***Humanity vs. Reciprocity***[[1]](#footnote-2): Articulated in the *St. Petersburg Declaration* (1866)

***Humanity*:** “the only legitimate object which States should endeavour to accomplish during war is to ***weaken the military forces*** of the enemy” (preamble).

* *See also* Martens Clause, *below*.

***Reciprocity*:** “This engagement is compulsory ***only*** upon the Contracting or Acceding Parties thereto in case of war between two or more of themselves…” (operative para. 4).

* The rise of courts as a means to enforce IHL may force us to reconsider reciprocity.

Both of these principles indicate that the question of who was the aggressor is immaterial to obligations under the laws of war.

But how can the law enforce humanity in situations where the other side will not enforce the law? *Note* the tension between these two principles in asymmetric warfare. If the emphasis is on humanity, then you would expect the law to apply equally in internal armed conflicts.

***The decline of reciprocity*:**

* *Kupersic* (2000): the bulk of humanitarian law “lays down absolute obligations, namely obligations that are unconditional or in other words **not based on reciprocity**.” (para. 517)

*Questions*: If the law is based on reciprocity, and if reciprocity is no longer practiced in warfare, then how should the law evolve? Once reciprocity is an *insignificant incentive* to either side, then should we introduce to the equation the question whether the opposing party violated the *jus ad bellum*?

* *Note the decline of reprisals* (*below*). This indicates that reciprocity is no longer the guiding force or the guiding enforcement mechanism behind the laws of war.

*What replaces reciprocity in enforcing compliance?*

❒ Public opinion (*Note* the article by Charles Dunlap (The Revolution in Military Legal Affairs): In the modern media environment, adherence to the laws of armed conflict in fact and in perception is critical to continued success. This argument has more force for democratic societies, but is applicable wherever a regime is dependent on popular support to wage war.)

❒ ***Tribunals*** (*see below*)

***Lawful combantancy & taking “direct part” in hostilities*:**

* Only lawful combatants may take part in combat
* All those taking *direct part in hostilities* may be targeted.
  + These could be others who do not wear a uniform and are not part of the opposing army.
  + When weaker parties resort to hostilities through a civilian population, the scope of this question is a major issue

***Distinction and Unnecessary Harm*:**

* *See Nuclear Weapons*, para. 78

*Note* the involvement of **civil society**, particularly the Red Cross in the development of Geneva Law, and the longtime role of **governments**, particularly the divide between strong and weak states.

***How Courts Transform the Laws of War***

❒ *Treaty Interpretation*:Using *Martens Clause*[[2]](#footnote-3), tribunals emphasize and develop the **principles of humanity**. Originally a stopgap measure, the provision is read as guidance and authorization to develop the law in conjunction with human rights discourse. (*See H.R. in armed conflict, below*)

❒ **Customary International Law**: Identifying *jus cogens* norms and extending C.I.L.

❒ Primary instruments of IHL are now categorized as customary international law (see *Nuclear Weapons*, 1996, para. 81)

❒ *Source material*: A court may argue that Martens Clause gives it authorization to look to what States do (as represented in military manuals) to establish custom, rather than what they say.

❒ *Human Rights in armed conflict*: Human Rights law gives courts the ability to review the decisions of military commanders as to whether an operation is proportional, and introduces the question of whether force was justified at all.

* + “…the protection of the International Covenant of Civil and Political Rights **does not cease in times of war**, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated…” (*Nuclear Weapons*, para. 25)
  + The test of what is an arbitrary deprivation of life, however, then falls to be determined by **the applicable *lex specialis*, namely, the law applicable in armed conflict** which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself. (*id.*)
  + *See also* the extension of the human rights covenants to occupied territory (*Wall*, 2004, paras. 102-13): This indicates that courts have the authority to develop the law beyond the intent of the parties.

***What explains this authority?***

***Necessity*:** The courts are old principles to new situations. Collective action among States to change the agreement requires assent from all the parties, which is difficult if not impossible to acquire.

* + *Kupersic*: *opinio iuris sive necessitates* may play a much greater role than *usus* in light of the Martens Clause’s invocation of the basic principles of humanity.

***Endless war*:** U.S. courts, for example, were deferential to military commissions in *Yamashita*, because WWII was limited to a period of time, and thus the commission was limited in its scope. When a conflict is endless, such as the war on terrorism, ***domestic*** courts may be more willing to act beyond government policy and beyond the bounds of the laws of war. *See below*.

***Problem* with the authority of courts:**

* Unlike national courts, once a tribunal interprets the law in a certain way, it is difficult to amend through legislative means.
* Also note the resistance of some States. Armies are also becoming skeptical.
  + “Our strength as a nation state will continue to be challenged by **those who employ a strategy of the weak** using international fora, **judicial processes**, and terrorism” (U.S. National Defense Strategy, 2005). *E.g.*, *lawfare*.
  + However, many States *ask* the courts to develop the laws in this way. *E.g.*, the ICTY’s prohibition on targeting civilians in all conflicts was supported in briefs from several governments.

Note on the practice of courts: International tribunals tend to act in accord with each others’ precedents, in a manner that lends legitimacy and consistency to the entire system. *One example* is the ICJ’s refusal to adopt the *Tadic* test over its *Nicaragua* test for control. Nothing was overruled, and it seems *Tadic* applies in international criminal law, and *Nicaragua* continues for state responsibility. This problem provides an interesting case study. It may be that the ICJ in 1986 felt as though it could not retain its legitimacy while placing too high a burden on the superpowers. Institutional territorialism may explain the continuation of *Nicaragua* in 2007.

