Lecturer in International Law at the University of Western Australia, teaching International Humanitarian Law (IHL), Public International Law and Supervised Research. Her research examines the connection between human rights and the genocide process; and sexual exploitation by peacekeepers. She has conducted fieldwork and research in Armenia, Austria, Cambodia, Israel, Germany, the Netherlands, Turkey, the UK and the USA. Melanie is on the Editorial Boards of *The International Journal of Human Rights* and *Human Rights Review*. She is 2nd Vice-President of the International Association of Genocide Scholars (IAGS) and co-convened the 2017 IAGS conference at the University of Queensland, serving on the Editorial Board of *Genocide Studies and Prevention* 2013-2017. Until a recent move to Western Australia, Melanie was a member of the Australian Red Cross IHL Advisory Committee in Queensland and is currently an expert observer on the Australian Red Cross IHL Advisory Committee in WA. Melanie is an admitted legal practitioner who has previously worked at several Australian universities; the National Human Rights Institution of Samoa; and the Legal Advisory Section of the Office of the Prosecutor at the International Criminal Court. She is the author of *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse* (2018, Palgrave) and tweets @DrMelOB.

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Roderick O'Brien is an Australian lawyer and Adjunct Research Fellow at the University of South Australia. Roderick has a law degree from the University of Adelaide, a Master degree from the University of Hong Kong and his Doctorate from the University of South Australia. Since the 1980s Roderick has been active in the dissemination of international humanitarian law, including with the Australian Red Cross IHL Advisory Committee in South Australia. Roderick has been a speaker on IHL at professional meetings and at universities in Australia and Asia and has published on international humanitarian law, international criminal law and ethics in Europe, Asia, and Australia, in English and in Chinese. Roderick is actively involved in mooting, including the development of the ICRC's International Humanitarian Law Moot in the Asia-Pacific.

Kevin Parker

Kevin Parker AC RFD QC is formerly a Judge of the Supreme Court of Western Australia (1994-2003) and Vice-President of the International Criminal Tribunal for the former Yugoslavia in The Hague (2003-2011). He was admitted to practise law in 1960 and since then has held a series of distinguished positions, both in Australia and overseas. Kevin worked as Chief Crown Prosecutor from 1971 to 1974, before being appointed QC in 1977. He then held the position of Solicitor-General of Western Australia from 1979 to 1994. Kevin also served as a Reserve Legal Officer in the Royal Australian Air Force and saw service in Australia, Thailand, Malaysia, Singapore and the United States of America and held the position of Hon ADC (Air) to Her Majesty the Queen from 1979 to 1981. Between the years 1995-2003, Kevin held the position of Chancellor to the Anglican Primate of Australia.

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Dr Lara Pratt is a Senior Lecturer and the Assistant Dean of Teaching and Learning at the Fremantle Law School at the University of Notre Dame Australia. She holds a PhD from Macquarie University where her research focused on comparative Bills of Rights. She has publications on public international law and international criminal law as well as on teaching law. Lara currently teaches in various Public International Law courses and Property Law. She has championed the University of Notre Dame's various international and humanitarian law initiatives including the introduction of "Law and War" as an elective and the introduction of an International Humanitarian

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John Reid

John Reid currently leads the Office of International Law in the Commonwealth Attorney-General's Department. John has been a legal adviser to Government for over a decade. In his current role, he is responsible for advice to the Attorney-General and Federal Cabinet on all areas of international law, including international human rights and refugee law, international security, international humanitarian law, environment law, law of the sea, air law and international trade and investment law. John is appointed Australia's Agent in disputes before the International Court of Justice and under the auspices of the Permanent Court of Arbitration and has appeared in a number of international cases for Australia. In 2018, he was awarded a Public Service Medal for outstanding public service through the provision of legal advice to the Commonwealth. John is a member of Australian Red Cross's National Committee on International Humanitarian Law.

Veronica Sebesfi

Veronica Sebesfi is in her fourth year of an undergraduate Advanced Science (Honours)/Law degree at UNSW. Amongst other competitions, Veronica has been very involved in mooting during her time at university. She has represented UNSW at the QUT National Torts Moot, Baker & McKenzie National Women's Moot, Justice William Gummow Cup Equity Moot and ALSA International Humanitarian Law Moot, which she won with her co-author. Within UNSW's Law Society, she co-coordinated the Ashurst Beginners Mooting Competition in 2016 and served as Mooting Training Director 2017. She currently co-convenes the Allen & Overy Private Law Moot hosted by UNSW Law. Beyond mooting, Veronica is an editor for the *UNSW Law Journal*, and works as a legal administration assistant at the Council for Law Reporting for NSW and as a tutor. She also volunteers at a community legal centre and is a Bible study leader at her church.

Geoff Skillen

Geoff Skillen served as a legal officer in the Australian Defence Force from 1975 to 1998. From 1995 to 1998, he occupied the position of Director-General of Defence Force Legal Services, holding the rank of Air Commodore. From 1998 to 2010, he served as a legal officer in the Attorney-General's Department. From 2003 to 2010, he was the Principal Legal Officer in the Office of International Law, International Human Rights section. He is an Adjunct Professor at the Australian National University College of Law and since 2010 has performed academic work at the ANU. Since that time he has also undertaken a number of roles on contract with the Australian Government, including as Counsel to the Defence Abuse Response Taskforce in 2013. Geoff is a long standing member of Australian Red Cross, representing the National Society at a range of international fora, and serving on a number of Australian Red Cross committees since 1995. Since July 2010 Geoff has been the Chair of Australian Red Cross's National Committee on International Humanitarian Law.

Helen Stamp

Helen Stamp has been part of the International Humanitarian Law program at Australian Red Cross since 2012, starting as an IHL Officer and now working as an Adviser for Red Cross People. Helen graduated with a Law Degree from Murdoch University in 1997 and was admitted to the Supreme Court of Western Australia in 1999. After a number of years working in private practice and for a community legal centre, Helen was accepted for an international internship with the Prosecutorial Support Section of the Special War Crimes Chamber based in Sarajevo. In late 2007, Helen joined the Corruption and Crime Commission (WA) as a lawyer in their Operations Directorate. Helen holds a Master of International Law, specialising in IHL, International Criminal Law and the Law of the Sea from the University of Edinburgh, and received First Class Honours from Curtin University last year after completing her dissertation on recklessness as a form of criminal intent for crimes of international concern. Helen is based in Perth where she is also a volunteer humanitarian observer, conducting immigration detention monitoring visits for the Australian Red Cross Immigration Detention Monitoring Program.

Tim Wright

Tim Wright is Treaty Coordinator at the International Campaign to Abolish Nuclear Weapons (ICAN), which won the Nobel Peace Prize in 2017 'for its work to draw attention to the catastrophic humanitarian consequences of any use of nuclear weapons and for its ground-breaking efforts to achieve a treaty-based prohibition of such weapons'. Tim helped establish the campaign in 2006 and now coordinates its work to secure signatures and ratifications for the UN Treaty on the Prohibition of Nuclear Weapons. He studied Law and Arts (with a major in international relations) at the University of Melbourne.

Abbreviations

As many of the authors in this Handbook commonly refer to the same international legislation or institutions, to reduce repetitious inclusion of the full names of certain treaties, a glossary has been provided for your convenience.

In-text abbreviation	Full name
1949 Geneva Conventions (GC I, II, III and IV)	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949 (First Geneva Convention), Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949 (Second Geneva Convention), Convention (III) relative to the Treatment of Prisoners of War, 12 August 1949 (Third Geneva Convention), Convention (IV) relative to the Protection of Civilian Persons in Time of War, 12 August 1949 (Fourth Geneva Convention)
1952 Commentary on GCI	Jean Pictet (ed.), Commentary on the Geneva Conventions of 12 August 1949, Vol. 1: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, ICRC, Geneva, 1952
1980 Convention	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980
2016 Commentary on GCI	ICRC, Commentary on GCI, Geneva, 2016
Additional Protocol I (AP I)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
Additional Protocol II (AP II)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
Additional Protocol III (AP III)	Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005
ARC	Australian Red Cross
CIHL	Customary International Humanitarian Law
Cluster Munitions Convention	Convention on Cluster Munitions, 30 May 2008
Common Article 1	Article 1 common to the Geneva Conventions of 12 August 1949
Common Article 3	Article 3 common to the Geneva Conventions of 12 August 1949
Hague Regulations	Convention No. IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907
Lieber Code	Instructions for the Government of Armies of the United States in the Field, 24 April 1863

Abbreviations *continued*

IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IFRC	International Federation of Red Cross and Red Crescent Societies
IHL	International Humanitarian Law
Movement	International Red Cross and Red Crescent Movement
NGO	Non-Governmental Organisation
NIAC	Non-International Armed Conflict
Ottawa Treaty	Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997
Protocol III to the 1980 Convention	Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, Geneva, 10 October 1980
Protocol IV to the 1980 Convention	Protocol on Blinding Laser Weapons, Geneva, 13 October 1995
Rome Statute	Rome Statute of the International Criminal Court, 17 July 1998
Seville Agreement	Agreement on the Organization of the International Activities of the Components of the Red Cross and Red Crescent Movement, Res 6, Council of Delegates (26 November 1997)
Statutes of the Movement	Statutes of the International Red Cross and Red Crescent Movement 25th International Conference of the Red Cross (1986, amended in 1995 and 2006)
Study on Customary IHL	ICRC study on customary international humanitarian law
UN	United Nations
UN Charter	Charter of the United Nations, San Francisco, 26 June 1945



The International Red Cross and Red Crescent Movement

part **01.**

What is the International Red Cross and Red Crescent Movement?

Jane Munro

The International Red Cross and Red Crescent Movement, known as the Movement, is the world's largest humanitarian network, with an estimated 100 million staff, volunteers, members and supporters in nearly every country in the world.¹ Our mission is to prevent and alleviate human suffering where it may be found. We work to respond to natural disasters, emergencies, conflicts, famines and epidemics, and we work with communities on development projects and other humanitarian activities. The Movement also has a distinct and special connection to IHL.

This chapter will provide a brief introduction to the structure and ways of working of the Movement, looking in particular at the following: the history of the Movement, the components of the Movement and their respective mandates, the Fundamental Principles, the Red Cross Red Crescent Statutory Meetings, and the inextricable link between the work of the Movement and IHL.

The Story of an Idea: Henry Dunant and the Battle of Solferino

The Movement was the vision of our founder, Henry Dunant. A Swiss businessman, Dunant was travelling through Italy in 1859 to engage in business with Napoleon III. He stumbled upon the end of the Battle of Solferino, and was overwhelmed by what he witnessed: wounded soldiers left for dead on the battlefield. Appalled by the lack of medical and other support for the injured, he recruited volunteers from the neighbouring town to provide first aid to the wounded.

Dunant was so moved by what he witnessed on the battlefield that he wrote a memoir of his experiences, *A Memory of Solferino*.² In this book, he proposed two key ideas. First, the creation of relief societies that existed during peacetime and were trained and prepared to respond to conflicts when they broke out.³ Second, the development of an international convention that would give such relief societies the mandate to provide assistance to the wounded and sick during conflict.⁴

Both of Dunant's ideas came to fruition. The Movement was created, beginning with the establishment of the International Committee of the Red Cross in 1863. Following on from this, the First Geneva Convention was adopted in 1864 protecting the sick and wounded, and creating the red cross emblem: a symbol of neutral humanitarian assistance.⁵ This led to the birth of contemporary IHL. As a result of Dunant's ideas, the work of the Red Cross Red Crescent Movement and IHL have always been inextricably linked.

ICRC and Syrian Arab Red Crescent workers with displaced children in Yalda, Syria. C BY-NC-ND / ICRC



The Three Components of the Movement

The Movement today consists of three components, and our work is governed by the Geneva Conventions and *Statutes of the Movement*,⁶ which establish the respective mandates and responsibilities of each of the components. These Statutes have been adopted by all States Party to the Geneva Conventions and all components of the Movement. IHL furthermore provides specific mandates to the ICRC and National Societies to provide assistance during armed conflict and to promote IHL.

The Movement components are:

- 1. National Societies:** Red Cross and Red Crescent National Societies, such as Australian Red Cross, exist in nearly every country in the world and act as auxiliaries to the public authorities in the humanitarian field.⁷ They have an obligation to disseminate and assist their governments in disseminating IHL, to disseminate the principles and ideals of the Movement and to cooperate with their governments to ensure respect for IHL and to protect the distinctive emblems.⁸ They also work in their respective countries to provide humanitarian assistance in areas such as disaster response, health and social programs. Under IHL, National Societies have a particular mandate to provide medical and other assistance in times of armed conflict.⁹
- 2. The International Committee of the Red Cross (ICRC):** the ICRC is mandated to protect and assist victims of armed conflict and other situations of violence.¹⁰ During armed conflict, the ICRC takes the lead among the Movement components in coordinating assistance provided to victims.¹¹ The ICRC also has a mandate to promote IHL globally. The work of the ICRC during conflict is provided for by IHL, which mandates in particular the role of ICRC in visiting prisons, organising relief operations, working to reunite families separated by the conflict, and providing general humanitarian assistance.¹² During international armed conflict (conflict between States), the ICRC has a right of initiative to provide the humanitarian assistance outlined above,¹³ and in non-international armed conflict (conflict on the territory of one State) the ICRC may offer its services.¹⁴ The ICRC has more than 16,000 staff working in more than 80 countries.¹⁵ Because of its history and particular role mandated to it in the Geneva Conventions and Statutes of the Movement, the ICRC is often referred to as the 'Guardian of IHL' (see **Chapter 3** of this Handbook).
- 3. The International Federation of Red Cross and Red Crescent Societies (the Federation):** the Federation has a dual function: it acts as Secretariat for all National Societies, and it works to coordinate and support the humanitarian work of the Movement in development, disasters and emergencies.¹⁶ Some activities of the Federation include disaster preparedness and response, health-related activities, supporting migrants, and promoting humanitarian values.

Eastern Aleppo, Syria, 30/11/2016.
S Turkmani/Syrian Arab Red Crescent



The Fundamental Principles: the Foundation of the Movement's Ways of Working

All Movement components conduct their operations in accordance with the seven Fundamental Principles: Humanity, Neutrality, Impartiality, Unity, Independence, Universality and Voluntary Service.¹⁷ Adopted in 1965, all components of the Movement in all parts of the world are obliged to comply with the Principles which underscore our common values, what the Movement aims to achieve, and how we work.¹⁸

Humanity is the ultimate objective of our work: that is, we strive to alleviate suffering wherever it may be found. Neutrality, Impartiality, Independence and Voluntary Service are the methods for working to achieve that objective. Neutrality obliges us not to take sides or engage in any controversies of a political, racial, religious or ideological nature. Impartiality gives the Movement the responsibility to provide assistance to those who require it most, regardless of nationality, race, religion or political opinion. While National Societies in particular have close working relationships with governments in the provision of humanitarian services, the Movement components must always remain independent of the control of government. Voluntary Service reminds us that we must not be motivated to undertake our work for any personal gain.

The final two Principles are concerned with the structure of the Movement. Unity indicates that there may only be one National Society in any country, and Universality affirms that all components of the Movement and National Societies have equal status.¹⁹

Setting the Humanitarian Agenda: the Red Cross Red Crescent Statutory Meetings

The Movement works through the mechanism of the Statutory Meetings to set its common policies, share best practices, and discuss issues of humanitarian concern. There are three main parts of the Meetings: the General Assembly, the Council of Delegates, and the International Conference.²⁰

The General Assembly and the Council of Delegates are held every two years with representatives of the Movement in attendance to discuss common issues, policies and ways of working. The International Conference, held every four years, is a unique forum which brings together all components of the Movement with representatives from all States Party to the Geneva Conventions (which, incidentally, is every State in the world). The aim of the Conference is to foster a non-political dialogue about the most pressing humanitarian issues, and determine how the international community can respond to them. There is a particular focus on conflict, disasters and IHL.

The Work of the Movement: a Mandate Inextricably Linked to IHL

The birth of the Movement was tied together with the creation and codification of modern IHL. That connection remains present in the work of the Movement today, as you will read about in the next two chapters of this Handbook. The ICRC, in its capacity as Guardian of the Geneva Conventions, continues to promote respect for and understanding of IHL, and National Societies, like Australian Red Cross, work in their own countries to disseminate IHL. **Chapter 2** will explore this responsibility of National Societies in more depth, and how this obligation is fulfilled in the Australian context.

1 For a list of current National Societies, see generally IFRC, *The International Red Cross and Red Crescent Movement* (4 January 2018) <<http://www.ifrc.org/en/who-we-are/the-movement/>>.

2 Henry Dunant, *A Memory of Solferino* (American Red Cross and the International Committee of the Red Cross, English translation reprint, 1986).

3 *Ibid.*, 115.

4 *Ibid.*, 126.

5 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, opened for signature 22 August 1864 (entered into force 22 June 1865).

6 Statutes of the Movement.

7 *Ibid.*, art 3.

8 *Ibid.*, art 2.

9 GC I, art 26; GC II, arts 24, 25; AP II, art 18.

10 Statutes of the Movement, art 5.

11 Seville Agreement, art 5.3.

12 GC III, arts 73, 122, 123, 126; GC IV, arts 76, 109, 137, 140, 143; AP I, art 81(1).

13 1949 Geneva Conventions, Common Article 9/9/9/10; API, art 81(1).

14 1949 Geneva Conventions, Common Article 3(2). For further information about conflict classification, please see Chapter 4 of this Handbook.

15 See generally ICRC, *The ICRC Worldwide* (4 January 2018) <<https://www.icrc.org/en/where-we-work>>.

16 Statutes of the Movement, art 6.

17 *Ibid.*, preamble.

18 The Principles were originally adopted at the 20th International Conference of the Red Cross (1965), however their current wording was revised and adopted at the 25th International Conference of the Red Cross (1986).

19 For a comprehensive guide to the Fundamental Principles, see generally Jean Pictet, *The Fundamental Principles of the Red Cross: Commentary* (International Committee of the Red Cross, 1979).

20 The Statutory Meetings are governed by the Statutes of the Movement.

International Humanitarian Law in Australia and the Role of Australian Red Cross

Fauve Kurnadi

Educating people about the laws of war and the need to ensure respect for these laws has long been a core element of the work of the Movement. Although promoting and ensuring respect for IHL are primarily the responsibilities of States Parties to the Geneva Conventions, the Movement has also assumed a key role in carrying out these tasks.¹ As can be seen in **Chapter 3** of this Handbook, the ICRC is mandated to protect and assist victims of armed conflict, and to promote, develop and strengthen IHL globally – it is well known and respected for doing so. In addition, Red Cross and Red Crescent National Societies are also tasked with the important and complementary role of disseminating and assisting their governments in disseminating IHL, taking initiatives in this respect, and cooperating with their governments to ensure respect for IHL.² This chapter will briefly outline the mandated responsibilities of National Societies vis-à-vis IHL and highlight the prominent role Australian Red Cross has played, and continues to play, in IHL education and implementation throughout the country.

Promoting respect for IHL

Why disseminate IHL?

In many countries around the world, war and IHL have a very real presence in people's lives. This was highlighted fairly powerfully in 2016, when the ICRC conducted a survey to gauge public opinion on a range of issues concerning IHL.³ The results clearly demonstrated that those living in countries directly impacted by armed conflict believe the law matters; that the Geneva Conventions are still relevant today and that they prevent wars from escalating.⁴ Similar results regarding the ongoing relevance of the Geneva Conventions were found among those residing in countries that are not directly impacted by armed conflict. However, those results also showed that a higher proportion of people living in non-conflict affected countries were more accepting of civilian deaths in conflict zones as an inevitable part of war.⁵ Despite this, the overwhelming majority of respondents still believe it makes sense to impose limits on war.⁶ The results suggest a strong global belief in the utility and necessity of the laws of war and, as ICRC President Peter Maurer commented, 'these findings should inspire all of us to do more to ensure that the rules of war are respected'.⁷

IHL dissemination was not codified as a distinct obligation at the time of negotiating the 1864 Geneva Convention.⁸ However, the importance of spreading knowledge of the laws of war was recognised at the First International Conference of the Red Cross in 1867.⁹ An explicit obligation to disseminate IHL was later included in the 1906 Geneva Convention, the 1907 Hague Convention (X) and the 1929 Geneva Convention on the Wounded and Sick,¹⁰ and then further emphasised in Article 47 of the First Geneva Convention of 1949.¹¹ The drafters of the

Panel discussion featuring (from left) Dr Helen Durham, Dr Knut Doermann, Dr Hitoshi Nasu, Eve Massingham and Group Captain Ian Henderson. ICRC / Andrea Lunt



Conventions deemed this inclusion imperative, on the basis that ‘knowledge of law is an essential condition for its effective application’.¹² Consequently, this obligation extended the duties of States Parties beyond respecting and ensuring respect for the Convention, in accordance with Article 1 of GCI, to ensure the widespread delivery of military and civil instruction of the Conventions within their respective countries.

Australia has a long history of disseminating IHL – not only to its armed forces, which have experienced increasing military commitments abroad, but also among civilian authorities (the executive, legislature and judiciary) and the general public. Although Australia is a country currently free from armed conflict on its own shores, its dissemination practices demonstrate that consolidating an understanding of IHL in peacetime will help to ensure that the laws are accurately interpreted and applied, and hopefully respected, when they are needed most. In situations where members of a State’s population find themselves in an armed conflict zone (i.e. armed forces, humanitarian aid workers, medical personnel, businesses with operations in conflict zones), or in the event that a conflict erupts within that State’s territory, it is important that all conflict-facing, and even non-conflict facing, stakeholders are aware of IHL and understand its central rules and principles.

The role of Australian Red Cross in IHL dissemination

The task of disseminating IHL is a clear legal obligation for States under the 1949 Geneva Conventions and their Additional Protocols of 1977,¹³ and in accordance with customary international law,¹⁴ but National Societies also have a unique role to play as IHL educators. This role is specifically recognised not just in the Statutes of the Movement,¹⁵ and in numerous resolutions adopted at International Conferences of the Red Cross and Red Crescent,¹⁶ but also in fora external to the Movement,¹⁷ in national legislation and in National Societies’ own statutory instruments.

Today, Australian Red Cross has a strong commitment to its IHL work. It is also one of the longest-running IHL programs within the Movement. The Australian Red Cross IHL program consists of ten staff members and over 100 volunteers – spread across the country from Brisbane to Hobart and Melbourne to Perth. The program aims to work across sectors in order to meet three fundamental goals. First, to ensure Australians involved in war and conflict understand that wars have laws and apply them; second, to ensure that Australian law and policy reflects IHL and humanitarian principles; and third, to contribute to the global impact of the Movement and encourage members of the Movement to use IHL to achieve their local humanitarian objectives.

Our commitment to these goals manifests in a range of dissemination efforts and activities. We also recognise the need to work closely with a wide range of stakeholders to ensure that Australia acts as, is perceived as, and is held to account as a respected member of the international community when it comes to its behaviours in armed conflict. For instance, in the private and humanitarian sectors we work alongside Australian companies and humanitarian organisations, respectively, to advise them on the risks they face when operating in conflict zones and to help them understand and manage these risks. In our civil-military work, we participate in Australian Defence Force simulations and exercises and contribute to military training, to provide a humanitarian, or a nuanced Movement, perspective to arms carriers. Internally, we collaborate with Australian Red Cross State and Territory IHL Advisory Committees, comprising experts in IHL from various sectors across the country who advise us in the work we do. We also help Australian Red Cross staff, members and volunteers (see **Chapter 12** of this Handbook) understand and leverage the unique features of the Movement so that they can confidently use the Fundamental Principles, promote awareness that there are limits in war, and protect the distinctive emblems. In our engagement with academia we contribute to national debate on thematic IHL concerns, such as the elimination of nuclear weapons (see **Chapter 21** of this Handbook) or the dangers facing health care services in conflict zones (see **Chapter 22** of this Handbook). Finally, in our public outreach work, we run public events on contemporary IHL issues, such as the recent Australia-wide ‘Culture under Attack’ photo exhibition, which highlighted the impact of armed conflict on cultural property. Our work is diverse, unique and of paramount importance to the ongoing fulfilment of Australia’s dissemination obligations.

Ensuring respect for IHL

Just as National Societies have a role to play in disseminating and assisting government in disseminating IHL, so too do they have a responsibility to cooperate with their governments to ensure respect for IHL. In order to ensure States Parties to the Geneva Conventions meet their obligations under IHL, States have a duty to take certain implementation measures, both in peacetime and in situations of armed conflict. Mostly, this requires States to take positive action, for instance, appointing legal advisers in their armed forces or identifying and marking protected persons and objects. However, in some cases, implementation can also require the adoption of national legislation (such as repressing war crimes), the assistance of the local National Society (for example in spreading knowledge of IHL) or both (such as protecting the distinctive emblems).

National Societies are often in a unique position to support government within their own countries due to: their mandate to do so under the Statutes of the Movement,¹⁸ their status as auxiliary to the public authorities in the humanitarian field, their position as a local touchpoint for the Movement in most States around the world, and on account of the relationships they have already established with local stakeholders. It is these characteristics that empower National Societies to promote the implementation of IHL within their own countries and to support their governments in implementing, not only the IHL obligations incumbent on them in international treaty and customary law but also those that derive from resolutions of the International Conference of the Red Cross and Red Crescent (for more on the International Conference, see **Chapter 1** of this Handbook).

This balanced, auxiliary relationship between the Australian government and Australian Red Cross allows the IHL Program to support government in its obligation to ensure respect for IHL in a number of ways. This includes promoting the adoption of relevant international legal instruments to which Australia is not yet party and encouraging the amendment of national legislation, or the adoption of implementing legislation, as a means of creating a relevant IHL framework within the Australian context. Our work also includes commenting on draft legislation and explaining to legislators and the public the need to ensure respect for IHL, protecting the distinctive emblems, supporting Australia's adoption of relevant International Conference resolutions made between the Movement and States, and entering into joint pledges with the Australian government as a means of advancing specific IHL-related priorities.

States are also encouraged to create national IHL committees or commissions as another means of implementing of IHL. In 1977, Australia established the *National Committee on International Humanitarian Law*, which comprises senior representatives from the Department of Defence, the Department of Foreign Affairs and Trade and the Attorney-General's Department. It also comprises senior Australian Red Cross representatives, academics and other distinguished individuals. Australian Red Cross demonstrates its ongoing support for the Committee by

Former WA IHL Officer Viv Ryan teaches a group at HMAS Stirling, Western Australia. Australian Red Cross



fulfilling chairperson, and secretarial roles as well as being a member of the Committee. Similarly to other global National IHL Committees or Commissions, the National Committee on IHL is mandated with various duties such as:

- working closely with relevant government departments to ensure the realisation of Australia’s obligations under IHL and assisting in the development of government policy on IHL;
- generating support for a more vigorous approach to IHL by government through contacts with parliamentarians, political parties, NGOs and the wider community;
- promoting education and debate on current IHL issues; and
- encouraging international respect for IHL and increased participation in IHL instruments.¹⁹

Protection of the distinctive emblems

In Australia, it is the role of the Department of Defence to protect the distinctive emblems in accordance with Australia’s obligations as a party to the Geneva Conventions and their Additional Protocols. However, it is also the mandated role of Australian Red Cross, under the Statutes of the Movement, to cooperate with government to promote awareness of, and protect, these emblems.²⁰

The distinctive emblems of the Geneva Conventions and their Additional Protocols – the red cross, red crescent and red crystal – are universal emblems of protection meaning “don’t shoot!” Far more than a logo or a trademark, these emblems identify persons and property that, in situations of armed conflict, are engaged in the delivery of impartial medical or humanitarian assistance and who are therefore protected at all times from attack – those being military medical and religious personnel and Red Cross and Red Crescent staff and volunteers, as well as medical sites, vehicles and equipment belonging to these groups.

Deliberately misusing the emblems in times of war in order to gain a military advantage over one’s adversary can amount to perfidy, which is considered a war crime.²¹ However, emblem misuse is not isolated to wartime situations. Misusing the emblem in times of peace can also be an offence, albeit not one of war crime status. Under the Geneva Conventions, States have a legal obligation to take measures (i.e. by adopting national legislation) necessary for the ‘prevention and repression’ of misuses of the emblem.²² In Australia, the *Geneva Conventions Act 1957 (Cth)* governs the use of the emblems and protects them from being used – either inadvertently or intentionally – without authorisation from the Minister for Defence.²³ The purpose of this is to ensure that the emblems continue to be universally recognised and accepted on the battlefield. A misrepresentation of the red cross, red crescent or red crystal in any situation – benign or otherwise – dilutes the true meaning and protective power of these emblems.

For many years, the Australian Red Cross IHL program has worked closely with the Department of Defence to strengthen emblem protection in Australia. We do this by helping members of the public understand the importance and protective purpose of the emblems and by contacting those that are – often inadvertently – misusing the red cross emblem and encouraging them to remedy this misuse. We rely on a strong network of Australian Red Cross staff, members and volunteers to help us achieve this goal of ensuring the protective meaning of the emblems is understood and respected by all Australians.

Conclusion

The role that Australian Red Cross, or any component of the Movement, plays in promoting and ensuring respect for the laws of war is not enough to prevent violations of IHL or the commission of war crimes, nor should it be expected to. The obligation, in times of conflict, to comply with the laws of war is the responsibility of multiple actors – governments, military commanders, non-state armed groups and courts of law – and their failure to do so should not be seen as a valid argument for the disposal or replacement of IHL nor a reason for disseminators to cease their efforts. In fact, in a time where hospitals and medical workers are being attacked, and civilians are being uprooted from their homes as a consequence of prolonged violence and urban warfare, it has never been so urgent to teach people – convince people – of the importance of acting with humanity and preserving human dignity in times of armed conflict.

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- 1 The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Res. 21 *Dissemination of knowledge of international humanitarian law applicable in armed conflicts*, Geneva, 7 June 1977.
- 2 Statutes of the Movement, art 3(2).
- 3 ICRC, *People on War: Perspectives from 16 Countries*, report, Dec 2016 <www.icrc.org/en/document/people-on-war>.
- 4 Ibid, 4.
- 5 Ibid.
- 6 Ibid.
- 7 Ibid, 1.
- 8 *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field*, opened for signature 22 August 1864 (entered into force 22 June 1865).
- 9 2016 Commentary on GCI, para. 2753.
- 10 See ICRC, *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 6 July 1906, art 26; Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, art 20; ICRC, *Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field*, Geneva, 27 July 1929, art 27.
- 11 'The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular to the armed fighting forces, the medical personnel and the chaplains.' GC IV, art 47.
- 12 1952 Commentary on GCI, p 348.
- 13 GC I, art 47; GC II, art 48; GC III, art 127(1); GC IV, art 144(1); AP I, art 83; AP II, art 19.
- 14 Study on Customary IHL, rules 142 and 143 <<http://www.icrc.org/customary-ihl/eng/docs/home>>.
- 15 Statutes of the Movement, art 3: '[National Societies] disseminate and assist their governments in disseminating international humanitarian law; they take initiatives in this respect'.
- 16 See for example: *30th International Conference of the Red Cross and Red Crescent*, Geneva, 2007, Res. 3, Reaffirmation and implementation of international humanitarian law: Preserving human life and dignity in armed conflict.
- 17 See for example: *Status of the Protocols Additional to the Geneva Conventions of 1949 and relating to the protection of victims of armed conflicts*, GA Res 67/93, UN GAOR, 67th session, Agenda item 80 UN Doc A/Res/67/93, 14 December 2012.
- 18 Statutes of the Movement, art 3(2); The Seville Agreement, art 9.3.2.
- 19 ICRC Advisory Service on IHL, *National Committees and Similar Bodies on International Humanitarian Law*, 31 July 2017 <<https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>>.
- 20 Statutes of the Movement, art 3(2).
- 21 AP I, arts 37(1)(d) and 85(3)(f).
- 22 GC I, art 54; GC II, art 45.
- 23 Misusing the red cross, red crescent or red crystal emblem is considered an offence under section 15 of the *Geneva Conventions Act 1957 (Cth)*, and carries a penalty of \$2,100.

The Role of the International Committee of the Red Cross as ‘Guardian Of IHL’

Georgia Hinds

The ICRC, established in 1863, is the Movement’s founding body. The ICRC is neither an intergovernmental nor a nongovernmental organisation. It is a private association under Swiss law,¹ but is entrusted with a mandate under international law, which confers upon it an international legal personality, similar to an intergovernmental organisation. Accordingly, the ICRC is often considered *sui generis* in its legal status.²

A key characteristic of the ICRC is its international mandate, given to it by States, to protect and assist victims of armed conflict.³ The ICRC largely carries out this mandate through its field operations. However, in order to protect and assist victims of armed conflict the ICRC also works to promote, develop and strengthen respect for the law of armed conflict. In fact, the ICRC’s operational activities are inextricably linked with its work on IHL: its operations occur within the framework of IHL and IHL draws on the practical experience of the ICRC’s operations. Together, these interconnecting lines of work have led to the ICRC being regarded as the ‘guardian’ of IHL.⁴

This guardianship role, whilst not explicitly mentioned in the Geneva Conventions, has developed through longstanding and uniform State practice, and is now enshrined in the universally adopted Statutes of the Movement.⁵ In particular, under Article 5 of the Statutes, the ICRC has a mandate to work for the faithful application, understanding and dissemination of IHL, to prepare for the development of IHL, and ‘to take cognizance of any complaints based on alleged breaches’ of IHL.⁶

Clearly, this is a wide-ranging and complex role, the various facets of which often overlap making them difficult to clearly discern or separate. Broadly though, the ICRC’s work in relation to IHL can be understood as efforts undertaken with various actors to prevent its violations, and end them when they occur, as well as initiatives to reaffirm and strengthen IHL, so that it is interpreted, applied and developed in accordance with its letter and spirit, and in light of the evolution of warfare.⁷ The ICRC conducts these different functions in both operational and non-operational contexts.

