

INTERNATIONAL LEGAL ANALYSIS ON ATTACKS TOWARDS MEDICAL PERSONNEL AND HEALTHCARE FACILITIES ON INTERNATIONAL ARMED CONFLICT



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MAKASSAR
2024



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TITLE PAGE

INTERNATIONAL LEGAL ANALYSIS ON ATTACKS TOWARDS MEDICAL PERSONNEL AND HEALTHCARE FACILITIES ON INTERNATIONAL ARMED CONFLICT

As a Final Project for the Department of International Law Undergraduate
Program in the Legal Studies Program

Written and Submitted by:

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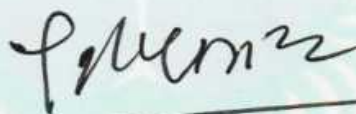
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I with this declare that the thesis entitled **INTERNATIONAL LEGAL ANALYSIS ON ATTACKS TOWARDS MEDICAL PERSONNEL AND HEALTHCARE FACILITIES ON INTERNATIONAL ARMED CONFLICT** is truly my own work. Anything that is not my work in writing this thesis is given a citation mark and shown in the bibliography. Suppose in the future it is proven that my statement is not true. In that case, I am willing to accept sanctions under the regulations of the Minister of National Education of the Republic of Indonesia Number 17 of 2010 and applicable laws and regulations.

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ABSTRAK

ANDI ALFISA AZZAHRA RAHMAN (B011201261). *International Legal Analysis On Attacks Towards Medical Personnel And Healthcare Facilities On International Armed Conflict*. Dibimbing oleh Abdul Maasba Magassing.

Penelitian ini bertujuan untuk mengkaji kerangka dan mekanisme hukum yang ada yang dirancang untuk melindungi tenaga medis selama masa bersenjata internasional dan pertanggungjawaban hukum terhadap para pelaku beserta dampaknya terhadap penyediaan dan efektivitas perawatan medis.

Dalam penelitian ini, penulis menggunakan metodologi penelitian normatif untuk menganalisis kerangka hukum seperti perjanjian-perjanjian utama, konvensi-konvensi, dan ketentuan-ketentuan hukum internasional yang lazim untuk melindungi tenaga medis untuk menentukan tanggung jawab para pelaku.

Hasil penelitian menyimpulkan bahwa serangan terhadap tenaga medis dalam konflik bersenjata internasional merupakan pelanggaran serius terhadap hukum humaniter internasional (IHL). Dilindungi oleh Konvensi Jenewa I-IV 1949, Protokol Tambahan, dan Statuta Roma Mahkamah Pidana Internasional, serangan-serangan ini dianggap sebagai kejahatan perang. Oleh karena itu, tindakan tersebut sangat berdampak pada populasi yang terkena dampak dengan membatasi akses ke perawatan medis dan bantuan kemanusiaan. Terlepas dari perlindungan hukum yang telah ditetapkan, pelanggaran yang sedang berlangsung menggarisbawahi perlunya penegakan hukum yang lebih kuat dan kepatuhan terhadap IHL untuk memastikan keselamatan personel dan fasilitas medis di zona konflik.

Kata kunci: Tenaga Medis, Serangan, Konflik Bersenjata Internasional, Hukum Humaniter Internasional



ABSTRACT

ANDI ALFISA AZZAHRA RAHMAN (B011201261). *International Legal Analysis On Attacks Towards Medical Personnel And Healthcare Facilities On International Armed Conflict*. Supervised by Abdul Maasba Magassing.

This research aims to examine the existing legal frameworks and mechanisms designed to protect medical personnel during an international armed and their legal accountability on the perpetrators alongside its impacts on medical care provision and effectiveness.

In this study, the author utilized a normative research methodology to analyze the legal frameworks such as key treaties, conventions, and customary international law provisions for safeguarding medical personnel to determine the responsibility of the perpetrators.

The result of the research concludes that attacks on medical personnel in international armed conflicts are serious violations of international humanitarian law (IHL). Protected under Geneva Conventions I-IV 1949, Additional Protocols, and the Rome Statute of the International Criminal Court, these attacks are considered war crimes. Therefore, such actions severely impact affected populations by restricting access to medical care and humanitarian aid. Despite established legal protections, ongoing violations underscore the need for stronger enforcement and compliance with IHL to ensure the safety of medical personnel and facilities in conflict zones.

Keywords: Medical Personnel, Attacks, International Armed Conflicts, International Humanitarian Law



FOREWORD

Assalamualaikum Warahmatullahi Wabarakatuh.

All praises to Allah SWT for the endless mercy and his uncountable blessings that allowed the author to prepare and complete this thesis, titled, “International Legal Analysis On Attacks Towards Medical Personnel and Healthcare Facilities On International Armed Conflict” as the final project for completing the bachelor of laws degree program at Faculty of Law Universitas Hasanuddin.

The author is pleased to express appreciation and gratitude to loved ones for providing endless support, help, and prayers on the author’s thesis journey. An honorable mention to the author’s parents, Dr. Andi Muh. Ali Rahman, S.H., M.H., or Papa, and Muthia Natsir, or Mama, who never stops believing and motivating the author with great affection and discipline, may Allah SWT bless them with love and health to live a prosperous life. Most importantly, endless gratitude is given to the author’s late grandmother, Ummi, who was not physically present during the completion of the thesis, and yet the author yearns for her affection. Ummi was there while writing the first three chapters, but couldn’t make it to see the last two chapters. Her presence and absence are what helped the author to stand still despite the numerous challenges faced.



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LIST OF CONTENTS

	Pages
COVER PAGE.....	i
TITLE PAGE.....	ii
SHEET OF APPROVAL.....	iii
THESIS APPROVAL.....	iv
STATEMENT OF AUTHENTICITY.....	v
ABSTRACT.....	vi
FOREWORD.....	vii
LIST OF CONTENTS.....	xii
CHAPTER I INTRODUCTION.....	1
A. Background.....	1
B. Research Questions.....	8
C. Research Objectives.....	8
D. Research Usage.....	9
E. Originality of Research.....	9
CHAPTER II LITERATURE REVIEW.....	16
A. International Humanitarian Law (IHL)	16
1. History of IHL	16
2. Definition of IHL.....	18
3. Principles of IHL.....	20
4. Sources of IHL.....	25
5. Scopes of IHL.....	33
6. Individuals Covered by IHL.....	39
B. Medical Personnel.....	44
1. Medical Personnel in International Armed Conflict...44	
C. International Courts and Humanitarian Aid Societies....47	
1. International Court of Justice.....	48
2. International Criminal Court.....	49
3. International Committee of the Red Cross.....	52



CHAPTER III RESEARCH METHODOLOGY.....	56
A. Research Type and Approach.....	56
B. Research Locations.....	57
C. Types of Data and Legal Sources.....	57
D. Methods of Collecting Data.....	58
E. Data Analysis.....	59
CHAPTER IV RESEARCH RESULTS AND ANALYSIS.....	60
A. Legal Accountability of the Perpetrators of an Attack Towards Medical Personnel During an International Armed Conflict Based on International Humanitarian Law.....	60
B. Attacks On Medical Personnel During International Armed Conflict (IAC) Affect the Provision Of Healthcare Services With Its Effectiveness And Compliance With International Humanitarian Law.....	87
CHAPTER V CONCLUSION.....	96
A. Conclusion.....	96
B. Recommendation.....	97
BIBLIOGRAPHY.....	98



CHAPTER I

INTRODUCTION

A. BACKGROUND

According to Mochtar Kusumaatmadja, the foundation of all the legal frameworks and principles affecting relationships or issues that cross national and international boundaries is known as international law.¹ Moreover, it is not relevant to view international law as simply a collection of rules; rather, it is a rapidly evolving complexity of rules - though not directly binding - principles, practices, and statements combined with increasingly advanced structures and processes.²

Whilst referring to international law, international conflicts and wars are two of the most vital issues that have been going on for centuries. The specter of war brings horror, suffering, and destruction that cannot be described in words for the people who suffered, both combatants and civilians. Hence, International Humanitarian Law as one of the branches of International Law was established as a set of legal frameworks that seek to minimize the damaging effects of armed conflict.³ International Humanitarian Law is also known as the law of armed conflict or the 'law of



Kusumaatmadja and Ety E. Agoes, 2019, *Pengantar Hukum Internasional* P.T. 1.