**The role of courts in the war on terror:**

* *Problem*: In the war on terror, detention may be endless, because people may be endlessly dangerous. Endless detention magnifies the risk of mistake in detention proceedings. Reducing the risk of mistake may work against legitimate national security interests. There is also a procedural concern that fair trial may compromise the sources used against detainees. We see several responses.
* Courts refuse to relinquish their authority to be the master of procedure
  + The U.S. supreme Court invokes Common Article 3 as a minimum standard applicable to detainees in Guantanamo, *Hamdan v. Rumsfeld* (2006), departing from the traditional deference that national courts have given to their executives
  + This approach is shared by several other high courts in democratic nations
* Courts display a willingness to go against precedent, ***and* advance international law**
  + The Court in *Hamdan* is drawing an immense amount of procedural guarantees from the provision Common Article 3 mandating judicial guarantees “recognized as indispensable”
  + The Israeli Court interprets GC4 to require that a State must prove that the “security threat” identified for detention is not arbitrary, and then uses this interpretation to transform the meaning of the Act at issue (see para. 21), shifting the burden of proof.
  + This confrontation arises in most democracies
* *Coordination*: Courts also seem to be coordinating their decisions, by citing foreign and international precedent, in reaction to the coordination of States. (*See note*, *above*).
* *Advocacy*: Though the judge is often empowered to review the evidence herself, we see an emerging understanding that there must be an adversarial process. Some argue that it’s not enough for the defendant to have an advocate, that he must have an *effective opportunity*. In other words, he must be able to tell the advocate what to say.

*Note* the tension between these two principles in asymmetric warfare. If the emphasis is on humanity, then you would expect the law to apply equally in internal armed conflicts.

**Factors leading to asymmetric warfare:**

*National Defense Strategy*: ❒ Rise of extremist ideologies ❒ Absence of effective governance

***Criticism*:** Saying that guerrilla warfare arises from extremist ideologies belies a refusal to accept the *problematique* of the laws of war. The fact is these tactics and ideologies will proliferate as long as there are **asymmetric power relations** and as long as disenfranchised people feel they have no other choice.

**Distributional implications** of the laws of war in asymmetric warfare:

* ***The laws of war tell the weaker party that they must give up*.** This is why weaker parties feel the laws of war are not legitimate.
* In turn, the stronger party then insists that it should not comply with the laws of war, invoking the principle of reciprocity.
* *The rise of courts*: In this situation, the international community interferes in this asymmetry by establishing tribunals to enforce the law on both sides. *Then more law is created by the courts*.

***Problem*:** As long as asymmetric tactics continue, there will be a temptation on the stronger party to change its definition of an appropriate target. *To what extent should we rely on the distinction between knowingly causing collateral damage and intentionally targeting civilians*?

*Specific problems of asymmetric warfare*:

❒ **Laws of internal armed conflict:** The traditional assumption in the laws of war is that a State will protect its own citizens in an internal conflict. In asymmetric warfare, the State feels a stronger temptation to afford less protection to civilians to provide security.

❒ Wearing uniforms in counter-insurgency (Page X)

❒ **Targeted Killings:** The fact of targeted killings represents a transformation of warfare. People become targets in situations where there are *no* traditional military targets (*e.g.*, bases, airfields, supply lines), and where the enemy lives within and among the civilian community. A questionable theory develops that targeted killing is a **proxy for winning the war** (Page X).

General Principle: *Reciprocity implies reprisals*. Reprisals are the old institution that made the law work.

**Reprisals are permitted when** (*See U.S. Army Field Manual* 497(b)) (*need both*):

❒ Violation of the laws of war (495) (note that it does not say *war crime*)

❒ Other means of compliance (495) are exhausted (*E.g.*, publication, protest, intercession, punishment)

❒ This requirement may be ***waived*** because (*need both*):

❒ Troop safety requires drastic action ❒ People who committed the offense can’t be secured

**How may reprisals be taken?**

❒ Reprisals ought to be calculated to enforce compliance (*see* 497(d)).

* This implies that, ifyou *know* the other party is *intent* on violating the laws of war, **then reprisals are not justified**
* In relation to this point, see para. 497(b) of the *Field Manual*: “Even when appeal to the enemy for redress has failed, it may be a matter of policy to consider, before resorting to reprisals, whether the opposing forces are not more likely to be influenced by a steady adherence to the law of war on the part of their adversary.”

🕱 Reprisals should never be employed by individual soldiers except on orders of a commander

**Whom may reprisals target?**

❒ Enemy troops (see Field Manual, 497(c))

🕱 POWs, wounded and sick are prohibited (GCIII, art. 87). 🕱 *Protected civilians* (GCIV, art. 33)

🕱 Hostages and “reprisal prisoners” are forbidden (*Field Manual*, 497(h)).

***What about civilians that are not “protected”?***The state of the law is **unclear**.

🕱 The U.S. *Field Manual* is silent on the subject, and the U.K., in ratifying Additional Protocol I, reserved the right to exact reprisals on the civilian population if they are considered necessary to induce the other party to cease violations of API articles 51-55. *See* paragraph (m) of the ratification document.