Preventing IHL violations

The rules of war must be observed not only by governments and their armed forces, but also by non-State armed groups. For this reason, the ICRC works with all parties to an armed conflict to make sure that they understand their obligations under humanitarian law, in order to prevent – or at the very least limit – the worst excesses of war. This prevention approach aims ultimately to foster an environment conducive to respect for the life and dignity of persons affected by armed conflict and other situations of violence; and respect for the ICRC’s work.⁸ In that regard, it encompasses efforts to communicate, develop, clarify and promote the implementation of IHL and other relevant bodies of law.⁹

Bringing together students from different origins to compete in IHL moots and to generally discuss IHL, armed conflicts and their consequences, can also contribute to the prevention approach. This contribution is especially apparent when these students are later pursuing careers in IHL (for instance, see **Part III** of this Handbook) or otherwise involved in IHL-related issues in their respective countries or abroad.¹⁰

Communicating the law

For IHL to be effective, States must know that it applies and give orders to comply with it. Accordingly, in the First World War, the ICRC issued its first appeal to States parties to the conflict, reminding them of the need to ‘ensure the rigorous and faithful application’ of the Geneva Convention of 1906.¹¹

Today, this is standard ICRC practice; at the outset of any armed conflict, the ICRC will issue all parties to the conflict with a document, known within the ICRC as a *rappel du droit*.

This document may take different forms. In the case of States, the ICRC generally sends formal memoranda, whilst organised armed groups may be better reached by way of a press release or direct meetings.¹² Whatever its form, the document will outline the ICRC's view as to the applicable rules and IHL principles governing the conduct of hostilities and the protection of persons in the hands of an enemy. For example, after hostilities broke out between Iraq and Kuwait on 2 August 1990, the ICRC issued a *note verbale* reminding all parties of the rules and principles of IHL, and offering its services to provide protection and assistance to the victims of the conflict and act as a neutral intermediary in matters of humanitarian concern.¹³

Importantly, the *rappel du droit* will often also instigate and serve as a basis for the ICRC's ongoing bilateral dialogue with the belligerent parties. In this dialogue, the ICRC will endeavour to secure access to any protected persons in the parties' power, as well as the facilities, authorisations and guarantees necessary for its operations.

Clarifying and developing IHL

As part of its 'guardian' role, the ICRC contributes to the development and strengthening of IHL by stimulating discussion of challenges encountered, possible solutions, and necessary changes to the law. This work forms a key component of the ICRC's long-term strategy of preventing IHL violations.

To fulfil this function, the ICRC regularly organises and participates in consultations, especially with governmental and academic experts, on the possibility of adopting new rules. It also prepares and contributes to draft texts for submission to diplomatic conferences. Indeed, the ICRC played a crucial role in generating momentum for the development and adoption of the 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction. It was one of the first voices to call attention to the problems caused by landmines when it, along with dozens of National Red Cross and Red Crescent Societies embarked on an unprecedented public campaign raising awareness of the need for a treaty banning landmines and the plight of mine victims themselves.¹⁴ In 1997, the ICRC attended the Expert Meeting on the Text of a Convention to Ban Anti-Personnel Mines, where it presented government representatives with an outline of what it considered to be the key issues in relation to the draft treaty text.¹⁵

The ICRC will also often act to protect against legal developments that potentially undermine or weaken IHL. During the negotiation and drafting of the UN Convention on the Rights of the Child, the ICRC made numerous statements in relation to proposed Article 38, warning that the draft provision represented a step backward from existing IHL protections for children under the age of 15.¹⁶

More recently, the ICRC has repeatedly called upon States, when implementing or tightening existing counterterrorism measures, to ensure that they maintain the safeguards protecting human life and dignity as laid down in IHL and international human rights law.¹⁷

Promoting the law and its implementation

The ICRC's promotion efforts are directed at ensuring that IHL is known and understood, and at encouraging implementation and integration at the national level. The implementation of IHL refers to the legal and administrative measures that States must take to comply with the obligations they have undertaken, while integration is the translation of IHL into concrete mechanisms or measures to ensure compliance (such as military doctrine, education and training).

Harasta National Hospital, Harasta, Rural Damascus, Syria. A surgeon talks to ICRC president Peter Maurer about the situation at the hospital and the difficulty of obtaining medical supplies. ICRC / I. Malla / sy-e-00142



Accordingly, the ICRC regularly reminds States that they have committed, notably through the Geneva Conventions and their 1977 Additional Protocols,¹⁸ to making humanitarian provisions known. The ICRC has also conducted and maintains an online study of the customary rules of IHL, to assist in promoting knowledge of these rules among the many actors involved in the application, dissemination and enforcement of IHL.¹⁹

The ICRC then encourages States to fulfil their IHL obligations by way of comprehensive national legislation and other implementing measures. Through its specialised Advisory Service, the ICRC provides technical guidance and assistance to national authorities on specific domestic implementation measures, such as legislation to prosecute war crimes and to protect the Red Cross and Red Crescent emblems.²⁰ To this end, the ICRC Advisory Service has developed an IHL implementation manual, to assist policy makers, legislators and other stakeholders in implementing IHL instruments.²¹ The Advisory Service also supports the exchange of information on existing national measures of implementation, chiefly through its online Database on National Implementation of IHL,²² which contains a collection of laws and case law dealing with IHL norms.

The ICRC also supports national programmes undertaken by States for the integration of IHL into the education, training, doctrine and operations of armed forces around the world.²³ These integration activities are continuous and are imperative for ensuring respect for IHL; it is not enough for a commander to be reminded by doctrine of the need to respect and protect prisoners of war, he or she must know what concrete measures must be taken regarding such persons and have the means available to perform them.

Responding to IHL violations

If the ICRC observes violations of IHL, it takes certain steps to end them and to prevent their reoccurrence. These measures will be in line with the ICRC's internal guidelines for action, adopted in 1981 and revised and published with explanatory notes in 2005.²⁴

The guidelines confirm that the ICRC's preferred mode of action in response to a violation of IHL is to make a confidential representation to the relevant authorities responsible for the incident. Whilst not part of the seven Fundamental Principles,²⁵ the ICRC's confidential approach has been part of the organisation's identity for decades and has proven its effectiveness from a humanitarian point of view, in particular in contexts in which a neutral and independent player is needed.²⁶ Belligerent parties are unlikely to provide the ICRC with unhindered access to security detainees or other vulnerable persons, or allow ICRC delegates to collect extremely sensitive information, unless they can be certain that the organisation will not publicly share the information it collects, particularly with regard to IHL violations.²⁷

The ICRC's confidentiality is not, however, unconditional. If an IHL violation is serious, repeated and established with certainty, and if confidential representations have failed, the ICRC may have recourse to a range of other modes of action. These may include the ICRC sharing its concerns with third party governments and international or regional organisations, publicly expressing these concerns or, as a last resort, publicly denouncing the failure

to respect IHL.²⁸ Importantly, such public condemnation is an exceptional step, and one which will only be taken if the ICRC deems that the publicity will be in the interests of those affected or threatened by violations.²⁹

One of the few times that the ICRC took this step was in September 1982, when the Israeli army denied ICRC delegates access to provide assistance and protection for the civilian population in and around the Palestinian refugee camps in Beirut. On September 18, the ICRC addressed an appeal to the international community, condemning the fact that

Photo: ICRC



‘hundreds of women, children, adolescents and elderly persons have been killed in Beirut... wounded persons have been killed in hospital beds and others, including doctors, have been abducted’. The appeal ended with the words: ‘The ICRC solemnly appeals to the international community to intervene to put an immediate stop to the intolerable massacre perpetrated on whole groups of people and to ensure that the wounded and those who treat them are respected and that the basic right to life is observed’.³⁰

Whilst the ICRC clearly plays an important role in highlighting and calling for action to prevent serious IHL violations, it is not the ICRC’s task to ultimately investigate or prosecute offences. States party to the Geneva Conventions are duty bound to introduce in their national legislation provisions for the repression of violations of humanitarian law, including the prosecution or extradition of war criminals.³¹

The above elaboration of the ICRC’s role as ‘guardian’ of IHL is by no means exhaustive or authoritative. Rather, it is just one way of thinking about the many complex roles and responsibilities vested in the ICRC by the international community. An examination of these functions also serves to highlight the fact that, although IHL is predominately developed and implemented by States, the ICRC has a unique and dynamic part to play in these processes.

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- 1 See Swiss Civil Code, arts 60-69 <http://www.admin.ch/ch/e/rs/2/210_en.pdf>.
 - 2 ‘The Role of the International Committee of the Red Cross’ in *The 1949 Geneva Conventions: A Commentary*, Edited by Andrew Clapham, Paola Gaeta, Marco Sassoli, Oxford Scholarly Authorities on International Law, 15 October 2015, 526.
 - 3 IHL expressly confers certain rights on the ICRC, such as that of visiting prisoners of war or civilian internees and providing them with relief supplies, and operating the Central Tracing Agency (see GC III, arts 73, 122, 123 and 126; and GC IV, arts 76, 109, 137, 140 and 143). In addition, IHL recognises the ICRC’s right of initiative in the event of international or non-international armed conflict (Common Article 3 and Common Article 9/9/9/10). In *Prosecutor v Simic et al*, IT-95-9-PT, the ICTY recognised that the States Party to the Geneva Conventions had “agreed to the special role and mandate of the ICRC.” (at 46).
 - 4 Yves Sandoz, *The International Committee of the Red Cross as Guardian of International Humanitarian Law*, Dec. 31, 1998 <<http://www.icrc.org/web/eng/siteeng0.nsf/html/about-the-icrc-311298>>.
 - 5 Statutes of the Movement, 537.
 - 6 Ibid arts 5(2)(c) and 5(2)(g).
 - 7 Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, 2016, 322-323, <<https://shop.icrc.org/international-humanitarian-law-a-comprehensive-introduction-2617.html>> (consulted 26.01.2018).
 - 8 ICRC, *ICRC Prevention Policy*, 2010, 5 <<https://www.icrc.org/en/publication/4019-icrc-prevention-policy>>.
 - 9 Ibid.
 - 10 Etienne Kuster and George Dvalaze, *Why educating students on humanitarian norms and value matters*, Humanitarian Law & Policy, 2016 <<http://blogs.icrc.org/law-and-policy/2016/07/29/ihl-competitions-humanitarian-education/>>.
 - 11 Lindsey Cameron ‘The ICRC in the First World War: Unwavering belief in the power of law?’ (2015) 97(900) *International Review of the Red Cross (IRRC)* <https://www.icrc.org/en/download/file/30312/irc_97_900-8.pdf>.
 - 12 Melzer, above n7, 323.
 - 13 ‘Conflict in the Middle East’ (1991) 31(280) *IRRC*, 22.
 - 14 Cornelio Sommaruga in Maresca and Maslen (eds.), *The Banning of Anti-Personnel Landmines: The Legal Contribution of the International Committee of the Red Cross 1955-1999* (Cambridge University Press, 2000) xvii.
 - 15 Stuart Maslen and Peter Herby, ‘An international ban on anti-personnel mines: History and negotiation of the “Ottawa treaty”’ (1998) No. 325, *IRRC* <<https://www.icrc.org/eng/resources/documents/article/other/57jpin.htm>>.
 - 16 ‘Optional Protocol to the Convention on the Rights of the Child concerning involvement of children in armed conflicts: Position of the International Committee of the Red Cross, Geneva, 27 October 1997’ (1998) No. 322, *IRRC*, 28 <<https://www.icrc.org/eng/resources/documents/article/other/57jp4u.htm>>.
 - 17 See, for example, the ‘International humanitarian law and the challenges of contemporary armed conflicts’ *Report of the 32nd International Conference of the Red Cross and Red Crescent*, Geneva, 8-10 December 2015, 17; Christine Beerli, ‘Terrorism, counter-terrorism and international humanitarian law’ (Statement delivered at the 17th edition Bruges Colloquium, Bruges, 20-21 October 2016) <<https://www.icrc.org/en/document/terrorism-counter-terrorism-and-international-humanitarian-law>>.
 - 18 Generally speaking, the obligation to spread knowledge of IHL is a corollary to the commitment made by the States party to the instruments of IHL to respect and ensure respect for the provisions they contain.
 - 19 The report on customary rules of IHL was prepared pursuant to Resolution 1 of the 26th International Conference of the Red Cross and Red Crescent, Geneva, 3-7 December 1995, which endorsed Recommendation II of the Intergovernmental Group of Experts for the Protection of War Victims.
 - 20 ICRC, *Domestic Law and IHL* <<https://www.icrc.org/en/war-and-law/ihl-domestic-law>> (consulted on 26.01.2018).
 - 21 Available at: <<https://www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf>>.
 - 22 Available at: <<https://ihl-databases.icrc.org/ihl-nat>>.
 - 23 ICRC, *Dialogue with weapons-bearers* <<https://www.icrc.org/en/what-we-do/building-respect-ihl/dialogue-weapon-bearers>> (consulted 26.01.2018).
 - 24 ‘Action by the International Committee of the Red Cross in the event of violations of international humanitarian law or of other fundamental rules protecting persons in situations of violence’ (2005) 87(858) *IRRC*, 393.
 - 25 Melzer, above n 7. See Chapter 1 of this Handbook for further information on the Fundamental Principles of the Movement.
 - 26 ‘The International Committee of the Red Cross’s confidential approach’ (2012) 94(887) *IRRC*, 1136.
 - 27 Melzer, above n 7, 325.
 - 28 Ibid, 325-7.
 - 29 Ibid, 327.
 - 30 ICRC Annual Report 1982, p 57. Available at: <<http://blogs.icrc.org/cross-files/annual-reports/>>.
 - 31 Melzer, above n 7.



An Introduction to the Sources and Principles of IHL

part **02.**

The Scope and Application of International Humanitarian Law

Jonathan Crowe*

IHL can be defined as *the body of international law governing the conduct of armed conflicts*. The existence of an armed conflict is therefore a necessary prerequisite for IHL to operate. It is important to note that IHL is concerned with regulating the *conduct* of armed conflicts, rather than their *commencement*. It is not concerned with how a conflict started or who was to blame for it, but what forms of conduct are permissible once the war is ongoing.

The body of international law relating to the conduct of armed conflicts is sometimes referred to using the Latin term *jus in bello* ('law in war'). This is generally viewed as synonymous with what we now call IHL. The law relating to the commencement of armed conflicts, by contrast, is known as the *jus ad bellum* ('law to war'). It is also sometimes called the *jus contra bellum* ('law against war'), since its primary aim is to stop wars from starting in the first place.

IHL is often divided further into the *Hague law* and the *Geneva law*, named after the two main sets of international treaties. Hague law takes its name from the 1899 and 1907 Hague Conventions and the accompanying Hague Regulations. These documents are directly concerned with regulating the conduct of armed exchanges, for example by restricting particular kinds of weapons or military strategies. Geneva law, by contrast, is now contained primarily in the four Geneva Conventions of 1949 and their two Additional Protocols of 1977. These conventions specify minimum standards of treatment for specific vulnerable classes of people in armed conflict, such as the sick and wounded, prisoners of war and civilians.

Types of Armed Conflicts

IHL (as the *jus in bello*) only operates during an armed conflict. IHL has traditionally distinguished between international and non-international armed conflicts. Prior to the Geneva Conventions of 1949, it was generally thought that civil conflicts were outside the scope of international law.¹ They were a matter for states to deal with internally. However, the rules of IHL governing non-international conflicts have consistently expanded since then. The vast majority of armed conflicts since the Second World War have been non-international in character.²

The Geneva Conventions themselves only apply in international armed conflicts. The exception is Common Article 3, which was the first provision to bring non-international conflicts within the reach of IHL. Additional Protocol I to the Geneva Conventions adopted in 1977 is also restricted to international armed conflicts, while Additional Protocol II covers non-international conflicts. It is increasingly recognised that many fundamental rules of IHL apply in non-international as well as international armed conflicts.³ An ICRC study from 2005 found that of 161 customary principles of IHL, 148 applied in conflicts of both types.⁴

The distinction between international and non-international armed conflicts is not always clear cut. In some cases, a non-international armed conflict may become international at a certain point in its history. This is often called an 'internationalised' conflict. A conflict may become internationalised because of the creation of a new state or states during the conflict (as in the former Yugoslavia).⁵ Alternatively, internationalisation may occur when a third party state militarily intervenes in a non-international conflict or where one or more participants in a non-international conflict are acting 'on behalf of' a third party state.⁶

Defining Armed Conflict

An influential definition of an armed conflict comes from the International Criminal Tribunal for the Former Yugoslavia (ICTY) interlocutory decision in *Prosecutor v Tadić*.⁷ The Appeals Chamber in *Tadić* confirmed that 'for there to be a violation of [IHL], there must be an armed conflict'.⁸ The Appeals Chamber then went on to say 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'.⁹

The definition proposed by the Appeals Chamber in *Tadić* recognises two distinct tests for the existence of an armed conflict. The first test refers to ‘a resort to armed force between States’. This is the classic definition of an *international* armed conflict. The second test refers to ‘protracted armed violence between governmental authorities and organised armed groups or between such groups within a State’. This formulation recognises that IHL may also apply to non-international armed conflicts. It covers conflicts between a state and one or more non-state groups, as well as conflicts in which no states are directly involved.¹⁰

International Armed Conflicts

Common Article 2 of the Geneva Conventions of 1949 states that the conventions 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 one of them’. A formal declaration of war is therefore not necessary for the existence of an international armed conflict. Common Article 2 goes on to clarify that the Geneva Conventions also apply in cases of total or partial occupation of a state’s territory, even when the occupation is met with no resistance.

Additional Protocol I generally applies to the same types of armed conflicts covered by Common Article 2.¹¹ However, Article 1(4) of Additional Protocol I extends its scope to a type of conflict not covered by Common Article 2: ‘armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in exercise of their right of self-determination’. Conflicts falling into this category are commonly called *wars of national liberation*. They are deemed international conflicts for the purposes of Additional Protocol I, although they would otherwise count as non-international conflicts.

Non-International Armed Conflicts

According to the ICTY Appeals Chamber in *Tadić*, an armed conflict involving non-state groups arises only if the violence is *protracted* and the non-state groups are *organised*. The ICTY Trial Chamber subsequently clarified that ‘protracted armed violence’ contrasts with ‘banditry, unorganised and short-lived insurrections’.¹² This was reiterated by the Inter-American Commission on Human Rights (IACHR) in the case of *Juan Carlos Abella v Argentina*.¹³

The IACHR in *Abella* stated that an armed conflict must be contrasted with ‘disturbances with no concerted intent’ and ‘isolated and sporadic acts of violence’.¹⁴ Among the examples given by the IACHR of situations falling short of armed conflict were violent civilian demonstrations, students throwing stones at police, bandits holding hostages for ransom and political assassinations.¹⁵ It may be difficult to draw the line in particular cases. However, the IACHR observed that ‘in making such a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case’.¹⁶

The ICTY Appeals Chamber in *Tadić* further states that an armed conflict featuring non-state forces must involve ‘organised armed groups’. Again, this standard is intended to distinguish armed conflicts from sporadic outbreaks of violence, such as riots and demonstrations. Typically, an organised armed group will have a clear chain of command. However, it is not necessary that each group involved in an armed conflict be clearly differentiated and defined.

There may be a number of loosely related armed groups involved, as in the conflict in the former Yugoslavia.¹⁷ The ICTY Trial Chamber in the case of *Prosecutor v Haradinaj* viewed the

Soldiers from the Niger national army receive handbooks containing information on international humanitarian law. CC BY-NC-ND / ICRC / Mouhamadou Birom Seck



following factors as indicative of organisation: the existence of command structure and disciplinary rules; control of a determinate territory; access to weapons, equipment and military training; and the ability to define military strategy and use military tactics.¹⁸ No one factor is decisive. The issue must therefore ultimately be considered on a case-by-case basis.

Scope of Armed Conflict

The existence of an armed conflict brings IHL into operation. However, an issue may arise as to whether particular acts fall within the conflict's geographical and temporal scope. In its jurisdictional decision in the *Tadić* case, the ICTY Appeals Chamber observed that 'the temporal and geographical scope [of the conflict] extends beyond the exact time and place of hostilities'. At least some aspects of IHL apply within the 'entire territory' of the warring parties for the duration of the conflict.¹⁹ It follows that 'a violation of the laws or customs of war may [...] occur at a time when and in a place where no fighting is actually taking place'.²⁰

The temporal reach of IHL, on the other hand, extends from the initiation of hostilities until 'a general conclusion of peace is reached'.²¹ Declaration of an armistice or ceasefire does not have the effect of terminating an armed conflict unless it constitutes a peace agreement and is followed by a general cessation of hostilities. The Geneva Conventions specifically provide for the continuing application of IHL in respect of particular vulnerable groups. Prisoners of war, for example, gain the protection of Geneva Convention III from the time they fall into the power of the enemy until their final release and repatriation.²²

Connection to the Conflict

The ICTY has held that a charge of violating the laws and customs of war in the context of international criminal law can only be established if the acts have an appropriate connection to the armed conflict. It is not enough that the acts occur at the same time and place as the conflict. Rather, they must take place *in the context of* the conflict.²³ In the words of the ICTY Appeals Chamber:

*The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit [the crime, the] decision to commit it, the manner in which it was committed or the purpose for which it was committed.*²⁴

This requirement is necessary to distinguish acts committed during an armed conflict that properly fall within IHL from those that properly fall under other criminal components of domestic law. For example, an ordinary theft or assault during wartime would be a matter for domestic criminal law, rather than IHL. On the other hand, ethnically motivated assaults during the Yugoslavian and Rwandan conflicts have been treated as violations of IHL, since the motivation was related to the conflict.²⁵ A list of factors that may be considered in determining this issue can be found in the ICTY Appeals Chamber judgment in *Kunarac*.²⁶

Liberia. Monrovia, Edward Binzah Kesselly military barracks. Training session for the Armed Forces of Liberia, set up with the help of the ICRC, about the conduct of search operations and interventions at checkpoints. 01.06.2015 CC BY-NC-ND/ICRC/Yamila Castro



- * For a more detailed discussion of the issues covered in this chapter, see Jonathan Crowe and Kylie Weston-Scheuber, *Principles of International Humanitarian Law* (Edward Elgar, 2013) ch 1.
- 1 The main exception was the doctrine of recognition of belligerency, where organised belligerent groups controlling substantial territory could come to be recognised by affected states as holding rights and duties under the law of armed conflict.
 - 2 Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law* (CUP 2005) xxviii; International Committee of the Red Cross, *International Humanitarian Law and the Challenge of Contemporary Armed Conflicts* (ICRC 2011) 6.
 - 3 *Prosecutor v Tadić*, International Criminal Tribunal for the Former Yugoslavia (ICTY) Appeals Chamber Decision on Jurisdiction, 2 October 1995 [96]-[127].
 - 4 Henckaerts and Doswald-Beck, above n 2. The figures are reported in International Committee of the Red Cross, *International Humanitarian Law and the Challenge of Contemporary Armed Conflicts* (ICRC 2011) 12.
 - 5 *Prosecutor v Tadić*, ICTY Appeals Chamber Decision on Jurisdiction, above n 3, [77].
 - 6 *Ibid*; *Prosecutor v Tadić*, ICTY Appeals Chamber Judgment, 15 July 1999 [88]-[97].
 - 7 *Prosecutor v Tadić* (Jurisdiction), above n 3.
 - 8 *Ibid* [67].
 - 9 *Ibid* [70]. See also *Prosecutor v Kunarac*, ICTY Appeals Chamber Judgment, 12 June 2002 [55]-[56].
 - 10 Slightly different thresholds for establishing the existence of a non-international armed conflict apply under Common Article 3 and AP II. Common Article 3 applies to any armed conflict 'not of an international character' occurring in the territory of a state party, while AP II applies to armed conflicts that take place between the forces of a state party and other armed groups within the state's territory: art 1(1).
 - 11 AP I, art 1(3).
 - 12 *Prosecutor v Tadić*, ICTY Trial Chamber Judgment, 7 May 1997 [562].
 - 13 *Juan Carlos Abella v Argentina*, Inter-American Commission on Human Rights Case No 11.137, Report No 55/97, 18 November 1997.
 - 14 *Ibid* [149].
 - 15 *Ibid* [154].
 - 16 *Ibid* [153].
 - 17 *Prosecutor v Tadić*, ICTY Appeals Chamber Decision on Jurisdiction, above n 3, [70].
 - 18 *Prosecutor v Haradinaj*, ICTY Trial Chamber Judgment, 3 April 2008 [60].
 - 19 *Prosecutor v Tadić*, ICTY Appeals Chamber Decision on Jurisdiction, above n 3, [67]-[68].
 - 20 *Prosecutor v Kunarac*, ICTY Appeals Chamber Judgment, 12 June 2002 [64].
 - 21 *Ibid* [70].
 - 22 GC III, art 5.
 - 23 *Prosecutor v Tadić*, ICTY Appeals Chamber Decision on Jurisdiction, above n 3, [69].
 - 24 *Prosecutor v Kunarac*, ICTY Appeals Chamber Judgment, above n 20, [58].
 - 25 See, for example, *Prosecutor v Delalic*, ICTY Trial Chamber Judgment, 16 November 1998; *Prosecutor v Kvočka*, ICTY Trial Chamber Judgment, 2 November 2001; *Prosecutor v Jean Paul Akayesu*, International Criminal Tribunal for Rwanda Trial Chamber Judgment, 2 September 1998.
 - 26 *Prosecutor v Kunarac*, ICTY Appeals Chamber Judgment, above n 20, [59].

Protected Persons under International Humanitarian Law

Lara Pratt

The primary function of IHL is to limit the adverse effects of warfare. One of the main ways this is achieved is by limiting who may be the subject of attack. Consequently, when determining whether a particular attack is lawful, it must first be determined whether the persons who are subject to the attack are legitimate targets.

The law can be summarized as follows:

1. All persons within a conflict zone 'are divided into two general classes...combatants and non-combatants.'¹
2. Members of military forces are combatants and always presumed to be legitimate targets unless they are *hors de combat*.
3. Civilians are non-combatants and always presumed to be protected against attack unless they are taking an active part in hostilities.
4. Certain categories of person, whether or not they are members of military forces, are entitled to use special symbols which identify them as specially protected against attack.

Moot participants are faced with two key overlapping challenges. Firstly, 'civilian' is defined in the negative.² That is, IHL provides a definition for 'armed forces', and civilians are those that do not fit into that definition.³ Secondly, the definition of combatant was written in the context of international armed conflicts (IAC), conducted by organised, State-run military forces. While the definition of combatant is not confined to such forces, participants in modern conflicts increasingly do not fit the organised military forces model. Individuals may at various times be a civilian entitled to protection, a civilian who has temporarily lost protection due to taking up arms or a member of an irregular armed force.⁴

Although it is only lawful to direct attacks against combatants, the mere fact that protected persons are casualties of a particular attack does not necessarily imply wrongful conduct on the part of the belligerents. Potential targets may be of a mixed civilian/combatant status, or the target may be identified as legitimate but the execution of the attack, in fact, results in civilian casualties. If the target is legitimate, the lawfulness of the attack still depends on whether the risk of casualties among protected persons is proportionate to military value of the site (principles of necessity and proportionality).⁵ It is not the purpose of this chapter to delve into the necessity/proportionality calculation. Instead, this chapter introduces mooters to the 'first step' in arguing the lawfulness of a particular attack.

Liberia, main prison in Monrovia. An ICRC visit. ICRC / B. Heger / Ir-e-00259



When is a Combatant *hors de combat*?

Combatants are the core participants in armed conflict and the only persons who are presumed to be a legitimate subject of attack.

Being defined as a combatant brings certain privileges. In particular, combatants in an IAC are entitled to Prisoner of War (POW) status if captured, and may not be prosecuted merely for their participation in the conflict.⁶ The privileges of combatant status do not generally extend to those participating in non-international armed conflicts (NIAC).⁷

At a basic level, combatants are usually members of State armed forces.⁸ ‘Armed forces’ includes both regular and irregular forces defined by the existence of an organisational structure featuring command responsibility.⁹ There remains ambiguity with regard to NIAC (which will be addressed below under “Civilians”). The IAC definition, found in the *Hague Regulations*¹⁰ and *Geneva Conventions*,¹¹ encompasses militia or other organised, armed groups that meet four criteria (the GC III requirements):

- (a) the forces are commanded by a person responsible for his/her subordinates;
- (b) members wear fixed distinctive sign recognizable at a distance;
- (c) members carry arms openly; and
- (d) operations are generally conducted in accordance with the laws and customs of war.¹²

AP I which has been extensively but not universally adopted, retains only the first of these criteria and specifies the necessity of an internal disciplinary structure. Although members of armed forces are required to carry their arms openly, this is only during active military engagement or when they are likely to be visible to the enemy,¹³ this is primarily for the purpose of entitlement to POW status.¹⁴

Subject to exceptions discussed below, where someone is a member of an armed force, they are presumed to be a legitimate target whether or not they are in fact armed or are actively participating in a conflict.

The term *hors de combat* literally translates to ‘out of combat’. It refers to persons who would ordinarily be combatants (and thus legitimate targets of attack) but for specific reasons are no longer active participants in the conflict. Once a person is *hors de combat* they are protected from attack by both treaty¹⁵ and customary international law.¹⁶ Attacks on persons *hors de combat* are considered grave breaches of IHL.¹⁷

There are three main categories of person who are considered to be *hors de combat*:

1. Those who are sick, injured, shipwrecked or otherwise defenseless.¹⁸
2. Anyone who has expressed a clear intention to surrender.¹⁹
3. Any combatant who is within the power of an adverse party (in particular Prisoners of War).²⁰

The protection is predicated on the persons who are *hors de combat* remaining ‘out’ of conflict. Consequently, resuming combat,²¹ communicating intelligence to one’s own party,²² or even attempting to return to combat (escape)²³ can lead to a removal of the protection against attack. In addition, falsely claiming the *hors de combat* protection, for example falsely claiming to surrender under a white flag, is in itself a violation of humanitarian law²⁴ and in some circumstances may constitute a war crime.²⁵

Civilians

As a general rule, civilians are non-combatants and may not be the subject of attack.²⁶ Where the conflict is of a non-international nature, or where there is an IAC involving atypical fighters that do not clearly fit the GC III definition of combatant, mooters will need to determine whether, at the time of the attack, the targeted individuals have lost their presumed civilian protection.

If the status of a person is in doubt, it is generally accepted that, so long as the person has not committed hostile acts, they should be treated as a civilian and not be attacked (at least until information resolving the person’s status is found).²⁷

As with the protection of those *hors de combat*, the protection is predicated on the presumption that civilians are not taking part in the hostilities. Thus, the protection will be lost where an individual takes *direct* part in the hostilities.²⁸

Direct participation has been defined in the *Commentary to AP I* as ‘acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.’²⁹ The ICRC Interpretive Guidance points to three criteria:

1. The civilian’s action must be likely to cause actual harm to the enemy;
2. There must be a direct causal link between the act and the likely harm; and
3. The act must be undertaken for the purpose of causing harm to the enemy.³⁰

The key practical distinction tends to be that where an individual voluntarily contributes to an active combat situation in a manner that has the potential to harm their enemy, they will be directly participating in hostilities. Driving an ammunition truck from a storehouse to the front would constitute a direct participation, driving the same truck between storehouses might not.³¹ Likewise, providing subsidiary services (e.g. catering) to a military force would fail to meet the threshold of causing ‘actual harm’ and thus the protection against direct targeting would remain.³² Certainly, civilians who are working in close proximity, or in a support role, to the armed forces places themselves at higher risk of being collateral damage, but they are not in themselves a legitimate target.

While this distinction allows for the determination of an individual’s status at a particular moment in time, it still relies on the civilian participant being the exception rather than the rule – warfare is still presumed to be conducted by an organised military force. This leaves open the challenge of how legitimate armed forces are able to effectively engage in combat against enemies which fail to meet the GC III definition. Although much of the discourse on this issue relates to an entitlement to POW status, the legitimacy of targeting is equally important.

Whereas members of the military force of one side are targetable at any time, members of the other side would need to be actively involved in combat to be targetable and absolutely protected at all other times. This situation would clearly be impractical and unsustainable.³³

In recent years the concept of ‘continuous combat function’ (CCF) has arisen and suggests that civilians may lose their protected status on an ongoing basis if they are performing an essentially military function for, or are an active member of, a militia that is *in practice* a party to the conflict, but which fails to meet the GC III criteria.³⁴ This also includes those that may not physically hold a weapon, but are involved in the planning, direction or other organisation of the military force.³⁵ CCF allows that civilians whose role is essentially analogous to that of a member of a military force to be targeted.³⁶ By contrast, a civilian who joins the fighting on an *ad hoc* or inconsistent basis would retain their protected status when not directly participating in hostilities.

The conflict in Syria has wreaked considerable destruction. This is the small town of Azaz, to the north-west of Aleppo, near the border with Turkey, on 23 April 2013. ICRC / T. Voeten / sy-e-00297



Although there is significant support for the suggestion that the concept of CCF has become a part of IHL,³⁷ including within the *ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities*,³⁸ CCF does not appear in any treaties and the concept remains unsettled.³⁹ Targeted killings of high-level Al-Qaeda and ISIS operatives who are not at the time engaged in conflict rely on this CCF status but remain controversial as to their legitimacy. While the law remains unsettled, Alston has stated that '[i]f States are to accept this category, the onus will be on them to show that the evidentiary basis [that a targeted individual has a CCF] is strong'.⁴⁰

Special Protections

A small final note must be made regarding special protections offered to particular categories of person. These persons are those entitled to display the 'distinctive emblem' of the Red Cross, Red Crescent, Red Lion and Sun⁴¹ or Red Crystal,⁴² which indicate that a person (or site) is not to be the target of attack.