Shaw. "International Law". *Encyclopedia Britannica*, 9 Jan. 2024, w.britannica.com/topic/international-law. Accessed 2 January 2024.

atif and Kadarudin, 2013, *Pengantar Hukum Internasional*. Pustaka Pena Press p. 15

war' (jus in bello).⁴ The sources of International Humanitarian Law are mentioned in Article 38 of the Statute of the International Court of Justice, which includes; general rules of international law, treaty interpretation, and state responsibility.

The long history of International Humanitarian Law known as the “Law of War” first began in 1864 with the adoption of the first Geneva Convention or the Amelioration of the Condition of the Wounded in Armies in the Field then continued developing the codification and customary law for International Humanitarian Law for centuries with much more recent details regarding means and methods of warfare. The 1864 first Geneva Convention, started with only ten articles, laid down several principles that have been maintained as core principles of International Humanitarian Law to this date: the protection of the wounded and sick without any distinction, whether friend or foe; the inviolability of medical personnel, establishments, and transports; and the use of a distinctive emblem of the red cross on a white ground (later supplemented by other emblems).⁵ It remained and continued to adapt newer versions in 1906, 1929, and 1949, much later on additional protocols were added in 1977 and 2005.

Aside from the legal sources, International Humanitarian Law also has its general principles including the principles of humanity, distinction, necessity, and the prohibition of causing unnecessary suffering or



er, *International Humanitarian Law: A Comprehensive Introduction*, International
of the Red Cross, p. 16
l and Dapo Akande, 2020, *The Oxford Guide to International Humanitarian Law*,
iversity Press, p. 3

proportionality.⁶ The principle of humanity emphasizes limitations on the means and methods of warfare and expects that individuals who have fallen into the adversary's hands always be treated with humanity.⁷ The principle of distinction prohibits indiscriminate attacks and requires a clear distinction between civilians and combatants, as well as civilian objects and military objects. The principle of necessity requires that the use of military forces must only be for the achievement of legitimate military purposes. Lastly, the principles of proportionality prohibits any actions that would be excessive in relation to the anticipated practical and direct military benefit and that are likely to result in accidental civilian deaths, injuries, damage to civilian property, or a combination of these.⁸

Thus, in warfare, a proportionality is needed between the needs of the military and humanitarian concerns. Its regulations align with the essential military requirements and the principles of humanity. Consequently, military necessity cannot be used as a reason behind the violation of humanitarian law's provisions during armed conflicts in pursuit of a military advantage through prohibited methods. That being stated, the goal is to reduce the degree of suffering brought on by conflict to minimise the risk of its consequences and to give victims of war—both combatants and civilians—legal protection.

Based on Additional Protocol I Article 43 (2), combatants are



1.
er, *Op.Cit*, p. 1
le 51(5)(b) of the 1977 Additional Protocol I.

“Members of the armed forces of a party to an international armed conflict, except medical and religious personnel assuming exclusively humanitarian functions.”

Meanwhile, civilians are defined as an “individuals who are not members of the armed forces.”

As regulated in the Geneva Conventions 1949 with its Additional Protocol 1977, it pertains to the provisions that outline the safeguarding of individuals involved in or uninvolved with combat operations, such as those who are injured, unwell, non-combatants, medical personnel, and individuals held in connection with armed conflicts. Specifically, this thesis focuses on medical personnel, a group recognized in international humanitarian law as non-combatants since they do not actively contribute to military actions. They are granted immunity and the entitlement to remain unharmed or singled out as victims during wartime.

As stated in Article 24 of Geneva Convention I of 1949,

“Medical personnel exclusively engaged in the search for, or the collection, transport, or treatment of the wounded or sick, or the prevention of disease, staff exclusively engaged in the administration of medical units and establishments, as well as chaplains attached to the armed forces, shall be respected and protected in all circumstances.”

Furthermore, another legal basis to uphold and enforce the prohibition against military attacks on medical personnel during wartime and ensure military forces do not target them is stated clearly in Article 24-36 1949 Geneva Convention I; Article 36 1949 Geneva Convention II; Article



Additional Protocol I; Article 9 1977 Additional Protocol II; Rule 25 Customary IHL; Resolution 2286 on Protection of The Wounded and Medical Personnel and Humanitarian Personnel in Armed Conflict;

and Article 164 of San Remo Manual on International Law Applicable to Armed Conflicts at Sea. There also has been an attempt to tighten the protection of medical personnel in the event of conflict adopted by the UN Security Council in 2016 called Resolution 2286, which was co-sponsored by more than 80 Member States, the 15-member Council strongly condemned attacks and threats against the wounded and sick, medical personnel and humanitarian personnel exclusively engaged in medical duties, their means of transport and equipment, as well as hospitals and other medical facilities.⁹

Despite the existence of regulations in international humanitarian law and their principles aimed at providing legal protection to medical personnel in armed conflicts, violations still occur at any time during warfare.

Recently, Ukraine had an unimaginable and unjustified inhuman attack from Russia resulting in much unnecessary damage. Bombardment on civilian infrastructure including schools and hospitals was all over the country. This sure endangered the lives of medical personnel and health facilities. According to the World Health Organization's (WHO) Surveillance System for Attacks on Health Care, from the beginning of February 2022 to September 2023, there have been a total of 1147 confirmed attacks on healthcare components, specifically 78 attacks on impacted medical



Council Adopts Resolution 2286 (2016), Strongly Condemning Attacks against Facilities, Personnel in Conflict Situations accessed September 4th 2023 ss.un.org/en/2016/sc12347.doc.htm

personnel resulting in injuries and death.¹⁰ Besides that, The International Federation of Red Cross and Red Crescent Societies (IFRC) confirmed that there were five medical personnel killed in armed hostilities in Israel and the Gaza Strip during the Israel-Palestinian conflict on 11th October 2023.¹¹ Even more recently on 17th October 2023, an airstrike by Israeli troops bombed several hospitals in the north of the Gaza Strip, one of them being the largest hospital in the area which is Al-Ahli Hospital causing 471 people to be killed in the blast according to the Palestinian Health Ministry.¹²

According to the Statute of Rome Article 8 regarding War Crimes, it is stated that

“Intentionally directing attacks against buildings, material, medical units, transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.”