❒ Additional Protocol I specifically bans this practice. (Art. 51(6)). *Unclear whether this is customary*.

❒ Consider the jurisprudence of the ICTY:

• *Kupersic* (2000) finds that reprisals against civilians in the combat zone are prohibited. Notes that this rule emerges under the pressure of the considerations in the Martens Clause.

• *Martic* (2007): The trial court in this case is “much less sanguine about the insulation of the civilian population from reprisals.” [Benvenisti’s words]. The court finds that the reprisal at issue was not done after other means were attempted, and notice was not given. It does not rest on the proposition, as in Kupersic, that reprisals against civilians are strictly forbidden

• *Why would the ICTY pull back on this question?* The ICC started working in the interval between these two cases, and has plenary jurisdiction, so international criminal law, then, has become much more serious.

❒ Rome Statute of the ICC offers two possibilities. *Either*:

❒ The practice is banned as “intentionally directing attacks against the civilian population” (art. 8)

🕱 Criminal responsibility is excluded under treaty and customary law as interpreted consistently with internationally recognized human rights (*see* arts. 21 & 31(3)).

***Generally*:** You can expect courts to move toward banning reprisals against civilians. Whether the regime of reprisals generally will be rolled back remains to be seen.

**When is a conflict international?**

❒ Between two States, including where one State operates alongside an insurgency in another State.

❒ *Proxy war*. Tribunals offer varying tests of control (*see notes below*):

❒ ***Effective control*** (*Nicaragua*, ICJ, 1986):

❒ Foreign State finances, trains, equips, trains and plans for the organized group

❒ Control is exercised with respect to the ***specific operation***.

❒ ***Overall control*** (*Tadic*, ICTY, 1999):

❒ Foreign power has a role in organizing, coordinating or planning the military activities, in addition to financing.

• *Note* that the effective control test (*Nicaragua*) applies only in the case of a private individual or a group that is not militarily organized.

• *Note* that both tests require more than financing.

• *Also note* that the ICJ, when given the opportunity in 2007, did not adopt this overall control test for state responsibility. Thus, ***there are varying tests for state responsibility and for applicable law in international criminal cases*.** Individuals may be seen to belong to Serbia, but Serbia will not be responsible for their crimes. Both cases stand as good law.

❒ *Wars of national liberation* (*see* Additional Protocol I, art. 1(4))

🕱 This is one reason why the U.S. did not adopt API, and many governments regard this provision as not reflective of international law.

❒ Britain argues that the provision applies *only* when the party is an “authority which is genuinely representative of the people”

**What law applies?**

❒ Geneva Conventions ❒ Hague Law ❒ Applicable treaties

❒ Additional Protocol I (much of this is considered **customary**, particularly by the U.S., which is not a party)

❒ *Minimum protections* of art. 75

❒ Human rights law in situations of ***extraterritorial jurisdiction***

***Policy note***: In Afghanistan, the U.S. willfully accepted the law of international armed conflict, even though it was fighting a non-recognized government and may have been able to argue that this was in fact a transnational conflict. Why? The laws of international armed conflict provide **clarity** to soldiers, they appear legal and well-structured, they reduce the incentive of the local population to **resist** the outside forces, and this choice **invites reciprocity** from the other side. In this way, we see armies

engaging in political and PR choices.

**What is Internal Armed Conflict?**

• The Geneva Conventions do not supply a definition. Different law applies at different levels.

🕱 Note the Rome Statute: definition “does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature.”

**Applicable Law:**

❒ Common Article 3: applies to ***all*** armed conflict as a **minimum standard**. *Cf.* API, art. 75.

❒ ***Customary*** provisions of **Additional Protocol II** in the following cases (*Tadic*; *ICC Statute*, art. 8(2)(f)):

❒ Protracted conflict ❒ Between gov. and “organized armed groups” or between the groups

❒ Human rights law (*above*) ❒ Domestic and penal law

**History of the law of internal armed conflict:**

Before WWII, the concept of international law was the regulation of international matters. Individuals were not in any way subject of international law. In the **Civil War in Spain** (1936-39), States expressed general revulsion against the tactics employed, leading to calls from countries such as Britain to stop targeting civilians. Here we begin to see humanitarian concerns coming to the fore. **Additional Protocol II** (1977) attempts to expand the scope of responsibilities in internal armed conflicts, but States cannot agree on much, and the threshold is set impossibly high. In the crisis in **Yugoslavia** (1990s), States wanted to restrain the parties to this conflict using the law, but the law was not sufficiently developed. **The ICTY and customary international law provided an opportunity for lawmaking**. The Court, for example, found that the targeting of civilians is prohibited in internal armed conflicts (*Tadic*), a decision that received the support and encouragement of many States. Finally, **human rights obligations** have gained authority and respect in light of the ECHR and the ICCPR.

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**When is a conflict transnational?**

❒ Internal armed conflict *AND* ❒ Involvement of foreign forces on the side of the government

**Applicable law:**

❒ Common Article 3 (*below*) ❒ Customary law, including some provisions of APII

❒ Human rights law in cases of extraterritorial jurisdiction (*effective control*)

🕱 If the force does not actually control the land, but the land is controlled by the inviting host government, then it’s ***unclear*** whether human rights law applies. *Note* that the United Kingdom says it’s not bound by its ECHR obligations when in Iraq.