There are two main categories of protected persons.

- Chaplains or Religious personnel who are engaged in the spiritual welfare and who are not actively participating in the conflict are protected by IHL. This applies to both IAC⁴³ and NIAC.⁴⁴ While there is no clear definition of religious personnel, a wide definition is preferred, with those providing for the spiritual wellbeing of troops being recognized.⁴⁵
- Medical personnel, including those who are part of military forces, are similarly protected against attack. The protection given to medical personnel is a logical corollary of the prohibition on targeting those who are *hors de combat*, but the use of the distinctive emblem allows medical personnel to clearly identify their protected status.
- Medical personnel is given a broad definition and includes those who are 'exclusively engaged in the search for, or the collection, transport or treatment of the wounded or sick, or in the prevention of disease, staff exclusively engaged in the administration of medical units and establishments.'⁴⁶ The prohibition on targeting extends to hospital ships⁴⁷ and members of aid societies – in particular the National Societies of the Red Cross and Red Crescent - who are authorized to perform aid and rescue functions generally performed by medical personnel.⁴⁸

As with all categories of protection, direct participation in the hostilities will have the effect of nullifying the presumption against attack.⁴⁹ This can cause confusion in practice when weaponry or military personnel are present to 'protect' a site protected by the emblem. In order to avoid ambiguity, some military practice manuals specify that military chaplains may only carry weapons for personal defence⁵⁰ or are unarmed in combat zones⁵¹ and various hospitals have implemented practices of "no weapons" among both personnel and patients.⁵² This practice should not be misconstrued. It is a principled stance taken by the organisations running these sites rather than having any legal effect. Medical (or religious) personnel may carry arms for the purpose of self-defence. The prohibition on attacking protected persons will not be rebutted merely because of the presence of weaponry. It may, however, make it more difficult for belligerents to make judgements about whether a particular person or site is misusing the emblem.

These persons or sites are not to be targeted even if they do not display the distinctive emblem,⁵³ which is only permissible where the State has authorised its use. Therefore, a doctor who has not been granted permission to display the Red Cross emblem should still not be the subject of an attack. The display is an additional protection allowing for the clear identification of protected persons and sites and intentionally targeting individuals or sites protected by the emblem is considered particularly egregious violation of IHL and constitutes a war crime.⁵⁴

The above mentioned IHL protections focus on the individual. The protections recognise that whether an individual may be the subject of attack will be determined based on their own particular status. While protected persons who are within combat areas are still at risk, the protections offered by IHL mean that they must not be individually targeted, and, where protected persons are present at any particular location, the appropriateness of any military action (the proportionality of military value to the likelihood of protected-person casualties) must be assessed. The following chapter will address the ways in which IHL extends this protection of persons to the protection of property.

- 1 Lieber Code, art 155.
- 2 Gary D. Solis, *The Law of Armed Conflict* (Cambridge University Press, 2nd edn, 2016), 579.
- 3 See e.g. AP I art 50; *Prosecutor v Blaskic*, IT-95-14-T, Judgement (March 3, 2000), para 180.
- 4 The definitional issue is further complicated because the categorization of an individual as a civilian or combatant has additional consequences – in particular, under GC III, art 4 combatants in international armed conflicts are entitled to POW status when captured and may not be prosecuted for merely participating in the conflict. This has led States to engage with language such as ‘unlawful combatant’ which seeks to define particular individuals as both civilian (for the purpose of prosecution) and combatant (for the purpose of targeting). The definitional issue will be discussed below.
- 5 These principles fall outside the scope of this chapter. However for an overview see e.g. Study on Customary IHL, Rules 8 and 14 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule8 and https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule14>.
- 6 A full explanation of POW status is found in GC III.
- 7 Note, the language of combatant is used with regard to formal, State-run armed forces in NIAC. Given that ‘combatant’ is specific to IAC, Solis suggests that while this is technically incorrect it serves a purpose of providing guidance as to what such forces may or may not do. See e.g. Gary D. Solis, *The Law of Armed Conflict* (Cambridge University Press, 2nd ed, 2016), 572; Study on Customary IHL, Rule 3 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3>.
- 8 AP I, art 43.
- 9 Ibid.
- 10 Hague Regulations, art 1.
- 11 GC III, art 4.
- 12 Although failure to comply with this condition will not necessarily preclude a group being defined as combatants, it will instead open them up to prosecution for their actions.
- 13 AP I, art 44.
- 14 Ibid.
- 15 AP I, art 41.
- 16 See e.g. Ministry of Defence, *Closing Submissions to the Baha Mousa Public Inquiry on Modules 1–3*, 25 June 2010, s 10.2, 10 <http://www.bahamousainquiry.org/linkedfiles/baha_mousa/hearings/oral_submission/sub000947.pdf>; *Von Leeb case (The German High Command Trial)*, Military Tribunal at Nuremberg, Trial of Wilhelm von Leeb and Thirteen Others (The German High Command Trial), Trial of 30 December 1947–28 October 1948 <https://www.loc.gov/rr/frd/Military_Law/pdf/Law-Reports_Vol-12.pdf>.
- 17 API, art 85(3)(e)
- 18 AP I, art 41(2)(c); Hague Regulations, art 23(c)
- 19 AP I, art 41(2)(b); Hague Regulations, art 23(c)
- 20 AP I, art 41(2)(a); Hague Regulations, art 23(c); GC III, art 3(1)
- 21 AP I, art 41(2).
- 22 Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols, ICRC*, Geneva, 1987, para 1920 cited, for example in *Prosecutor v. Galić*, Judgment, Trial Chamber I, 5 December 2003, Case No. IT-98-29-T, para 90.
- 23 GC III, art 42. Although the act of escaping from an enemy’s power is indicative that the person is no longer *hors de combat*, it is widely accepted that attack ought not be the ‘first response’ to an escaping POW. Warnings ought to be given before an escaping POW becomes the subject of attack. Study on Customary IHL, Rule 47 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule47>.
- 24 AP I, art 38(1); Hague Regulations, art 23(f); Lieber Code, art 114.
- 25 See e.g. Rome Statute, art 8(2)(b)(vii).
- 26 AP I, art 51(2), AP II art 13(2).
- 27 Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols, ICRC*, Geneva, 1987.
- 28 AP I, art 51(3); AP II art 13(3).
- 29 Sandoz et al, above n 27, para 1679.
- 30 ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities*, Geneva, May 2009, Part I, Recommendation V, available at: <<https://casebook.icrc.org/case-study/icrc-interpretive-guidance-notion-direct-participation-hostilities>> (*‘Interpretive Guidance on the Notion of DPH’*).
- 31 Ibid, Part 2B, V,2(e).
- 32 Ibid, Part 2B, V,2(b).
- 33 Ibid, Part 2B, V,2(c).
- 34 These persons are sometimes referred to as unprivileged belligerents or unlawful combatants, although these statuses have practical rather than legal significance.
- 35 Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), 317.
- 36 See e.g. Dapo Akande, ‘Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities’ (2010) 59(1) *International and Comparative Law Quarterly* 180;
- 37 Gary D. Solis, *The Law of Armed Conflict* (Cambridge University Press, 2nd edn, 2016), 584
- 38 *Interpretive Guidance on the Notion of DPH*.
- 39 P Alston, *Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions, Addendum: Study on targeted killings*, A/HRC/14/24/Add 6 May 28 2010, para 65.
- 40 Ibid.
- 41 GC I, art 38; GC II, art 41; AP I, art 38; AP II, art 12.
- 42 AP III. Protections under IHL also exist for property, including cultural property which is protected by the Blue Shield emblem of protection. For more information see **Chapter 6** of this Handbook.
- 43 GC I, art 24; GC II, art 36; AP I, art 8(d).
- 44 AP II, art 9(1).
- 45 The Netherlands, for example, includes humanist counsellors, although ‘ministry’ is the general criterion: *Humanitair... Oorlogsrecht: Handleiding, Voorschrift No. 27-412*, Koninklijke Landmacht, Militair Juridische Dienst, 2005. s.0616 cited Study on Customary IHL, Rule 27 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule27>.
- 46 GC I, art 24.
- 47 GC I, art 20.
- 48 GC I, art 26.
- 49 Study on Customary IHL, Rules 25 & 27 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule25>; <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule27>.
- 50 *Humanitarian Law in Armed Conflicts – Manual*, DSK VV207320067, edited by The Federal Ministry of Defence of the Federal Republic of Germany, VR II 3, August 1992, English translation of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, August 1992. This manual was superseded by *Law of Armed Conflict - Manual*, Joint Service Regulation (ZDv) 15/2, DSK AV230100262, Federal Ministry of Defence, Berlin, 1 May 2013, English version of ZDv 15/2, *Humanitäres Völkerrecht in bewaffneten Konflikten - Handbuch*, 1 May 2013), paras 817 - 820; *Revised Civic Education Manual*, South African National Defence Force, 2004, s 64; cited in Study on Customary IHL, Rule 27 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule27>.
- 51 *The Manual of the Law of Armed Conflict*, Ministry of Defence, 1 July 2004, s7.30 cited in Study on Customary IHL, Rule 27 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule27>.
- 52 See e.g. *Doctors without Borders* <<http://www.doctorswithoutborders.org/our-work/humanitarian-issues/armed-conflict>>.
- 53 AP I, art 15.
- 54 Rome Statute, arts 8(2)(b)(xxiv) and (e)(ii).

Protected Property under International Humanitarian Law

Tara Gutman*

IHL limits the adverse effects of armed conflict by protecting objects that are not legitimate military targets. This principle extends beyond the protection of non-combatants (see **Chapter 5** of this Handbook) to the protection of property.¹ Protected property is necessarily civilian in nature.² Just as belligerents must differentiate between civilians and combatants, so too must they distinguish between civilian objects and military objects. These complementary obligations ensure not only the preservation of human life but the protection of the means to successfully sustain it.

Generally Protected Property: Civilian Objects

Civilian objects are defined in the negative. That is, they are any objects that are not considered military objects.³ Objects that are normally civilian in nature, such as homes, schools and religious places are presumed to retain this character; these therefore attract *prima facie* protection, unless an assessment shows that they are being used for military purposes.⁴ This general protection may be lost if by its nature, location, purpose or use, the object becomes a military objective, destruction of which would provide a direct and concrete military advantage. A civilian object that is being used for military purposes loses its protection for only as long as the object continues to be so used.⁵



Abdul Wahid shows a 14th century manuscript hidden at his house in Timbuktu, Mali. 4,203 manuscripts were destroyed by jihadists in 2012. MINUSMA/M. Dormino

Specifically Protected Objects

Beyond the general protection of civilian objects, there are certain categories that attract special protection. In the event that such objects are used for military purposes and become legitimate military targets, extra measures may be required to limit the effects of such attack.

Specifically protected objects attract greater levels of protection. These include:

- medical units;
- cultural property;
- objects indispensable to the survival of the civilian population;
- works or installations containing dangerous forces; and
- the natural environment.

The rules protecting these objects are summarised in turn below, along with their exceptions, namely the conditions which result in the loss of their presumptive protection. Greater weight is given in this chapter to the protection of medical and cultural property as these are the subject of more nuanced regimes.

Medical units

Armed conflict invariably exacerbates the need for medical services and creates serious impediments to the timely delivery of healthcare. Indeed, the need to treat and care for injured combatants was Henry Dunant's inspiration for forming local committees to aid wounded soldiers on the battlefield. These relief committees were the forbears of today's International Red Cross Red Crescent Movement and envoy of the original Geneva Convention of 1864.⁶

It is a cornerstone of IHL that medical facilities shall be respected and protected and may not be made the object of attack.⁷ This is a norm of customary international law applicable in IAC.⁸ In a NIAC situation the protection of medical facilities is implied in the requirement to care for the sick and wounded, in Common Article 3, and is further considered customary international law.⁹ The protection of humanitarian relief objects, which may include medical provisions, is also a customary rule, applicable in both IAC and NIAC.¹⁰

Under these rules, medical facilities whether fixed or mobile, permanent or temporary, military or civilian, must be respected and protected and, if occupied, able to continue functioning.¹¹ Such facilities include hospitals and treatment centres, blood transfusion centres, preventive medicine centres, medical depots and medical and pharmaceutical stores.¹² Hospital zones (areas generally agreed in writing by the parties) that are established at a distance from military operations to protect the wounded and sick, and medical transports must also be respected and protected.¹³ It is the obligation of the operating authorities to ensure that all medical facilities are not situated close by military objectives that would imperil them.¹⁴

Medical facilities must be used exclusively for humanitarian purposes. They may lose their protection if used 'outside their humanitarian duties' and in a manner to commit 'acts harmful to the enemy'.¹⁵ These harmful acts are not defined in the Conventions. However, guidance on conditions that do not give rise to loss of protection is provided,¹⁶ and examples are also cited in various States' military manuals. These include firing at the enemy other than in self-defence, using the facility as a firing position, observation post or arms dump, the use of a hospital as a shelter for able-bodied combatants or situating a medical unit near a military objective to shield it from attack.¹⁷ The specifically protected nature of medical objects, which attracts a higher threshold protection, is lost only after a warning has been issued and, after a reasonable period, the warning is unheeded.¹⁸

Note on current practice

This rule is being regularly flouted in current contexts. The inadequate observation of the IHL rules that protect health care services (and workers) has been the subject of considerable research and educational campaigns by the Movement, which has generated a series of reports that aim to strengthen stakeholder practice to improve implementation of existing IHL rules (see **Chapter 22** of this Handbook).¹⁹

Note on the use of the protective emblems on medical objects

The emblems of the red cross, red crescent and red crystal are recognised indicia of protected persons and objects in times of armed conflict.²⁰ Medical objects and humanitarian goods are conferred this protection whether or not they are marked with an emblem. Although marking is a requirement in some jurisdictions, protection under IHL is not conditional on the emblems being displayed.²¹

Cultural objects

The protection of cultural property from land, sea and air attack has been affirmed as *lex scripta* since 1899.²² It is the only object category with stand-alone treaties addressing its war time protection.²³ Today, the destruction and removal of cultural property is recognised as a significant international crime because it is considered an attack on national identity, collective memory and, in certain cases, the historical knowledge of humankind. More than just ideological insults, the removal or destruction of cultural property is known to weaken the foundations of durable peace, undermine local identity, inhibit post-conflict reconciliation and forestall the affected area's economic recovery. Recent spikes in the incidence of deliberate assaults against cultural heritage, mainly in the Middle East and in Mali, have brought the issue into sharp relief and prompted investigations and prosecution by the International Criminal Court.²⁴



A mosque damaged in the fighting, Azaz in Syria. 23 April 2013. Photo: ICRC/T. A. Voeten

Parties to conflict must respect cultural property; to intentionally attack it can be a war crime.²⁵ This general rule is considered customary international law and is applicable in both IAC and NIAC situations. Respect for cultural property, however, is not restricted to protecting it from destruction; seizure, wilful damage, theft, pillage and misappropriation are also recognised international crimes. Additionally, in situations of occupation, the occupier must prevent the illicit export of cultural property from the occupied territory and at the end of hostilities return any illicitly exported property.

'Cultural property' includes movable or immovable property 'of great importance to the cultural heritage of every people' such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings of historical or artistic interest; works of art; manuscripts; books; scientific collections; collections of books or archives; museums; libraries and centres containing monuments.²⁶ Such protected property may be identified by the internationally-recognised blue shield symbol, though only a small number of States currently follow this practice.²⁷

The Hague Convention for Protection of Cultural Property in the Event of Armed Conflict (1954) (the Hague Convention) provides a system of special protection for some cultural property. Refuges to shelter movable cultural property and centres containing immovable cultural property of 'very great importance' can attract special protection provided they are listed on an international register.²⁸ This regime is largely defunct.²⁹ The Second Protocol (1999) established a later one conferring 'enhanced protection' that has superseded the special protection provisions.³⁰

The efficacy of the Hague Convention (which, under CIL, applies in both IAC and NIAC situations) is arguably undermined by waiver provisions that apply in situations of imperative military necessity.³¹ The Second Protocol allows such waiver when the property has been made into a military objective by its function and there is no feasible alternative that would attain a similar military advantage. Military necessity must be established

by a senior commanding officer and the attack must be preceded with an effective advance warning when permissible.³² A range of precautionary measures are also required.³³ However, the ability to waive the protection does not apply in the case of ‘historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of peoples’. Here ‘peoples’ is a higher order of cultural property than the heritage of ‘every people’, referring to recognised internationally significant works.³⁴ Similarly there is no waiver for this category works that would permit its use for military purposes.

Objects indispensable to the survival of the civilian population

It is a norm of customary international law, in both IAC and NIAC, that objects indispensable to the survival of the civilian population cannot be attacked, destroyed, removed or rendered useless.³⁵ This applies to life-sustaining productions and infrastructure and food supplies, farms, crops, livestock, irrigation works, and drinking water installations. The corollary to this rule is the prohibition of starvation of civilians.³⁶ The Rome Statute recognises as a war crime in IAC ‘intentionally using starvation of civilians as a method of warfare by depriving them of objects indispensable to survival’.³⁷

These protected objects, however, will lose their protection in circumstances:

- (a) when such objects are used solely to sustain members of the armed forces;
- (b) when such objects are used in support of military action and attacks against them would not be expected to deprive civilians of critical sustenance; and
- (c) of imperative military necessity, a party may attack such objects located on territory under their own control.³⁸

Works or installations containing dangerous forces

Works or installations containing dangerous forces cannot be attacked.³⁹ The 1977 Additional Protocols further specify that this term applies to dams, dykes and nuclear electrical generating stations.⁴⁰ The ICRC’s Rules of Customary IHL extend this prohibition, by analogy, to petroleum refineries and chemical plants, as well as attacks on military objectives located proximate to works and installations containing dangerous forces.⁴¹

Whereas generally objects lose their protection if they become military objectives, that is not the case for works or installations containing dangerous forces. Even where such works or installations are military objectives, they shall not be made the object of an attack if that attack may ‘cause the release of dangerous forces and consequent severe losses among the civilian population’.⁴² Upon ratification of AP I, some states noted that the protection was not absolute but that every necessary and due precaution be exercised to avoid severe losses of civilians. Usual requirements including the principle of proportionality still apply, meaning that injury to civilians or civilian objects must not be excessive.

The Natural Environment

The principle of distinction applies equally to the natural environment as it does the built environment.⁴³ The environment is characterised as inherently civilian and is to be protected against widespread, long-term and severe damage.⁴⁴ Arguably, this principle applies not only in IAC but also NIAC.

If the environment becomes a military objective it may be targeted, however the use of means and methods of warfare must be taken into consideration. That is, means and methods which are intended, or likely to, cause widespread, long-term and severe damage, and that would result in prejudice to the health or survival of civilians, are prohibited.⁴⁵ A lack of readily available scientific evidence as to the effects on the environment of certain military operations does not excuse a party from taking all necessary precautions to avoid, or minimise, incidental damage to the environment.⁴⁶ Extensive destruction that is not justified by military necessity, and which is carried out unlawfully and wantonly, is considered a grave breach.⁴⁷ The *UN Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict* are instructive to clarify the application of this rule.⁴⁸

- * The author would like to thank Red Cross volunteer Veronica Oh for additional research on cultural property.
- 1 For IACs: AP I, arts 48, 52(2); for NIACs arguably AP II, art 13(1); see commentary to Study on CIHL, Rule 7.
 - 2 An exception is military medical facilities that are also protected.
 - 3 See *ICRC Customary IHL Database*, August 2016, Rule 9 at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule9>.
 - 4 See AP I, art 52(3): 'in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used'.
 - 5 See *ICRC Customary IHL Database*, August 2016, Rule 10. Civilian objects are protected against attack, unless and for such time as they are military objectives at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule10>.
 - 6 See Dunant, H., *A Memory of Solferino*, 1939, reprinted by ICRC, Geneva.
 - 7 Historically see 1899 and 1907 Hague Conventions. Modern day protection is found in GC I, art 19; GC II, art 22 with respect to hospital ships; GC III, GC IV, art 18; AP I, art 12.
 - 8 CIHL, rule 28.
 - 9 Ibid.
 - 10 Ibid, rule 32.
 - 11 GC I, art 19; GC IV, art 18 with respect to military medical units; AP I, art 12 with respect to civilian medical units.
 - 12 AP I, art 8(e).
 - 13 See GC I, Annex 1: Draft Agreement relating to hospital zones and localities; CIHL, rule 35; GC I, art 23. On medical transports: GC I, art 35; GCIV, art 21.
 - 14 GC I, art 19.
 - 15 GC I, art 21.
 - 16 GC I, art. 22.
 - 17 See ICRC Commentary of 2016 to GCI: <<https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=A3FED10C8AF9145DC1257F7A0054BEA2>>.
 - 18 Ibid.
 - 19 See report series at <<http://healthcareindanger.org/resource-centre/>>; ICRC International Humanitarian Law and the Challenges of Contemporary Armed Conflicts in 2015, pp30-33.
 - 20 GC I, art 38; GC II, art 41; AP I, art 38; AP II, art 12; AP III. The emblem of the red lion and sun is also protected but has not been in use since 1980.
 - 21 See e.g. <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule28 at footnote 26>.
 - 22 Hague Regulations Respecting the Laws and Customs of War on Land, Annexed to Hague Convention II of 1899 and Hague Convention IV of 1907.
 - 23 See The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (the Hague Convention); Protocol 1 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954); Protocol 2 to the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (1999).
 - 24 See *Al Madhi* case (2016) <<https://www.icc-cpi.int/mali/al-mahdi/Documents/Al-MahdiEng.pdf>>; *Al Hassan* case (commenced 2018): <<https://www.icc-cpi.int/mali/al-hassan/Documents/al-hassanEng.pdf>>.
 - 25 The Hague Convention, art 4; ICC Statute, art 8(2)(b)(ix).
 - 26 Ibid, art 1.
 - 27 Note that 'great importance to ...every people' applies to the national cultural heritage of each state party as determined by that party.
 - 28 The Hague Convention, arts 8(1), (6).
 - 29 States failed to take advantage of the register; only five sites have been listed see O.Keefe, R., Protection of Cultural Property under international criminal law (2010) 11 *Melbourne Journal of International Law*, 339, 362.
 - 30 The Second Protocol entered into force in March 2004 and, at time of writing, has 78 parties; Second Protocol, art 10.
 - 31 The Hague Convention, art 4(2).
 - 32 Second Protocol, art 6(a)-(d).
 - 33 Ibid, arts 7 and 8.
 - 34 AP 1, art 53(a); see further discussion at CIHL Rule 38, Waiver in case of imperative military necessity.
 - 35 AP 1, art 54(2); CIHL, rule 54.
 - 36 AP 1, art 54(1).
 - 37 Rome Statute, art 8(2).
 - 38 AP I, arts 54(3)(b); 53(5).
 - 39 AP I, art 56(1); AP II, art 15.
 - 40 Ibid.
 - 41 CIHL, rule 42 at Scope of application of the rule, <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule42>.
 - 42 AP I, art 56(1).
 - 43 CIHL, rule 43.
 - 44 AP I, arts 35(3), 55; see also Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, Principle 9: <<https://www.icrc.org/eng/resources/documents/article/other/57jn38.htm#a2>>.
 - 45 AP I, art 55.
 - 46 CIHL, rule 44.
 - 47 GC IV, art 147
 - 48 *Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict*, Principle 9(a): These specify for example that forested or canopied locations that offer plant cover can only be made the object of attack by incendiary weapons when those natural elements are military objectives or being when used to conceal or camouflage combatants or other military objectives or if they themselves are military objectives.

The Conduct of Hostilities

Chris Hanna

Introduction

IHL dictates that the measures which armed forces may adopt to conduct hostilities during armed conflict are not unlimited. In short, IHL:

- aims to balance legitimate military action and the humanitarian objective of reducing human suffering;¹ and (in so doing)
- protects those who are not or are no longer participating in the conflict and places boundaries on methods and means that can be used to conduct operations.²

It follows that any military force, and particularly its commanders, must understand the principles and rules of IHL when planning and then conducting military operations. Commanders must also have both the capability and will to ensure that such principles and rules are applied by their subordinates. Failure to do so, risks criminal sanction. Defendants before international criminal tribunals and courts have been held responsible for their conduct of military operations, most particularly with respect to who and what they have attacked³, the methods or means they have used during such attacks⁴, their treatment of protected persons in their custody⁵, and/or their failure to exercise control over their subordinates' actions⁶. The application of IHL to combat operations is not, however, just about reacting to breaches of the law. Many armed forces have embraced IHL principles and integrate them into the planning and execution of military operations. While not guaranteeing compliance, this can be expected to reduce the frequency and severity of IHL breaches.

This chapter provides an overview of the legal framework and general principles applicable to the conduct of hostilities; describes how armed forces may approach the application of IHL; refers to challenges of coalition operations; and provides a guide to discerning the law applicable to particular military actions.

This chapter is an overview only and is confined to the discussion of IHL rather than the application of other laws that may apply during armed conflict, including international human rights law. Moreover, this chapter generally does not distinguish between the principles and rules of IHL that apply in international armed conflict (IAC) and those applicable during non-international armed conflict (NIAC) (see **Chapter 4** of this Handbook).⁷ Suffice to say, the law applicable in IAC is more extensive and detailed than in NIAC; but key principles, most particularly the protection of the civilian population, will be applicable across both. Finally, this chapter does not delve into differences in the law that will apply in the land, sea and air environments.

Essential principles applicable to the conduct of hostilities

The law applicable to the conduct of hostilities is drawn from the principles of humanity, distinction, proportionality and military necessity, together with the prohibition on causing superfluous injury and unnecessary suffering.⁸ These core tenets regulate the conduct of hostilities as follows:

Parties to the conflict must at all times distinguish between civilians and combatants and also between civilian objects and those objects that are military objectives (the principle of 'distinction').⁹ Military objectives include combatants



Ali, 13, stands in the middle of destroyed buildings in his neighbourhood. Yehia Arhab/EPA for ICRC

and, in the case of objects, 'are limited 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.'¹⁰ This criteria-based definition provides scope to include objects that are not part of the fielded military forces.

- The parties must only direct their operations against military objectives (whether combatants or objects). They must not attack¹¹ civilians or civilian objects¹², insofar as they have not lost their protection¹³. Accordingly, decision makers (including military commanders) must do everything feasible to verify that their targets are neither civilians nor civilian objects and are not subject to special protection, but are military objectives.¹⁴ They must also react to changing circumstances, by cancelling or suspending an attack if it becomes apparent that the objective is not a military one or is subject to special protection.¹⁵
- Parties have obligations regarding keeping military objectives geographically separate from civilians, civilian objects and medical units.¹⁶ Moreover, deliberately using civilians or medical units to shield military objectives is prohibited.¹⁷ They are also required to take other necessary precautions to protect civilians and civilian objects under their control against the dangers resulting from military operations.¹⁸
- Indiscriminate attacks are prohibited.¹⁹ This includes attacks which:
 - are not directed at a specific military objective, or
 - employ a method or means of combat:
 - which cannot be directed at a specific military objective, or
 - the effects of which cannot be limited as required,

and consequently in each such case, are of a nature to strike military objectives (whether combatants or objects) and civilians or civilian objects without distinction.²⁰ Additionally, other attacks will be considered indiscriminate if they:

- involve 'area bombing' (that is, treating as one military objective a number of separate and distinct military objectives in an urban or similarly populated area; and
- breach the principle of proportionality (see below).²¹
- Those who plan or decide upon attacks (including military commanders) must refrain from launching any attack which may be expected to cause incidental civilian casualties, damage to civilian objects or a combination of both, which would be excessive in relation to the concrete and direct military advantage anticipated (the principle of 'proportionality').²² Decision-makers must also react to changing circumstances, by cancelling or suspending an attack if it becomes apparent that the principle of proportionality will be infringed.²³
- Even when an attack is directed specifically at a military objective, employs discriminate means, and where the expected incidental effects are proportional, parties are still required to take all feasible precautions to avoid or at least minimize the death or injury caused to civilians and damage to civilian objects.²⁴
- Certain objects (for example, personnel and units providing medical services) receive special protection from the effects of combat operations. (See **Chapter 6** of this Handbook).
- Specific 'methods' of warfare are prohibited. Examples include the prohibitions on using starvation of civilians as a method of warfare²⁵, attacking objects indispensable to the survival of the civilian population²⁶, the use of civilians as human shields²⁷, acts or threats of violence designed to cause terror among the civilian population²⁸, the misuse of protected emblems (such as the red cross or red crescent)²⁹, perfidious conduct³⁰ or ordering or threatening that no prisoners will be taken³¹. Reprisals against the civilian population and prisoners of war are prohibited.³² Many of these limitations are based on principles of humanity and will apply irrespective of any military advantage a party to the conflict may seek to achieve.
- Specific limitations apply to certain weapons (which are primarily a 'means' of warfare). That is, a weapon may be unlawful or at least restricted in its use (noting that any weapon is liable to misuse), either:

- through the application of general principles and prohibitions of IHL, such as the prohibition on causing ‘superfluous injury and unnecessary suffering’ (which is drawn from the principles of humanity and military necessity) or because the weapon cannot be used discriminately; or
- because it has been specifically dealt with by description and/or class in a particular treaty (such as anti-personnel land mines for those States Party to the Ottawa Treaty³³, incendiary weapons³⁴, blinding laser weapons³⁵ and cluster munitions³⁶) and/or by customary international law (such as ‘expanding bullets’ for those countries not party to the 1899 Hague Declaration³⁷).³⁸

Notably, some States perform formal weapons reviews (including as required by Article 36 of the Additional Protocol I) to confirm the lawfulness of the weapons with which they propose to equip their armed forces. Such reviews must account for any specific prohibitions or restrictions, or the application of general principles and prohibitions under IHL.

- There are specific obligations concerning the treatment of civilians and persons *hors de combat* (prisoners of war, other detainees and the wounded and sick). While there are nuances applicable to specific classes of people, the main themes include protection from harm, inhumane and cruel treatment, and from outrages against personal dignity, as well as requirements concerning their maintenance (sustenance, medical care, housing etc).³⁹ (See **Chapter 5** of this Handbook).
- There are specific mechanisms which parties to armed conflict can adopt to limit and confine the effect of combat operations. These include the designation of ‘non-defended localities’⁴⁰ (which are protected from attack) and ‘demilitarized zones’.⁴¹

Application by military forces

By its nature, IHL limits a military commander’s freedom of action, while simultaneously placing great responsibility upon them to make critical judgements.⁴² Mitigating this burden, many IHL principles are consistent with military effectiveness,⁴³ while other principles will operate to protect the military commander’s own forces.⁴⁴ In this regard, a commander may value compliance as a means of encouraging reciprocity from an adversary.⁴⁵ Nevertheless, many key IHL obligations, primarily drawn from considerations of humanity, apply irrespective of any claim of ‘military necessity’⁴⁶ or whether compliance by an adversary is evident.⁴⁷

Many, but certainly not all, participants in armed conflict have recognized that compliance with IHL principles during the conduct of hostilities not only protects them from criminal liability, but reflects domestic and international expectations in relation to involvement in such conflicts. Their armed forces may have developed sophisticated approaches to IHL compliance, providing training and instruction on IHL principles and systematically applying IHL to their operations.⁴⁸ Such approaches include ensuring that any new weapons, means or method of warfare have been subject to legal review.⁴⁹ Importantly, they possess (or have access to) their own expert legal advisers and engage in dialogue with the ICRC and national Red Cross and Red Crescent bodies on IHL matters. Finally, such an armed force will value a culture of compliance and will respond properly to allegations of breaches of IHL.

Coalition operations

Coalition operations can create challenges with respect to the application of IHL. While the general principles of IHL have universal application, States vary in their participation in IHL treaties and so may not share all the same legal obligations with other States.⁵⁰ In some cases, participation in a particular treaty will not determine whether a particular legal principle or rule will apply as the treaty may codify existing principles of customary law.⁵¹ Nevertheless, even where States have common legal obligations, their interpretation of those obligations may differ.⁵² Accordingly, during coalition operations, States will expect their legal advisers to identify, assist and manage the practical consequences of operating in the same area of operations with partners whose obligations, or interpretation of their obligations, differ.



François de Sury/ICRC

Discerning the law

The law applicable to particular aspects of the conduct of hostilities is not necessarily available in a consolidated form, nor have all its provisions been subject to extensive consideration by courts or tribunals. It may be necessary to have regard not only to the relevant treaties (which may overlap and/or have gaps in their coverage), customary law and case law⁵³, but also to consider the views of States (including their armed forces⁵⁴) and international organisations such as the ICRC⁵⁵, together with the extensive academic and expert writings on particular topics. Such views and writings are of course not definitive of the law but may be considered by international tribunals in determining cases or, more prospectively, by military lawyers when advising their commanders with respect to their operational plans. Moreover, States may adopt certain practices or principles as matters of policy⁵⁶, without necessarily accepting that there is an underlying legal obligation involved.

Conclusion

IHL will not immunize against the tragedy of armed conflict, but it can reduce the suffering caused by the conduct of hostilities. There are both preventative and reactive elements to the application of IHL as outlined above. Military commanders must be both willing and equipped to treat IHL as an integral part of their planning and execution of operations, and operate in the knowledge that they are accountable for their own actions and the conduct of their subordinates. While not all breaches of IHL relating to the conduct of operations have resulted in criminal prosecution, breaches carry significant risks for both individuals and States.