It is one of the other serious violations of the laws and customs applicable in international armed conflict within the established framework of international law.¹³ Thus, attacking medical personnel involved in international armed conflict not only violates the Geneva Convention I of 1949, two Additional Protocols 1977, Rule 25 ICRC Customary IHL, and Resolution 2286 on Protection of The Wounded and Sick, Medical Personnel and Humanitarian Personnel in Armed Conflicts but also, violates

¹⁰ WHO. Surveillance System For Attacks On Health Care. Accessed September 4th, 2023. <https://extranet.who.int/ssai/Index.aspx>

¹¹ Anadolu Agency. Five Red Cross Red Crescent Staffers Killed in Armed Hostilities in Gaza. Accessed 16th October 2023. <https://www.aa.com.tr/en/middle-east/five-red-crescent-staffers-killed-in-armed-hostilities-in-israel-gaza/3016053>

¹² BBC News. Gaza hospital: What video, pictures and other evidence tell us about Al-Ahli last. Accessed 6th November 2023. <https://www.bbc.co.uk/news/world-middle-4061.amp>

¹³ Rome Statute of International Criminal Court, Article 8(b)



the Statute of Rome and is within the jurisdiction of the International Criminal Court (ICC). That being said, accountability and investigation should fall under the jurisdiction of the ICC to serve the interests of justice and the victims. An investigation should be initiated and conducted to ensure whether a state or an individual allows the attack to happen in the first place.

Based on the countries the author mentioned as case examples for attacked medical personnel, which are Palestine-Israel, Ukraine-Russia, and Sudan, they have been brought to the investigation state for years in ICC but have yet to release any arrest warrant. Therefore, the pre-trials and trial stage cannot be conducted until the concrete enforcement of International Humanitarian Law and the perpetrator's responsibility could be sentenced. In addition, the investigation does not specifically highlight the attacks on medical personnel but rather the bigger picture that may or may not have included the issue.

Hence, the implementation of International Humanitarian Law regulations and principles is still relatively weak, resulting in endangering and losing the lives of medical personnel in international armed conflict.

Therefore, the author will research attacks on medical personnel in international armed conflict and the implementation of existing regulations.

Based on the legal issue mentioned above, more in-depth legal research is deemed necessary, titled **“International Legal Analysis on Attacks**

s Medical Personnel and Healthcare Facilities on International Conflict.”



B. RESEARCH QUESTIONS

Based on the aforementioned introduction, this thesis will identify 2 (two) research questions which will be researched thoroughly, as follows:

1. What legal accountability lies upon the perpetrators that attack medical personnel during an international armed conflict based on International Humanitarian Law?
2. How do attacks on medical personnel during international armed conflict (IAC) affect the provision of healthcare services with its effectiveness and compliance with International Humanitarian Law?

C. RESEARCH OBJECTIVES

1. Find out the legal accountability of perpetrators that attack medical personnel during an international armed conflict viewed by International Humanitarian Law.
2. Examine how the attacks on medical personnel during international armed conflict affect the provision of healthcare services with its effectiveness and compliance with International Humanitarian Law.



D. RESEARCH USAGE

1. Academic Usage

This research ought to contribute a better knowledge of International Humanitarian Law, especially in recognizing the impacts of indiscriminate attacks on medical personnel in international armed conflicts,

2. Practical Usage

This research ought to serve as a resource for the government or humanitarian organizations to understand more about the legal framework governing their operations in conflict zones in compliance with international law.

E. ORIGINALITY OF RESEARCH

Author	: Sitta Desy Ratnasari	
Title	: <i>Perlindungan Hukum Humaniter Petugas Medis Dalam Sitiasi Bersenjata Internasional</i>	
Category	: Thesis	
Year	: 2019	
Institution	: Universitas Sriwijaya	
Description	Existing Research	Research Plan
Issues	: 1. Bagaimana kedudukan petugas	1. What legal accountability lies upon the



<p>medis dalam Hukum Humaniter?</p> <p>2. Mengapa perlindungan hukum terhadap petugas medis dalam situasi bersenjata sulit diimplementasikan?</p>	<p>perpetrators that attack medical personnel during an international armed conflict based on International Humanitarian Law?</p> <p>2. How do attacks on medical personnel during international armed conflict (IAC) affect the provision of healthcare</p>
---	--



	services with its effectiveness and compliance with International Humanitarian Law?
Research : Normative Method	Normative
Research : This thesis focuses on the Results status and legal protection of medical personnel in general, rather than the specific state or individual legal accountability of those responsible for the attack.	This thesis focuses on the legal accountability that lies upon the perpetrators in two forms; individual criminal responsibility and state responsibility.



Author : Nada Aliyah

Title : <i>Implementasi Hukum Terhadap Perlindungan Petugas Medis Berdasarkan Hukum Humaniter Internasional Dalam Konflik Bersenjata (Menurut Resolusi Dewan Keamanan PBB Nomor 2286 Tahun 2016)</i>		
Category : Thesis		
Year : 2019		
Institution : Universitas Andalas		
Description	Existing Research	Research Plan
Issues :	1. Bagaimana pengaturan perlindungan petugas medis berdasarkan Hukum Humaniter Internasional dalam konflik bersenjata? 2. Bagaimana implementasi hukum perlindungan	1. What legal accountability lies upon the perpetrators that attack medical personnel during an international armed conflict based on International



petugas medis dalam konflik bersenjata menurut Resolusi Dewan Keamanan PBB Nomor 2286 tahun 2016?	Humanitarian Law?
3. Bagaimana tantangan dan hambatan dari implementasi resolusi Dewan Keamanan PBB Nomor 2286 Tahun 2016?	2. How do attacks on medical personnel during international armed conflict (IAC) affect the provision of healthcare services with its effectiveness and compliance with International Humanitarian Law?



Research Method	: Normative	Normative
Results	: This thesis focuses on how the Resolution 2286 of Security Council of United Nations are implemented in protecting medical personnel.	This thesis focuses on the legal accountability that lies upon the perpetrators in two forms; individual criminal responsibility and state responsibility as well as the impacts of the unjust attacks on the provision of health care in international armed conflicts.

According to previously disclosed study titles, there is a significant difference between this research and the abovementioned titles. According to the prior studies, the legal protection of medical personnel was highlighted more than state responsibility and individual responsibility regarding unjust attacks. Hence, the author's



aim in this research is to delve more into the lawful responsibility of the perpetrators of the unjust attacks and how it affects the medical field in international armed conflicts.



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CHAPTER II

LITERATURE REVIEW

A. International Humanitarian Law

1. History of International Humanitarian Law

The battle of Solferino in 1859 was seen to be a vital moment in the history of International Humanitarian Law as Henry Dunant, a Swiss citizen was horrified by the distress of injured soldiers had to endure that led to the inspiration of the Red Cross Movement.¹⁴ Dunant then proposed a peacetime creation in his book *A Memory of Solferino* regarding permanent aid societies in all countries to ensure that qualified volunteers would be available in the event of war to help the wounded of all parties.¹⁵ Dunant also suggested that the states meet to formulate international principles sanctioned by a Convention to regulate the functioning of such societies and to give legal protection to the wounded soldiers in the field.¹⁶ According to those proposals made by Dunant, the Red Cross Movement and the adoption of the 1864 Geneva Convention was established.