🕱 So there is a gap in the law. Could argue that the logic of protection in international armed conflict should apply, because this type of combat endangers civilians (*see note below*)

In transnational conflicts, the warring actor often claims that it is not bound by any law, because it is not fighting combatants, it is not bound by human rights law outside its territory, and the UN is not bound by human rights law. But what’s at stake in these claims is the protection of the civilian population. This calls for a new reading of the law of transnational armed conflict that calls on the State Party to internalize the cost to the civilian population by asking a series of questions:

1) Is the military object legitimate

2) Is the military operation *necessary*? Have you tried other means?

3) Ask the *jus ad bellum* question. Why do we fight?

4) Accountability: Give reasons for the conflict, and conduct *ex post* inquiries.

*Policy Notes*: A conflict can be at the same time international and internal. If we accept the idea that different norms apply, then we enter into a complex fine-tuning of the laws. Because of this, *we see a convergence into a single set of norms*. Eventually, as more internal conflict becomes transnational, the assumption that States will protect their own civilians breaks down, and countries mustrecognize that the **applicable law must be international armed conflict**.

**Human Rights Law:**

Human Rights law gives courts the ability to review the decisions of military commanders as to whether an operation is proportional, and introduces the question of whether force was justified at all.

❒ Two questions (*Isayeva*, ECtHR, 2005):

❒ Is the aim legitimate? ❒ Were the means absolutely necessary?

❒ Basic protections:

❒ ***Right to life*:** is protected unless ***absolutely necessary*** to use force for specific goals (ECHR). See also the ICCPR, which prohibits “***arbitrary deprivation***” of the right to life**.**

*Consider* the impact of human rights applying above and beyond the protections of the laws of war…

❒ This law also leads to the requirement to investigate (See Isayeva; attacks on hijacked tankers)

**How is extraterritorial jurisdiction determined** (*Bankovic*, ECtHR, 1999, para. 71)?

❒ *One of the following* (note the similarly high threshold to occupation under *Congo*. Higher than Hague Regs suggest.):

❒ Effective control of the territory *and* its inhabitants

❒ Consent, invitation, or acquiescence of the local government

❒ “Public powers” (*Bankovic*): this has little meaning. Later, the ECtHR included controlled via proxies

**Common Article 3:**

❒ “Persons taking no active part in the hostilities … shall in all circumstances be treated humanely, without any adverse distinction …” To this end, the following are prohibited “at any time and in any place whatsoever”:

❒ Violence to life and person, e.g., murder of all kinds, mutilation, cruel treatment, torture.

❒ taking hostages ❒ outrages on personal dignity: humiliating & degrading treatment

❒ the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples

❒ “The wounded and sick shall be collected and cared for.”

• *Note*: Benvenisti’s reading of Common Article 3 is that it is focused on the treatment of the people who are under the control of the army, and that therefore it **refers only to situations *after* the conduct of hostilities**.

**‘Fundamental Guarantees’ (Additional Protocol I, art. 75)** (these have some customary status):

*Applies to “persons in the power of a Party to the conflict”*:

❒ Without adverse distinction, with respect for the person, honour, convictions, and religious practices

❒ Prohibits violence to life, **health**, **physical or mental well-bein**g of persons, in particular (2):

❒ Murder ❒ Torture (physical or mental) ❒ corporal punishment ❒ mutilation

❒ Outrages on personal dignity: ID treatment, enforced prostitution, indecent assault

❒ taking hostages ❒ collective punishments ❒ threats to do the foregoing

❒ **Detention provisions:**

❒ Informed promptly/understandably of the reasons for detention

❒ Released with minimum possible delay, as soon as justifying circumstances no longer exist

❒ Separation of women’s and men’s quarters (art. 75(5))

❒ Protection lasts until repatriation or release, even beyond the conflict

❒ **Sentencing** requires an **impartial**, **regularly constituted court**, respecting **general principles:**

❒ Informed of particulars of offence and the means for defense

❒ Convict only on basis of individual responsibility ❒ Non-retroactivity (4(c))

❒ Presumption of innocence ❒ No *ex parte* trials ❒ Right to remain silent (4(f))

❒ Right to examine witnesses and gather evidence ❒ No double jeopardy

❒ Right to public pronouncement of judgment ❒ Advised on conviction/remedies

**Guide to the Provisions of APII:**

❒ ***Field of application*** (art. 1): Sets a high threshold. May be irrelevant after *Tadic*, ICC Statute (*above*).

❒ dissident/organized armed groups ❒ responsible command ❒ territorial control

❒ able to carry out sustained and concerted military operations

❒ able to implement the laws of this protocol

❒ ***Fundamental protections*** (art. 4):

❒ Humanity/neutrality ❒ Specific violations (4(2)) ❒ Care for children

❒ ***Provisions for internment and prosecution***(arts. 5-6) ❒ ***Care for wounded*** (arts. 7-12)

❒ ***Protection of civilians*** (arts. 13-18):

❒ Prohibition on targeting civilians (“*unless and for such time as they take direct part…”*)

❒ Protection of civilian objects, dangerous works and cultural objects (arts. 14-16)

❒ Prohibition on forced movement (*unless civilian security or military imperative*) (art. 17)

❒ Relief actions shall take place subject to the consent of the Party (art. 18)

**In internal conflicts, must armies avoid excessive harm to civilians?**

* Additional Protocol II does not prohibit excessive harm to civilians, and this is not included in the Rome Statute. However, it is unlawful to direct attacks at them (art. 13(2))
* In Afghanistan, Germany’s commitment to ask questions about harm to civilians in the bombing of the tankers indicates that excessive harm is prohibited.
* The ICRC has studied state practice and concluded that the prohibition on excessive harm to civilians also applies in internal conflicts.
* Perhaps an obligation not to cause excessive harm may be derived from the derogations of the right to life: unless *absolutely necessary* (ECHR); prohibition on *arbitrary deprivation* (ICCPR).
  + If the right to life is enshrined in international instruments, and institutions are to enforce these rights, then these protections might apply *above and beyond* the laws of war.