- 1 The ICRC states that: 'International law on the conduct of hostilities regulates and limits the methods and means of warfare used by parties to an armed conflict. It aims to strike a balance between legitimate military action and the humanitarian objective of reducing human suffering, particularly among civilians.' See: <<https://www.icrc.org/en/document/conduct-hostilities>>.
- 2 Available at: <<https://www.icrc.org/en/document/what-international-humanitarian-law>>.
- 3 For example, the ICTY convicted defendants for shelling and planning of offensive operations against the old town of Mostar (which led to the destruction of the Old Bridge). See, for instance, *Prlic et al* (IT-04-74) including the specific cases of *Milivoj Petković* and *Slobodan Praljak* at <www.icty.org/en/action/cases/4>.
- 4 For example, with respect to the siege of Sarajevo, the ICTY convicted defendants for the conduct of 'terror attacks' aimed at the civilian population (sniping and shelling) and the campaign of artillery and modified air bomb shelling of civilian areas and its civilian population (such attacks being deliberate, indiscriminate and disproportional and resulted in over a thousand civilian casualties) - see cases of *Dragomir Milošević* (IT-98-29/1) and *Stanislav Galić* (IT-98-29) See: <www.icty.org/en/action/cases/4>.
- 5 See the cases of *Radislav Krstić* (IT-98-33), *Momir Nikolić* (IT-02-60/1), *Dragan Obrenović* (IT-02-60/2), *Popović et al* (IT-05-88), *Zdravko Tolimir* (IT-05-88/2). More generally, the ICTY convicted defendants for a range of crimes committed respect to protected persons, including for outrages upon human dignity, inhumane treatment, cruel treatment and the use of human shields (see cases of *Tihomir Blaškić* (IT-95-14) and *Zlatko Aleksovski* (IT-95-14/1)). See <www.icty.org/en/action/cases/4>.
- 6 Under the principle of command responsibility, culpability has been sheeted home not only to military commanders and civilian leaders who directed criminal conduct during military operations, but also those who failed to take the measures required to control the operations of subordinate military elements during those operations. For example, see the ICTY cases of *Rasim Delić* (IT-04-83), *Zlatko Aleksovski* (IT-95-14/1), *Enver Hadžihasanović* and *Amir Kubura* (IT-01-47), *Prlić et al* (IT-04-74), and *Miodrag Jokić* (IT-01-42/1). See <www.icty.org/en/action/cases/4>. See also, AP I, arts 86.2 and Rule 153 of the Study on Customary International Law and Rome Statute, art 28.
- 7 The IHL applicable to NIAC is drawn, variously, from Common Article 3, AP II and customary international law.
- 8 Different formulations of the fundamental principles exist. This formulation is drawn from <<https://casebook.icrc.org/glossary/fundamental-principles-ihl>>. While these principles stand separately from each other, there is considerable overlap in many important respects. For example, the rationale for the principle of distinction can itself be drawn from the principles of military necessity and humanity; the principle of proportionality can itself be viewed as a manifestation of the principle of distinction; and, the prohibitions on causing superfluous injury and unnecessary suffering flow from the principles of humanity and military necessity.
- 9 AP I, art 48.
- 10 AP I, art 52.2.
- 11 AP I, art 49(1) defines 'attacks' as 'acts of violence against the adversary whether in offence or defence'.
- 12 AP I, art 51.2 and AP II, art 13.2.
- 13 For example, civilians lose their protection if, and for such time, they take a direct part in hostilities (see AP I, art 51.3 and AP II, art 13.3). Also, civilian objects are all objects that are not 'military objectives' (AP I, art 52.1). Accordingly, if an object satisfies the criteria applicable to a military objective, it is not protected (but note that some military objectives will have special protection which may only be lost in specific circumstances).
- 14 AP I, art 57.2(a)(i). Military commanders can be expected to rely on intelligence to support their decision-making regarding the appropriate characterisation of a person or an object.
- 15 AP I, art 57.2(b). For example, if it became apparent that a civilian building that had been used as military headquarters, has now been abandoned and its military value to the enemy is nil, it would have then reverted in status as a civilian object and be protected.
- 16 AP I, art 58(a) and (b) in relation to civilians and civilian objects, and art 12(4) in relation to medical units.
- 17 AP I, art 51.7 in relation to civilians, and, art 12(4) in relation to medical units.
- 18 AP I, art 58(c) and AP II, art 13.1.
- 19 AP I, art 51.4.
- 20 AP I, art 51.4.
- 21 AP I, art 51.5.
- 22 AP I, art 57.2(a)(iii). Essentially, the principle of proportionality concedes that not all civilian casualties or damage to civilian objects is/are inherently unlawful. Note, however, that even if such casualties or damage is considered proportional, there is still an obligation to take all feasible precautions in the choice of means and methods of attack to avoid or at least minimize such effects (see AP I, art 57.2(a)(ii)).

- 23 AP I, art 57.2(b). For example, an attack might be launched but contrary to expectations, it becomes apparent that there are civilians in the target area. This new information would need to be taken into account and a decision made whether or not to cancel or suspend the attack.
- 24 AP I, art 57.2(a)(iii). For example, with this obligation in mind, the force attacking a military objective will need to consider the type of weapon used, the method of attack (including in some cases the direction of attack), the time of attack etc., albeit while maintaining military effectiveness (i.e. the target is neutralized).
- 25 AP I, art 54.1 and AP II, art 14.
- 26 AP I, art 54.2 and AP II, art 14.
- 27 AP I, art 51.7.
- 28 AP I, art 51.2 and AP II, art 13.2.
- 29 AP I, art 38 and AP II, art 12.
- 30 AP I, art 37.
- 31 AP I, art 40.
- 32 AP I, art 51.6 with respect to the civilian population and civilians; GC III, art 13 with respect to prisoners of war.
- 33 *Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, Oslo, 18 September 1997 (known as the Ottawa Treaty).
- 34 *Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons* (Protocol III to the 1980 Convention), Geneva, 10 October 1980 (for 1980 Convention, see Final Act of the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980).
- 35 *Protocol on Blinding Laser Weapons* (Protocol IV to the 1980 Convention), 13 October 1995.
- 36 *Convention on Cluster Munitions*, Dublin, 30 May 2008 (known as the Oslo Convention).
- 37 Declaration concerning expanding bullets. The Hague, 29 July 1899. See Rule 70 of the Study on Customary IHL at <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rule70>.
- 38 In the case of weapons that are specifically prohibited or restricted, such measures will generally be the result of a perception that the weapon, or certain uses of the weapon, offend the general principles and prohibitions of IHL. See generally <[https://www.unog.ch/80256EE600585943/\(httpHomepages\)/\\$first?OpenDocument](https://www.unog.ch/80256EE600585943/(httpHomepages)/$first?OpenDocument)> for discussion of the main conventions and treaties which prohibit and/or restrict particular weapons.
- 39 For example, with respect to prisoners of war, see GC III, arts 13-16.
- 40 AP I, art 59.
- 41 AP I, art 60.
- 42 For instance, in assessing whether an object is a military objective and determining questions of proportionality – the military commander must make critical judgements based on all the information that is available to them at the time.
- 43 For example, the IHL definition of, and restriction of attacks to, military objectives, fits readily with the military principle of economy of effort. That is, a professional military commander is loathed to waste resources and risk their forces attacking targets that do not contribute to military success.
- 44 For example, from the use of prohibited weapons or from attack while recovering in a military medical unit.
- 45 Note, however, in most respects IHL will not permit breaches by the adverse party to excuse an adversary from compliance.
- 46 For example, the protection granted to medical services at all times is only lost when they are used to commit, outside of their humanitarian duties/function, acts harmful to the enemy.
- 47 For example, under AP I, art 51.8 infringement of the prohibition on the use of civilians as human shields (see AP I, art 51.7), does not release the party from its obligations with respect to the civilian population and civilians, including the obligation to take the precautionary measures provided in AP I, art 57.
- 48 For example, to support their application of the key obligations contained in AP I, art 57 (whether as treaty obligations or under customary international law) concerning 'Precautions in Attack', many armed forces involved in the targeting of military objectives will formally incorporate the provision of legal advice into the planning and decision-making process and will collect and use intelligence in support of that advice. See 'Operations BASTILLE and FALCONER: Legal Support to Commanders' in the *Australian Defence Force Journal*, Issue No.184 2011, Air Commodore Paul Cronan and others, found at <www.defence.gov.au/adcf/adfj/Documents/issue_184/184_2011_Mar_Apr.pdf>.
- 49 AP I, art 36.
- 50 For example, the prohibition on cluster munitions, noting that a significant number of States are not parties to the Convention on Cluster Munitions
- 51 For example, most of the provisions of AP I are accepted by States as reflecting customary international law.
- 52 For example, States may have different views on the scope of the definition of a 'military objective' or to whom the status of 'prisoner of war' is applicable to under the GC III (see art 4) and AP I, art 44.
- 53 Primarily from the international criminal tribunals and the ICC, but also from domestic sources.
- 54 Many armed forces and/or defence departments have developed military law manuals which provide insight into how they will interpret and apply their legal obligations. For example: Australia - *Australian Defence Doctrine Publication 06.4 Law of Armed Conflict* (at <www.defence.gov.au/adfwc/documents/doctrinelibrary/addp/addp06.4-lawofarmedconflict.pdf>); UK - *Joint Service Publication 383 The Joint Service Manual of the Law of Armed Conflict* (at <<https://www.gov.uk/government/publications/jsp-383-the-joint-service-manual-of-the-law-of-armed-conflict-2004-edition>>); US Department of Defense, *Law of War Manual 2015* (at <<https://www.defence.gov/Portals/1/Documents/pubs/Law-of-War-Manual-June-2015.pdf>>).
- 55 Of particular research value are the ICRC commentaries on the Geneva Conventions and the Additional Protocols to those Conventions (see <<https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions>>), as well as the Study on Customary IHL (see <<https://www.icrc.org/en/war-and-law/treaties-customary-law/customary-law>>).
- 56 Which can range from the rules of engagement (ROE) adopted by States for their armed forces through to identifying 'best practices' or sets of principles. For example, see the *Copenhagen Process Principles and Guidelines* (from the *Copenhagen Process on the Handling of Detainees in International Military Operations*. See <<https://www.asil.org/insights/volume/16/issue/39/copenhagen-process-principles-and-guidelines-handling-detainees>>).

Implementation and Enforcement of International Humanitarian Law

Geoff Skillen

Implementation

Having established that the purpose of IHL is to provide protection for persons affected by armed conflict and to regulate the conduct of hostilities, it seems obvious to ask: how are these obligations to be implemented and, in the event of a violation, how are they enforced?

Each party to the conflict must respect and ensure respect for IHL by its armed forces and other persons or groups under its control. This obligation is spelled out in the Geneva Conventions of 1949¹ and Additional Protocol I.²

The duty to ensure respect by others comprises both a negative and a positive obligation. Under the negative obligation, States may not encourage, aid or assist in violations of the Conventions by parties to a conflict. It would be contradictory if common article 1 obliged States to 'respect and to ensure respect' by their own armed forces while allowing them to contribute to violations by other parties to a conflict.

Under the positive obligation, States must do everything reasonably in their power to prevent and bring violations of the Conventions to an end, in particular by using their influence on parties who are committing violations. This obligation is not limited to stopping ongoing violations, but includes an obligation to prevent violations when there is a foreseeable risk that they will be committed and to prevent further violations in case they have already occurred.

In order to achieve this end, the Geneva Conventions and Additional Protocol I specify that instruction on their provisions must be provided to members of the armed forces and to the civilian population.³ These provisions are supplemented by Article 82 of API, which requires that legal advisers be made available to advise commanders on the application of IHL.

Common article 3 requires that armed opposition groups respect, as a minimum, the rules of IHL applicable in non-international armed conflicts, which are set out in this article.

The obligations to respect and ensure respect apply regardless of the actions of other parties to the conflict. Common article 1 makes clear that these obligations apply 'in all circumstances' and the rules in Common article 3 must also be observed regardless of the conduct of other parties.

The International Committee of the Red Cross has recognised the reality that IHL continues to be violated frequently by both State parties and non-State parties

The International Criminal Court
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to armed conflict, and that IHL lacks effective mechanisms to ensure respect for its rules. As a consequence, the 2011 International Conference of the Red Cross and Red Crescent mandated research and consultations with States on possible ways to improve the effectiveness of mechanisms of compliance with IHL. As of 2018, these efforts are ongoing.

In some cases it is necessary to enact domestic legislation to implement the provisions of treaties that govern IHL. So, for example, the violations of the Geneva Conventions and API that are described as ‘grave breaches’⁴ must be criminalised in the domestic law of States. Australia has done this in the *Criminal Code Act (Cth) 1995 (Criminal Code)*.⁵



The Swiss Delegation signing the final act of the Diplomatic Conference on the Revision of the Geneva Conventions, 12 August 1949.
J. Cadoux/ICRC archives

Enforcement

The absence of mechanisms specifically designed to enforce compliance with IHL has been described as its major shortcoming.

The fundamental rule to be understood is that the primary responsibility to enforce compliance, and to provide the means to punish violations, lies with States that are party to the treaties that govern IHL. Despite this rule, international tribunals have been established to try war crimes in particular cases. Most notably, International Military Tribunals were convened after World War II to try major criminals at Nuremberg and Tokyo. In 1993, the United Nations Security Council established an International Criminal Tribunal to try war crimes and other serious international crimes committed in the former Yugoslavia. In 1994, it established a tribunal for the same purpose in relation to crimes committed in Rwanda. In 1998, the Statute of the International Criminal Court (ICC) was adopted (‘Rome Statute’), creating a permanent court, with jurisdiction to try genocide, crimes against humanity, war crimes and acts of aggression.

The responsibility of States is confirmed in the Rome Statute, the sixth preambular paragraph of which states: ‘Recalling that it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’. In the case of grave breaches of the Geneva Conventions and API, States are obliged to bring perpetrators before their own courts, regardless of the nationality of the perpetrator or the place where the violation occurred. This is an expression of the principle of ‘universal jurisdiction’. Australia has criminalised war crimes and other serious international crimes in Division 268 of the Criminal Code. Under section 268.117 of the Code, the extended geographical jurisdiction provided for in section 15.4 of the Code applies to these crimes. Section 15.4 provides for jurisdiction for offences committed outside Australia. The consent of the Attorney-General to prosecute is required for offences committed outside Australia where the alleged perpetrator is not an Australian citizen.

As an alternative to prosecution, States may extradite alleged perpetrators to other States for trial.

States must not encourage violations of IHL and must exert their influence to stop violations. This flows from the obligation to respect and ensure respect in common article 1 to the Geneva Conventions and article 1(1) of API. Article 89 of API adds that, in the event of serious violations, States must act individually or jointly, in cooperation with the United Nations.

Serious violations of IHL constitute war crimes. Individuals are criminally responsible for war crimes they commit. In addition, commanders and other superiors are criminally responsible for war crimes committed pursuant to

their orders. Commanders are also responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit crimes and did not take the necessary action to prevent their commission.

Every combatant has a duty to disobey a manifestly unlawful order. An order to commit a violation of international humanitarian law, for example to mistreat a person who has surrendered or is being detained, would be manifestly unlawful. Obedience to a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew or should have known that the order was manifestly unlawful.

The responsibility of individuals and commanders was the basis for prosecutions before the Nuremberg and Tokyo International Military Tribunals. This is confirmed in the Rome Statute.⁶ The rule that superior orders is not a defence was also established at Nuremberg and Tokyo, and this is restated in the Rome Statute.⁷ Under the Criminal Code, the fact that a war crime was committed pursuant to an order of a superior can only be a defence if the person was under a legal obligation to obey the order, the person did not know that the order was unlawful, and the order was not manifestly unlawful.⁸ Further, under the Defence Force Discipline Act, which applies to acts committed by members of the Defence Force, a person is not liable to be convicted of an offence by reason of an act or omission that was in obedience to a lawful order, or an unlawful order that the person did not know, and could not reasonably be expected to have known, was unlawful.

A number of acts are recognised as war crimes under Article 8 of the Rome Statute. In the case of international armed conflict, they are the grave breaches of the four Geneva Conventions, together with a number of other acts that qualify as serious violations of the laws and customs applicable in international armed conflict. Article 8 also recognises as war crimes acts committed in non-international armed conflict, namely violations of common article 3 to the Geneva Conventions and other serious violations of the laws and customs applicable in non-international armed conflict.

States must investigate war crimes allegedly committed by their own nationals or on their territory, and if appropriate, must prosecute the suspects. The same obligations apply to war crimes committed by non-nationals or crimes committed outside their territory, where States have asserted such jurisdiction. It is only when States are unwilling or unable genuinely to carry out the investigation and prosecution that the ICC may exercise its jurisdiction.⁹

States must cooperate with other States to facilitate the investigation and prosecution of war crimes. Under API, this includes cooperation by way of extradition and mutual assistance in criminal matters.¹⁰

Finally, there are particular rules that apply to reprisals. A reprisal is an action that would otherwise be unlawful under IHL but that in exceptional circumstances is considered lawful when used in reaction to unlawful acts of an adversary, as a means of enforcing compliance by the adversary in the future. Stringent rules must be observed in order for actions by way of reprisal to be considered lawful. For example, reprisals against persons protected by the Geneva Conventions are prohibited.¹¹ Similarly, reprisals against protected objects, including cultural property, are also prohibited. Additional Protocol I also prohibits reprisals against objects that are specifically protected by the Protocol, such as the natural environment and works and installations containing dangerous forces. Thus, reprisals may only be carried out against combatants and military objectives, and even then only in very limited circumstances.

There is a clear trend away from the use of reprisals as a means of enforcing compliance with IHL in conflicts in the late 20th century and 21st century. Their use has been criticised by the UN Security Council. Some States argued for reprisals to be outlawed entirely in the negotiation of Additional Protocol 1 in the 1970s. It might be argued that the disuse of reprisals in modern times means that the concept can no longer be relied on as a lawful means of enforcing compliance with IHL.

1 Common article 1.

2 AP I, art 1(1).

3 GC I, art 47; GC II, art 48; GC III, art 127; GC IV, art 144; AP I, art 83.

4 GC I, arts 49 and 50; GC II, arts 50 and 51; GC III, arts 130 and 131; GC IV, arts 147 and 148; AP I, arts 11 and 85.

5 *Criminal Code*, Div 268.

6 Rome Statute, arts 25 and 28.

7 Rome Statute, art 33.

8 *Criminal Code*, section 268.116.

9 Rome Statute, art 17.

10 AP I, art 88.

11 GC I, art 46; GC II, art 47; GC III, art 13; GC IV, art 33.



IHL in Practice: Insights
and Experiences from
Australians working in IHL

part 03.

Special Adviser on International Humanitarian Law to the Prosecutor of the ICC

Tim McCormack

Special Advisers to the Prosecutor of the ICC

It is an honour for me to serve as the Special Adviser on IHL to Madame Fatou Bensouda, the Prosecutor of the International Criminal Court (ICC) in The Hague. The opportunity to develop IHL through the caselaw of the ICC and to deepen the understanding of and respect for IHL amongst my colleagues in the Office of the Prosecutor (OTP) is a privilege I do not take for granted.

The role of Prosecutor is arguably the most significant in the ICC. The Prosecutor acts independently of all other organs of the Court and initiates virtually all proceedings before the Court. The Prosecutor, for example, decides: which situations to investigate; whom she accuses of Rome Statute offences and who should be arrested and charged; what charges she chooses to lay; the nature and scope of the case against an individual; and which witnesses to call in evidence against the accused. There are, of course, important checks and balances on the powers of the Prosecutor. It is the judges who decide: whether or not to approve the issuance of an arrest warrant; whether or not to confirm the charges against an individual accused; the guilt or innocence of an accused at the end of trial; the sentence to be awarded in response to a conviction. But the Prosecutor alone initiates pre-trial and trial proceedings and, if the Prosecutor does not do so for whatever reason, the ICC will rapidly run out of substantive work.

Article 42 of the Rome Statute enumerates the powers of the Prosecutor and, paragraph 9, the final paragraph of that provision, states that:

The Prosecutor shall appoint advisers with legal expertise on specific issues, including, but not limited to, sexual and gender violence and violence against children.

Pursuant to Article 42(9) of the Statute the first ICC Prosecutor, Luis Moreno Ocampo, appointed Professor Catherine MacKinnon as his Special Gender Adviser in 2008 and Professor Juan Méndez as his Special Adviser on Crime Prevention in 2009. Mr Ocampo appointed me his Special Adviser on International Humanitarian Law in 2010.¹ In 2012, when Fatou Bensouda was elected ICC Prosecutor at the end of Mr Ocampo's term, she asked me to stay on in my role as Special Adviser on International Humanitarian Law. None of the other special advisers appointed by Mr Ocampo have continued to serve under Mrs Bensouda and, instead, she has appointed the following experts in addition to me: Professor Patricia Sellers, Special Adviser on Gender; Professor Leila Sadat, Special Adviser on Crimes Against Humanity; Professor Diane Amman, Special Adviser on Children in and Affected by Armed Conflict; and Mr Mohammed Ayatt, Special Adviser on Regional Co-Operation with the Middle East and North Africa.



Premises of the International Criminal Court, The Hague, Netherlands.
Photo by Rick Bajornas/UN

My Role as Special Adviser on IHL

When I was first appointed Special Adviser on IHL there was no written job description. My role was, and continues to be, an honorary one and so the Prosecutor was adamant that, far from being told what to do, I was free to develop the role and to identify the opportunities to contribute to the work of the OTP as I saw fit. As the role has developed, I travel two to three times a year from Melbourne to The Hague and do most of my work the rest of time remotely from Australia. However, I also have the privilege of placing a legal assistant in the OTP full-time. The person in that position provides a critical conduit between the Trial Teams (and other key personnel in the OTP) and me – vicariously acting as my ‘eyes and ears on the ground’. For the past seven years my legal assistant has usually been the Tim Hawkins Memorial Scholar. Tim Hawkins was a young

(25 year old) then recent 1st class honours graduate in Law from the University of Tasmania (UTas) who was the one Tasmanian tragically killed in the Bali bombing in October 2002. Tim’s family and the University of Tasmania combined forces to raise money to establish a scholarship to honour Tim’s memory. The scholarship has recently been endowed in perpetuity and the annual recipient – a graduate of UTas Law – spends up to one year at the OTP in The Hague as my legal assistant. It is a wonderful thing that something so positive and constructive can come from an event so tragic and so devastating.



Tim McCormack

My role involves the provision of advice (in person in The Hague on my visits to the Court but more substantively in the delivery of written memos of advice) to all the Enquiry, Investigative and Trial Teams dealing with situations of armed conflict and involving potential or actual allegations of war crimes pursuant to Article 8 of the Rome Statute. Often my advice relates to whether or not an armed conflict exists and, if it does, whether it is an international or a non-international armed conflict. That legal characterisation is critical for the OTP because it determines what specific charges are available to the Prosecution (the war crimes enumerated in Articles 8(2) (a) and 8(2)(b) of the Rome Statute apply to international armed conflicts whereas the war crimes in Articles 8(2) (c) and 8(2)(e) apply to non-international armed conflicts). On other occasions my advice relates to a substantive IHL issue and some recent topics have included: clarification of the legal elements of the war crime of pillage; the minimum requirements for a ‘regularly constituted court’; the requisite test for the war crime of disproportionate military force; and the circumstances in which a non-international armed conflict can be said to have terminated such that IHL no longer applies.

The single most significant substantive IHL issue has resulted in a ground-breaking development in the law. Bosco Ntaganda was charged not only with the war crime of child soldiering but also with the war crimes of rape and sexual slavery. He was allegedly responsible for the abduction of girls into the UPC (*Union de Patriotes Congolais* – Ntaganda’s non-State armed group) for the sexual gratification of UPC commanders. The Defence in Ntaganda argued that IHL only extends legal protection to the civilian population and to enemy fighters but not to members of one’s own armed forces. The Defence conceded that the rape and sexual enslavement of girls was reprehensible conduct but that it was not regulated by IHL. The argument ran that legal protection in such circumstances derives from systems of internal military justice and/or domestic criminal law – not from IHL and that, consequently, the ICC had no jurisdiction to try Ntaganda for alleged offences perpetrated against members of the UPC. The Defence rightly argued that if the ICC had no jurisdiction over these particular alleged offences, the charges should be dropped before the trial had commenced – at least before the Defence Case commenced – so that the accused could be certain of the charges against him and have time to properly prepare his defence. I agreed with the Defence on the need for clarification on jurisdiction but I disagreed with the Defence on the substantive law. While it is true that the legal protections of GCIII (for prisoners of war) and GCIV (for civilians in militarily

occupied territory) do not extend to members of one's own armed forces, the legal protections of GCI and GCII apply without any restriction as to the affiliation of the victims. That lack of requisite affiliation is also true of the protections in Common article 3 – a position confirmed by the ICRC's recently published revised commentary to GCI (and GCII).

In close collaboration with successive legal assistants over a five year period, I advised the OTP in five separate litigations of this issue in the Ntaganda proceedings (twice before the Pre-Trial Chamber, twice before the Trial Chamber and once before the Appeals Chamber). Ultimately, the Appeals Chamber accepted the proposition that the perpetration of Rome Statute offences against members of one's own armed forces, provided those offences have a sufficient nexus to the armed conflict (and not simply opportunistically vengeful conduct for example), are regulated by IHL and properly within ICC subject matter jurisdiction. Of course the Prosecution must still prove Ntaganda's criminal liability in respect of these alleged offences. All the Appeals Chamber decision means is that the offences are not dismissed at a preliminary stage of proceedings. But, given the lack of any judicial precedent – international or domestic – confirming the application of IHL's protective legal regime to members of one's own armed forces, the Appeals Chamber's decision is profoundly significant to the development of IHL.

Another aspect of my role involves the provision of in-house training to OTP staff members in IHL issues of concern. One key group of OTP personnel with whom I interact regularly are the investigators. The overwhelming majority of the investigators are not lawyers by training – they are mostly former military police or domestic police experienced in criminal investigations. They are experts in the identification and gathering of witnesses and of other evidentiary sources to enable the Trial Teams to do their work of prosecuting cases. Without professional and thorough investigative work, the Trial Teams are precluded from effective trial advocacy. But in ICC trials, the accused are rarely responsible for physical perpetration of the alleged offences. It is not enough in ICC trials to establish what actually happened – it is also necessary for the Prosecution to prove beyond reasonable doubt that a particular accused was criminally responsible for what happened. The investigators are tremendously receptive to training on key issues to help them more effectively assist the Trial Teams to complete their primary task of conducting an effective trial.

Most recently, for example, I conducted in-house training for approximately 50 OTP investigators on Article 28 of the Rome Statute – the mode of liability we call Command Responsibility. For the investigators to benefit I had to ensure a practical and relevant focus. So, although I spent some time on the different elements of Article 28 and the contextual background to this mode of liability from Articles 85 and 86 of Additional Protocol I of 1977, the primary emphasis in the training session was on evidentiary lessons from the Bemba Trial – the first case at the ICC to result in a conviction on the basis of Command Responsibility. I involved two members of the Bemba Trial Team who explained the way various evidentiary materials, identified and gathered by the investigative team, was used by the Trial Team to establish each of the elements of the mode of liability: that Bemba exercised effective authority and control over his forces; that Bemba knew or, owing to the circumstances at the time, should have known that the atrocities were occurring; and that Bemba failed to take all reasonable and necessary measures to stop the atrocities occurring or at least to investigate and punish those responsible. Previously I have undertaken in-house training for the investigators on the legal characterisation of an armed conflict, why that question is so critical for the Trial Teams and the types of evidence that has been used effectively in trials to determine the dual criteria of intensity and organisation for the existence of a non-international armed conflict.

Personal Reflections

My role at the ICC is a hugely rewarding one and I am deeply privileged to act in my current capacity. But two concerns remain for me. The first is a deep and palpable awareness of the limits of the ICC's capacity. The fact that the ICC has no jurisdiction over the appalling carnage in Syria – now in its eighth devastating year – is symptomatic. Syrian civilians would be thoroughly sceptical of any notion of international law as a constraint on resort to armed violence. Imagine the incredulity and derision to any such suggestion on the smashed streets of Aleppo, Idlib or Homs. If there is one situation in the world today that ought to be the subject of ICC jurisdiction it is surely Syria. The lack of authority to formally investigate alleged atrocities in that benighted place is appalling although the preclusion is hardly the fault of the ICC itself. But even where the ICC does have jurisdiction, its role can only ever be reactive – *ex post facto* – to gross atrocity and extensive human suffering. This inevitability does not obviate the need for some measure of accountability but it is, nevertheless, a real limitation. So much more needs to be done proactively – to avoid the outbreak of violence and the inevitable human devastation that flows from it.

My second concern is with the overwhelming and demoralising effect of the abject disregard for humanity. So much of the subject matter is dark. The human capacity for depravity and the sheer scale of suffering is staggering. I often wonder about the subliminal effects of recurrent exposure to the effects of evil. I so hope and pray that I do not become inured to human suffering – that my sensitivities become dulled, my capacity for empathy diminished, my heart hardened by the relentless assault of the subject matter. Here perspective is so important. I am not a direct victim of this depravity – my emotional responses pale into insignificance relative to the shattering of the lives of those in the line of fire. My commitment as an International Humanitarian Lawyer is to do the best that I can to promote increased awareness of and respect for the law without ever over-stating the nature of my own small contribution.

1 See 'ICC Prosecutor Appoints Tim McCormack as Special Adviser on International Humanitarian Law', ICC Press Release, 2 March 2010 <<https://appablog.wordpress.com/2010/03/02/icc-prosecutor-appoints-tim-mccormack-as-special-adviser-on-international-humanitarian-law/>>.

The Role of the First Assistant Secretary in the Office of International Law

John Reid

As First Assistant Secretary of the Office of International Law in the Attorney-General's Department in Canberra, I am privileged to see International Humanitarian Law (IHL) up close and in all its (often confronting) detail. On a daily basis, I am involved in interpreting and applying IHL to Australia's military operations abroad and our legislative frameworks at home.

The Attorney-General and the Office of International Law

The Attorney-General is the 'First Law Officer' of the Commonwealth. This means that he or she is ultimately responsible for providing legal advice to Cabinet on all matters. More specifically, though, the Attorney-General is the Cabinet Minister in Australia responsible for international law (in other countries it is often the Foreign Minister who bears this responsibility). This means that should an issue arise in international law, it is the Attorney who will advise Cabinet of the international legal position.

In performing his or her functions, the Attorney relies on advice of the Office of International Law within the Attorney-General's Department. The Office provides legal advice to Government departments, Ministers and Cabinet on all areas of Australia's international legal obligations. Broadly, we are responsible for providing international legal advice, and for conducting international litigation. We are staffed with about 30 lawyers who have specialised in their career in international law. We cover all areas of public international law from environmental law to law of the sea, from air and space law to international trade and investment, and all points in between. We take our role very seriously; since it is states which make and develop international law, the advice that states receive on their international obligations, and the positions they take on a range of issues, has the potential to develop, expand, or redirect the development of the law for better or ill.



Robert Garran Offices, head office of the Attorney-General's Department, located in Barton, Australian Capital Territory (ACT).

Our role in IHL

A key role of the Office of International Law is to provide advice on Australia's IHL obligations, to guide the deployment and operations of our forces overseas and to ensure that the Cabinet is aware of the obligations and operations of others internationally. We do this in close partnership with the Department of Foreign Affairs and Trade and the Department of Defence. Our advice also feeds into the development of Australia's domestic legislative regimes which touch on IHL, such as Division 268 of the *Criminal Code Act (Cth)* 1995, which implements many aspects of international criminal law in Australia's domestic law.

Whilst no two days are alike, and every legal question raised by the deployment of forces abroad is new in some way, there are number of areas on which we regularly advise. For instance, ahead of a deployment of forces overseas, it is the Office of International Law which provides the advice to Cabinet on the legal basis for the deployment, whether it be as a matter of self-defence, UN Security Council Resolution or other legal basis. In providing this advice, it is also necessary to characterise, as a matter of international law, the nature of the conflict which exists. We will advise on whether a pre-existing conflict is a non-international armed conflict, international armed conflict, or something else, in order to determine the legal regime applying to the conduct of hostilities.

Once forces are deployed, the largest role for the Office of International Law relates to rules of engagement and targeting. In these, the Office works very closely with the Department of Defence to ensure that Australia's legal frameworks for the conduct of the hostilities are in line with our international obligations and the applicable IHL and human rights standards. This involves regular review of the rules of engagement and, occasionally, amendment of targeting directives and policies to ensure that the legal frameworks keep pace with the operational requirements as well as the applicable international law as the situation on the ground evolves.

Policy challenges

There are a couple of particular policy challenges we face in providing legal advice to the Government on IHL issues.

The first of these is the policy-law conundrum in international law. There is a need to distinguish between what a state does as a matter of law, and what it does as a matter of policy. This is important as it determines the question of *opinio juris* leading to state practice and the development of customary international law. The Australian Government, for instance, often constrains itself in the conduct of hostilities as a matter of policy. In many cases, we would take the position that law may allow certain conduct, but that as a matter of *policy* we will limit our behaviour. In such cases, it is important that the state clearly articulate the difference. Otherwise the behaviour may be taken as evidence of state practice leading to custom.

The second 'policy' challenge for us is the intersection between domestic and international legal frameworks. Ministers and senior Government decision-makers are not international legal experts, so much of the role of the Office of International Law is an educative one. We need to identify whether particular legal strictures may be sourced in domestic law (which may be open to amendment) or public international law (which will not). The increasing interconnectedness between the domestic and international legal orders amplifies this concern as many issues (in this space, notably counter terrorism) now have both an international and domestic legal paradigm. Where these paradigms diverge, the educative role of the Office of International Law becomes more important.

Contemporary and emerging legal challenges

Of course, IHL is constantly evolving and new issues arise as the nature and conduct of warfare change. The challenges I face in my work are not the same as those of my predecessor; likewise my successor will face new issues. Currently there are a number of contemporary and emerging issues which occupy much of our time in IHL.