1864 Geneva Convention becomes the core principle of International Humanitarian Law and the first legal protection towards the wounded and sick with no discrimination, “the immunity from any



a Alexander, 2015, *A Short History of International Humanitarian Law*, The Journal of International Law, Vol. 26 No. 1, Oxford University Press on behalf of p. 112

Al and Dapo Akande, *Op.Cit*, p. 3

3

harm of medical personnel, medical establishments, and medical transports,” the neutral symbol hospitals and medical staff use to aid the sick and injured on the battlefield which is the distinctive Red Cross emblem on a white background. The Geneva Convention continued to develop through the years with newer adaptations including:

- 1) Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- 2) Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea;
- 3) Geneva Convention III Concerning the Treatment of Prisoners of War;
- 4) Geneva Convention IV Concerning the Protection of Civilian Persons in Time of War.

Additionally, the three Protocols to the Geneva Conventions were added to strengthen the laws in Geneva Conventions, include:

- 1) Protocols of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of International Armed Conflicts;
- 2) Protocols of 8 June 1977 Additional to the Geneva Conventions of 12 August 1949, and Concerning the Protection of Victims of Non-International Armed Conflicts; and



- 3) Protocol of 8 December 2005 Additional to the Geneva Conventions of 12 August 1949, Relating to the Adoption of an Additional Distinctive Emblem.

With 196 state parties, the previously mentioned 1949 Geneva Conventions and their Additional Protocols remain in effect today and have grown to be the most broadly ratified treaty.¹⁷

2. Definition of International Humanitarian Law

International Humanitarian Law as one part of international law, is one of the tools and means that can be used by every country, including by peaceful or neutral countries, to participate in reducing the suffering experienced by the community due to wars that occur in various countries.¹⁸ Furthermore, the existence of laws regulating the wars can be categorized as the '*jus ad bellum*' and the '*jus in bello*', which respectively means the area of law that establishes the conditions which enable a State to resort to war in general and the framework of law that regulates the action of belligerents during a war and minimizes the impact on civilian populations.¹⁹ One of the most important things to this context is that International Humanitarian Law is focused on regulating the conduct of armed



zer, *Op.Cit.* p.36
ati, Denny Ramadhany, and Rina Rusman, 2012, *Hukum Humaniter
nal Dalam Studi Hubungan Internasional*, Rajawali Press, p. 27
derson, 2009, *The Contemporary Law of Targeting*, Martinus Nijhoff Publishers,

conflict, rather than their commencement.²⁰ In other words, the main concern is not how an armed conflict started or which parties are to blame for it, but rather focuses on what forms of conduct are allowed once the conflict is ongoing.²¹

The primary goal of International Humanitarian Law is to safeguard those who are not, or are no longer, directly or actively involved in hostilities, and to restrain the means of method of warfare.²² Regardless of the phrase ‘International Humanitarian Law’ and the conceptualization of *jus in bello* is commonly accepted for its long history, both terms are fairly new. Before the 1960s, the phrase ‘International Humanitarian Law’ was not applied widely to describe a field of law in international law, even when the phrase started to be used in the 1960s, it still implied a quite different understanding of the law due to its current embodiment as the ‘law of war’ or the ‘law of armed conflict’. Although both terms might seem similar, the previously mentioned terms were not a different nomenclature for the same type of law. Rather, it was an appropriate title for a different concept of law and different rules.²³ The changes from the phrase “law of war” to “International Humanitarian Law”, have partially been



²⁰ Jonathan Crowe and Kylie Weston-Scheuber, 2013, *Principles of International Humanitarian Law*, Edward Elgar Publishing Limited, p. 7

zer, *Op.Cit.* p. 37

ional Committee of The Red Cross. What is International Humanitarian Law?

24 January 2024 <https://www.icrc.org/en/document/what-international-law>

Alexander, *Op.Cit.* p. 114

done to reflect the growing influence of human rights and humanitarian aims of IHL.²⁴ Since the phrase “International Humanitarian Law” is not used in the Geneva Conventions I-IV, still it is connected to Additional Protocols where the drafting conference which is called the “Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts”.²⁵ Additionally, some see the ‘International Humanitarian Law’ as a potentially narrower section of international law because it only relates to the laws in armed conflict that are crafted to exert control over the treatment of persons whether it is civil or military, wounded or actively participating in the armed conflict.²⁶

That being said, International Humanitarian Law maintains a compromising balance between the necessity for the military and humanity. According to the Geneva Convention I-IV Common Article 1, which “states the respect for the present Convention in all circumstances”, applied to International Humanitarian Law obligations during an armed conflict. Thus, it must be complied with under any circumstances.

3. Principles of International Humanitarian Law

The principles of International Humanitarian Law demonstrate the core values and obligations that must be obeyed in times of



Drawford and Alison Pert, 2015, *International Humanitarian Law*, Cambridge Press, p. 96

96
95

armed conflict. All the substantive rules of International Humanitarian Law are drawn from these principles, as follows:

A) The principle of distinction

As stated in Article 48 of Additional Protocol I,

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.”

Additionally, based on the St. Petersburg Declaration, it is mentioned that,

“the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.”

By all means, the obligation of both parties is not to obscure the boundaries between military and civilian. Hence, combatants need to set themselves apart from the civilian population through the use of uniforms and other visible signs that mark them as military in nature.²⁷ Furthermore, still in line and connected with the principle of distinction is the prohibition of indiscriminate attacks. Article 51(4) of the Additional Protocol I mentioned that

“indiscriminate attacks are prohibited and that includes; those which are not directed at specific military objectives; those which employ a method or means of combat which cannot be directed at specific military objective; or those which employ a method or means of combat the effects of



which cannot be limited; and are of a nature to strike military objectives and civilians or civilian objects without distinction.”

B) The principle of precautions

Entailing from the previous principle, the principle of precautions evokes a responsibility to prevent incidental death, damage, and destruction from occurring as much as possible to persons and objects that are shielded from direct attack.²⁸ Accordingly, in Article 57(1) Additional Protocol I,

“in the conduct of military operations, constant care shall be taken to spare the civilian population, civilians, and civilian objects.”

This is relevant to both parties in an armed conflict, they are required to take all reasonable precautions to prevent unintentional harm from arising from their military operations (precautions in attack) and to safeguard the civilian population under their control from the consequences of any attacks carried out by military operations (precautions against the effects of attack).²⁹

The measures needed to take precautions are to confirm that the targets are military and that there has been a sufficient warning to the civilian population before the



zer, *Op,Cit.* p. 18

attack took place. Restrictions may also apply to the weapons or strategies used and the attack's place and time.³⁰

C) The principle of proportionality

The principle of proportionality exists when it is impossible to prevent accidental harm from occurring to civilians or civilian property, the principle of proportionality must be established.³¹ This principle simplifies to grasp when viewed negatively. That is, an attack will be regarded as disproportionate if it is anticipated to (or does) result in incidental civilian casualties, injuries, property damage, or any combination of these, which would be deemed greater than a direct military operation would anticipate.³²

The highlight of this principle is the term 'excessive'. The restriction of attacks against civilians and civilian objects directly is absolute and so does the need of proportionality, but the accepted norm of 'excessiveness' is quite subjective. There is no universally accepted definition of what constitutes excessive incidental injury to civilians or civilian objects under international



International Committee of The Red Cross. What is International Humanitarian Law? 25 January 2024 <https://www.icrc.org/en/document/what-international-law>
zer, *Op.Cit.* p. 19
rawford and Alison Pert, *Op.Cit.* p. 109; See Article 51(5)(b) of Additional Protocol

humanitarian law. This argument led to the belief that the proportionality principle might contain subjective elements. However, an objective view could be taken from the terminology used in the legal sources, such as the treaties and conventions. Hence, there is no political, economic, or other non-military benefit that can justify the infliction of incidental injury on civilians or civilian objects other than those of a "military" nature.³³ To avoid being ambiguous in this manner, the military advantage cannot be of a hypothetical, speculative, or indirect nature; rather, it must be solid and direct.³⁴ Any means of intent or achieving "winning the war" cannot be justified if it is meant to violate the proportionality principle.