The status of a privileged combatant grants ***immunity from domestic criminal prosecution*.**

* ***Principle of distinction*:** To get this status, you must distinguish yourself from the population
* ***Note*:** It’s ***not*** a duty to distinguish yourself. If you do not, you may be targeted, you may participate, and you may be prosecuted (*See* Hays Parks).

**There are *only* two categories in international conflicts** (*see A&B v. Israel*)**:**

❒ Combatant (privileged) ❒ Civilians (*protected persons*) (*unprivileged combatants*)

**Who is a privileged combatant?**

*Under the Third Geneva Convention* (1949), article 4:

❒ Members of the ***armed forces*** of a Party, including militias or volunteers that form a part

🕱 In practice, this is a ***rebuttable presumption*.** The burden is on detaining party to disprove.

❒ This assumes that the armed forces comply with the conditions in 4(2), *below*.

❒ Militias and other volunteer corps, belonging to a Party, even in occupied territory (*need all*):

❒ Responsible command ❒ Fixed distinctive sign recognizable at a distance

❒ Carry arms openly ❒ Operations in accordance with the laws of war

❒ Organization ❒ “Belonging to a Party to the conflict”

\* *Customary Law* allows **non-aligned** groups to respond to wars of decolonization.

❒ Other groups:

❒ Allied to non-recognized authority

❒ Civilians accompanying armed forces, with authorization (*see* ***military companies****, below*)

❒ Merchant marine, civil pilots, etc. ❒ *Levee en masse* (see 4(6)

*Additional Protocol I attempts to relax the standard, in response to wars of liberation*:

❒ Organized ❒ Responsible command ❒ Subject to an internal disciplinary system

❒ Belong to a government or a self-regarded authority

❒ Distinction, or at least carry arms openly, during each engagement, and while visible to the enemy

🕱 Many important countries (U.S., France, Israel) felt this went too far.

**How to decide who is privileged?**

❒ *Third Geneva Convention*: Should any doubt arise, a competent tribunal will decide (art. 5).

❒ *Additional Protocol I*: Shall be presumed to be a POW, then should any doubt arise… (art. 45(2))

***Policy Note: Insurgency and the erosion of the principle of distinction***

Occupied territory poses a constant problem in the laws of war. The occupier is charged with ensuring law and order, but how can it do so if the population has the right to rebel? On the other hand, the rebelling population argues that it is in an armed conflict, so why sit silent? *Additional Protocol I* navigates this by privileging rebels who carry arms openly during combat and are subject to a disciplinary system that can enforce the laws of war. This erosion of distinction ***endangers*** ***civilians*.** Note that *API* seems to recognize this problem, and holds that the treaty is not intended to change the “generally accepted practice” of wearing uniforms. Art. 44(7). It’s not clear what kind of legal force a provision like this would have. In addition, the fact of nondistinction ***does not remove obligations to avoid collateral damage*.**

**What law protects an unprivileged combatant?**

❒ The Fourth Geneva Convention considers them *protected persons*: those who, at the given moment, find themselves in the hands of a party to the conflict, of which they are not nationals. (*note limitations*, in art. 5, that are explained in the War on Terror case study).

❒ Common Article 3 applies in internal armed conflicts

❒ The *fundamental protections* of Additional Protocol I, art. 75, have arguably become customary international law and apply also to internal conflicts.

**Non-Standard Uniforms:** To what extent is it legitimate for soldiers to wear civilian clothing?

🕱 Doing so may qualify as *perfidy* under the laws of war if (*API*, art. 37) (*need both*):

❒ Soldier kills, wounds, or captures an adversary

❒ ***Intended*** to lead the adversary to believe he was entitled to protection

❒ But doing so is not necessarily a war crime:

❒ It is not a *grave breach* of API (art. 85) to feign civilian status, only to use the red cross emblem

🕱 ICC Statute prohibits “killing or wounding treacherously,” may include feigning civilian status

❒ But ICC statute does not prohibit *capturing*. *This is not a war crime*.

**Problems with wearing a uniform in counter-insurgency:**

* Wearing a uniform increases the risk of being targeted
* It’s likely that the insurgency will hold uniformed soldiers hostage
* In addition, if you wish to effectively work with the civilian population, you may need to wear civilian clothes. *See*, I guess, *Lawrence of Arabia*.