The first is the proliferation of non-international armed conflicts (NIACs), and the need to develop the law of NIAC. Historically, most conventional IHL has focussed on international armed conflicts (reflecting the experience of history), but the recent experience of global affairs has seen a focus on non-international armed conflicts. The translation of rules applicable to international armed conflicts to the NIAC regimes (either as a matter of custom or treaty) occupies much consideration.

Another issue is the emergence of new methods and means of warfare such as cyber effects, and autonomous weapons systems. IHL has always had to deal with new weapons and has made provision for this in Article 36 of

API. It's not a new problem, but the speed with which technology develops and the directions in which it is taking us is certainly novel.

A further issue in modern IHL which occupies much time of government is the growth of coalition activities. More often than not, Australian forces now deploy alongside forces of other states, often with different legal obligations and different technical limitations. These divergences create real issues which need to be considered when advising the Australian government on its own obligations in these activities. Can we trust the partner with whom we are working? Does international law permit them to behave in ways we cannot? How will we resolve differences if command and control models are integrated?

The final contemporary 'challenge' in IHL which we deal with is the interaction between IHL and international human rights law.

It was not long ago that this question was answered with a pithy, *lex specialis* response, but international legal thought has advanced far in recent years (largely pushed by the jurisprudence of the European Court on Human Rights) such that a much more sophisticated understanding of the relationship between these two different regimes is required. Advisers to government must be able to identify not only the existing legal understanding in this space (such as where it is uncontroversial that one regime may displace the other) but must also be able to identify where these regimes are heading.

As a Government legal adviser, I sit in a privileged position close to the centre of decision-making for Australia. My daily role involves questions of law which go to the heart of the management of the international legal order. In no area is this more significant than in IHL, as the Office of International Law identifies and shapes the legal paradigms which apply to the exercise of force deployed overseas. While my job most days resembles a new and challenging moot question, this is a serious task, and one which I am fortunate to enjoy.



Federal Parliament House in Canberra.

Practising public international law: The role and responsibility of public international lawyers

Catherine Drummond

Public international lawyers are a unique breed of lawyers. The system of law in which they practise expects - and indeed depends on - them having an understanding of international law as a whole. This is because, while public international law might be made up of different branches of international law, such as IHL, international human rights law (IHRL), international criminal law, international environmental law, the law of the sea and so on, in order for the system to function effectively and for each branch to operate harmoniously with one another, a degree of integration is required. The architects of the system entrusted with ensuring this integration are not only the State representatives that make the law in a formal treaty-making sense, but also public international lawyers tasked with interpreting and applying the law every day. Through using the law to solve complex disputes, and devising novel arguments to address new legal challenges, public international lawyers have the ability to impact the development of the content and scope of international law - and to a far greater extent than their counterparts in any domestic legal system.

The impact that public international lawyers have in this respect on international law is not theoretical, it is discernible. With this role comes great responsibility: public international lawyers are trusted with the responsibility of ensuring different rules can operate consistently and effectively, and thereby ensuring the system as a whole is a coherent one. In order to discharge this responsibility, public international lawyers need to

Wide view of the Security Council as Luis Moreno-Ocampo briefs on the situation in Darfur and ICC charges of genocide levied against Sudanese President Omar Al-Bashir, New York, 9 December 2010. *Photo: UN /Ryan Brown*



have an understanding of how different rules of international law interact with one another: where they might converge or conflict, whether the application of one precludes the application of another, what one set of rules can teach us about the other. This is particularly true as regards IHL. Owing to its very aim of regulating armed conflict in order to minimise human suffering, the degree to which other rules of international law might affect the content, scope and operation of rules of IHL has the potential to have a very human impact.

Who are public international lawyers?

Public international lawyers are professionals working in international law in a variety of roles. They are barristers or lawyers in private firms who advise and represent States (including their armed forces), individuals, international organisations, NGOs and companies (including private military companies and weapons manufacturers) with respect to international law issues and disputes. They are government legal advisers, legal officers at international organisations and NGOs, and independent consultants working in a variety of advisory, litigious, research or advocacy capacities. They are academics who teach and are scholars of international law. They are judges on international courts and tribunals. What defines us as public international lawyers is the subject matter of the work in which we engage and our participation in the cosmopolitan system-building project of international law. It is this underlying idea of professional unity that binds us together in what has famously been described as the ‘invisible college of international lawyers’.¹

Interactions between IHL and other branches of public international law

The trend in international law towards specialisation in different subject-matter branches is continuing unabated. This presents challenges for international lawyers who are specialised in only one area of international law but are faced with challenges that span two or more branches. IHL in particular has the potential to interact with many other branches of public international law.

The interaction between IHL and international human rights law is one example. IHRL does not cease in times of armed conflict.² Where both IHRL and IHL govern a situation, an understanding of how to approach potentially conflicting rules is important. If, for example, a soldier kills an armed civilian in an armed conflict, is that killing lawful? The first step is to identify the applicable rules. International human rights law prohibits the arbitrary deprivation of life.³ IHL prohibits the targeting of civilians, but considers that civilians that are directly participating in hostilities are lawful targets.⁴ Both of these rules are peremptory norms from which no derogation is permitted. The second step is to consider what general rules or principles of international law guide the approach to take where two rules govern the same situation. In this case, Article 31(3)(c) of the Vienna Convention on the Law of Treaties (“Vienna Convention”) and the principle of *lex specialis* are applicable. Article 31(3)(c) of the Vienna Convention provides that when interpreting a treaty, all other relevant rules of international law applicable between the parties to that treaty (including customary international law rules) must be taken into account. The principle of *lex specialis* provides that where two rules govern a situation, the more specific rule will take precedence. In the example given above, therefore, IHL would be the more specific rule in times of armed conflict. What is “arbitrary” for the purpose of IHRL would therefore be interpreted by reference to IHL. If the civilian was not a lawful target because he or she was not directly engaged in hostilities at the time of being killed,⁵ then the loss of life will not be lawful under IHL, and it will be “arbitrary” for the purpose of international human rights law. Both rules are applicable, and both rules would not have been complied with.⁶ This is one basic example, but the reality on the ground in hostile and fast-changing environments can be far more complex.

IHL also interacts with international criminal law and the rules on State jurisdiction and immunity. Imagine, for example, that the soldier that killed the civilian in the above example was also the Vice-President in State A. If he took a holiday after the conflict to State B, was arrested, and put on trial in State B for the murder of the civilian, would that be permissible under international law? What jurisdictional basis would State B have to arrest and prosecute the Vice-President (universal jurisdiction, passive personality, nationality or the protective principle)? Would the Vice-President be entitled to immunity from arrest and prosecution, and if so would it be Head of State immunity or State official immunity, and how does each differ in scope? If peremptory norms - including the IHL prohibition on the targeting of civilians - permit no derogation, how can that be reconciled with the existence of any immunity and is the law changing in this regard? Understanding if the law is changing to permit an exception to the doctrine of immunity in turn requires an understanding of how customary international law is created and evidenced.

Where actions taken by the State in armed conflict affect private investments, IHL may interact with treaty regimes for the protection of foreign investment. Wartime conduct that causes damage to the natural and civilian-sustaining environment highlights the interaction between IHL and international environmental law. Where naval warfare is involved, IHL interacts with the law of the sea. Where cultural heritage is located in theatres of operation, treaty and customary international law regimes on the protection of cultural and world heritage interact with IHL. International humanitarian law can also interact with other treaty regimes, such as those concerning the trade in and use of certain types of weapons, or sanctions imposed by regional and global international organisations. In many instances the rules in these different areas of international law will be consistent with IHL, even if they differ in scope or what is required for the State to discharge its respective obligations. But in some cases they will not be. All cases, in any event, require a proper appreciation of the relevant rules and how they interact.

Being a good public international lawyer or successful IHL Moot participant does not necessarily require a detailed knowledge of the law across all these areas. It does require being conscious of where the problem is situated in the broader framework of international law, mapping the legal issues, asking questions, and knowing where to look for answers. Mooting is a particularly good learning ground for these skills because it gives participants the opportunity to delve into a factual scenario to solve a legal dispute, which is the same work that public international lawyers do every day.

As modern international law becomes increasingly complex and highly specialised in each of its branches, it 'generates a parallel need, equally important and demanding, for a common understanding and interpretation of the overarching principles ... in order to keep the system together' as a coherent whole.⁷ This requires a certain conscious effort on the part of public international lawyers in their everyday work to ensure fidelity to the foundational principles that underlie the entire system of international law.



ICTR Prosecutor, Hassan Bubacar Jallow (right), addresses the UN Security Council on the work of the Tribunal. UN/Paulo Filgueiras

The importance of foundations

Part of the universality that underpins international law as a discipline is that all international lawyers use the same foundational tools. The formal sources of law found in Article 38(1) of the Statute of the ICJ which create binding international rules - treaties, customary international law and general principles of law - are the same for all areas of international law. The general rules on treaty interpretation, enshrined in Articles 31 and 32 of the Vienna Convention, apply to all treaties irrespective of their subject matter. The rules about subjects of international law - what entities can and cannot have certain types of obligations under international law - are the same for all areas of international law. The distinction between primary rules - rules of international law that impose binding obligations on subjects of international law - and secondary rules - the rules that govern the consequence of a breach of a primary rule - is a framework that applies across the board as regard the responsibility of States and international organisations.⁸ The principles that guide the interaction of different rules of international law - in particular Article 31(3)(c) of the Vienna Convention, and the principles of *lex specialis* and *lex posterior* - are equally the same across all branches of international law. It is axiomatic to say that lawyers should pride themselves on having an excellent understanding of the foundations of the legal system in which they practise, but it is often underappreciated just how important it is in public international law both for coming to the correct answer to any basic question of international law, but also for addressing controversial issues on which there may be no clearly correct position.

For moot competitors facing intractable issues to which there are no clear answers, just as for international lawyers in practice, these foundational tools are often key to constructing arguments that present a legal solution to the problem. At its core, this is referred to as reasoning from first principles. Two recent cases aptly demonstrate the importance of having a good understanding of the foundations of public international law as a whole in order to resolve questions relating to IHL. In the first, the courts of the United Kingdom grappled with whether there exists a right to detain suspected insurgents in non-international armed conflicts.⁹ In the second, the Co-Investigating Judges at the Extraordinary Chambers in the Courts of Cambodia considered whether attacks by a State against its own armed forces in times of peace or armed conflict constituted a crime against humanity at customary international law in 1975.¹⁰ In both of these proceedings, the decision-makers concerned and the international lawyers pleading before them had regard to the relationship between rules of treaty and customary IHL, considered the general rules on treaty interpretation, examined in detail the interaction between IHL and IHRL, drew on analogies from other rules of IHL, and paid serious regard to the underlying purpose of IHL as a whole. A sound understanding of the foundations of public international law was crucial to the analysis, reasoning and outcome in these cases.

What, then, does this mean for us as public international lawyers and public international lawyers in the making? In speaking about international law as a profession and a discipline, Professor James Crawford (as he then was) stated that as ‘members of the profession of international law, we carry some of the responsibility for ensuring the ongoing legitimacy, and perceived legitimacy, of our discipline’.¹¹ An important factor that goes to the heart of the legitimacy of international law is whether it is a system that operates effectively to produce, in any given case, the correct legal answer. Getting the law right should always be the paramount consideration. Where legal problems fall in a grey area and where novel arguments have to be devised, good counsel and advocates will run only those arguments that have a sound basis in the foundational legal principles underpinning public international law as a whole. Public international lawyers derive credibility from adopting a principled approach to the law and by setting for themselves standards that are consistent with their responsibility to ensure that the system of international law as a whole remains a coherent one. As public international lawyers, and public international lawyers in the making, we do not just have to get the job done, we have a duty to get the job done *right*, because the system as a whole depends on it. Getting the job done *right* requires having a solid understanding of the foundations of public international law, an awareness of the different ways in which different rules of international law interact and a conscious recognition of our role and responsibility in the international legal system.

1 Oscar Schachter, ‘The Invisible College of International Lawyers’ (1977) 72(2) *Northwestern University Law Review* 217-226.

2 With the exception of specific treaty provisions that permit derogations applicable in times of emergency (such as Article 4 of the International Covenant on Civil and Political Rights (ICCPR) or Article 15 of the European Convention on Human Rights (ECHR)), which can include armed conflict. These provisions, however, also list non-derogable rights.

3 See, e.g., ICCPR, art 6 and ECHR, art 2.

4 Protection extends to civilians that are ‘taking no active part in hostilities’. See Common Article 3. See also AP I, arts 51(3) and 45 and AP II, art 13(3).

5 Which includes, according to some, being a member of an organised armed group participating in the hostilities: see Nilz Melzer, *Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, May 2009, p 71.

6 See *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996*, para 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. Reports 2004*, paras 105-106.

7 In this respect, Georges Abi-Saab coined the phrase “complexification” of the international legal order: ‘Fragmentation or unification: some concluding remarks’ (1999) 31(4) *NYULJ* 919, 926. In making these remarks almost two decades ago, Professor Abi-Saab was speaking about institutional fragmentation and recognised the need for conscious and coordinated action among the relevant legal actors - in his example, specialised judicial institutions - in order for the international legal system to retain its authority and legitimacy. The same can be said of the role of international lawyers.

8 See, International Law Commission, Articles on the Responsibility of States for Internationally Wrongful Acts, UN Doc A/56/10, 2001; International Law Commission, Articles on the Responsibility of International Organisations, A/66/10, 2011.

9 See, e.g., *Serdar Mohammed and others v Ministry of Defence* [2014] EWHC 1369 (QB); *Serdar Mohammed and others v Ministry of Defence* [2015] EWCA Civ 843; *Mohammed and others v Ministry of Defence* [2017] UKSC 1. See also the enlightening debate on this case by scholars and practitioners on the EJIL Talk! Blog: <<https://www.ejiltalk.org/>>.

10 Extraordinary Chambers in the Courts of Cambodia, Office of the Co-Investigating Judges, *Case File 004/07-09-2009-ECCC-OCIJ*, “Notification on the Interpretation of ‘Attack against the Civilian Population’ in the Context of Crimes Against Humanity with regard to a State’s or Regime’s Own Armed Forces”, 7 February 2017.

11 James Crawford, ‘International Law as a Discipline and Profession’ (2012) 106 *ASIL Proceedings* 471, p 482.

In the life of an IHL Adviser with Australian Red Cross

Helen Stamp

The extraordinary sequence of events, which began in 1859 with Henry Dunant witnessing by chance the horrors of the Battle Solferino,¹ and which led to the codification of the rules of war and the development of the Movement never ceases to amaze me. It is a story that I have told on many occasions to different audiences in my role as an Adviser in the IHL Program at Australian Red Cross. These audiences include school and university students, medical personnel, politicians, community groups, journalists, legal professionals, Red Cross staff and volunteers and interested members of the public – all enthralled by Dunant’s determination to reduce suffering in situations of armed conflict and his vision of having volunteers, trained and ready to assist others, in such dire situations.²

I came to Australian Red Cross in 2012 after working as a lawyer both in private practice and the community legal sector. My interest in IHL had continued throughout my legal studies – I completed my Masters in International Law at Edinburgh University (focusing on IHL, International Criminal Law and Law of the Sea) and this interest continued through my early professional experience, during which I completed an internship in the Prosecutions Section of the Special War Crimes Chamber of the Sarajevo State Court in Bosnia and Herzegovina. Whilst the pragmatic approach of IHL in addressing the worst of human behaviour always interested me throughout my studies in law, it wasn’t until I joined Australian Red Cross that I truly understood the unique role of the Movement, and the ICRC in particular, in promoting respect for IHL. As I learnt more, I was struck by the breadth and depth of the Movement, the number of countries it serves and the many different forms of help that are provided to those in need, in an impartial and neutral way.

The importance of IHL dissemination and the obligation on States to do this, together with the unique role that National Societies of the Movement also have in this respect, has been explored in Chapter 2 of this Handbook. But, how does this dissemination role work in practice?

The Australian Red Cross IHL Program is structured to engage directly with relevant stakeholder groups who need to know about IHL due to their link to armed conflict, as well as the Australian population more generally, as anticipated in the Geneva Conventions.³ Whilst Australia has the good fortune of being free from armed conflict within its own territory, this does not mean that we remain untouched by conflict. Our government is an active participant in the international community and our armed forces are currently deployed in the Middle East, Sudan, Egypt, Iraq, Israel and Lebanon.⁴ Many Australians work or volunteer for the Movement and for other humanitarian aid organisations overseas in countries experiencing armed conflict. An emerging area of IHL dissemination for Australian Red Cross relates to private companies registered in Australia, often involved in the resources industries, that have set up operations in countries that are experiencing armed conflict, such as in Africa.

The IHL Program is geographically dispersed around Australia with at least one staff member located in most States and Territories to provide this coverage. Each staff member of the IHL Program focuses on engagement with a particular stakeholder group that has a link to armed conflict, such as those described above. These



Photo: Australian Red Cross

stakeholder groups include the Australian government, the Australian Defence Force and Australian Federal Police, humanitarian organisations and the private sector. We also work with non-conflict facing sectors such as media and academia. Our engagement with each of these stakeholder groups is broad and far-reaching. In the private sector, our Legal Adviser works towards ensuring that Australian companies have the right information, advice and training when it comes to conducting business operations in a conflict zone. Our Humanitarian Adviser to the ADF and AFP builds our relationships with the military and Federal Police whilst our Adviser to the Humanitarian and Medical Sectors assists humanitarian agencies to prepare for their missions to conflict situations. In particular, she assists these agencies to learn more about the different legal frameworks that apply in situations of armed conflict and the specific issues that impact on the work of medical personnel operating in these situations.

The stakeholder group for which I am responsible, together with my colleague in Adelaide, is that of Red Cross people, namely the staff, volunteers and members that make up Australian Red Cross. As the strategic direction of Australian Red Cross moves to significantly increase the number of people in Australia taking voluntary humanitarian action with our organisation to help others, and encourages self-mobilisation as part of this,⁵ the capacity building of Red Cross People is increasingly important. A strong understanding of the basic principles of IHL, the Fundamental Principles and humanitarian diplomacy is imperative for this stakeholder group. My particular focus is on Red Cross volunteers and members. I am available to provide an internal advisory service to volunteers and members on IHL matters, the Fundamental Principles and Red Cross ways of working. Recently, this has allowed me to work with Australian Red Cross staff members in regional areas on everyday situations they face in their work and the application of the Fundamental Principles to these.

Based in Western Australia, my work as an Adviser is always varied. I have provided IHL training workshops for our staff and volunteers at our headquarters in Perth, in the heat of Kalgoorlie and in the tropics of Broome. I have arranged IHL seminars for the general public on a range of issues including chemical weapons, the Arms Trade Treaty, Health Care in Danger (HCiD) (see **Chapter 22** of this Handbook), the protection of cultural property during armed conflict and the work of the International Criminal Court. This role has also created international opportunities for me to participate in IHL dissemination, including presenting at an IHL course for students in Japan (in collaboration with the ICRC and the Japanese Red Cross Society) and taking part in a HCiD Movement Reference Group Meeting in Geneva.

A highlight for me has been meeting the many interesting people whose work relates to IHL and/or who are involved in different parts of the Movement – from chemical weapons experts to war crimes investigators, protection delegates and health workers – all of these people demonstrate a strong desire to use their different skills to minimise the suffering of civilians in times of war.



Members of the Australian Defence Force attended a four-day Red Cross IHL course in Brisbane in March 2013, which provided comprehensive instruction on international humanitarian law. The course has been conducted bi-annually since 1991 and is attended by representatives from the Army, Navy and Air Force. *Australian Red Cross/Katrina Elliot.*

One of the most exciting aspects of my role at the moment is the development of the IHL Program's Community Speaker's Network – this will create a network of Red Cross volunteers throughout Australia who will be trained in IHL dissemination and will be available to present on IHL to community organisations. To me, this 'grassroots' dissemination of IHL is vitally important to ensure an understanding of IHL by the general population as required by the Geneva Conventions. At the time of writing we have provided initial dissemination training to a pilot group of volunteers who will now take part in further practice sessions before they begin community speaking engagements. My work to date on this project has really demonstrated how motivated and competent volunteers can be in carrying out IHL dissemination work. My colleague and I are also working on developing a Community Engagement Network of volunteers who will work on the organisation of IHL dissemination events to create further awareness of IHL throughout the community.

My work in the IHL Program continues to confirm for me the absolute necessity of disseminating IHL as widely as possible. Having spoken to many people from different walks of life about IHL, it is very apparent to me that despite the fact it has been more than 150 years since Henry Dunant stood on the battlefield of Solferino, most people are deeply concerned about the suffering of people in armed conflict, they support IHL principles which aim to alleviate this suffering and they want to assist in some way with the work of the Movement to achieve this.

1 'I was a mere tourist with no part whatever in this great conflict; but it was my rare privilege, through an unusual train of circumstances, to witness the moving scenes that I have resolved to describe.' Dunant, H, *A Memory of Solferino* (International Committee of the Red Cross, 1959) 16.

2 Ibid, 115, for example.

3 GC IV, art 47.

4 See Australian Government Department of Defence Global Operations <<http://www.defence.gov.au/Operations/>>.

5 See Australian Red Cross Strategy 2020 <https://www.redcross.org.au/annualreport_2017/year-in-review/about-red-cross/strategy-2020.html>.

In the Life of an ICRC Regional Legal Adviser

Eve Massingham

Last week I was in Djibouti, running a two day workshop for government officials on IHL. Next week I will be in Addis Ababa for a seminar on IHL with the Federal Attorney-General's Department. Today I am sitting in my office in Nairobi, working towards the conduct of a four day workshop for Somali IHL academics. I work as part of the ICRC's Legal Advisory Service,¹ a unit consisting of a small team in Geneva and thirteen regional legal advisors across the world who work to support states to sign, ratify and implement IHL treaties and obligations. These regional legal advisers are most ably supported by a team of locally qualified legal experts. Here in East Africa I work with the wonderful Judith in Uganda, Hillary in Kenya, Marco in South Sudan, Ahmed and Abdulhafid in Somalia and Eyerusalem in Ethiopia. I also have a host of other colleagues involved in implementing the ICRC's prevention file objectives – namely, to foster an environment conducive to respect for the laws which protect those affected by armed conflict and for the ICRC's work.

Principally, the work involves meeting with relevant officials to promote the ICRC and its IHL implementation work, planning and facilitating awareness raising sessions or more in-depth training for authorities on relevant IHL issues, drafting and reviewing draft implementing domestic legislation and championing regional involvement in discussions pertaining to IHL. As I have noted elsewhere, as part of the global community taking on the challenges to our common humanity, but also as part of a region that has long had its own region wide challenges relating to the conduct of hostilities, East Africa has a necessary interest in the law of war.² Sadly, fighting continues in South Sudan where the peace agreement brokered by the African Union has not brought peace and people continue to be killed and displaced;³ Somalia has experienced a continuing series of terror attacks, including its worst in history;⁴ renewed clashes took place on the Ethiopia-Eritrea border in 2016 (and unrest continues within Ethiopia);⁵ situations of violence erupted at various stages in the Kenyan 2017 presidential elections;⁶ and more people keep arriving in Tanzania fleeing the fighting in Burundi.⁷

The work on this file is therefore, not surprisingly, challenging and progress is not measured in small intervals of time. We are working on a couple of key themes relating to weapons law and displaced persons. For example, I've represented ICRC at regional workshops on the Cluster Munitions Convention⁸ and the Arms Trade Treaty⁹ and I've run national workshops on topics including the Arms Trade Treaty and the the African Union Convention on the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention). In October 2016 and again in October 2017 I worked with colleagues and the Intergovernmental Authority on Development (IGAD) to plan and facilitate a meeting for member States of IGAD on ratification and implementation of and implementation of the Kampala Convention.¹⁰

In addition to the work with governments I also work with humanitarian actors and agencies and with students and academics of IHL. One thing that I am very excited about is the interest in the region among academics in exploring traditions of warfare and how they correlate (or don't) to modern IHL principles. The 1949 Geneva Conventions and their Additional Protocols are the modern form of the rules of war, but these rules by no means originated with the ICRC and these Conventions. They are as old as

Participants at the second Seminar on the Kampala Convention in Nairobi, Kenya.
CC BY-NC-ND / ICRC



warfare itself. Something that I have brought with me from my Pacific home is the ICRC's *Under the Protection of the Palm: Wars of Dignity in the Pacific* study.¹¹ This research demonstrates very clearly that many, although not all, of the principles of modern IHL are firmly enshrined in traditions of warfare in various societies in the Pacific.¹² I have really enjoyed sharing this study in East Africa over the past two years, and have found this work to be of great interest and resonance in East Africa. An older study, published in 1997, by the



Eve Massingham, Regional Legal Advisor for the ICRC, makes a presentation on protected persons to academics at the 13th IHL faculty round table held in Nairobi. CC BY-NC-ND /ICRC/Abdikarim Mohamed

Somali delegation of the ICRC, *Spared by the Spear*¹³ looked at the traditional customary laws of Somalis and the 1980 publication *African Customary Humanitarian Law*¹⁴ includes a number of examples from the East Africa region which show respect for the principles of IHL.¹⁵ It is clear that rules of war concepts are not foreign concepts in East Africa. Rather, they are deeply rooted in tradition and experience. A number of conversations with academics in the region indicate a strong interest in updating some of this work and expanding on it and this is indeed an exciting project to be a part of.

One of the really fun parts of the job is the involvement that I have in student competitions on IHL. There is very significant interest among law students and academics in East Africa in IHL. Many universities across the region include IHL courses at both undergraduate and graduate level. For example, IHL in Ethiopia is a compulsory course in the law degree. ICRC competitions for students in the region attract hundreds of students every year. Over 50 competed in the 2017 East African IHL Essay competition and over 300 students competed in IHL moot court, debate and role play competitions across Uganda, Tanzania, Kenya, Somalia, South Sudan and Ethiopia. In November each year, in my position, I have the privilege to facilitate the annual All Africa IHL Competition – whereby student winners of the national competitions mentioned above gather in Arusha for a week-long role play and a series of IHL lectures culminating in a moot court final in the courtroom of the Mechanism for International Criminal Tribunals in Arusha.¹⁶ The impressive performance of these students indicates a bright future for IHL in the region.

I think this student competition is particularly meaningful for me because my career was very heavily influenced by my involvement in the Australian Red Cross IHL Moot. My Red Cross journey actually started in 1999 when I was a first year law student looking for a volunteering role. I turned up at Australian Red Cross and my first job was sorting seconds clothing donated by a retailer for sale in Red Cross shops. I soon moved into volunteering in the IHL team. In 2001, I heard about the Red Cross IHL Moot Court competition and convinced my university to let me enter with my friend Michael Carey. Neither Michael nor I knew anything about mooting and to be perfectly honest we found digesting ICTY and ICTR case law a bit beyond us. We didn't do particularly well. However, I was definitely hooked, both on IHL and mooting and in 2003, with my friend Carmen Elder, I had another go at the Red Cross competition and was the national runner up in the Red Cross IHL Moot Court Competition. I remember being terribly disappointed that we didn't win. Not because I thought we deserved to. Indeed our competition was two very seasoned and experienced mooters from the University of Queensland who were, quite simply, better than us. I was disappointed because the prize for winning was a week-long trip to visit an ICRC delegation. I would have so loved to go! But it would have to wait, and some 13 years later, after working in IHL for many years with Australian Red Cross, I did in fact end up at an ICRC delegation – here in Nairobi.

For the last two years, I have been so incredibly fortunate to have this position in East Africa. Professionally I have had so many wonderful, interesting and challenging experiences including those mentioned above. I have taught IHL in Somalia while listening to the enthusiastic singing of locals celebrating the inauguration of Somalia's new president 'Farmajo'¹⁷ outside the classroom, gone rhino tracking with Kenya Wildlife Services in Lake Nakuru National Park during a workshop on the Arms Trade Treaty, dipped my toes into the Indian Ocean waters around Mauritius during a UNESCO meeting on the protection of cultural property in armed conflict, climbed Dune 7 in

Namibia during the Commonwealth National IHL Committees Meeting,¹⁸ drunk the volcanic sourced water in Georgia's Borjomi town during the 2017 Jean-Pictet IHL competition (a small detour outside the East Africa region), watched the sun set from a rocky outcrop in Tanzania's Usambara Mountains following a meeting with the Judicial Training Institute of Tanzania, celebrated Australia Day at the Indian Embassy (26 January is also India Day) in Juba with a fellow former Australian Red Cross colleague, been shown around Eritrea's (at the time of writing, soon to be) World Heritage Listed modernist capital Asmara by a cultural property and museums expert, and viewed Mount Kilimanjaro, the Nile and Lake Victoria from (too) many aeroplane windows.

While aeroplanes and airports quickly lose any appeal they may have had, a role like this is what I always wanted to do when I grew up. I am under no illusions that what I will do in the three years I spend here will be significant in the overall scheme of things. However, I can see that the combined efforts of my predecessor, their predecessor, my predecessors' predecessor, me, my successor (etc) and the team of legal officers around the region will, over time, have played a role in improving IHL implementation and ultimately compliance.

It wasn't until after I started volunteering with Australian Red Cross in 1999 that I really learnt about the Geneva Conventions and the role of the Red Cross in their development and promotion. The whole concept of IHL fascinated me. The universality of the concept really resonated with me, and the (albeit sad) realism behind the purpose of IHL – that mankind will always be silly enough to go to war with each other and all we can do is to try to reduce the suffering when they do – called to me. I thought through this recent experience of working in conflict-affected countries I might understand a bit more about human nature and why conflict is so pervasive. I don't. I still don't understand why we can't effectively address the root causes of conflict, but if anything that just makes me believe in the ICRC mandate even more. The Geneva Conventions are indeed even more necessary than ever.

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- 1 See further, 'The ICRC Advisory Service on international humanitarian law' (ICRC website) 1 January 2015 <<https://www.icrc.org/en/document/icrc-advisory-services-international-humanitarian-law>>.
 - 2 Eve Massingham, 'International Humanitarian Law in East Africa: A regional perspective on its importance to the people' (2016) 6 *Zanzibar Yearbook of Law*, 27-40.
 - 3 See, for example, 'Fifty dead in South Sudan raids' *Daily Nation* (online), 29 November 2017 <<http://www.nation.co.ke/news/africa/50-dead-in-South-Sudan-tribal-raids/1066-4207894-11nki4j/index.html>>.
 - 4 Mogadishu truck bomb: 500 casualties in Somalia's worst terrorist attack' *The Guardian* (online), 16 October 2017 <<https://www.theguardian.com/world/2017/oct/15/truck-bomb-mogadishu-kills-people-somalia>>.
 - 5 See, for example, 'Ethiopia and Eritrea blame each other for border clash', *BBC News* (online), 13 June 2016 <<http://www.bbc.com/news/world-africa-36515503>>; Peter Fabricius, 'Turning up the volume on Ethiopia' *ISS* (online), 5 September 2016 <https://www.issafrica.org/iss-today/turning-up-the-volume-on-ethiopia?utm_source=BenchmarkEmail&utm_campaign=ISS+Weekly&utm_medium=email>.
 - 6 See, for example, 'Violence erupts in Kenya over new election law' *Al-Jazeera* (online), 12 October 2017, <<http://www.aljazeera.com/news/2017/10/violence-erupts-kenya-election-law-171011171513178.html>>; '37 killed in August 8 post-election violence, KNHRC reports, *Standard Digital*, 10 October 2017, <<https://www.standardmedia.co.ke/article/2001256865/37-killed-in-august-8-post-election-violence-knchr-reports>>.
 - 7 Leo Dobbs, 'Number of Burundian Refugees tops 250000 since April', *UNHCR* (online), 4 March 2016, <<http://www.unhcr.org/news/latest/2016/3/56d97f2d9/number-burundian-refugees-tops-250000-since-april.html>>.
 - 8 ISU, *African States meet to promote the universalization of the Convention on Cluster Munitions*, 9 August 2016 <<http://www.clusterconvention.org/2016/08/09/african-states-meet-to-promote-the-universalization-of-ccm/>>.
 - 9 Control Arms, First ATT Academy training a success, 26 June 2016, <<http://controlarms.org/en/news/first-att-academy-training-a-success/>>.
 - 10 ICRC, *Kenya: IGAD and ICRC hold seminar on the Kampala Convention*, (ICRC website), 10 October 2016 <<https://www.icrc.org/en/document/igad-and-icrc-hold-seminar-kampala-convention>>; 'Kenya: protection for internally displaced persons' (ICRC website), 16 October 2017 <<https://www.icrc.org/en/document/kenya-protection-and-assistance-internally-displaced-persons>>.
 - 11 ICRC, *Under the Protection of the Palm: Wars of dignity in the Pacific* (ICRC, 2009).
 - 12 For example, the obligation for combatants to distinguish themselves from the civilian population, and carry their arms openly, so as to benefit from combatant privilege was practised in many conflicts. In Samoa, 'warriors were identified as distinct from the civilian population by the wearing of white hats'. In Papua New Guinea, 'one band of warriors smeared their faces with lime in lines from the mouth to the temples'. In the Solomon Islands, 'sprigs of ferns (amaama) and a native comb (mangita) were inserted into a warrior's hair when going out to fight'. In Fiji, 'warriors painted their bodies to indicate the type of weapon they bore'.
 - 13 ICRC, *Spared by the Spear: Traditional Somali Behaviour in Warfare* (ICRC, 1997).
 - 14 Emmanuel Bello, 'Shared Legal Concepts' in *African Customary Humanitarian Law* (University of California, 1980).
 - 15 For example, from Kenya it was recorded that that Kikuyu tribesman would allow their weaker Maasai enemies a chance to surrender by ordering a halt and calling for them to do so. A handful of Nyarageta grass held in the right hand was understood to mean surrender. The Nuer people of the Nile had a customary rule that during cattle raids women and children were not to be badly treated and places storing food were to be left untouched: *Ibid*, 30,34.
 - 16 'Collaboration with judicial institutions promotes international humanitarian law expertise among African students' (ICRC website), 4 December 2017, <<https://www.icrc.org/en/document/africa-international-humanitarian-law-expertise-competition-judges-students-university>>; 'African students practice international humanitarian law at continental competition', (ICRC website), 29 November 2016, <<https://www.icrc.org/en/document/africa-students-tanzania-law-ihl-court-competition>>.
 - 17 Mohamed Abdullahi Mohamed was inaugurated as Somali president on 22 February 2017.
 - 18 ICRC Advisory Service on IHL, *National Committees for the Implementation of International Humanitarian Law*, 31 January 2003, <<https://www.icrc.org/en/document/national-committees-implementation-international-humanitarian-law-0>>.