D) The principle of humanity

Lastly, among the most essential core of International Humanitarian Law is regardless of their status or past roles or activities, everyone who has fallen under an adversary's influence has a right to humane treatment.³⁵ Based on common Article 3 of the Geneva Conventions,

"Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse



zer, *Op.Cit.* p. 101

distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.”

Furthermore, the idea of humanity or humane treatment should be seen as a limiting factor because there should be limits on what a person should do in times of armed conflict. The principle aims to balance the limitation of harm, destruction, and incidental death during an armed conflict.

4. Sources of International Humanitarian Law

As a branch of international law, International Humanitarian Law is derived from four sources which are treaties, customs, the general principles of law, and judicial decisions and the teachings of the most highly qualified publicists of various nations.³⁶ That includes:

1) Treaty law

As mentioned before, the most significant sources of applicable International Humanitarian Law would be the ‘Geneva Conventions of 1949’ and its ‘Additional Protocols of 1977 and 2005’ since it has come to be internationally binding upon all states. These are commonly called the Geneva Laws which are concerned with the protection of vulnerable parties who are offering humanitarian aid during



³⁶ Statute of International Court of Justice, Article 38(1).

warfare.³⁷ The first Additional Protocol of 1977 expands the security granted to victims of international armed conflicts and contains rules on the conduct of hostilities that define the permissible types of means and methods of warfare.³⁸ Meanwhile, the second Additional Protocol of 2005 expands the protection granted to persons affected by non-international armed conflicts.³⁹

The Additional Protocols are not as widely ratified as the Geneva Conventions but the provisions in both Protocols are regarded as customary and consequently universally binding regardless it has been ratified or not by a certain State.⁴⁰ On the other hand, the 1907 Hague Convention is concerned with regulating the means and methods of warfare employed by the parties to an armed conflict.⁴¹

The Hague Convention is commonly called the Hague Laws and its main concentration is controlling the acts of armed exchanges such as the types of weapons that can be used and its restrictions and prohibiting certain military strategies. Although the Hague Laws are treaty rules, It is



³⁷ n Crowe and Kylie Weston-Scheuber, *Op.Cit.* p. 28
³⁸ Guide to International Humanitarian Law 4th Revised Edition, 2021, Diakonia
³⁹ International Humanitarian Law Centre, Jerusalem, p. 6

⁴⁰ n Crowe and Kylie Weston-Scheuber, *Op.Cit.* p. 28

not required to verify whether a particular State is bound by them because all of their rules are regarded as customary law and therefore are binding on all States unless the rule in question has been replaced by more recent treaty rules.⁴²

A merging between the Geneva Laws and Hague Laws in contemporary International Humanitarian Law begins with the adoption of Additional Protocol I in 1977 and today efficiently summarizes the dual aims of International Humanitarian Law since it balances the military needs and humanitarian objectives.

2) Customary law

Customary of international law is known as ‘the general practice accepted as law’.⁴³ The formation of customary law requires two elements which are general practice and an indication that this practice is followed as a ‘matter of law’ (*opinio juris*).⁴⁴ Customary law fills gaps on issues not covered by treaties and it binds non-parties to a treaty that are involved in a conflict.⁴⁵ The advantage of customary law is that it is a constantly evolving body of law that always changes over time simultaneously with State practices and



Sassoli, 2019, *International Humanitarian Law: Rules, Controversies, and to Problems Arising in Warfare*, Edward Elgar Publishing Limited, p. 36
tute of International Court of Justice, Article 38(1).
Jl and Dapo Akande, *Op.Cit*, p. 16
Sassoli, *Op.Cit*. p. 51

legal opinion.⁴⁶ Compared to treaty law, customary law can evolve to new developments far more quickly.

For instance, the use of customary law in International Humanitarian Law could be seen in the 'International Criminal Tribunal for the Former Yugoslavia', known as ICTY, and the 'International Criminal Tribunal for Rwanda', known as ICTR, both relied on customary law in their jurisprudence. Moreover, the 'International Committee of the Red Cross', known as ICRC, published the ICRC Customary Law study in 2005 based upon a wide survey of practice and expert consultations and is currently being used as a database.⁴⁷ 161 customary principles of international humanitarian law have been identified by the ICRC as applying to both international and non-international armed conflicts.⁴⁸

On the other hand, customary law is not based on a written agreement therefore determining the extent to which a certain rule has become customary can be challenging.⁴⁹ Nonetheless, customary law is not inherently less legally binding than treaty law since it continues to hold a



zer, *Op.Cit.* p. 22

Massoli, *Op.Cit.* p. 46

Database, Customary IHL, Rules - Customary IHL - ICRC, <https://ihl-databases.icrc.org/en/customary-ihl/v1> Accessed on 9th February 2024

zer, *Op.Cit.* p. 23

significant part in a rapidly evolving contemporary International Humanitarian Law.

3) General principles of law

As stated in Article 38(1) of the Statute of the International Court of Justice, “general principles of law recognized by civilized nations”. In other words, general principles of law are those that are recognized by all national legal systems. When treaty law or customary law does not offer a rule of decision, it can be generally applied to fill in the blanks.⁵⁰ The subsidiary nature of general principles of law as a source of International Humanitarian Law is manifested into three different functions, namely: (1) filling legal gaps; (2) interpreting legal rules, and (3) confirming a decision based on other legal rules to reinforce the legal reasoning.⁵¹ Examples are the principles of *res iudicata*⁵², good faith, and ‘certain principles of procedure’.⁵³

As mentioned in his book, Raimondo stated that ‘there is no hierarchy among the sources of international law’,

⁵⁰ Laura Pineschi, 2015, *General Principles of Law: The Role of the Judiciary*, Springer, p. 10.



O. Raimondo, 2008, *General Principles of Law in the Decision of International Courts and Tribunals*, Martinus Nijhoff Publishers, p. 44

In Miriam Webster Dictionary, *res iudicata* means ‘a matter finally decided on its a court having competent jurisdiction and not subject to litigation again between parties’.