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**Status of private military companies** (from ICRC “Challenges” document)

* These have the status of private entities. Insofar as the *companies* are not organized armed groups, they are not themselves parties to the conflict. *Individuals* working in armed conflicts have rights and obligations under IHL

**Categories of individual:**

❒ Members of the armed forces (GC3, art. 4(A)(1)) if they are incorporated into armed forces (*rare*)

❒ Militias/volunteer corps (4(A)(2)) in an **international** armed conflict *if* (*need all*):

❒ “belonging to a Party” ❒ Responsible Command ❒ Carry arms openly

❒ Fixed, distinctive sign ❒ Obey the laws and customs of war

❒ Civilians accompanying the armed forces (4(A)(4)).

❒ *There must be a “****real link****”* to the armed forces, not merely the State.

*Protections to civilians accompanying armed forces*:

❒ Entitled to prisoner of war status in international armed conflict

🕱 Are *not* entitled to participate in combat, and may arguably be prosecuted for doing so.

❒ Civilians. Entitled to all the protections under IHL.

🕱 **Mercenaries:** (*see* ICRC document, page 3, for reasons why this category is rarely applicable)

🕱 A mercenary has no right to prisoner-of-war status (API, art. 47)

❒ Nonetheless, mercenaries are *protected persons* (GC4, art. 4, limited by art. 5)

**States employing PMCs:**

❒ Responsible for the acts of PMCs attributable to them under the rules of state responsibility

❒ Obligation to ensure respect by PMCs of IHL, through, e.g., contract provisions

❒ Must repress war crimes and suppress other violations of the laws of war by PMCs

**States on whose territory PMCs operate:**

❒ Ensure IHL is respected within jurisdiction, through, e.g., licensing and regulations

**States where PMCs are incorporated:**

❒ Obligation to ensure respect for IHL by, e.g., mandating training and other regulations.

**States whose nationals work for PMCs:**

❒ These are “well-placed to exercise criminal jurisdiction over them should they commit violations of IHL, even abroad.”

**What law applies to terrorists?**

❒ *Internal armed conflict?* May argue that this is a protracted conflict between organized armed groups involving the territory of many States

❒ Domestic law ❒ Human rights law

🕱 *International outlaws*: It could be argued that Al-Qaeda are not protected by GCs or by CA3, because they are not parties to a conflict, and *cannot* be parties to a treaty. *Response*:

❒ *Nicaragua* and *Hamdan* indicate that CA3 and API, art. 75, apply *regardless and wherever*

❒ We can look at the relevant State, by becoming party to the rules of IHL, as undertaking to protect civilians within its territory. Treating Al-Qaeda as international outlaws *endangers civilians.* (*See* note on erosion of distinction, page X).

**Case study: Killing of the Al-Qaeda leader in Somalia:**

* Is this an armed conflict at all? Al-Qaeda were not even attacking.
  + *Response*: You could connect the series of attacks into a protracted armed conflict (*above*)
  + The muted reaction of States may suggest that this shows an understanding that the war on terror requires something broader than police power.
* If it is, this is a *transnational armed conflict*. Applicable law includes:
  + Minimum standards (CA3, art. 75) and customary law
  + Because the area is not effectively controlled, there is no question that human rights law does not apply in attacking the area (*see, e.g., Bankovic*)

**What is the status of detainees?** They’re generally

*Problems*: Ensuring people are not detained for life, and preventing harsh treatment.

**Applicable law in International armed conflict:**

*Note that anyone can be detained or assigned a residence for “safety measures.”*

❒ Common Article 3 and API, art. 75

❒ *Protected person status*: “in any manner whatsoever” find themselves in the hands of a Party

🕱 Limitations on protected status (GC4, art. 5):

❒ In territory of a Party *AND* ❒ Activities hostile to the security of the State

🕱 *Then* loses benefits that would be prejudicial security

❒ Occupied territory  *AND* ❒ Detained as spy or saboteur

🕱 *Then* forfeits rights of **communication** as “absolute military necessity” requires

• *Note* the savings clause in the third paragraph.

**What protections are the detained entitled to?**

❒ Life, food, etc. ❒ Right to appeal and periodic review (*e.g.*, GC4, art. 78)

🕱 They have ***no immunity*** from prosecution under domestic/occupation law.

***Policy note*:** The Geneva Conventions and the rules that have passed into customary law envision a war that has an *ending*. So these basic provisions may need to be altered, being informed by human rights and constitutional guarantees.

**What can be done about endless detention?** *See Courts as Actors, Page X*.

**Basic regulation:** The right of a belligerent to adopt **means** of injuring the enemy is not unlimited (Hague Regulations). Additional Protocol I adds the term **methods**. It is ***prohibited***to:

❒ Employ weapons of a nature to cause superfluous injury or unnecessary suffering (API, art. 35(2))

* The Hague Regulations originally prohibited only superfluous injury. The addition of unnecessary suffering implies a subjective element, where the Hague Requirement was entirely objective. It’s an open question how far this goes.

❒ Means or methods intended or may be expected to cause widespread, long-term, severe environmental damage (API, art. 35(3))

❒ Hague regulations specifically prohibit poison (art. 23(a))

🕱 *Note that the formulation of these regulations implies a weapon is lawful until found unlawful.*

**Note on Internal armed conflict:**

🕱 Neither the ICC Statute nor Additional Protocol II restrict means and methods.

❒ Such restrictions must be found in *customary law*. The ICRC argues that the same restrictions apply.

**What does it mean to cause unnecessary suffering or superfluous injury?**

• **Proportionality:** “Superfluous” and “unnecessary” suggest that the suffering and injury should be compared with the military objective, indicating that proportionality is the background principle.