International Criminal Trials

Kevin Parker AC RFD QC

The International Criminal Court (ICC) is now well established as a court of trial for many international offences. The jurisdiction of the ICC is to be found in Article 5 of the Rome Statute of the International Criminal Court (Rome Statute). This jurisdiction is over Genocide, Crimes against Humanity, War Crimes and the Crime of Aggression. There are limits to the exercise of this jurisdiction by the ICC. In particular, the jurisdiction of the ICC:

1. is 'complementary' to national criminal jurisdiction;¹ contrast Article 9 of the Statute of the International Criminal Tribunal for the Former Yugoslavia;
2. is only with respect to offences committed after the entry into force of the Rome Statute on 1 July 2002;²
3. does not apply to an offender who is under the age of 18 years at the time of the commission of the alleged offence;³
4. is only over the 'most serious crimes' of concern to the international community;⁴ and
5. may only be exercised with respect to an offence if the provisions of Articles 12 and 13 are satisfied. This limitation is often overlooked in descriptions of the ICC's jurisdiction.

The ICC is not a court of the United Nations (UN). It is established by a treaty to which States may become a party.⁵ By January 2018 nearly 140 States had become a party to the Rome Statute. Australia is one of these. The ICC is governed by a body known as the Assembly of States Parties⁶ which bears the cost of the ICC and elects the judges of the ICC.⁷ There are eighteen judges of the ICC sitting at The Hague in The Netherlands. By a system of rotation the terms of six judges come to an end every three years.

Because the ICC is not a court of the UN, provisions of the Rome Statute according privileges and immunities to the ICC⁸ are not binding on a State unless it has become a party to the Rome Statute or has accepted the Jurisdiction of the ICC under Article 12. For practical purposes the result is that the ICC is not able to carry out its functions effectively with respect to events in a State which has not become a party to the Rome Statute.

An ICC Trial

Australia is a party to the Rome Statute. Hence, all Australians, including members of the Australian Defence Force, are subject to the jurisdiction of the ICC. However, as this jurisdiction is complementary to national criminal jurisdiction, Australian courts including Australian military courts can continue to exercise their jurisdiction. This precludes the ICC from exercising its jurisdiction. An exercise of jurisdiction by an Australian court occurs whenever there is a genuine prosecution in that court or where the authority, responsible for prosecuting in that court, genuinely decides not to proceed with a case, which the authority has investigated.⁹

The first thing an Australian lawyer would notice about the ICC is that there are three judges and no jury. The absence of a jury is inevitable given that the ICC normally sits in The Hague. Originally, at common law, the idea of a jury was that citizens from the locality of the alleged offence would have some knowledge of what had occurred and who was involved, and so would come to a reliable verdict. With time, the emphasis came to be on the evidence given in court, not on what individual jurors had heard or seen. Yet, the idea of citizens from the locality deciding the question of guilt or innocence had a persuasiveness which was preserved and favoured over a single judge. Jurors are used in some other legal systems but the roles of judges and jurors differ between legal systems. It takes little thought to appreciate that it would be a formidable legal and practical task, and a prohibitive cost, to transport a body of citizens from the locality of the alleged offence to The Hague. Neither is it practical to try to hold a court in the locality of the offences likely to be tried by the ICC.

It should be appreciated that the common law system with which Australians are familiar is not the dominant legal system of the world. The civil system (Roman or Napoleonic) is the predominant system. The procedure used by the ICC is more akin to that used in parts of Europe. Procedures used in courts in most parts of the world owe much to the procedures developed in Europe over past centuries. Nevertheless, there is a wide range of procedures even in Europe, and Australians need to be aware that the procedure followed may not be that with which they are familiar.

Three Judges or One

If it is not practical to conduct a trial with a jury, it is necessary to ask the question whether one judge should be used rather than three, which is usual for trials of serious offences in most civil law systems. Three judges have clear advantages. Discussion between them of a matter for decision or of the evidence about an issue is a great safeguard against oversight, conscious or unconscious bias, or failure to fully appreciate the significance of the matter or issue.

Further, in my experience, discussion can show up a matter or issue, or its implications, in a quite different light. This is especially so when it is necessary to look back over much varying evidence. This has shown to me the value of more than one judge dealing with the evidence, especially where a judge is persuaded to come to a different conclusion having considered the view of another judge of the same evidence. Of course, there can be differences of view which are not reconcilable. In itself that is a safeguard against an unjust result as the difference of view will be exposed in the reasons for decision.

One material factor to be considered when deciding whether one or three judges is to be preferred is the view of the decision likely to be taken by the population from the locality of the offence. As much as this can be weighed, more people are likely to accept a decision of three judges than one, and it appears to me that they are more likely to be persuaded to accept as proper a verdict of three judges who have studied the law, than of a jury.

This does not suggest that every decision is going to result in unanimity in reaching a decision, but it is instructive to discern how differing mental processes can lead experienced judicial minds to the same conclusion, and to agreement as to the way in which their reasoning is expressed, whether in oral or written decisions.

Judges

Judges from different legal systems have been prepared and selected for their roles as judges in different ways.

In common law countries, a judge is prepared by general experience in legal practice, usually as counsel, which enables a future judge to identify the factors relevant to decision making and to the consequences of decision. This also allows a future judge to come to appreciate the factors that make a fair trial. Appearances before many different judges has proved to be a great way of learning the skills necessary for good decision making and for fairness. Fairness is critical to the overall success of a criminal trial and to the impression which the general public form of their criminal justice system. It is equally important for international criminal trials.

In the common law system it is the more experienced and successful lawyers who are considered for appointment to the judiciary. In many European countries law graduates are immediately trained for the judiciary/magistracy and then appointed to their first judicial position. Of these, some are later selected for more senior judicial roles. This can ensure that the brightest graduates enter the judiciary, but the consequence is that judges never know what it is to act for a client, or to lose, especially because of decisions made as counsel, and do not learn from



ICC judges, March 2018 ICC-CPI CC

seeing other judges at work. It also has the consequence that evaluation of a candidate for higher judicial service is made only from his/her experience of simpler trials. There are, however, some European nations which manage to combine experience in legal practice with other qualities in their selection process for judicial appointment.

Neither the common law nor any other system can be claimed to be better at preparing lawyers for the judiciary or to serve as a judge in the more complex criminal trials, despite assertions to the contrary so often heard from judges and others.

However, I have noticed that, on the whole, judges from common law countries are more ready to listen to views other than their own. Of course this is a subjective view and is affected by the personalities of individuals. Judges from common law countries can be as impressed with the correctness of their own view as judges from other systems.



Harare, National International Humanitarian Law (IHL) Moot Court Competition.
Christopher Scott/ICRC

The Presiding Judge

The European systems and the common law system are very different in their approach to the role of the presiding judge. Presiding judges, in particular, tend to see themselves as controlling the conduct of a trial. Procedure does vary, but it is typical in some systems for the presiding judge to question a witness before counsel about issues that the judge considers important, whereas a judge from a common law country is likely to do this, if at all, after counsel has finished. This procedure of questioning first by a judge, can result in counsel losing the advantages of surprise and of being able to guide a witness in his/her approach to a topic, each of which can be critical.

Evidence

There is a significant difference in the approach to evidence. At common law, the approach is to determine whether evidence when tendered is admissible in the trial, whereas it is more usual in other systems for evidence, which could be relevant, to be admitted and then weighed at another time. The difference can be significant particularly as at common law much evidence is excluded because of the danger of it being misunderstood or misused by a jury. The absence of a jury from an international trial provides reason to question the use of rules of evidence which exist because of the potential for the evidence to be misused or misunderstood by a jury. In an international trial findings of fact are made by experienced judges.

This is not to suggest that all evidence is of the same weight. For example, hearsay evidence may become admissible but it must be weighed in light of all relevant evidence.

Reasons for Decision

As a common law judge, I am used to explaining in my reasons for decision why I prefer one body of evidence rather than a contrary body of evidence. This is not always the position taken by judges from other systems of law who may refer to all of the evidence – to show it has not been overlooked – and then record the finding they have made without further explanation. This seems to be an accepted method of expressing findings of fact.

This difference of judicial style may well explain why, in an appellate proceeding, it is quite common to find that appeal judges come to their verdict or findings after a reconsideration of the whole evidence, rather than limiting their reasons to a consideration of the expressed grounds of appeal. This will be found in the ICC.

Preparation for any appeal needs, therefore, to include the whole case and, in particular, why some evidence was favoured over other evidence by the trial judges. This can include a comparison of an original statement and the

evidence of the witness before the court. Do not overlook the fact that trial judges have heard all the evidence and their factual findings have this distinct advantage.

My views expressed briefly in this short chapter are not intended to suggest that judges from any particular system are to be preferred to judges from another. Indeed, it is my experience that fairness and competence are the essential judicial qualities and these are to be found in judges from all types of legal backgrounds. What is apparent, however, is that judges from different legal backgrounds tend to approach a case, whether at trial or on appeal, with habits learned in their own system and, when in doubt, they draw on their past experience. The result is to bring a variety of judicial skills to the task of deciding cases. On the whole this is a creditable achievement.

Length of Trial and Delay

There are a number of reasons why international criminal trials are longer than domestic criminal trials or are delayed. Some examples drawn from my experience are as follows:

The criminal conduct included in an international indictment is often much greater than criminal conduct encountered in domestic matters. This is because the conduct typically occurs in the course of warlike activities, so it is usual to find (for example) large numbers of deaths the subject of one indictment, instead of the usual one death in one indictment in a domestic trial. Each death, and cause of that death, must be proved and this necessitates many witnesses.

Thorough and impartial investigation is unknown or very rare in warlike conditions. A failure to investigate at the time of the alleged offence means there is a need to do so at a later time. Such a delay usually results in longer investigation at a later time and additional witnesses at trial.

Accused persons have a habit of avoiding discovery. They must be located and then arrangements made for their arrest and transfer to The Hague. This can cause an extensive delay, sometimes of years, to the commencement of proceedings. In that time, critical witnesses may have died or must themselves be located.

The elements of the offence which must be proved in an international trial are often complex and require a large body of evidence to establish. These often include proof that those killed were not themselves engaged as combatants in the warlike activities, which usually requires a great deal of additional evidence. For example, in one trial it became necessary to establish the identity of over 800 deceased as a means of proving they were not combatants. The remains of many of the deceased were found in mass graves which necessitated DNA testing as part of the identification process. Evidence was necessary to establish each step in this process. Hence the trial lasted over two years. Some trials last even longer.

Australians in International Criminal Trials

Australians, lawyers and non-lawyers, have played a significant role in the enforcement of international criminal law. They are typically regarded as competent, adaptable, fair and hard working. Australian lawyers hoping to find a place in this field should not regard themselves as ill-prepared. The contrary is usually the case. But hard work is often called for and they need to be prepared to encounter ways of thinking and approaches to a task which are different from their own experience. These can be informative and there is much to learn, but be aware of the trap of thinking that because it is different it must be better.

1 Rome Statute, art 1.

2 Ibid, arts 11, 24 and 126.

3 Ibid, art 26.

4 Ibid, arts 1 and 5(1).

5 See in particular Rome Statute, arts 12, 124 and 126.

6 See primarily Rome Statute, art 112.

7 Ibid, art 115 and arts 34-36 respectively.

8 Ibid, art 48. *Editors' note: the Security Council might affect privileges and immunities when it refers a matter to the ICC under Article 13(b) of the Statute.*

9 Ibid, art 17.



How to Prepare for an IHL Moot

part **04.**

Insights, Experiences and Challenges from the 2017 ALSA Winning Team

Christopher Chiam and Veronica Sebesfi

In July 2017, we competed in the Australian Red Cross and Australian Law Students' Association (ALSA) IHL Moot in Canberra as representatives of the University of New South Wales. After four days, many hours of work, and a series of challenging rounds, we were fortunate enough to win the 2017 competition.

Other chapters in Part IV of this Handbook will address techniques for preparing and writing memorials, so this chapter will not be a substantive guide on the mechanics of how to moot. Instead, we will share some of our experiences from the competition in the hope that they will offer insight into what to expect as a competitor.

Preparation

Unlike other Australian moots, this competition focuses solely on international humanitarian law and international criminal law. Neither of us had studied these subjects in any detail before, so we found it useful to begin with a general overview of these bodies of law and how they interrelate with each other. A unique aspect of these areas of law is the various sources of the law itself, going beyond the 'standard' legislation and cases to also include treaties, custom, and general principles of law. We found skimming through the Rome Statute, Elements of Crimes,¹ and the 1949 Geneva Conventions a useful place to start, as well as secondary materials such as the ICRC's How Does Law Protect in War² and Customary IHL Database,³ both of which are available online. When it came time to review the case law, we were initially shocked at the sheer length of the judgments. Thankfully, however, they have tables of contents and are usually text-searchable.

One of the difficulties in preparing our memorials was juggling our time with studying and preparing for end-of-semester exams, though we took some comfort in knowing most other teams would be in the same position. It is no secret that preparing for a moot requires a significant time commitment, but the time you do set aside for preparations will pay off once you're standing before a bench, delivering your arguments. When the problem was released, we read over it carefully and assigned the two charges between the two of us. From then on, we took responsibility for researching and formulating the arguments for our allocated charge. Up until exams finished, we spent a couple of hours each week working on the moot. Post-exams, we dedicated most of our time to finalising our submissions.

We also ensured that we set aside enough time for practice moots, where we could test the strength of our arguments and practise responding to questions. If you aren't familiar with mooting, or even if you are, you might want to consider scheduling a number of practice moots before competition week and inviting international law experts at your law school to serve as judges in these practice rounds. Something we tried to keep in mind while developing our arguments in this way was the practical implications of our case, and, particularly, what kind of burden our arguments would impose on military commanders and soldiers.



Christopher Chiam (*left*) and Veronica Sebesfi (*right*) with their Coach Samuel Hartridge, Doctoral Candidate and Sessional Lecturer at UNSW (*middle*)



The 16th Red Cross International Humanitarian Law Moot, Hong Kong

The Moot

After submitting the memorials, we travelled to Canberra for the oral rounds. The first thing we did, which we would highly recommend doing, was to buy ourselves a printer so we didn't have to rely on the hotel printing facilities at 2am in the morning. The competition consisted of three preliminary rounds over two days, followed by the quarter-final, semi-final and grand final rounds over the remainder of the week. The problem question remained the same throughout, but because teams prepared their case differently, each moot focused on different issues, requiring us to slightly reassess our material round by round. We found that preparation between each round was quite tight, particularly between the quarter- and semi-finals. We also found we were continuing to research (within the limitations of our citations) as the moot progressed in order to better respond to questions and feedback from the judges and the issues that other teams had raised. This meant the moot was a continual learning experience.

An aspect of each round that we found challenging was being able to present our material within the allotted time. Since all the crimes have several elements and modes of liability, in addition to questions of admissibility and jurisdiction, it was crucial to focus on the key issues in our oral submissions. This also meant some alternative arguments had to be culled, for example regarding different levels of command responsibility. We found that, to do this well, we had to be thoroughly familiar with all of our material as well as flexible in our approach in order to respond appropriately to the other team's arguments and questions from the bench.

A particular highlight of the oral rounds was definitely the calibre of the judges. Even in the preliminary rounds, we were judged by academics in the field, members of Australian Red Cross and the International Committee of the Red Cross, government representatives from the Department of Foreign Affairs and Trade and the Attorney-General's Office and military legal officers. We were thrilled to have both the experience and the challenge of discussing international legal issues with people who actually practise in the area. Australian Red Cross is also very supportive of expanding the number of IHL opportunities available to students in Australia and encouraged many of the judges to discuss their roles and work with teams as well as highlight any further opportunities to study and practise in the area.

This IHL competition sits within the larger ALSA conference, which takes place annually and involves other competitions such as trial advocacy, negotiation and paper presentation. The conference is attended by student delegates from law schools across Australia and the South Pacific region. The conference also includes social events and seminars, which are a great way to meet students from other universities. However, as a consequence of all these events, we often found it a challenge to juggle between preparing for the upcoming rounds, supporting the other members of our university delegation, and attending the various functions. We would recommend prioritising sleep wherever possible! Having said this, the sense of community and sportspersonship was definitely one of the highlights of the experience for both of us.

Post-Moot Opportunities

Courtesy of Australian Red Cross, the winning team of the ALSA competition is given the opportunity to compete in the ICRC's Asia-Pacific rounds in Hong Kong the following year. This is an annual inter-university competition for the Asia-Pacific Region, which is co-organised by Hong Kong Red Cross and the International Committee of the Red Cross in collaboration with The University of Hong Kong and the Chinese University of Hong Kong. Australian Red Cross will be funding our travel to and from the competition, while Hong Kong Red Cross covers all teams' accommodation. At the time of writing this chapter, we are in the preliminary stages of research and preparation for the 2018 competition and are excited to compete!

We found that participating in this competition was an amazing opportunity for us as law students, one which furthered our engagement with IHL and international criminal law and which has helped us sharpen our advocacy skills in these important areas of law.

Editors' note: Chris and Veronica competed in the 16th Red Cross International Humanitarian Law Moot in Hong Kong in March 2018. Following the Grand Final they were awarded "Runner-Up Team" and Chris was awarded "Best Mooter".

1 ICC, *Elements of Crimes*, ICC-PIOS-LT-03-002/15_Eng (adopted 2010).

2 ICRC, *How Does Law Protect in War* <<https://casebook.icrc.org/>>.

3 Study on Customary IHL <<https://ihl-databases.icrc.org/customary-ihl/eng/docs/home>>.

Advocacy in Mooting: Ethics

Roderick O'Brien

Student moots require practice not only in professional skills but also in professional ethics. Mooting under the auspices of the International Red Cross and Red Crescent Movement (the Movement) also provides an ethical base by the seven fundamental principles: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.¹ Ethics in mooting is not only an attractive addition, it is vital to the success of a moot.

The Law Society of Western Australia provides a convenient definition of legal professional ethics:

Ethics are the moral principles that govern a person's behaviour. For legal practitioners, ethics take on an added level of importance. Alongside rules of professional conduct and the common law, ethical values act as a guide to proper behaviour for lawyers.

Navigating the ethical minefield can be a difficult prospect for many practitioners, but it is important that lawyers stay on the right side of morality as well as the law. Legal practitioners are subject to high ethical standards due to the prominent position they hold in the administration of justice. For this reason, and to maintain the reputation of the profession, lawyers must always act in a highly ethical manner.²

Australian students can look to the professional ethics of counsel from the states and territories of Australia. While these standards may vary in detail from one jurisdiction to another, they share many common characteristics.³ Mooters apply these standards as far as possible to the circumstances of a moot. To moot with high ethical standards is not only internally satisfying, it also puts the mooter in a favourable light with fellow students, and with the judges and other professionals who participate. A lapse in ethical standards is not only a personal disaster, it may be remembered when the student seeks advancement in the profession.⁴

Counsel in real-life Court and Tribunals will not find a single key to ethics. In fact, counsel have a complex set of ethical relationships, and these must be balanced in facing ethical problems. Counsel have their overriding duties to the court, their specific duties to their client, and their professional duties to other professionals such as prosecutors and defence counsel. Underlying these ethical relationships are principles of justice and equity, which are not only part of Australian law but also part of international law.⁵

In the same way, counsel in a moot will not find a single key to ethics – they must navigate a complex set of ethical relationships. Some of these arise from the nature of a moot as a student exercise, others arise from the desire to practise as nearly as possible professional ethics, and yet others arise from participating in a wider project, such as a competition organised within the Movement. Counsel must work ethically with the other members of their team, counsel must work ethically with the court officials and judges who serve the moot, and counsel must work

ethically within the framework of a student project. While there is no single key to ethics, a simple bottom line can be stated: it is unethical to seek to win at all costs.

Ethics, including professional ethics, are much more significant than courtroom etiquette or professional courtesy. Ethics are grounded in the values and principles both of humanity in general and of a particular profession with its own culture and history.



In the quarter final, Purbanchal University of Nepal enters the final four following an unexpected win over the University of Auckland from New Zealand. CC BY-NC-ND / Shanshan ZOU / ICRC

The Seven Fundamental Principles

When participating in an international humanitarian law moot competition organised within the Movement, of which Australian Red Cross is part, it is important that students understand the particular ethos of the Movement. This is summarised in the seven Fundamental Principles: humanity, impartiality, neutrality, independence, voluntary service, unity, and universality.⁶ Mooting is not simply a matter of black-letter law, but often requires mooters to articulate the underlying principles on which their arguments are based. Mooters must be able to see beyond national positions on any particular area of law.

Preparatory Research

Counsel must familiarise themselves with the rules relating to preparatory research. A moot is an educational project, and the rules will usually require counsel (or perhaps a student team) to undertake their own research. In this way, participants will increase their knowledge of IHL and its application. Outsourcing research to others, whether paid or volunteers, runs counter to the particular ethos of the student moot. It is not just a matter of staying within the competition rules, it also requires adherence to the spirit of the moot as a learning project.⁷ Nevertheless, the competition rules will indicate whether moot counsel can work with other students, or must work only with their team and other members. Some competition rules encourage the participation of junior students in the learning project.

Sometimes a moot problem may be re-used from an earlier competition, or a moot problem may be used within a competition over a number of days or rounds. This may give an opportunity to teams to plagiarise when writing their written submissions for later rounds by copying written submissions from opposing teams in earlier rounds. To plagiarise the work of another team may seem like a quick way to prepare, but it runs counter to the learning project. It is not plagiarism, however, to learn from your opponents and if an opponent has found an important case authority that you weren't aware of then you are entitled to learn from that case and to develop your arguments in responding to that case in later moots.

Knowing Your Court

Moot problems are sometimes set before an unidentified court, sometimes before an identified international tribunal, and sometimes before an identified national tribunal. Students should look for any ethical statements of principle which relate to a particular court. For example, the International Criminal Court has a *Code of Professional Conduct for Counsel*.⁸

Deception

Counsel could deceive the judges in a moot. This could arise because a moot has a limited timeframe and the judges do not have the opportunity to check your sources. Counsel could choose to cite only cases or authorities which support their case, suppressing those cases or authorities which run counter to their argument. Counsel

could provide a false translation of an important case or authority, deceiving the judge as to its merit. Counsel could cite a fake case or authority, knowing that the judges and the other team will not have the opportunity to check it. Counsel should act honestly at all times, and never knowingly deceive the court.

Should such deception occur, it may involve the whole team. Corruption spreads like a virus. But if the deception is observed by another member of the team who is not a party to the deception,



Photo: ICRC

that member of the team should correct the deception as soon as possible. Team loyalty is only one principle of ethics, and duty to the court will mandate correction.

The circumstances of the moot may make correction difficult or impossible – for example, if the deception is perpetrated by the last counsel. Depending on the circumstances, counsel who have identified a deception may be able to find a way to acknowledge the deception and, if serious, apologise to the judges and other teams.

Unintended Deception

Listening to a judge, counsel may realise that the judge has misunderstood the presentation of the facts, or the citation of cases or authorities, in a way that is favourable to that counsel's argument. While the deception is not intended by counsel, duty to justice and fairness requires counsel to alert the judge to the misunderstanding. It is not ethical to simply sit back, and silently gloat in the advantage gained by the misunderstanding.

The Role of the Moot Judge

In a real-life court, judges will have their own entrances, even their own elevators, to limit their contact with counsel and parties. In a moot held in an informal context, such as university classrooms, this is not possible. The judges may be teachers who are in regular contact with their students. But for the period of the moot (including preparation) respect the impartiality and neutrality of the judge. Do not try to make conversation or do anything which would appear to give advantage. Justice must not only be done, but must be seen to be done.⁹

This would also apply to other persons who are organising the moot. Keep a respectful distance, and do not ask for privileges which would not be available to other counsel.

Counsel are Courteous

In the heat of the moment it is possible to act or speak without courtesy, to the judges, or even one's own team-mates. With its short time limits, the very circumstances of the moot put a lot of pressure on the mooters. Judges can sometimes be persistent in questioning, team-mates can suddenly let you down – remember that they are under pressure too. Practice the advocate's arts of maintaining poise and a smile.

Accept the Imperfections of a Moot

Once, a first year student was serving as a timekeeper. Accidentally, she gave one team a minute less than the other. But the team leader was gracious, and accepted the mistake. The timekeeper was in tears, and the team which lost the minute were comforting to her. Accept that moots are usually organised by volunteers, who are doing their best. A classroom used as a moot court may have terrible acoustics. A judge, particularly in the minor rounds, may be inexperienced. Accept the imperfections of the moot with magnanimity.

Model Teamwork

The prize of best individual moot counsel is attractive – but more rewarding is the prize for teamwork. A counsel who draws attention to themselves by diminishing their team-mates will be displaying a serious breach of professional ethics, and it will not be forgotten. A moot is not simply a legal exercise, it provides mooters with the opportunity to practise ethics, and to practise being ethical as a team.¹⁰

Act with Professional Courtesy to Other Teams

Treat other teams in the competition as your fellow professionals. All ethical codes for lawyers require this as a minimum, and it is good to practise as a mooter. If a team has fewer resources, be generous and lend yours. Do not try to gain advantage by holding back your resources.

International Moots

Some mooting competitions provide the opportunity to compete internationally. For example, the most successful team in the Australian Red Cross and Australian Law Students' Association IHL mooting competition has the chance to compete in the Regional Moot organised by the International Committee of the Red Cross and Hong Kong Red Cross.¹¹ This is a wonderful opportunity, but it also brings with it new ethical responsibilities. Realise that

other teams may come from jurisdictions with markedly different professional ethics. Even though you may not have the time to become familiar with every team from widely divergent parts of Asia, you can show that you are well grounded in Australian and international ethics.

Representing your University, representing Australia

Taking part in an international moot gives you a special opportunity to practise the values of the Movement. Even outside the competition, express your humanity with good grace and a co-operative spirit. Show your universality with other teams, and your unity with all those who work hard to provide this opportunity for you to advance in your knowledge of IHL. Although you may not be a member of a Red Cross or Red Crescent Society, you should acknowledge the specific values, and respect the ethos of this moot.

International Personnel

There are new challenges in an international moot. Judges and other counsel may speak with unfamiliar accents, or might be difficult to understand. You may have to slow down your presentation to be understood – that can be difficult when you feel pressed to include all your material in a very short time! The legal authorities cited by counsel may be completely unfamiliar to you. Recognise that judges bring different gifts to the moot competition: some may be experts in IHL, while others may be invited for their skill and experience as trial judges and appellate judges. Expect to be closely tested not only on the applicable law, but also on its application to the facts. Respond courteously.

Finally

Enjoy mooting! To learn more about IHL, and the necessity for this law, is a welcome advance in learning. To actively practise good ethics in the context of your moot is satisfying both as an individual and as a team. To meet new friends who share your passion for IHL, especially from other places in our region, can be a gift not only for the moot but also for life. Despite the competitive stresses, despite the difficulties which come from mooting itself, take some time to enjoy the moot!

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- 1 Jean Pictet: "The Fundamental Principles of the Red Cross: Commentary" (1979) <<https://www.icrc.org/eng/resources/documents/misc/fundamental-principles-commentary-010179.htm>>.
 - 2 Law Society of Western Australia: 'Ethics and Professional Conduct' <<https://www.lawsocietywa.asn.au/professional-practice-support/ethics-professional-conduct/>>.
 - 3 Law Council of Australia: 'Australian Solicitors Conduct Rules 2015' <https://www.lawcouncil.asn.au/policy-agenda/regulation-of-the-profession-and-ethics/australian-solicitors-conduct-rules>>.
 - 4 Michelle Evans: 'Plagiarism and academic misconduct by law students: The importance of prevention over detection' (2012) 17(2) *International Journal of Law and Education*, 99-121.
 - 5 Justice Susan Kiefel: 'Ethics and the Profession of the Lawyer' address at The Vincents' 48th annual symposium (2010) Queensland Law Society <<http://www.hcourt.gov.au/assets/publications/speeches/current-justices/kiefelj/kiefelj-2010-03-26.pdf>>.
 - 6 Australian Red Cross: 'Principles' <<https://www.redcross.org.au/principles>>.
 - 7 John Snape and Gary Watt: *How to Moot: A Student Guide to Mooting*, (2010) 2nd ed., Oxford University Press, 85.
 - 8 ICC, Code of Professional Conduct for Counsel (2005) ICC-ASP/4/Res 1. The ICTY had its own code: *Code of Professional Conduct for Counsel Appearing Before the International Tribunal*, (2009, 3rd revision) IT/125 Rev.3.
 - 9 *R v Sussex Justices, Ex parte McCarthy* [1924] 1 KB 256, [1923] All ER Rep 233.
 - 10 Bobette Wolski: 'Beyond Mooting: Designing an Advocacy, Ethics and Values Matrix for the Law School Curriculum' (2009) 19(1) *Legal Education Review*, art 3.
 - 11 Michael Crowley and ICRC (eds.), *Introduction to International Humanitarian Law and IHL Moot in Asia-Pacific Region*, (2012) Hong Kong Red Cross.

So you've decided to compete in an IHL moot: what now?

Emily Camins

Welcome to the wonderful world of IHL mooting! Whether you are participating through your university, at the Australian Law Students' Association (ALSA) conference or elsewhere, the IHL moot offers the opportunity to become familiar with a fascinating and meaningful area of law, while enhancing your advocacy skills.

Many of the skills and techniques relevant to mooting generally are also helpful for the IHL moot. A number of these have been covered elsewhere (see **Chapters 18 and 19** of this Handbook). However, due to the nature of the law, the format of the moot and the forum in which the moot occurs, the IHL moot has some unique features. This Chapter will address several of these features, and provide guidance on how to deal with them. It is intended as a starting point rather than an exhaustive list of relevant resources or considerations.

Getting started: preparing your IHL moot

Preparation for your IHL moot can be directed primarily towards knowing three things: the facts; what you need to establish; and the case law.

Knowing the facts

As with all moots, knowing the facts is critical. Once you receive your moot question, read it over several times. An IHL moot question will generally proceed along the following lines:

There is geopolitical, ethnic or religious tension between State A and State B.¹ The situation escalates, and manifests in State A or State B using some kind of military force against the other. This develops into armed conflict, during the course of which some dubious conduct occurs, resulting in injury, loss of life or damage to property. The matter is referred to the International Criminal Court (ICC), or a special ad hoc international criminal tribunal is established. The role of the ICC or ad hoc tribunal is to determine the criminal responsibility of the person or people who hold the greatest responsibility for the offending conduct.

You will ordinarily be given an indictment or charge sheet which sets out the relevant facts and charges against the accused. Here is an example of a charge against an accused from a previous moot:

On 6 March 2014, General Brisbane, as Commander of the Miltonia military forces in Milton and operating in the surrounding region, ordered the deployment of a single nuclear warhead against the Chelmer military base. By her acts and omissions, General Brisbane is responsible for:

Violations of the Laws or Customs of War (employing a weapon of warfare causing superfluous injury, unnecessary suffering and/or widespread, long-term and severe damage to the natural environment in contravention of Article 35(2) and/or Article 35(3) and Article 55 Additional Protocol 1) punishable under Articles 3(a) and 3(b), 7(1) and 7(3) of the Statute of the Special Court.

Your role as a mooter is to act as counsel for either the prosecution or defence team (both of which comprise two mooters). As there are normally two accused, or two counts against one accused, these can be split between the two mooters on each team, with the first mooter (senior counsel) addressing count one and the second mooter (junior counsel) addressing count two.

Knowing what you need to establish

What you need to prove over the course of the moot will be determined by the charges against the accused, as well as the terms of the Statute which establishes the tribunal, whether the Rome Statute or a fictitious statute. Although each moot question will vary based on these considerations, there are a few issues that will likely arise.

In order to establish the criminal responsibility of the accused, the prosecution will need to establish, first, that a violation of the law (a war crime) occurred, and second, that the accused is criminally responsible for the conduct. The defence will be seeking to disprove these issues, or at least raise reasonable doubt about them. It is not necessary for both counsel on a team to cover common material between the two counts (such as the existence of an armed conflict), but it is necessary for you both to be familiar with the threshold issues addressed below.



Competition Judges focusing on the final round of the competition, a trial of an insurgent leader in front of the International Criminal Court.
Joe Gibson/American Red Cross

a. A violation of the law occurred

i. Threshold issues

In order to establish that the conduct in question violated IHL, it must be demonstrated that the relevant rules of IHL actually applied to the conduct in question. The constituting statute will determine which rules of IHL are relevant. The Rome Statute sets out several categories of war crimes, including grave breaches of the Geneva Conventions, other serious violations of the laws or customs of war applicable in international armed conflict, and serious violations of article 3 common to the four Geneva Conventions.² In order to establish that the relevant provisions apply you should be able to demonstrate:

- the existence of an international or non-international armed conflict (or occupation);³
- that the conduct occurred in connection with the armed conflict; and
- that the rule of IHL applied as a matter of treaty or custom.

International judicial decisions, particularly the case law of the International Criminal Tribunal for the Former Yugoslavia (ICTY), address these requirements in more detail.⁴

In order to address point (a), you will need to examine the facts to determine whether the fighting reached the threshold of an armed conflict, whether international or non-international. (See **Chapter 4** of this Handbook).