19

thus the applicable sources could be applied simultaneously. For instance, based on the case of *Erdemovic* in ICTY, the judgment of the trial may depend on the presence of a general principle of law as the ICTY decides on various personal defenses that may absolve someone of personal criminal liability, such as by using the general principles of law acknowledged by all nation.⁵⁴

4) Judicial decisions and the teachings of highly qualified publicists

As mentioned in Article 38(1) of the Statute of the International Court of Justice, 'judicial decisions are seen as a subsidiary means for the determination of rules of law', in other words, judicial decisions are viewed as a secondary source.⁵⁵ Judicial decisions certainly influenced the rapid evolution of International Humanitarian Law where the interpretation of primary legal rules can determine the matters of life and death, especially towards civilians and non-combatants during an armed conflict.⁵⁶



⁵⁴ Prosecutor v. Drazen Erdemovic (Appeal Judgment), IT-96-22-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 7 October 1997, www.refworld.org/jurisprudence/caselaw/icty/1997/en/20274, Accessed 10 2024

Darcy, 2014, *Judges, Law and War: The Judicial Development of International Humanitarian Law*, Cambridge University Press, p. 22

15

The principal court that is considered significant includes 'The International Court of Justice', 'The International Criminal Court', 'The International Military Tribunals at Nuremberg and Tokyo', 'The International Criminal Tribunals for Rwanda and the former Yugoslavia', and 'The Special Court for Sierra Leone'. Each tribunal's jurisprudence contributes its substantive proceedings to the evolution of International Humanitarian Law by determining the scope and content of relevant regulations and enforcing those regulations that stimulate discussions of the entirety of International Humanitarian Law.⁵⁷ Judicial decisions by both international and national courts own the potential to have a major influence on the international legal order, and national systems, as well as treaty-making and the possibility of the creation of new International Humanitarian Law derived from the judges.⁵⁸

Meanwhile, the teachings of the most highly qualified publicists are defined as books and articles that aim to provide legal answers and are used to identify the content



of international law.⁵⁹ For instance, the International Court of Justice has used a few of its teachings in the citation of court decisions. In the 'Land, Island, and Maritime Frontier Dispute between El Salvador, Honduras, and Nicaragua' case, for example, the Court cited "Oppenheim's International Law," and in the advisory opinion regarding the Wall in the occupied Palestinian territory in 2004 referred to works published by the International Committee of the Red Cross.

Though the concept of qualification should be seen as a gradual progression from the least to the most qualified where the more highly qualified works are cited more, the term "most highly qualified publicists" may be interpreted as implying that some writers are more qualified than others. The standard seems subjective and cannot be definitively proven.⁶⁰ Nonetheless, there are certain factors to consider when determining the value of the teachings, such as the quality of the writing, the author's experience, their official position, and whether or not other writers approve.⁶¹



Torp Helmersen, 2019, *Finding 'the Most Highly Qualified Publicist': Lessons from the International Court of Justice*, The European Journal of International Law Vol. 30 Oxford University Press on behalf of EJIL Ltd., p. 510

511

531

5. Scopes of International Humanitarian Law

International Humanitarian Law is formed specifically to govern armed conflicts. Any activity carried out for conflict-related reasons after an armed conflict has begun must abide by International Humanitarian Law.⁶² International Humanitarian Law applies in two different types of situations: international armed conflicts and non-international armed conflicts.

a) International armed conflict

The Geneva Conventions of 1949 and the Additional Protocol of 1977, along with customary international humanitarian law, are the regulations that apply to international armed conflicts.⁶³ Any warfare in which one or more states employ force against another state is considered an international armed conflict.⁶⁴ Common Article 2(1) of the Geneva Convention states that,

“in addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them;”.

⁶² Nils Melzer, *Op.Cit.* p. 57

ns Sans Frontières. The Practical Guide to Humanitarian Law. Accessed 26 January 2024 <https://guide-humanitarian-law.org/content/article/3/international-armed-conflict/>
International Committee of The Red Cross. What is International Humanitarian Law? Accessed 26 January 2024 <https://www.icrc.org/en/document/what-international-humanitarian-law>



Common Article 2 of the Geneva Conventions that states 'to all cases of declared war...', translates to International Humanitarian Law only aimed to be applicable in any declared war done by States, it must be highlighted that the final phrase should be read as 'even if the state of war is not recognized by one or both of them.'⁶⁵ In reality, ever since 1945, declarations of war have become unseen since there are no cases of a formal declaration of war being delivered by one State to another through diplomatic channels such as what was done in World War I and World War II.⁶⁶ Instead, the majority of contemporary conflicts is that neither side has declared nor admitted that they are in a state of war, but they deemed the Geneva Conventions to be applicable.⁶⁷

Moreover, Common Article 2 goes on to define that International Humanitarian Law also applies in cases of 'total or partial occupation of a state party's territory, even when the occupation is met with no resistance'. Also, a declaration of war initiates the application of international humanitarian law, which regulates international military conflicts, even with no such declarations, it can be drawn



⁶⁵Leck, 2009, *The Handbook of International Humanitarian Law: Second Edition*, University Press, p. 50

from the actual execution of force in a conflict that indicates belligerent intent.⁶⁸ The application of International Humanitarian Law in international armed conflicts applies equally to both States and does not depend on which side was responsible for initiating the conflict.⁶⁹ There is no specific intensity needed to trigger the relevance of International Humanitarian Law in international armed conflicts, as soon as minor hostilities occur between States, the protection shall apply every time.⁷⁰

Furthermore, in the temporal scope of international armed conflicts, the conflict ends when a peace treaty or similar agreement is signed by both parties involved, or a unilateral proclamation, or any other clear act indicating the end of such hostile intent; such as capitulation, declaration of surrender, or unconditional, permanent, and complete withdrawal from previously contested territories.⁷¹ An international armed conflict will ultimately end according to factual and objective standards. In terms of territorial scope, where an armed conflict exists



zer, *Op.Cit.* p. 57
leck, *Op.Cit.* p. 51
Kolb and Richard Hyde, 2008, *An Introduction to the International Law of Armed*
Hart Publishing, p. 76

between two states, military operations may only be carried out by the parties on their territories and the high seas, including the airspace above them, the seafloor below, and the exclusive economic zones of neutral states.⁷²

b) Non-international armed conflicts

Most contemporary armed conflicts occur not between States but rather between States and non-international organized armed groups. Armed conflicts that take place on a single state's territory and do not involve the armed forces of any other state against the central government are referred to as non-international armed wars.⁷³

Additionally, non-international armed conflicts can be seen in Common Article 3 of the Geneva Conventions of 1949 which states 'In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'. Common Article 3 does not mention exactly when or how it will apply to International Humanitarian Law as it only mentions the term 'non-international character'. To determine whether or not a



Jl and Dapo Akande, *Op.Cit.* p. 35
Bartels, 2009, *Timelines, Borderlines, and Conflicts: The Historical Evolution of I Divide Between International and Non-International Armed Conflicts*,
ial Review of the Red Cross, Vol. 91 Number 873, ICRC, p. 39, Accessed 26
024

conflict should be deemed as non-international conflict, it is to be seen by customary international law.⁷⁴ First and foremost, for determining non-international armed conflict is the involvement of an organized armed group, thus, at least one side of the conflicting parties must be a non-state group.⁷⁵ A non-state group needs to reach a specific degree of organization with a command structure to be deemed applicable.⁷⁶

Important factors that might be considered to determine whether a non-state group is within the right intensity are 'the existence of a command structure; disciplinary rules and mechanisms; the existence of headquarters; control over territory; access to weapons and other military equipment, recruits, and military training; the ability to plan, coordinate, and carry out military operations that include troop movements and logistics; a unified military strategy and the use of military tactics; and an ability to speak with one voice to negotiate and conclude agreements such as ceasefire or peace accords.'⁷⁷



Al and Dapo Akande, *Op.Cit.* p. 40

utor v. Haradinaj et al. (Trial Judgment), IT-04-84-T, International Criminal for the former Yugoslavia (ICTY), 3 April 2008, available at: w.refworld.org/cases/ICTY/48ac3cc82.html, accessed 31 January 2024

For a conflict to be classified as non-international armed, it must be easily distinguished from other types of internal conflict; that is, it must be distinct from domestic disturbances like riots, solitary and intermittent acts of violence, and other similar actions.⁷⁸ An additional criterion besides a sufficient level of military organization to each party, the conflict must reach a threshold of intensity that includes: “the number, duration, and intensity of individual confrontations; the type of weapons and other military equipment used; the number and caliber of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; the number of civilians fleeing the combat zone; and the involvement of the United Nation Security Council.”⁷⁹