• **Indiscriminate:** Weapons that cannot by their nature distinguish between civilians and combatants could potentially fall under this heading. (*Additional Protocol I*, art. 51(4) prohibits means and methods that can’t be directed against a specific military objective).

• **Rendering death inevitable:** The St. Petersburg Declaration holds that the purpose of war is to disable enemy forces, not to kill. Weapons like *poison* render death inevitable. Perhaps this is contrary to the principles in these instruments.

• Should the laws of war require an *opportunity to respond*?

**Problem of Proportionality:**

• It’s unclear whether the military objective should be ***assumed*** as necessary, or whether the commander should be forced to weigh alternatives. If the military objective is necessary, then civilian deaths are justified to save soldiers.

• If the commander is choosing between competing strategies, with lives on both side of the equation, there is no guidance as to how to balance.

• *Nuclear Weapons* (ICJ): Indicates it might be legal for a State to use nuclear weapons when its survival is at stake. (*See* para. 96). So perhaps the military advantage is sometimes so important that it affects the proportionality analysis.

**Problem of specificity:**

• It’s likely that these principles — superfluous injury, unnecessary harm, indiscriminate — have little application by themselves, and that a weapon is legal unless specifically banned.

• *Nuclear Weapons*: Because nukes can ***potentially*** be used without causing unnecessary harm, they are lawful.

• Rome Statute, art. 8(2)(b)(xx) defines the following war crime: deploying weapons that cause superfluous injury or unnecessary harm, or are indiscriminate, ***provided*** that such weapons are subject to a comprehensive prohibition.

• A general principle is a more ***humane*** approach, but this would meet with suspicion from armies. First, commanders need concrete guidance as to whether a weapon will be lawful. In addition, we need some common ground to assure us that the other side is on the same page with respect to lawful weapons.

• Thus, you see both governments (Framework Convention concerning certain conventional weapons), and civil society (Ottawa conventions on antipersonnel mines and cluster munitions), engaging in parallel paths of treatymaking.

**Law applicable to irregulars and fighting civilians:**

❒ ***Additional Protocol I***:Civilians enjoy protection *unless* and *for such time* as they take a *direct part* in hostilities. *This obligation exists in internal conflicts as* ***customary law****.* (Art. 51(3))

❒ ***Human Rights Law***: In a territory under your control, you must also consider whether killing is the legitimate step to take. (*Note in Targeted Killings case, it was crucial whether the killings took place in territory where the army had effective control, or in territory that was no longer occupied*)

🕱 Note the API requirement does not create a third category: civilians are civilians.

**Direct part in hostilities:** *Two views*

❒ *General approach*: “Nature and objective” (*TK case*, para. 33). Includes “gathering intelligence, or while preparing himself.”

❒ *Specific acts*: The ICRC sees direct participation as a ***specific act***, with *three elements*:

❒ *Threshold of harm*:Likely to *either*:

❒ Adversely affect the military operations or capacity of a party to a conflict

❒ Inflict death, injury, or destruction on protected persons or objects

❒ *Direct causation*: Direct causal link between the act and the likely harm

❒ *Belligerent nexus*: *Specifically designed* to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another.

**For such time:** *Three views*

❒ *Nearly any time* (*TK case*): The Court says the inquiry must be case-to-case, with some procedural guarantees, but in para. 33, the focus on the “nature and objective” of the acts indicates that nearly anything can be considered “conduct of hostilities.”

❒ *Specific acts* (ICRC): Preparation, deployment, and return constitute part of the specific act.

❒ ***Continuous combat function* (ICRC):** Where a person is a member of an organized armed group and holds a CCF in that group, he may be targeted for such time that he holds this function.

**Problems with “continuous combat function”:**

• Once you say that, for *some* groups, there is no need to prove “for such time,” then the worry is that civilians will be endangered.

• If the ICRC insists on the specific act requirement, then it must recognize this CCF exception, otherwise protection would encompass many actual fighters. The Israeli Court has a wider criterion, and may not need this third category.

EB: Actors with their own interpretations establish a system of normative checks and balances. Perhaps the best test is whether you feel uneasy after your decision.

**General Rule:** Civilian objects must not be the objects of attack. Civilian objects are those which are not military objectives. (Additional Protocol I, art. 52).

**Military objectives** (art. 52(2)) (*need both*):

❒ By their nature, location, purpose or use make an effective contribution to military action;

❒ Total/partial destruction/neutralization, in the circumstances, offers a *definite* military advantage.

• *So in hard cases, the question often comes down to* ***military advantage****.* Take the prosecutor’s report on Belgrade bombings of TV stations. The only reason the attack on the TV station is OK is because it was designed to destroy communications infrastructure and *not to destroy a propaganda outlet*.

**Prohibition on indiscriminate attacks** (art. 51(4)):

❒ *Need one of the following*:

❒ Not directed at military objective ❒ Means/method cannot be directed at specific m.o.

❒ Employ means/method the effects of which cannot be limited as required

❒ Consequently of one of the above, the attacks are of a nature to be indiscriminate.

• *Note*: This formulation raises the vagueness problems associated with the rules governing Lawful Weapons (*above*). Therefore, API offers two more specific rules (*below*).

**Specific rules on indiscriminate attacks** (art. 51(5)):

❒ Prohibition on carpet bombing and similar activities.