Point (b) will be met if there is a nexus between the armed conflict and the alleged conduct of the accused.⁵ This requirement distinguishes war crimes from ordinary crimes.

Due to the nature of international law, it is necessary that the rule of IHL applied as a matter of treaty or customary international law (point (c)). In order to establish the applicability of a treaty rule, the treaty must have been binding on the parties at the time of the alleged offence.⁶ In order to establish that a rule of custom applied, it is necessary to satisfy the twin requirements of sufficient state practice and *opinio juris*. The International Committee of the Red Cross' online database on Customary International Humanitarian Law is extremely useful in this respect.

ii. Establishing the offence occurred

Once these threshold matters are established, you can consider whether the conduct in question breached the relevant principle. This will involve looking, first, at the relevant provisions of the constituting Statute and underpinning IHL treaty provisions to ensure you understand the elements of the offence.⁷ In the example charge above, you would look at Article 35(2) and/or Article 35(3) and Article 55 of Additional Protocol I to the Geneva Conventions of 1949, and Articles 3(a) and 3(b) of the Statute of the Special Court. It is then helpful to consider the case law (particularly from, but not limited to, the International Criminal Tribunal for Rwanda (ICTR) and the ICTY, as well as the ICC) to assess whether the facts disclose a violation of the law. How well you apply the case law to the facts at hand can be determinative of the outcome of your moot (see below).

b. Attributing responsibility

Frequently the crime will be committed by the subordinates or associates of the accused. In this situation, the accused may be convicted of the offence only if they bear criminal responsibility for the conduct, as set out in the constituting statute. Criminal responsibility for the conduct of another can arise either through acts (such as planning or ordering the conduct) or omissions (such as a commander failing to prevent or punish the conduct). As with the example given above, the indictment will not always specify the form of criminal responsibility. However it will usually be apparent from the facts and the indictment which form of criminal responsibility is the most relevant (e.g. General Brisbane is said to have ordered the attack). You should focus your moot around that. Examine the provisions of the constituting Statute to understand what is required to sheet home criminal responsibility to the accused. Once you are familiar with the relevant provision, you can use case law to clarify the law and help you make your case.

Knowing (and using) the cases: persuasive advocacy

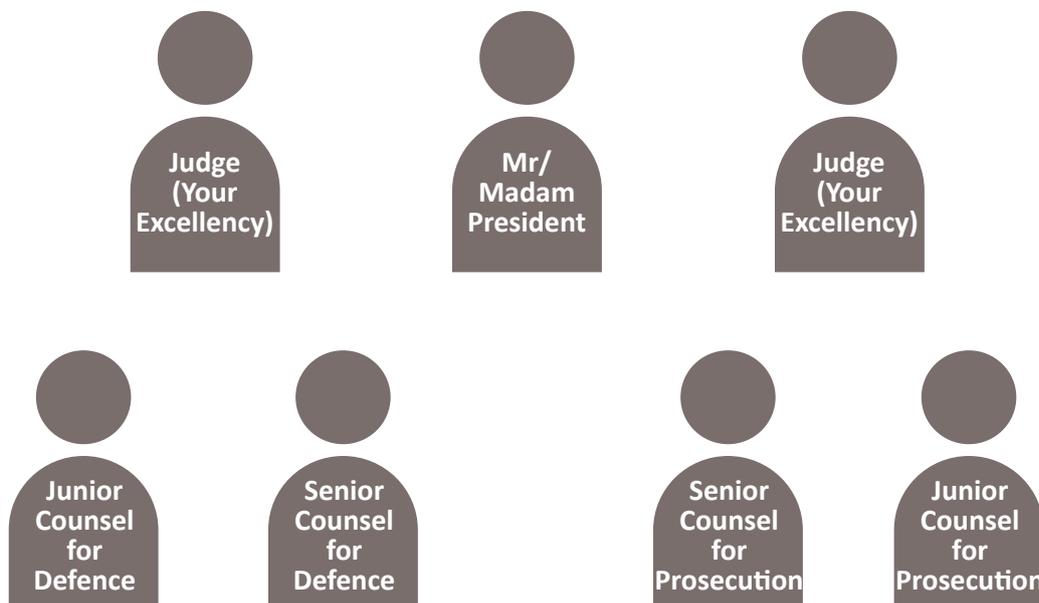
As with other moots, good use of case law can determine the outcome of an IHL moot. Often the IHL moot question will raise issues analogous to those considered in previous judicial decisions. Your job is to apply the case law to the facts persuasively, by drawing out the similarities and distinctions between the cases in a way that favours your argument.

In international law, judicial decisions are not a formal source of law, and are not binding precedent in the common law sense. They are, however, of persuasive value and can be regarded as evidence of the law. This said, it is important to note that international judicial decisions are based on their constituting statute, so the interpretation of analogous principles might turn on different language. This is relevant, for example, in the standard required to establish command responsibility, as the language used in the Statutes of the ICTY and ICTR differs from that in the Rome Statute.

It is important to consider unfavourable authorities as well as favourable ones. Sometimes you will be able to distinguish unfavourable authorities on their facts. If not, it can help to remind the Court of the non-binding nature of such decisions before reiterating your case.

Your day in court

As with other moots, you should dress and behave professionally for the IHL moot. Ensure you leave time before your moot to get settled in the courtroom. The prosecution generally sits to the right of the courtroom when you are facing the bench (on the judges' left). The defence team generally sits to the left of the courtroom when facing the bench (on the judges' right).



You should treat all judges and mooters respectfully and use relatively formal language, as would befit a real court. Judges in international courts are generally referred to as ‘Your Excellency’, with the presiding judge being Mr or Madam President. You may refer to your co-counsel as ‘my learned junior/senior’, and opposing counsel as ‘my learned friend’ or ‘senior/junior counsel for the defence/prosecution’.

Remember that all the judges will have a say in the outcome regardless of their loquacity, so try to share your eye contact between them equally.

Giving appearances and beginning your moot

At the beginning of the moot senior counsel for the prosecution and defence may be invited to give appearances. This involves senior counsel standing up and saying something along the lines of ‘May it please the Court. My name is Ms Jones, and I appear for the prosecution, together with my learned junior, Mr Smith. Mr Smith and I will each be speaking for 15 minutes.’ The senior counsel for the defence will then follow suit. Senior and junior counsel for the prosecution will deliver their case, then senior and junior counsel for the defence will have their turn. In some competitions, teams may reserve time for rebuttal and surrebuttal – check the relevant IHL moot rules for whether there is a right of reply.

When it is your turn to make submissions, you can stand at your bar table or the lectern until the judges indicate that they are ready to hear from you. It is courteous to wait until the bench is ready for you to speak before you commence your moot. Remember that first impressions count, so if you can deliver your opening with confidence and clarity, you are off to a good start.

Start your submissions with a broad statement about your case (e.g. ‘This case concerns the criminal conduct of General Brisbane, who ordered the unlawful deployment of a nuclear warhead’). It helps the bench if you then briefly set out your arguments at the start of your submissions (e.g. ‘The prosecution will first argue that the deployment of the nuclear warhead violated Article 35 of the Additional Protocol and Article 3 of the statute of this honourable Court. Second, we will argue that General Brisbane is criminally responsible for the conduct under Article 7 of this Court’s statute as he ordered the deployment of the weapon’). Try to structure your arguments logically, and speak slowly and clearly so the bench can follow the structure of your moot. You should not exceed three submissions per mooter (though remember that each submission might have sub-points). It might help to remember that as the prosecution, you need to establish the elements of the crime. As defence, you need to raise reasonable doubt as to one or more of the elements. Generally speaking, as defence counsel it is best not to concede that an offence occurred or that the accused was responsible for the conduct.

Questions from the bench

This is your chance to shine! It is relatively easy to deliver a prepared speech, but answering questions with confidence and mastery of the facts and law will set you apart. Here are a few tips to help you deal with questions from the bench.

First, listen carefully to the question, and ensure you answer the question the judge is asking. You might wish for a different question, but it is important to deal with the judge’s question before addressing the material you have prepared.

Second, questions present an opportunity to persuasively apply the law to the facts. Sometimes all that is needed is a persuasive iteration of the facts favouring your argument.¹ If you have favourable case authorities up your sleeve, take the chance to draw them to the Court’s attention.

Third, although it is important to respond respectfully to judges’ questions, remember that this is your moot! Once you have addressed the judge’s question,

The 16th annual All Africa International Humanitarian Law Competition witnessed a total of 11 teams from 9 African countries.
CC BY-NC-ND / ICRC / Mike Mina



you are free to proceed. Segueing smoothly back to your material will convey a sense of control. Avoid asking the bench questions (e.g. ‘can I continue with my first submission?’) rather, state your intentions (e.g. ‘returning to my first submission, ...’). The ability to move around your submissions is important to ensuring you stick within your allocated time.

Finally, adopt a welcoming attitude towards questions. Judges enjoy interacting with engaged counsel, and you will enjoy the moot more if you come willing to persuade the court on the trickier issues.

The IHL moot provides an invaluable gateway to a world of interesting and topical issues. Your participation might prove the first encounter in a long and fulfilling career in IHL, or it might simply provide a backdrop to your daily life in law or elsewhere. Either way, the advocacy skills, knowledge and experience the IHL moot provides will prove an asset long beyond your day in court.

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- 1 Sometimes State A or State B may be substituted for non-state armed group A and/or B, giving rise to a non-international armed conflict. As will be discussed below, this has significant implications.
 - 2 Rome Statute, art 8.
 - 3 Whether the prosecution needs to establish the existence of an international or non-international armed conflict will depend on the crime with which the accused is charged.
 - 4 See e.g. *Prosecutor v Tadic* (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT-94-1-AR72 (2 October 1995), para. 143; *Prosecutor v Martić* (Judgement, Trial Chamber), Case No IT-95-11-T (12 June 2007), paras 40-44.
 - 5 See e.g. *Prosecutor v Kunarac* (Judgment, ICTY Appeals Chamber), Case No IT-96-23 & IT-96-23/1-A, (12 June 2002), paras 57-59.
 - 6 *Prosecutor v Tadić* (Defence Motion for Interlocutory Appeal on Jurisdiction), Case No IT-94-1-AR72 (2 October 1995), para 143.
 - 7 The Rome Statute *Elements of Crimes* and the ICRC Commentaries to the Geneva Conventions and Additional Protocols (both available online) may assist in this respect.
 - 8 Just remember that the facts are settled as per the question; don't go beyond the established facts or ask the court to make assumptions which are not founded on (or necessarily inferred from) the facts provided.

Preparing Written Submissions

Angus Macinnis

Written advocacy and oral advocacy are two different modes of transport travelling in the same direction; namely, towards the persuasion of the person to whom the advocacy is directed. In mooting, this means persuading the judges that the prevailing team should be yours. If your opponents' written submissions are noticeably better than yours, the judges are likely to go in to the moot with the (conscious or unconscious) persuasion that your opponents are better mooters than you are. That persuasion is not impossible to shake, but it is not what you are aiming for.

The preparation of written submissions also provides the framework within which you research the legal issues that arise from the moot question, select and arrange your arguments. Accordingly, the techniques of persuasive argument construction, which you will employ in the moot itself, will also need to be employed in the written advocacy phase if your oral submissions are to be persuasive. In other words, if you cannot clearly express your submissions in writing you may not be able to do so orally.

Read before you write

The first step is to read the problem carefully and make sure that you understand all the facts. *You cannot hope to argue the law if you do not understand the facts.* During the course of your preparation for the moot, you should continuously read and re-read the facts. You need to know the facts better than your opponents do, and better than the judges do. Preparing a chronology can be a good starting point.

If the problem is voluminous, you also need to be able to locate relevant facts quickly (whether by reference to page number or paragraph, depending upon the way that the question is formatted). Having a good command of the facts of the problem (by knowing both what the facts are, and where to find them) will help you to avoid pitfalls during the moot, and will create a sense of assured competence which makes the other parts of your presentation more impressive.

When reading the problem, ask yourself why the person who wrote the problem has included each particular fact or detail – what issue does it go to and what might it be used to prove? Not every fact in a moot problem is of critical importance; some will be mere scene setting and others may be deliberately designed to throw you off course. However, most of the content of a well-written moot question is there for a good reason. If you can work out the reason for the inclusion of each fact, that will help you to analyse the question. It is also important to consider what facts are *not* apparent from the question. Sometimes, the omission of particular facts will be deliberate. In other cases, it will simply be a by-product of the fact that a moot problem can never contain every conceivable fact that might be available to you if you were dealing with the problem in real life. You should avoid submissions that cannot fairly be refuted by your opponents because the necessary facts that would be needed are missing from the problem.

Finally, read the Moot Rules carefully before you do anything else. Each member of the team needs to understand the Rules. You should focus on rules relating to the length and format of written submissions (so that when you begin to write, you put down your words in accordance with the Rules) and the extent of any outside assistance that the team is allowed to receive (so that you do not inadvertently obtain prohibited assistance).

Students from the Harvard Law School team prepare for their next round
Joe Gibson/American Red Cross



Prepare before you research

Having understood the facts, you should be able to start isolating and analysing the contentious issues. Sometimes, these will be set out in the question (for example, in the form of indictments). In other cases, you will need to work them out for yourself.

To provide a framework for the written submissions, it is often helpful for the team to start by preparing a draft skeleton of the arguments. The skeleton will almost certainly change as the argument develops. However, you should start with a document that, even if in rough form, sets out everything that needs to be proved for your side of the argument to establish its case. You should also set out the sub-points that need to be established to make good each primary point (including, for example, any alternative submissions).

As well as ensuring that you do not miss any points, a good skeleton should prevent you from wasting time by researching issues that are not directly related to things you need to prove. If you find yourself writing paragraphs which don't seem to have an obvious home in the skeleton, it's likely be that you have gone off on a tangent. Stop what you are doing and do something else.

The skeleton will also allow you to divide the arguments amongst your team and hopefully identify any significant opposing arguments. This skeleton will also give you an indication of how many pages you are likely to need for each issue in your written submissions. The IHL Moot allows for only five pages of written submissions. If your skeleton contains four submissions that you need to establish, and the first submission has three sub-points, you should not write three pages on the first sub-point.

Researching the question

The first step in your researching process will be to establish the Court in which the moot is taking place – the IHL Moot usually takes place in the International Criminal Court (ICC). The identification of the Court is important because you are then able to identify the sources of law that are persuasive in that Court.

The ICC is not, of course, the High Court of Australia or the International Court of Justice (ICJ). This does not mean that decisions of the High Court or the ICJ will be irrelevant to your research. However, the question must always be *“How likely is it that the Court will regard this authority as being one which will guide the Court towards the correct outcome?”* The higher the likelihood, the more likely it is that the authority is worthy of your research time.

In an age where Google and specialist databases put enormous amounts of information within easy reach, mooters are often tempted to dive into a vast ocean of material trying to find the one point that will win the decisive victory. This is rarely a good way to start.

A better starting point will be the leading text or texts in the area of law that you are considering. You are looking for practitioner texts, as distinct from student texts (although student texts can be very helpful, because they will point you in the direction of the leading practitioner texts, and will often give you a simple introduction, which will help you to better understand the information in the practitioner texts). The ability to identify the leading texts, and to use them effectively, will save you a lot of time in your research. Leading texts will point you to the leading authorities, which in turn will point you to other authorities, which may point you to less well-known texts or articles, and so on. It is important to ensure that you start at the heart of the matter and work your way outwards. If you have not identified the heart of the matter before you start, you may end up missing it completely. Equally, by starting with the leading texts you are likely to pick up the names of cases, or particular experts in the area, or distinctive words that will allow you to better focus your keyword searches when you return to the databases (or to Google).

The efficient direction of your research also requires constant attention to the overall structure of your case, and to the propositions you need to establish in the case. There is little utility in trawling through a big pile of cases, looking for some passages that will support your arguments, until you have first worked out what those arguments are going to be. You will not find the passages if you do not know, or if you are not able to say precisely, what you are looking for.

How much authority do you need in your written submissions?

At some point, you will have to stop researching and start writing. The short answer to “how many authorities do you need?” is “no more than are necessary to prove what you need to prove”. That requires you to return to the question of how persuasive each authority is likely to be. One strong authority will always trump an accumulation of weak ones.

The Rules of the IHL Moot require you to include in your written submissions all of the authorities on which you wish to rely during the moot. However, you should resist the temptation to submit “paper bomb” written submissions; that is, to list a huge number of authorities (to which you do not intend to refer during the moot) in the hope of confusing your opponents. If a judge asks you a question about an authority in your written submissions and you cannot explain the relevance of the authority, this will not go well for you.

Of course, this does not mean that you will refer to every authority in your written submissions during the moot; some authorities will be included to answer a question you might have anticipated but which never comes. However, unless the authority provides a passage or a principle you are likely to cite, leave the authority out of your written submissions and save the space for your stronger points.

Constructing effective arguments

Once you have gathered the authorities, which are most likely to persuade the Court to reach the decision that your side of the case requires to succeed, you will then need to start constructing arguments. The construction of effective mooting arguments will generally be a three-stage process:

Firstly, set out clearly and concisely the proposition that you want the Court to adopt;

Secondly, set out why the Court should adopt the proposition (that is, why that proposition is correct).

This is the “meat” of the argument where your authorities, your reference to the relevant facts, your policy considerations and other relevant matters come into play;

Thirdly, set out the consequence for your case if the Court adopts the proposition.

If your arguments are arranged in this way (and in particular, if the third “consequence” step is clearly explained) then the judges will be able to see where your arguments are going. This means that the judges will understand, well before they ever meet you, the reasoning process in your oral submissions. That will make those judges receptive to your oral advocacy when you employ the same argument construction process in the moot. It will also encourage them to follow you in the direction in which you are travelling – that is, towards victory for your side of the argument

Formatting the document to enhance the arguments

Mooters are often tempted, when faced with a page limit of five pages, to format their submissions to fit as many words as possible into the space allowed. However, a much better approach is to format the submissions in a way that allows for as much understanding as possible into the space allowed. You can say more by saying less, especially if, by saying less, you have the space to say it in a way that is easier to follow.

This means using numbered headings (which reflect the propositions that you want the Court to adopt). In most cases, you will need levels of headings,

Judges deliberating their scores.
Joe Gibson/American Red Cross



so that it is possible for the reader to distinguish between the second proposition and the first sub-point of the first proposition. Underneath each heading, the content of each paragraph should support the heading directly above it so that the argument flows, irresistibly, to the conclusion that you want the Court to adopt. A reasoning process that is irresistible does not need to be a reasoning process that is shorn of sophisticated arguments; but simplicity ought to always be preferred over intricacy.

Finally, allow time for editing (and for re-reading, and checking your compliance with, the Moot Rules). It was no less an authority than Albert Einstein who observed that if you cannot explain a thing simply, you do not understand the thing well enough. There is no record of Einstein ever having mooted, but the observation is apposite to mooting (and to advocacy more generally). If your written submissions are to explain the detailed legal knowledge you have acquired, they must explain it in a way which is simple – and in a way that is persuasive to those who have less knowledge than you, as well as to those who have a great deal more.

Preparing for Your Day in Court

Angus Macinnis

It is often said that the five key requirements for successful advocacy are preparation, tact, preparation, knowledge of the law, and preparation (roughly in that order). In researching your written submissions, you should have acquired knowledge of the law. Teaching tact (if you have not yet acquired it) is beyond the scope of this work, so that leaves the remaining requirements of preparation, preparation and preparation.

One of the key aspects of preparation is the identification and arrangement of the most compelling arguments available to you. Arranging arguments effectively means determining the amount of time to be devoted to each argument and determining how the arguments fit together so they are presented in a logical way. You will also need to make decisions about what you take into the moot (in terms of your notes, and the authorities on which you wish to rely) and you will need to practice your submissions once these decisions have been made. This chapter will deal with each of these aspects of preparation.

Assembling the arguments

The first step is to look at the number of arguments you need to make in order for your case to succeed. The next step is to look at the amount of time you have, and to assess the approximate amount of time allowed for each argument. This will require you to weigh up the strength and priority of arguments – a task that would be simplified if you have already started to consider these questions in the preparation of your written submissions.

In a moot, you are unlikely to have enough time to run all of your good arguments. It follows that you most certainly do not have time to run any bad arguments. It is always better to have a small number of clear, well thought out and well-argued points than to attempt to gallop through a large number of disparate arguments. Equally, if you have a number of alternative ways to establish a particular proposition, it is important to identify which alternative is your best point, so that the best point is put first (and so that time is not wasted on lesser points when it could be better spent on stronger points).

If you want the judges to make a decision that favours your side, then the first step is to make it as easy as possible for the judges to adopt your view. Judges will adopt arguments more easily if they are constructed out of a series of discrete propositions, rather than being an amorphous chunk of stream-of-consciousness discourse. The three-step argument construction process (proposition, then body of argument supporting proposition, then consequence of proposition), discussed in the previous chapter, is a useful tool for making it clear to judges where one submission starts and another ends, especially when the consequence is clearly explained at the conclusion of the submission.

Although the process of explaining the steps in an argument is usually described as “signposting”, perhaps a better metaphor is that of stepping stones in a river – your arguments should move from one stone, to the next, and then to the next, and so on. If you are trying to get across the river by taking a single flying leap, it is likely that you will get wet, and if you are trying to communicate a legal argument by running all its parts together at once, it is likely that you will be similarly unsuccessful. The process of signposting is something you will need to do in the moot itself, but it will be much easier to do if you have constructed your arguments in a way that allows them to be easily explained. If you have not constructed your arguments in a logical way, then it will be impossible to explain them logically when you are on your feet in the moot.

Once you have assessed and arranged the arguments, you should then be able to start putting your speech together. That will require you to consider how you record your speech in writing (and how you want to use that written record in the form of notes during the moot) and how you want to use authorities.

A note on the use of notes

It is generally inadvisable to go into a moot without any notes at all – there is great risk on the downside and not much reward on the upside. In particular, if you are the respondent, it will be almost impossible to remember all of the points to which you wish to respond unless you have made a note of those points.

Equally, however, it is generally inadvisable to go into the moot with a full script, no matter how much of a safety net this may appear to provide. With a full script, you will be tempted to read to the judges (which is a bad thing, because you cannot engage with the judges while your head is down in your notes). A full script will also make it difficult to respond to questions effectively, and on the respondent side, will limit your ability to respond to what your opponents have said.

However, there are some mooters who feel more comfortable with a full script, and ultimately, the key is to find a method which works well for you. If you must use a script, try to mark your headings clearly (and in large type) so that they become, in effect, bullet points. That approach should give you the necessary confidence to deliver your submissions without the script becoming a barrier to communication between you and the judges you must persuade.

One very effective technique is to use a double page of a spiral bound A4 notebook, with one page containing your own written arguments and on the other page the arguments for the other side. This is particularly effective if you are the respondent – by drawing lines joining your opponents' arguments on a particular issue with your own, you can integrate the rebuttal of those arguments with your own positive arguments.

In many cases, handwritten notes are a better bet than a typed script. A good test of whether you know your submissions well enough is whether you can write out from memory (as opposed to copying from another piece of paper) the main propositions and sub-points that you wish to make. If you cannot do that, you need to direct your energies to inserting the necessary material into your brain rather than inserting additional polish into a word-perfect script, which the judges will never see.

Some mooters think that having a script is an indication of good preparation, because they have carefully worked out exactly what they want to say and reduced it to writing. In fact, the opposite is true; good preparation is demonstrated by the ability to throw your script to the wind and speak for 25 minutes off a single sheet of paper. Judges who are being read to are likely to become increasingly annoyed, but by contrast, judges who feel at the end of your submissions that they have just taken part in a spontaneous and engaging conversation with you are likely to score you highly.

Using authorities

Some moot competitions do not allow for materials to be handed up to the judges; others may allow judges to request a copy of the cited authority. In competitions like the IHL Moot, which do permit materials to be handed up to the bench, you will need to consider how you want to use those materials to emphasise the best points in your argument. Of course, to do that you will need to ensure that you go into the moot with enough copies of those materials to ensure that there is one for each of the judges and at least one for your opponents.

A passage in an authority which is particularly good for your case will make more impact on a judge if the judge is able to read the passage from the materials which you have handed up while you read it aloud. The judges can also satisfy themselves that you are not quoting out of context (which, of course, you should not do). However, because mooting is about the application of the law to the facts, it is unlikely that submissions, which are merely a series of quotes strung together, will be effective.

Equally, there is a time trade-off in taking judges to passages in authorities, because you should never continue your submission, even to the extent of reading out the quotation, while a judge is leafing through the materials searching for your reference. A judge who is leafing will not be listening to you, or taking in the substance of your devastatingly powerful authority. You must always wait for all judges to locate the reference before you continue, and that takes up precious time. You can reduce the amount of time taken by having the material clearly tabbed in the folder (and by giving the judges pinpoint references to where you want them to go) but there will always be a loss of time, which you could otherwise use for submissions.



Frits Kalshoven Competition 2014, final round /
© Netherlands Red Cross

Therefore, in deciding whether to use a quote, the question is to what extent the quote will support the proposition that you are trying to persuade the Court to adopt. That is, consider the issue in terms of a trade-off – is the value of taking the judges to the passage, and having the judges read the passage for themselves, greater than the value of the time you will lose while the judges find the passage? Obviously, it is more likely that the answer will be “yes” where the passage supports an argument which is crucial to the overall success of your case (or which meets what you anticipate to be your opponents’ best point) than for an argument which is merely a lesser alternative submission.



Panda Hotel, Hong Kong. Every available minute is precious to the mooters, so they use the time spent waiting for the bus to read and prepare in the hotel foyer. © ICRC / J. Sison

Practice makes perfect (or, at least, better than before)

Once you have worked out the arguments you want to run, and how you want to record them in your notes, the next step is to practise, and then to practise some more. In the days before nearly all of us carried a video camera in our pockets, mooters were often advised to practise in front of a mirror. Although this remains good advice, it is almost always preferable to practise while filming yourself, for at least four reasons:

- First, the mirror tends to make you self-conscious, because you will be focusing on the mirror rather than on what you are doing. You want to be self-aware, not self-conscious – the two are not the same;
- Secondly, although both the mirror and the smartphone will allow you to see yourself as others see you, a smartphone recording will also allow you to hear yourself as others hear you;
- Thirdly, the smartphone will give you a record which can be viewed by your team mates and or your coach; and
- Fourthly, if you have any repetitive mannerisms (especially distracting mannerisms, such as swaying from side to side) you will be able to diagnose these very quickly by playing the recording back at high speed.

The aim of the practice is to build confidence and to eliminate nerves – no one can stop you from being nervous by telling you to stop being nervous. Rather, what will stop you from being nervous is the confidence of knowing what you are doing and the confidence that you are able to project to the judges the fact that you know what you are doing.

The best way to sound like you know what you are talking about is to actually know what you are talking about, which comes back to the quality of the legal argument that you have researched and prepared. Your preparation process may show up as gaps in your legal argument, in which case, fill them. It is obviously much better to confront any gaps in your case during preparation for the moot than to discover those gaps for the first time when you are on your feet in the competition.

Remember as you practise that the point of the moot is to be persuasive. Consider also that judges are more likely to be persuaded by someone they like than someone they do not like. In a mooting context, being “likeable” does not mean presenting the judges with gifts beforehand; instead, it means demonstrating to the judges that you can be relied upon to assist them in reaching the right decision.

If the content of your legal argument creates the impression that you know what you are talking about, and your arguments are organised in a way that is easy to follow and then presented in a manner that is easy to listen to, you will make it as easy as possible for the judges to like your team. This will also (and this is no coincidence) make it as easy as possible for the judges to award your team the moot.



IHL in Focus

part 05.

Sexual violence in armed conflict

Melanie O'Brien

Sexual violence has a long history as a weapon of war and being used during mass atrocities such as crimes against humanity and genocide.¹ While men are also subject to sexual violence,² the majority of victims of sexual violence committed during mass atrocities are women, particularly in relation to sexual violence crimes.³ Hence it is crucial to be aware of gender when dealing with this area of law. This means recognising the disparate impact of atrocities on men versus women, which manifests in specific victimisation targeted by gender, and being sensitive to the needs and experiences of victims which differ between women and men.⁴ That is, women are targeted because they are women and as such are representative of the nation through their ability to reproduce, but are also perceived as either caregivers (mothers) or whores (sexual objects), and overall, as weak victims. In contrast, men are seen as strong protectors and fighters, where raping of women can be carried out to demonstrate the lack of ability of the enemy's men to 'protect' their women.

Prohibition under International Humanitarian Law

Under international humanitarian law (IHL), the relevant law is as follows:⁵

- Common Article 3 of the Geneva Conventions proscribes outrages upon personal dignity, in particular humiliating and degrading treatment.
- APII fundamental guarantees prohibit 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.⁶
- Fundamental guarantees in AP I do not expressly include rape: 'outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault'.⁷

Other provisions focus on women's 'honour', rather than on the crime as a violation of the victim's sexual autonomy:

- Article 27 of GCIV: 'Women shall be especially protected against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault'.
- AP I: 'Women shall be the object of special respect and shall be protected in particular against rape, forced prostitution and any other form of indecent assault'.⁸

This phrasing is highly problematic. Firstly, it renders rape gender-specific; the crime must be gender neutral in order to provide justice for male victims. Secondly, positioning rape as a crime of 'honour' does not recognise the true impact of rape on its victims, placing rape as about reputation rather than bodily and sexual autonomy and integrity. This imagining of rape as a crime of 'honour' throughout history has led to women's experience of sexual violence being under-represented and ignored, and women in many communities being shamed or ostracised for having been raped. Hence, when dealing with sexual violence, it is important to not position sexual violence as a crime of 'honour', but one that has a significant impact physically and emotionally on victims.

Accountability

Despite regulation under IHL, crimes of sexual violence have long been committed with impunity. The long-term and devastating impact of sexual violence on women and their community exposes the need for prosecution of the perpetrators of such violence. Notwithstanding the widespread commission of sexual violence in Europe and Asia, sexual violence committed in World War II went unpunished.⁹

With the establishment of international and hybrid criminal courts and tribunals in the late 20th Century, criminal accountability for sexual violence in mass atrocities increased, resulting in significant development of definitions of crimes of sexual violence. This is important because definitions of individual sexual offences vary extensively between domestic criminal jurisdictions.

Rape

A number of cases in the ad hoc tribunals developed jurisprudence on sexual violence, particularly rape.¹⁰ *Akayesu* was the first international case to address rape, with the International Criminal Tribunal for Rwanda (ICTR) creating a definition of rape and sexual violence in international criminal law:

[V]ariations on the form of rape may include acts which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual... rape is a form of aggression... the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts... Like torture, rape is used for such purposes as intimidation, degradation, humiliation, discrimination, punishment, control or destruction of a person. Like torture, rape is a violation of personal dignity, and rape in fact constitutes torture when it is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity... The Tribunal defines rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The Tribunal considers sexual violence, which includes rape, as any act of a sexual nature which is committed on a person under circumstances which are coercive.¹¹

The Čelebići Trial Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY) declared: ‘[t]here can be no doubt that rape and other forms of sexual assault are expressly prohibited under international humanitarian law’.¹² In 2001, the Foča Trial Chamber settled on this definition:

the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or (b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim. Consent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.¹³

In international law, the definition of rape centres on non-consent rather than force. Armed conflict is considered an inherently coercive circumstance.¹⁴

Rape has also been determined to constitute torture.

Sexual Slavery

Sexual slavery occurs frequently in armed conflict. The two main elements of sexual slavery are ownership or deprivation of liberty, and imposition of sexual acts. The ICTY had difficulty addressing this crime, as it is not in the ICTY Statute. Consequently, sexual slavery was charged as enslavement, rape, outrages upon personal dignity, and torture, (as war crimes and crimes against humanity). It was held that ‘enslavement as a crime against humanity in customary international law consisted of the [intentional] exercise of any or all of the powers attaching to the right of ownership over a person’.¹⁵ The ICTY noted that indications of enslavement include sex and prostitution, and enslavement can be determined through, *inter alia*, control of someone’s movement; psychological control; force, threat of force or coercion; assertion of exclusivity; subjection to cruel treatment and abuse; control of sexuality; and forced labour.¹⁶

Sexual slavery is a crime under the Rome Statute: ‘The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty’ and ‘caused such person or persons to engage in one or more acts of a sexual nature’.¹⁷

The *Katanga and Chui* Pre-Trial Chamber determined: ‘a particular parameter of the crime of



Photo: ICRC

sexual enslavement- in addition to limitations on the victim's autonomy, freedom of movement and power' is the restrictions placed on a person's ability to decide matters relating to his or her sexual activity; and that this violates 'the peremptory norm prohibiting slavery'.¹⁸

Other Sexual Violence

Other sexual violence crimes have been addressed by the courts and tribunals, resulting in a broad definition of sexual violence:

'all serious abuses of a sexual nature inflicted upon the physical and moral integrity of a person

by means of coercion, threat of force or intimidation in a way that is degrading and humiliating for the victim's dignity'.¹⁹ 'Sexual violence is not limited to physical invasion of the human body and may include acts which do not involve penetration or even physical contact...'²⁰ Coercion is a material element, but what constitutes the sexual violence itself is not subject to a limited definition, and will depend on the particular circumstances of a case. Examples constituting sexual violence have included forced nudity and forced naked activity (such as dancing or gymnastics), sexual mutilation, forced abortion, sexual molestation,²¹ and biting and kicking of the genital area.²²

Forced Marriage

Another significant form of violence that has been discussed within the sphere of sexual violence is forced marriage. Forced marriage is not prohibited under IHL, nor does it appear as a crime under any of the international criminal courts and tribunal statutes. However, forced marriage was pervasive during the armed conflict in Sierra Leone and in Cambodia under the Khmer Rouge, so the Special Court for Sierra Leone (SCSL) and the Extraordinary Chambers in the Courts of Cambodia (ECCC) addressed the crime. Conflicting SCSL jurisprudence placed forced marriage as the crime against humanity of sexual slavery or under 'other inhumane acts'.²³ The ECCC charged under the crime against humanity of 'other inhumane acts'.²⁴ Forced marriage may be but is not necessarily sexual in nature, rather is focused on the relationship of exclusivity. Thus, it is advised not to consider this sexual violence; instead situate it under 'the crime against humanity of 'other inhumane acts', or the war crime of 'outrages upon personal dignity'.²⁵

Challenges of Prosecuting Sexual Violence

In addition to the crimes of sexual violence listed here, other crimes such as forced pregnancy and enforced prostitution may arise. There is limited jurisprudence to guide definitions of these crimes. Part of this reason is that these crimes do not appear in the statute of the *ad hoc* international criminal courts and tribunals; something that is a problem more generally for sexual violence, as shown above with regards to sexual slavery.