The temporal scope of non-international armed conflicts is when the previously stated necessary threshold of intensity is exceeded by an armed conflict involving parties that are sufficiently organized. Regardless, in reality, they are frequently interpreted freely, especially by the involved government in each



zer, *Op.Cit.* p. 71
utor v. Haradinaj et al. (Trial Judgment), IT-04-84-T, International Criminal
for the former Yugoslavia (ICTY), 3 April 2008, available at:
w.refworld.org/cases,ICTY,48ac3cc82.html, accessed 31 January 2024

party.⁸⁰ International Humanitarian Law applies until there is a peaceful resolution reached.⁸¹ In terms of territorial scope, International Humanitarian Law applicability is based on Common Article 3 and Additional Protocol II restricted to 'armed conflict taking place in the territory of a High Contracting Party'. Additionally, the Additional Protocol mentioned that 'the territorial State be involved as a party to the conflict'.⁸²

6. Individuals Covered by International Humanitarian Law

As previously mentioned, one of the core principles of International Humanitarian Law is the principle of distinction, whereby both parties engaged in warfare must constantly distinguish between combatants and civilians, as well as between civilian objects and military objectives, and they must only use force to accomplish their military goals.⁸³ Therefore, the ability to distinguish between a combatant, non-combatant, and a member of the civilian population is critical to conduct such analyses.⁸⁴

⁸⁰ Nils Melzer, *Op.Cit.* p. 71

utor v. Haradinaj et al. (Trial Judgment), IT-04-84-T, International Criminal for the former Yugoslavia (ICTY), 3 April 2008, available at: www.refworld.org/cases,ICTY,48ac3cc82.html, accessed 31 January 2024

zer, *Op.Cit.* p. 73

ditional Protocol I, Article 48.

rawford and Alison Pert, *Op.Cit.* p. 202



a) Combatants

The fundamental means of the principle of distinction in international armed conflict lies upon two elements; combatants and non-combatants to ensure in all circumstances the conflict is solely between combatants of the belligerent parties.⁸⁵ The definitions of combatants may be referred to according to the Hague Regulations of 1899 which stated, 'the armed forces of the belligerent parties may consist of combatants and non-combatants'.⁸⁶ Additionally, Additional Protocol I mentioned that,

"Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains) are combatants, that have the right to participate directly in hostilities."⁸⁷

Individuals who own weapons that can be considered combatants outside of the armed forces are *levée en masse*.⁸⁸ According to ICRC, *levée en masse* are 'the inhabitants of a territory which has not been occupied, who on the approach of the enemy spontaneously take up arms to resist the invading troops without having had time to organize themselves into regular armed forces'.⁸⁹ If they



⁸⁵ Yoram Dinstein, 2004, *The Conduct of Hostilities Under the Law of International Armed* Cambridge University Press, p. 27
Article 3 of the Hague Regulations 1899.
Additional Protocol I, Article 43(2).
Zer, *Op.Cit.* p. 82
International Committee of the Red Cross Glossary, ebook.icrc.org/a_to_z/glossary/levee-en-masse accessed 6th February 2024.

adhere to the rules and regulations of international humanitarian law and openly carry weapons, they ought to be regarded as combatants.⁹⁰ Individuals engaged in warfare who do not fit into one of these categories—such as mercenaries or civilians directly participating in hostilities—are not eligible to be classified as combatants.⁹¹

Furthermore, a member of the armed forces must fulfill four conditions that associate them as a member, which are:

‘(1) they were commanded by a person responsible for his subordinates;

(2) they had a fixed distinctive emblem recognized recognizable at a distance;

(3) they carried arms openly; (4) they conducted their operations by the laws and customs of war.’⁹²

The combatants have the right to take part in direct combat without fear of prosecution or punishment for doing so.⁹³ Additionally, combatants must set themselves apart from the civilian population in a situation of armed conflict to increase the protection of the civilian population against the effects of hostilities.⁹⁴

In the event of an international armed conflict, combatants who are captured by an opposing force are



zer, *Op.Cit.* p. 81
Jinstein, *Op.Cit.* p. 33
n Crowe and Kylie Weston-Scheuber, *Op.Cit.* p. 47
leck, *Op.Cit.* p. 90

entitled to the status of prisoners of war.⁹⁵ A combatant becomes unlawful to attack when they become '*hors de combat*', in that sense, they must be:

(a) in the power of the adverse Party;
(b) clearly express an intention to surrender, and;
(c) have been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defense.⁹⁶

b) Non-Combatants

Non-combatants are those who do not serve in the armed services and who do not engage in hostilities in any other way.⁹⁷ Non-combatants also include those members of the armed forces who are entitled to special protection under the Geneva Conventions such as medical personnel and chaplains, or who have been rendered incapable of combat by wounds, sickness, shipwreck, or capture.⁹⁸ The mention of the term non-combatants can be found in the Hague Regulations of 1899 and 1907 which states,

"the armed forces of the belligerent parties may consist of combatants and non-combatants and In case of capture by the enemy, both have the right to be treated as prisoners of war."⁹⁹



⁹⁵ International Committee of the Red Cross Glossary, Combatants and POWs, ebook.icrc.org/highlight/combatants-and-pows accessed 6th February 2024
erson, *Op.Cit.* p. 84

omas and James C. Duncan, Annotated Supplement to The Commander's
on the Law of Naval Operations, International Law Studies Volume 73, p. 481

Hague Regulations of 1899 and 1907, Article 3

The rights entitled to the prisoners of war can be highlighted as: (1) fundamental guarantees such as humane treatment; (2) General provisions regarding treatment during captivity, including matters like quarters, food, clothing, hygiene and medical care, morale, and labor including conditions, wages, and types of employment; (3) Relations with the exterior, including correspondence and relief shipments and relief agencies; (4) Penal and disciplinary actions, including judicial guarantees; and (5) Termination of captivity, including repatriation during or after hostilities.¹⁰⁰

c) Civilian population

The definition of civilian status can be seen negatively or by a process of exclusion.¹⁰¹ Before the Additional Protocols of 1977 were adopted, a committee of the diplomatic conference reached a consensus that defined civilians as 'anyone who is not a member of the armed forces or an organized armed group'.¹⁰² Additionally, in Additional Protocol I, a civilian is 'any person who does not fall within the categories of combatants'.¹⁰³ The article further states that 'in case of a doubt whether a person is



¹⁰⁰ Crawford and Alison Pert, *Op.Cit.* p. 238
¹⁰¹ Crowe and Kylie Weston-Scheuber, *Op.Cit.* p. 72

¹⁰³ Additional Protocol I, Article 50(1).

civilian, that person shall be considered as civilian'.¹⁰⁴

Moreover, the civilian population retains its civilian nature despite the existence of combatants inside it.¹⁰⁵

Unless they actively participate in hostilities, civilians in an armed conflict have the right to be shielded from direct attack.¹⁰⁶ Put differently, their immunity and protection as civilians may be revoked if they took part in hostilities. The term "direct part of hostilities" refers to measures taken to directly assist the belligerent party in injuring its adversary, either through direct military action or by directly inflicting death, injury, or destruction on targets that are shielded from direct attack.¹⁰⁷

B. Medical Personnel

1. Medical Personnel in International Armed Conflict

The term medical personnel is provided in Additional Protocol I, which refers to 'military or civilian persons who have been formally assigned by a party to a conflict to: (1) search for, collect, transport, diagnose, or treatment of the wounded, sick, and shipwrecked, or the prevention of disease; (2) the administration of medical units, or the operation or administration of medical transports.'¹⁰⁸ International



¹⁰⁴ Additional Protocol I, Article 50(3).