❒ An attack which *may be expected* to cause incidental loss of civilian life, injury, or damage to civilian objects, which would be ***excessive*** in relation to the *direct & concrete* military advantage anticipated.

**What is a military advantage?**

• ***Direct and concrete*:**Refers to the specific military operation. (API, art. 51(5)(b)). Many armies refuse to accept this formulation.

• ***Considered as a whole*:***See* the British ratification of the additional protocols: “the military advantage anticipated from an attack is intended to refer to the advantage anticipated from the **attack considered as a whole** and not only from isolated or particular parts of the attack.” (para. (i)).

• The trouble with this latter formulation is that it appears to balance civilian losses against *winning the entire war*.

**Do you question the military advantage?**

• This would introduce a *jus ad bellum* question into the equation

• The rise of human rights and the principles of humanity may demand this.

**How armies approach excessiveness:**

• Army manuals generally hold that, if the actor was diligent and not reckless, then the attack is within the bounds and is not excessive. Some require “willful intent” to inflict civilian casualties. (*See* Benvenisti, “Human Dignity,” at 96).

• There is a problem with this view, which blurs the lines between individual criminal responsibility and state responsibility. The question of excessive harm, absent *mens rea*, should be a state responsibility question. (*Cf.* Benvenisti at 97).

**Basic precautionary measures (API, art. 57):**

❒ In planning the attack …

❒ Do *everything feasible* to verify that objectives are military objectives

❒ Take *all feasible precautions* in choice of means/methods

❒ Refrain attack that would be excessive in relation to concrete/direct military advantage

❒ Cancel/suspend attacks if it becomes apparent that object is not military or the attack may be expected to cause excessive harm

❒ **Effective advance warning** shall be given, *unless circumstances do not permit*.

**What is effective warning?**

• Goldstone Report argues that art. 57 requires effective warning that:

❒ Will reach those in danger ❒ Gives sufficient time to respond

❒ Explains what civilians should do

🕱 What if civilians don’t comply with a warning? Are they taking direct part in hostilities and thus may be targeted? This seems counter to the principles of humanity.

🕱 ***Mock warnings*** designed to terrorize civilians would be prohibited under art. 51(2).

**Must armies assume risks to protect the civilian population?**

• This is unresolved in the ICTY.

• Goldstone report indicates that some risks must be assumed.

• Military manuals and statements of armies indicate only that the obligation is not to act recklessly. (*See* discussion of excessiveness, *above*).

• *Currently*, the law offers no obligation to take risks to save civilian lives on the other side. Consider the argument from *reciprocity*: how can one side know that the other side is taking risks to save its civilians?

*Moral arguments regarding risks to save civilians*:

• *Walzer* finds **no distinction between allied and enemy civilians**. All are deserving of protection. Bombers should fly lower, risking being shot down, to reduce risks to the civilian population.

• EB: Consider international and internal/asymmetric conflicts separately.

• With respect to international armed conflict, the idea is that each adversary is responsible to its own population. There is a distinction between obligations to one’s own population and obligations to other populations. (“Human Dignity”).

• In asymmetric conflicts, however, the civilians on the side of the enemy do not have any institutional actors to protect them.

**Syllabus readings not integrated into the above outline:**

Physicians for Human Rights et al vs. Almog et al, Israel Supreme Court (2003)

Prosecutor v. Martic, Case No. IT-95-11-T, Judgment, ¶¶ 461-463 (June 12, 2007)

ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts (2007) (excerpts) (on “cluster munitions”)

Israel Supreme Court, Adalah – The Legal Center for Arab Minority Rights in Israel v. GOC Central Command, IDF (2005)

Assumption: Acting hostilities have ended. We need to move to a law & order regime.

Definition in Hague Regulation art. 42:

Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

Note the tension between the two sentences. The first indicates that actual control of territory is all that is needed. The second may suggest that you actually need the establishment of authority over the people as well.

ICJ (armed activities) emphasizes assuming authority over the population. “Substituting its own authority for the authority of the Congolese government”

Dissent: Where they are in a position to exercise such authority and have prevented the local government from doing so.

Perverse incentive: The majority view in the ICJ seems to allow armies to control territory without incurring responsibility to the local population. Once you have the *means* to secure control, you can argue that you incur the obligations.

History: In 1907, a strict reading of occupation made sense; invaders would hasten to say they were occupiers. Now the situation has reversed.

What about the situation in which the army tries to control the territory from the outside? If we look at the laws of war as a way to ensure protection of individuals, there is a need to ask who is responsible for their survival. The ICJ separate opinion would indicate that, to the extent they prevent a local regime from forming, they incur responsibility.

End of occupation: traditionally when the parties sign peace agreements. But Gaza indicates that the clear-cut distinction between occupation and end of occupation needs to be questioned here.

1. *Note on terminology*: This tension can be seen in the terms used to describe the laws of war. Humanitarian actors prefer the term “International Humanitarian Law,” which places the individual at the center of this body of rules. Military lawyers wish to emphasize the term “law of armed conflict.” The point is that the law is not necessarily humanitarian in character, and is primarily a set of agreements between States governing the conduct of hostilities. [↑](#footnote-ref-2)
2. *Martens Clause*: Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the **principles of international law**, as they result from **the usages established between civilized nations**, from the **laws of humanity**, and the **requirements of the public conscience.** (preamble to 1899 Hague Regulations) [↑](#footnote-ref-3)