While the focus of the IHL moot is on war crimes, it is also important to remember the role of sexual violence in other categories of mass atrocities, which may overlap and thus enable these crimes to be charged as war crimes and crimes against humanity and/or genocide. For example, rape is often committed as a crime of genocide, and has been recognised as such by the ICTR.²⁶ As genocide, rape aims to either render the victim unable to reproduce (thereby preventing future generations of the targeted group), or to impregnate the women with a child of the perpetrator group, in so doing passing on the father's ethnicity, race, nationality or religion.²⁷

Crimes of sexual violence can be challenging to prosecute. Despite the widespread commission of these crimes, prosecutors in the past have avoided prosecuting sexual violence because it is predominantly a crime committed against women; therefore, seen as simply 'part of war' and not important enough to prosecute. Only after the push by women-focused NGOs and certain judges of the international criminal courts and tribunals in the 1990s did sexual violence come to be recognised and punished. Another challenge is obtaining evidence. Atrocity crimes are not prosecuted immediately following their commission, therefore the traditional forensic evidence of rape



A victim – veiled to protect her identity – testifies before the closed military tribunal. © Diana Zeyneb Alhindawi

is generally not available. Evidence of rape relies on victim and witness testimony. This can be difficult to obtain: many victims do not wish to speak publicly about their experience, which is obviously extremely traumatic and personal. Further, many women are shamed and ostracised by their communities for being raped, as such conduct is seen as engaging in sexual activity outside of marriage. For these women, giving testimony results in a second victimisation.²⁸

One positive advancement in international criminal law is that victims of sexual violence are not vilified on the stand, as they have been for many years in domestic courts. In addition to the recognition of coercive circumstances and move away from focus on force, this includes such policy as they are to be treated with respect; the assumption that they are truthful; and they cannot be badgered or asked about what they were wearing.²⁹

- 1 Susan Brownmiller, *Against Our Will: Men, Women and Rape* (London: Secker & Warburg, 1975); Alexandra Stiglmeier, ed. *Mass Rape: The War against Women in Bosnia-Herzegovina* (Lincoln and London: University of Nebraska Press, 1994).
- 2 Maria Eriksson Baaz and Maria Stern, 'The Complexity of Violence: A Critical Analysis of Sexual Violence in the Democratic Republic of Congo (DRC)', (Uppsala: SIDA and Nordiska Afrikainstitutet 2010) 43-47; Dustin Lewis, 'Unrecognized Victims: Sexual Violence against Men in Conflict Settings under International Law', (2009) 27(1) *Wisconsin International Law Journal*; Sandesh Sivakumaran, 'Sexual Violence against Men in Armed Conflict', (2007) 18(2) *European Journal of International Law*; Sandesh Sivakumaran 'Lost in Translation: UN Responses to Sexual Violence against Men and Boys in Situations of Armed Conflict', (2010) 92(877) *International Review of the Red Cross*.
- 3 Helen Durham and Katie O'Byrne, 'The Dialogue of Difference: Gender Perspectives on International Humanitarian Law', (2010) 92(877) *International Review of the Red Cross*.
- 4 Catherine A MacKinnon, 'Rape, Genocide, and Women's Human Rights', (1994) 17 *Harvard Women's Law Journal*, 8.
- 5 See also Rule 93 in Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law Volume I: Rules* (Cambridge: Cambridge University Press, 2005).
- 6 APII, art 4(2)(c); API, art 75.
- 7 API, art 75(2)(b).
- 8 API, art 76(1) Protection of Women.
- 9 Only peripherally did sexual violence enter any trials, through command responsibility: *Soemu Toyoda*, United States, US Military Tribunal sitting in Tokyo, 6 September 1949, Official Transcript of Record of Trial, 4998-5007; *Iwane Matsui*, International Military Tribunal for the Far East, November 1948 at 453-4; In re Yamashita (1945) 327 US 1.
- 10 *Prosecutor v. Akayesu*, 2 September 1998, Trial Judgement, ICTR-96-4-T; *Prosecutor v. Delalić et al. (Čelebići)*, 16 November 1998, Trial Judgement, IT-96-21-T; *Prosecutor v. Furundžija*, 10 December 1998, Trial Judgement, IT-95-17/1-T; *Prosecutor v. Kunarac et al. (Foča)*, 22 February 2001, Trial Chamber Judgement, IT-96-23-T & IT-96-23/1-T; *Prosecutor v. Semanza*, 15 May 2003, Judgment and Sentence, ICTR-97-20-T; *Prosecutor v. Gacumbitsi*, 17 June 2004, ICTR-2001-64-T, Trial Judgement; *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), 20 June 2007, SCSL-2004-16-PT, Trial Judgement; *Prosecutor v. Sesay, Kallon and Gbao* (RUF Case), 2 March 2009, Trial Judgement, SCSL-04-15-T.
- 11 *Akayesu*, Trial Judgement, paras. 686-688. The Trial Chamber found that forcing a young girl to do gymnastics naked in front of a crowd constitutes sexual violence; para 688.
- 12 *Čelebići*, Trial Judgement, para. 476.
- 13 *Foča*, Trial Judgment, para. 460.
- 14 *Akayesu*, Trial Judgement, paras. 686-688; Final Report of the Special Rapporteur of the Working Group on Contemporary Forms of Slavery, on systematic rape, sexual slavery and slavery-like practices during armed conflict, UN Doc. E/CN.4/Sub.2/1998/13, 22 June 1998, para. 25.
- 15 *Foča*, Trial Judgement, para. 540.
- 16 *Ibid.*, paras. 542-3. See also *Prosecutor v. Germain Katanga*, 7 March 2015, Jugement rendu en application de l'article 74 du Statut, ICC-01/04-01/07, paras. 975-8 (ibid in English trans.).
- 17 Rome Statute, arts 7(1)(g), 8(2)(b)(xxii), 8(2)(e)(vi), as a crime against humanity and a war crime. The ICC Elements of Crimes should always be consulted. With regards to sexual slavery, the Elements of Crimes also make reference to the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956, and include human trafficking under the rubric of sexual slavery. This inclusion of human trafficking is problematic; see Melanie O'Brien, "'Don't Kill Them, Let's Choose Them as Wives': The Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law", (2016) 20(3) *The International Journal of Human Rights*.
- 18 *Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, 30 September 2008, Decision on the confirmation of charges, ICC-01/04-01/07, paras. 431-2. For further examples on right of ownership, see *Katanga*, Jugement en l'article 74, paras. 975-8.
- 19 *Furundžija*, Trial Judgement, para. 186.
- 20 *Akayesu*, Trial Judgement, para. 687.
- 21 *Prosecutor v. Kvočka et al.*, 2 November 2001, Trial Judgement, IT-98-30/1-T, para. 180 (fn. 343).
- 22 *Prosecutor v. Todorović*, 31 July 2001, Sentencing Judgement, IT-95-9/1-S, paras. 38 and 66.
- 23 *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), 20 June 2007, SCSL-2004-16-PT, Trial Judgement; *Prosecutor v. Brima, Kamara and Kanu* (AFRC Case), 22 February 2008, SCSL-2004-16-A, Appeal Judgement; *Prosecutor v. Sesay, Kallon and Gbao* (RUF case), 2 March 2009, Trial Judgment, SCSL-04-15-T; *Prosecutor v. Charles Ghankay Taylor*, 18 May 2012, Trial Judgement, SCSL-03-01-T.
- 24 *Prosecutors v. Chea et al.*, 4 April 2014, Trial Chamber Decision, Decision on Additional Severance of Case 002/02 and Scope of Case 002/02, Case 002/02, 002/19-09-2007-ECCC-TC. Cases 003 and 004 will also include charges of forced marriage.
- 25 Despite the distinct connection to the armed conflict in Sierra Leone, forced marriage has not yet been tried as a war crime. The jurisprudence on forced marriage is highly convoluted; see Melanie O'Brien, "'Don't Kill Them, Let's Choose Them as Wives': The Development of the Crimes of Forced Marriage, Sexual Slavery and Enforced Prostitution in International Criminal Law", (2016) 20(3) *The International Journal of Human Rights*.
- 26 *Prosecutor v. Akayesu*, 2 September 1998, Trial Judgement, ICTR 96-4-T, paras 731-734.
- 27 Chile Eboe-Osuji, 'Rape as Genocide: Some Questions Arising', (2007) 9(2) *Journal of Genocide Research*, 251; Claudia Card, 'The Paradox of Genocidal Rape Aimed at Enforced Pregnancy', (2008) XLVI, *The Southern Journal of Philosophy*, 176.
- 28 For a recent example of rape ostracism, see Human Rights Council, "'I lost my dignity": Sexual and gender-based violence in the Syrian Arab Republic', Conference room paper of the Independent International Commission of Inquiry on the Syrian Arab Republic, UN Doc. A/HRC/37/CRP.3 (8 March 2018).
- 29 See, e.g., Rules 70-72 of the ICC Rules of Procedure and Evidence <<https://www.icc-cpi.int/iccdocs/pids/legal-texts/rulesprocedureevidenceeng.pdf>>; Office of the Prosecutor, Policy Paper on Sexual and Gender-Based Crimes, (ICC, June 2014) <<https://www.icc-cpi.int/iccdocs/otp/OTP-Policy-Paper-on-Sexual-and-Gender-Based-Crimes--June-2014.pdf>>.

Nuclear Weapons

Tim Wright

Indiscriminate and inhumane

Nuclear weapons are unique in their destructive power and the threat they pose to humanity and the environment. They release vast amounts of energy in the form of blast, heat and radiation. No effective humanitarian response would be possible in the aftermath of a nuclear attack. A regional nuclear war involving dozens of detonations would severely disrupt the global climate and agricultural production, leading to widespread famine.¹



Folding paper cranes has become a leading symbol of the impact of nuclear weapons and their devastating humanitarian consequences. *Photo: New Zealand Red Cross*

Nuclear weapons are incapable of distinguishing between military and civilian targets, or between combatants and non-combatants. Once the explosive energy of a nuclear chain reaction has been released, it cannot be contained. People in neighbouring and distant countries who have nothing to do with the conflict would suffer from the effects of radioactive fallout. Radiation would also pose a serious danger to future generations.

It is for these reasons that most nations consider any use of nuclear weapons to violate international law. The International Court of Justice examined the legality of nuclear weapons in an advisory opinion in 1996, concluding that ‘the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law’.² However, the court was unable to ‘conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defence, in which the very survival of a State would be at stake’. The inconclusiveness of its opinion has allowed States possessing nuclear weapons – and those claiming protection from an ally’s nuclear weapons – to continue asserting the lawfulness of use.

In response to the opinion, the International Committee of the Red Cross said that it found it ‘difficult to envisage how a use of nuclear weapons could be compatible with the rules of international humanitarian law’.³ It expressed its ‘earnest hope that the opinion of the Court will give fresh impetus to the international community’s efforts to rid humanity of this terrible threat’.

A mandate for negotiations

Two decades later, in December 2016, the UN General Assembly adopted a resolution establishing a mandate for negotiations on a ‘legally binding instrument to prohibit nuclear weapons, leading towards their total elimination’.⁴ The new instrument would help to clarify and codify the illegality of the use of nuclear weapons and strengthen the global norm against their possession by any State.

In the years leading up to the negotiations, governments and civil society worked in partnership to enhance global understanding of the humanitarian impacts of nuclear weapons, convening three major conferences that shed new light on the devastation that would result from nuclear detonations, whether deliberate or accidental.⁵ The conferences underscored the importance of stigmatization and prohibition for advancing the cause of disarmament.

Nuclear weapons were, at this time, the only weapons of mass destruction not yet subject to a comprehensive

prohibition treaty. Biological weapons had been prohibited by treaty since 1972 and chemical weapons since 1993. Moreover, certain conventional weapons, such as anti-personnel landmines and cluster munitions, had also been prohibited.

For nuclear weapons, the international legal regime was patchy. The Non-Proliferation Treaty of 1968 simply barred States without such weapons from manufacturing or acquiring them.⁶ Five States parties to the treaty – the United States, Russia, the United Kingdom, France and China – still retain large stockpiles of nuclear weapons, which they are now modernising,⁷ despite being obligated to pursue negotiations for disarmament.

Given lack of progress towards disarmament in recent years and the deepening concern of the international community over the potential use of nuclear weapons, 127 States endorsed an Austrian-led pledge in 2015 to work together ‘to identify and pursue effective measures to fill the legal gap for the prohibition and elimination of nuclear weapons’.⁸ As Austria and others remarked, not only did a gap exist in international law, there was also ‘a reality gap, a credibility gap, a confidence gap and a moral gap’.⁹

A treaty-based prohibition

On 7 July 2017, following more than two decades of paralysis in disarmament negotiations, 122 States voted to adopt a landmark agreement to outlaw for all time the very worst weapons of mass destruction. The Treaty on the Prohibition of Nuclear Weapons is the first globally applicable multilateral agreement to comprehensively prohibit nuclear weapons.¹⁰ Its adoption was, in the words of Izumi Nakamitsu, the UN high representative for disarmament affairs, ‘a historic accomplishment’.¹¹

The treaty prohibits its States Parties from developing, testing, producing, manufacturing, transferring, possessing, stockpiling, using or threatening to use nuclear weapons, or allowing nuclear weapons to be stationed on their territory.¹² It also prohibits them from assisting, encouraging or inducing anyone to engage in any of these activities.¹³

A State that possesses nuclear weapons may join the treaty, so long as it agrees to destroy its nuclear weapons in accordance with a legally binding, time-bound plan.¹⁴ Similarly, a State that hosts another State’s nuclear weapons on its territory may join, so long as it agrees to remove the weapons by a specified deadline.¹⁵

States Parties must also provide assistance to victims of the use and testing of nuclear weapons and take measures for the remediation of contaminated environments.¹⁶ The preamble acknowledges the harm suffered as a result of nuclear weapons, including ‘the disproportionate impact of nuclear-weapon activities on indigenous peoples’ around the world.

The treaty is based on the principles and rules of international humanitarian law, ‘in particular the principle that the right of parties to an armed conflict to choose methods or means of warfare is not unlimited, the rule of distinction, the prohibition against indiscriminate attacks, the rules on proportionality and precautions in attack, the prohibition on the use of weapons of a nature to cause superfluous injury or unnecessary suffering, and the rules for the protection of the natural environment’.¹⁷

It opened for signature on 20 September 2017 and will enter into legal force once 50 States have ratified or acceded to it.¹⁸ It is of unlimited duration.¹⁹

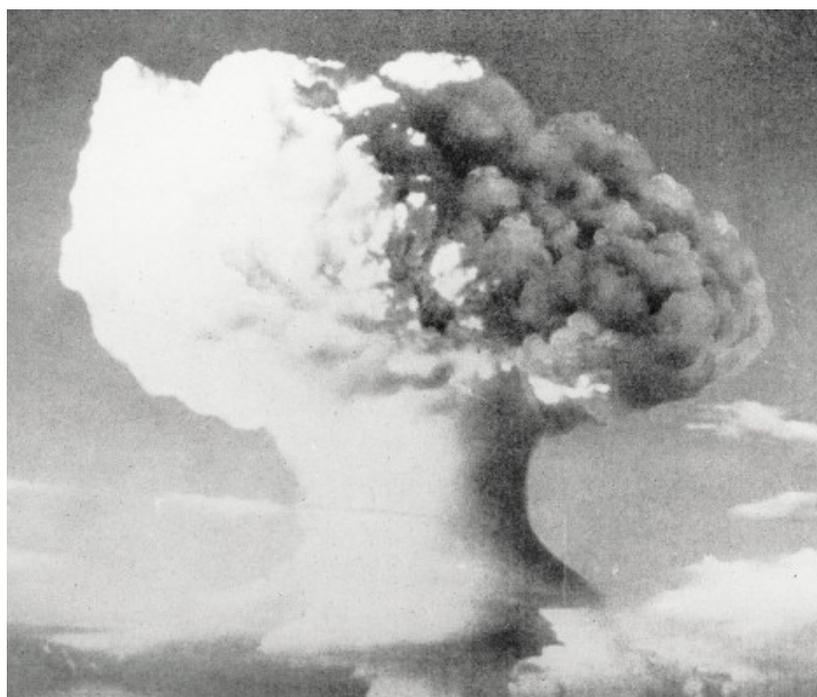


Photo: ICRC

The effect of prohibition

Each of the nuclear-armed States, and many allies of nuclear-armed States, chose not to participate in the negotiation of the treaty, insisting that nuclear weapons are a legitimate and lawful means of defence. However, as the norms of the treaty take hold over time, many such States are expected to change their stance and accept that nuclear weapons are abhorrent and illegal.

History shows that the prohibition of a certain weapon facilitates progress towards its elimination. A weapon that has been outlawed by international treaties is increasingly seen as illegitimate, losing its political status. Arms companies find it more difficult to acquire funds for work on illegal weapons, and such work carries a significant reputational risk. Banks, pension funds and other financial institutions may choose to divest from these producers.²⁰

Underpinning the decision by governments and civil society to pursue the prohibition treaty was our belief that changing the rules regarding nuclear weapons would have a major impact even beyond those States that would adopt it at the outset. This belief stemmed from experience with treaties outlawing other weapons, which have established powerful norms that greatly influence the policies and practices of States that are not yet parties to them.

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- 1 See International Physicians for the Prevention of Nuclear War, *The humanitarian impact of nuclear weapons*, 2014 <<https://hinwcampaignkit.files.wordpress.com/2015/01/hinwcampaignkit.pdf>>.
 - 2 ICJ, 'Legality of the threat or use of nuclear weapons', Advisory Opinion, ICJ Reports 1996, 1996, pp. 226–267.
 - 3 ICRC, statement to the 51st session of the UN General Assembly, 19 October 1996 <<https://www.icrc.org/eng/resources/documents/article/other/57jncx.htm>>.
 - 4 UN General Assembly, resolution 71/258, 'Taking forward multilateral nuclear disarmament negotiations', adopted on 23 December 2016 <https://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/71/258>.
 - 5 International Campaign to Abolish Nuclear Weapons, 'Humanitarian initiative' <<http://www.icanw.org/campaign/humanitarian-initiative/>>.
 - 6 Treaty on the Non-Proliferation of Nuclear Weapons, opened for signature on 1 July 1968, entered into force 5 March 1970, art II.
 - 7 Reaching Critical Will, *Assuring destruction forever*, 2018 <<http://www.reachingcriticalwill.org/resources/publications-and-research/publications/12371-assuring-destruction-forever-2018-edition>>.
 - 8 'Humanitarian Pledge', issued on 9 December 2014 <<http://www.icanw.org/pledge/>>.
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 - 10 ICRC, *2017 Treaty on the Prohibition of Nuclear Weapons: Signature and ratification kit*, April 2018.
 - 11 Izumi Nakamitsu, statement delivered to the 72nd session of the First Committee of the UN General Assembly, New York, 2 October 2017 <<https://s3.amazonaws.com/unoda-web/wp-content/uploads/2017/10/final-hr-remarks-first-committee.pdf>>.
 - 12 Treaty on the Prohibition of Nuclear Weapons, opened for signature on 20 September 2017, art 1.
 - 13 Ibid, art 1(e).
 - 14 Ibid, art 4(2).
 - 15 Ibid, art 4(4).
 - 16 Ibid, arts 6 and 7.
 - 17 Ibid, Preamble.
 - 18 Ibid, art 15.
 - 19 Ibid, art 17.
 - 20 See PAX and International Campaign to Abolish Nuclear Weapons, *Don't Bank on the Bomb*, 2018 <<https://www.dontbankonthebomb.com>>.

Health Care in Danger: A Matter of Life and Death

Jane Munro and Fauve Kurnadi

Every day, around the world, medical personnel, patients and medical facilities come under attack: hospitals and ambulances are deliberately or accidentally targeted; medical facilities are misused; doctors, nurses and patients are threatened with or experience violence; and civilian access to medical services are obstructed or delayed. This violence has a significant impact on the delivery of health care at times when it is most needed, namely, during armed conflict and other emergencies.



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Protection of health care is at the core of modern IHL, which was originally developed in the mid-nineteenth century to protect wounded soldiers on the battlefield and to ensure they could receive medical assistance. Since 1864, IHL has evolved and now includes strong legal protections for health care, not just for the sick and wounded in battle but also, importantly, for medical personnel, medical facilities and medical vehicles that are caught up in the hostilities. Violence against health care, in all its forms, regularly violates these legal protections.

This chapter will address the critical issue of the danger facing health care in times of armed conflict and other emergencies, by outlining the nature of the problem, providing an overview of the legal protections afforded to health care under IHL, and by highlighting what the Movement is doing, alongside the international community, to address and prevent violence against healthcare.

Introduction to the issue: the occurrence of attacks on health care

The provision of health care during armed conflict and other emergencies is essential, not only in ensuring that those injured on the battlefield can be collected and treated humanely and impartially, but also to ensure that a civilian population can continue to access the health care needed on a daily basis. Attacks on health care, therefore, can result in direct death and injury to personnel and patients, as well as damage to facilities. It can also indirectly impede the provision of essential health care services to those who are suffering as a result of the conflict or emergency.

Between January 2012 and December 2014, the ICRC analysed 2,398 incidences of acts and threats of violence against health care during armed conflicts and other emergencies across 11 countries.¹ This analysis resulted in several key findings. First, the report found that most incidents took place ‘against, inside or within the perimeter of health-care facilities’.² The types of acts this included were, for instance, killing and wounding patients, threatening health care personnel or coercing them to act against health care ethics, firing at and bombing facilities, looting and pillaging supplies, and occupying facilities and using them for military purposes.³ Second, the analysis determined that many of the recorded incidents occurred ‘on the way to and from health-care facilities, at checkpoints and in public spaces’.⁴ This included denying and delaying medical transports passage, denying and delaying patients’ access to health care services, killing and wounding patients, depriving health care personnel of their liberty and some incidents of sexual violence being committed against personnel.⁵ Third, the report showed

that a number of incidents occurred in ‘other areas or at unidentified types of location’, such as civilian residences, non-medical compounds, refugee or internally displaced persons camps and police stations.⁶ These incidents primarily concerned killing, wounding, threatening and the coercing of health care personnel as well as the deprivation of their liberty.⁷ Finally, as can be seen from the examples provided, the report found that the victims of these attacks were most likely to be local health care providers,⁸ and that most perpetrators of violence against health care were either members of state armed forces or armed non-state actors.⁹ It is important to note that this report only contains data about those incidents recorded in the 11 identified countries and, as such, cannot be seen as a comprehensive analysis of the types and extent of violence against health care in armed conflict and emergencies. Although these figures and examples are just the ‘tip of the iceberg’,¹⁰ the report does highlight the significance and prevalence of this issue, and identifies some of the worrying trends of violence against health care.

The relevant legal framework

Treaty law and customary IHL both provide comprehensive legal obligations relevant to the protection of health care delivery in armed conflict and other emergencies. These legal protections can be found in the Geneva Conventions and their Additional Protocols and are applicable in both international and non-international armed conflict (see **Chapter 4** of this Handbook for further discussion on the classification of conflicts); many of the rules outlined in treaty law have also attained the status of customary IHL.¹¹

At the heart of IHL is the protection of the wounded and sick, who must be provided with medical care and attention,¹² and must be treated without adverse distinction based on race, religion, political opinion or any factor other than medical need.¹³ Attacks against the wounded and sick are prohibited.¹⁴ The obligation to respect and protect medical personnel is also a well-established principle in IHL and comprehensive protections are provided for military and civilian medical personnel, personnel belonging to National Red Cross or Red Crescent Societies or of other duly recognised and authorised voluntary aid societies, as well as those persons made available to a party to the conflict by a neutral third State, a recognised and authorised aid society of such a State or an impartial international humanitarian organisation.¹⁵ Medical personnel must always be respected and protected,¹⁶ and cannot be the object of any attack.¹⁷ Similar provisions also exist to protect medical units, establishments, transports, equipment and supplies in order to ensure that the wounded and sick have access to vital care and therefore be respected and protected at all times.¹⁸ Such facilities and transportation must be respected and protected, and may never be the target of an attack.¹⁹ Attacking medical personnel, facilities and transportation may constitute a war crime.²⁰



Photo: ICRC

The distinctive emblems of the red cross, red crescent and red crystal are universally recognised as emblems of protection for medical personnel, facilities and transportation, and may also be used by members of the Movement. However, the protection afforded these groups do not stem from the emblems themselves, so they will not lose their protective status should they choose not to display the emblem.²¹ During armed conflict, the emblems are a critical means of identifying and therefore protecting the provision of health care. Perfidious use of the emblems may constitute a war crime.²²

There are clear and comprehensive protections for the provision of health care under IHL and attacks on any personnel, facilities or transportation required for the safe delivery of health care represent a clear violation of these rules. Yet, health care remains under threat and both targeted and incidental attacks have unfortunately become a prevalent but unacceptable phenomenon. This trend of violence against health care indicates that other practical measures to encourage compliance with the law are necessary to protect the safe delivery of health care in armed conflict. This has been one of the critical objectives of the Health Care in Danger Project.

History of the Health Care in Danger Project and the work of the Movement on addressing attacks on health care

The Health Care in Danger issue was first formally identified as a priority for action by the Movement at the 2009 Council of Delegates and the 31st International Conference of the Red Cross and Red Crescent in Geneva. Resolution 5, entitled 'Health care in danger: Respecting and protecting health care', was adopted calling upon States, the ICRC, the IFRC and National Societies to undertake certain actions that reinforce their mandates and obligations under IHL and work towards strengthening protections for health care workers, facilities and the wounded and sick.

However, in 2011, in response to the concerning and increasing trend of attacks against health care during armed conflict and emergencies, another resolution of the International Conference was adopted, calling on the Movement to address this phenomenon.²³ The resolution furthermore called on the ICRC to conduct consultations with experts, States, armed groups and key members of the health care sector to work towards practical recommendations to safeguard the delivery of health care.²⁴ In direct response to this call to action, the ICRC launched a global initiative on Health Care in Danger.²⁵

Over the years, the implementation of this initiative has generated positive momentum. The project specifically focuses on three key actions, including raising awareness about this issue through public campaigning; consolidating and improving practices in the field, and strengthening domestic legal frameworks to improve national responses to violence; and mobilising a broad, international community bound together by their mutual concern for this issue. The creation of this 'Community of Concern' has given impetus to heightened engagement at both the operational and diplomatic levels amongst a variety of stakeholders. It comprises experts and other stakeholders, such as health professionals, governments, weapons bearers, civil society, NGOs and international organisations,²⁶ and it is the authority and influence of these members that has contributed to the positive development and implementation of recommendations and measures to safeguard health care services.²⁷ The wide range of high-level consultations with these experts and stakeholders have also culminated in the publication of seminal reports, surveys and manuals. Many of these publications focus on best practice and risk reduction, considering in particular: military operational practice that ensures safe access to, and delivery of, health care;²⁸ best practices for the protection of ambulances;²⁹ engagement with armed groups;³⁰ security for health facilities;³¹ and violence prevention and management in health care facilities.³² Other publications outline the rights and responsibilities of key actors in safeguarding health care,³³ and some seek to bolster legal frameworks to ensure the provision of health care is adequately protected in domestic contexts.³⁴ Several academic publications have also been produced.³⁵

National Societies have also played a strong role in this initiative. For instance, Australian Red Cross has been a key partner of the project in its contribution to the Health Care in Danger diplomatic track, which aims to shape policy and attitudes around addressing violence against health care. Most recently, Australian Red Cross contributed to the work of the project by conducting a legislative analysis of Australia's domestic legal framework as it pertains to the protection of health care services.

International responses

There have been significant developments at the international level addressing the threats and violence posed to health care in armed conflict and other emergencies. The Health Care in Danger project, in particular, has given momentum to this by continuing to shine a light on the issue and by bringing together diverse stakeholders to address some of the key concerns. The first of these international responses – beyond the resolutions adopted in the International Conferences – was in 2014. That year, the United Nations General Assembly adopted a Resolution on global health and foreign policy, which ‘strongly condemns all attacks on medical and health personnel, their means of transport and equipment, as well as hospitals and other medical facilities, and deplores the long-term consequences of such attacks for the population and health-care systems of the countries concerned’.³⁶ The resolution represented a significant advance in establishing the necessary protections for health care workers and facilities.³⁷ It also offered up the tools and recommendations needed to reinforce the objectives of the Health Care in Danger project and to prompt action and implementation of measures that could help make health care safer.

A couple of years later, in 2016, the United Nations Security Council unanimously adopted Resolution 2286 condemning attacks against medical personnel, transports and facilities, and the obstruction of the delivery of humanitarian assistance by parties to armed conflicts.³⁸ The Resolution demanded that ‘all parties to armed conflicts fully comply with their obligations under international law [...] to ensure the respect and protection of all medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities’.³⁹ The Security Council further emphasised the need for increased respect for the protective emblems, the distinction between civilian populations and combatants, and called on States and all parties to armed conflict to ensure that effective measures are implemented into their domestic legal frameworks to prevent and address attacks and threats against medical personnel, equipment and facilities.⁴⁰ This resolution was a significant development at the multilateral level.

Conclusion

The concerted efforts of the Movement, particularly through the Health Care in Danger Project, in generating awareness of the issue of violence against health care and creating the momentum needed for positive change and the implementation of stronger protection measures is to be commended. However, violence against health care workers, attacks on hospitals, and everyday threats to the delivery of short and long-term health care in conflict and emergency situations continues to be a serious humanitarian concern. The achievements that have been made in the past ten years have laid a strong foundation on which we can continue to build, but if we are to see real, tangible and effective change then more needs to be done to address the issue. For instance, greater efforts can be made to strengthen domestic normative frameworks and implement domestic measures, gain a better understanding of the root causes of this violence to help develop practical solutions to address the problem, improve and increase training for health care personnel on their rights and responsibilities under IHL, enhance the security and preparedness of health care facilities, and to facilitate safer access for Red Cross and Red Crescent staff and volunteers in communities where they delivery health care services.

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2 Ibid, 1.

3 Ibid, 10-14.

4 Ibid.

5 Ibid, 15-17.

6 Ibid, 1.

7 Ibid, 18.

8 Ibid, 7.

9 Ibid, 8.

10 Ibid, 1.

11 For a comprehensive outline of the legal framework applicable to health care in armed conflict and other emergencies, see generally: ICRC, *Domestic Normative Frameworks for the Protection of Health Care*, 2015 <<https://www.icrc.org/en/publication/4215-domestic-normative-frameworks-protection-health-care>>.

12 Common Article 3; GC I, arts 36, 7, 9, 10, 12, 15, 18, 19, 46; GC II, arts 6, 7, 9, 10, 12, 18, 21, 28, 30, 47; GC III, art 30; GC IV, arts 16, 91; AP I, arts 10, 11, 44(8); AP II, arts 7, 8; Henckaerts, Jean-Marie and Louise Doswald-Beck, *Customary International Humanitarian Law Volume 1: Rules* (Cambridge University Press, 1st ed, 2005), rules 109-111.

13 GC I, arts 12, 15; GC II, arts 12, 18; GC IV, art 16; AP I, art 10.

14 GC I, art 12(2); GC II, art 12(2).

15 GC I, arts 24-27, 28-30, 32; GC II, arts 36 and 37; GC IV, art 20; AP I, arts 15, 16; AP II, arts 9, 10; Study on Customary IHL, rules 25, 26.

16 GC I, arts 24, 25; GC II, arts 36, 37; AP I, art 15; AP II, arts 9, 10; Study on Customary IHL, rules 25, 26, 86.

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- 17 Study on Customary IHL, rules 30, 102.
- 18 GC I, arts 19-23, 33-37; GC II, arts 21-35, 38-40; GC IV, arts 18, 91, 21, 22, 57; AP I, arts 12-14, 21-31; AP II, art 11; Study on Customary IHL, rules 28 and 29.
- 19 GC I, art 19; GC II, art 23; GC IV, art 18; AP I, arts 12, 21; AP II, art 11(1).
- 20 Rome Statute, arts 8(2)(b)(ix) and (xxiv), and 8(2)(e)(ii) and (iv).
- 21 GC I, arts 36, 38-44, 53, 54; GC II, arts 39, 41, 43-45; GC IV, arts 39, 41, 43-45; AP I, arts 8, 18, 23, 38, 85, Annex 1; AP II, art 12; AP III; Study on Customary IHL, rules 30, 59, 60.
- 22 Rome Statute, arts 8(2)(b)(ix), 8(2)(e)(ix); AP I, art 85(3f).
- 23 31st International Conference: Health Care in Danger, Resolution 5 (2011), International Conference of the Red Cross and Red Crescent, 31st International Conference of the Red Cross and Red Crescent (1 December 2011), [14].
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- 27 See generally ICRC, HCID Project, 2018 <<http://healthcareindanger.org/hcid-project/>>.
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- 34 ICRC, above n 11.
- 35 See generally: (2013) 95(889) *International Review of the Red Cross* and (2013) 95(890) *International Review of the Red Cross*.
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