¹⁰⁵ Additional Protocol I, Article 51(3).

¹⁰⁶ Elzer, *Op.Cit.*, p. 87

¹⁰⁷ Additional Protocol I, Article 8(c), Geneva Convention I, Article 24

Humanitarian Law divides medical personnel into three categories, that includes:¹⁰⁹

- a) 'Medical personnel of a party to a conflict: Whether military or civilian', consists of the permanent and temporary medical personnel of the armed forces and the medical personnel and crews of hospital ships. It also includes civilian medical personnel and individuals working for civil defense services.
- b) 'Medical personnel of National Societies or other voluntary aid societies': This category includes medical personnel of National Societies or other national voluntary aid societies duly recognized and authorized by the belligerent parties. When societies are formally permitted to hire medical professionals on their behalf in compliance with military rules and regulations, that party may consider these societies to be "authorized." To be considered 'national', such societies must be built within the territory of the conflicting party. Lastly, to be acknowledged, they are typically required to be constituted following the national law and regulations. This category consists of the 'National Red Cross or Red Cross Societies' and the 'International Committee of the Red Cross'.



Marie Henckaerts and Louise Doswald-Beck, 2009, *Customary international Law*, Cambridge University Press, p. 81

- c) 'Medical personnel made available by neutral States or humanitarian organizations': The final category consists of medical personnel, medical units, or transports that are provided by an impartial international humanitarian organization, a recognized and authorized aid society of such a State, or a neutral or other non-belligerent State for the party involved in the conflict for humanitarian purposes.

To accomplish their noble humanitarian mission, medical personnel require special respect and protection as provided in the Geneva Conventions.¹¹⁰ Medical personnel are immune from being targeted and attacked. Based on Article 16 of Additional Protocol I,

“Medical personnel engaged in medical activities shall not be compelled to perform acts or to carry out work contrary to the rules of medical ethics or to other medical rules designed for the benefit of the wounded and sick or to give any information regarding the people she or he has treated if that information is deemed to be harmful to the patients or their families, except as required by the law of their own party.”

The belligerent party or an occupying power must provide civilian medical personnel with the assistance necessary to perform their functions and they are required to preserve hygienic conditions and health in the occupied area with the cooperation of national and local authorities.¹¹¹



Geneva Convention I, Article 24
van Crowe and Kylie Weston-Scheuber, *Op.Cit.* p. 86

Medical personnel in armed conflict are required to wear the emblem of the Red Cross on their left arm, as well as carrying photograph identification or tags stamped by the responsible authority.¹¹² The distinctive emblem is meant to serve as a visible symbol of protection which can only be exclusive to medical personnel, giving them the right to immunity.¹¹³ The symbol needs to be proportionately large to be useful as a protection sign and visible to the adversary party even at a considerable distance.¹¹⁴

Violation in attacking medical personnel falls under a grave breach of the Geneva Conventions as well as the Rome Statute of the International Criminal Court that states that 'intentionally directing attacks against buildings, material, medical units, and transport, and personnel using the distinctive emblem of the Geneva Conventions in conformity with international law constitutes a war crime in international armed conflicts.'¹¹⁵

C. International Courts and Humanitarian Aid Societies

As a result, national institutions should always be used for the prosecution and adjudication of violations of international humanitarian law. International mechanisms should only be triggered



¹¹² Additional Protocol I, Article 18(3).
¹¹³ Schoups, *Op.Cit.* p. 152

¹¹⁴ Rome Statute of International Criminal Court, Article 8(2)(b)(xxiv).

in cases where national responsibility is insufficient.¹¹⁶ Moreover, humanitarian aid societies are critical in the state of armed conflicts to ensure the protection of the wounded, sick, and shipwrecked. The prominent entities recognized for their contributions to International Humanitarian Law include:

1. International Court of Justice

The International Court of Justice, known as ICJ, is a principal judicial organ of the United Nations based in the Hague, Netherlands. The focus of the Court is not whether a particular individual has committed a crime, but whether a State is deemed responsible for a breach of International Humanitarian Law.¹¹⁷ The Court is governed by the Statute of International Court of Justice. Furthermore, the Court may entertain two types of cases, including: '(1) legal disputes between States submitted to it by them (contentious cases); and (2) requests for advisory opinions on legal questions referred to it by the United Nations organs and specialized agencies (advisory proceedings).'¹¹⁸ The jurisdiction of the International Court of Justice is limited to only States members of the United Nations and other States parties to the Statute of the Court or States that have accepted its jurisdiction under certain conditions.¹¹⁹ As a consequence, the



elzer, *Op.Cit.* p. 293
per Greenwood, 2022, *The International Court of Justice and the Development of International Humanitarian Law*, International Review of the Red Cross, Vol. 104, p. 1842
International Court of Justice, How the Court Works, <https://www.icj-cij.org/how-the-court-works> Accessed 9th February 2024

ability of the Court to govern the cases of International Humanitarian Law is quite limited.

The contentious case that regards the violations of International Humanitarian Law is the *Nicaragua v. United States Case* where the Court found the United States responsible for various military incidents in Nicaragua, such as laying mines and the publishing of a manual of psychological operation that encouraged the conduct that is inconsistent with International Humanitarian Law.¹²⁰ Additionally, in the case of *Democratic Republic of Congo v. Uganda Case*, the Court declared that Uganda was found guilty of an act of aggression, committing repeated violations of the Geneva Conventions of 1949 and its Additional Protocols, as well as taking forcible possession of dams and causing massive electrical power cuts.¹²¹

2. International Criminal Court

The International Criminal Court, known as the ICC, investigates, and under a warrant, tries individuals charged with the gravest crimes that concern the whole international community under the Statute of Rome, including genocide, war crimes, crimes against

¹²⁰ Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States of America); Merits, -, International Court of Justice (ICJ), 27 June 1986, <https://www.refworld.org/jurisprudence/caselaw/icj/1986/en/26087>, Accessed 10th July 2024



Concerning Armed Activities on the Territory of the Congo (Democratic Republic of Congo v. Uganda); Request for the Indication of Provisional Measures, -, International Court of Justice (ICJ), 1 July 2000, www.refworld.org/jurisprudence/caselaw/icj/2000/en/94615 Accessed 10th July 2024

humanity, and the crime of aggression.¹²² The Court is an independent international organization, making it different from the International Court of Justice. The Court may have jurisdiction in a situation that includes: '(1) In a situation where crimes mentioned earlier were committed after 1 July 2002 and the crimes were committed by a State Party or in the territory of a State Party or in a State that has accepted the jurisdiction of the Court; and (2) the crimes were referred to the ICC Prosecutor by the United Nations Security Council'.¹²³ Moreover, the Court has required that the State party's domestic court would try to prosecute the crimes before taking matters into ICC's jurisdiction. In other words, the Court's role is subsidiary and only when domestic courts are unwilling or unable to prosecute then the ICC would take over.¹²⁴

Concerning International Humanitarian Law, the Court prosecutes alleged war criminals with grave breaches and serious violations of the Geneva Conventions and its Additional Protocols. Legal process and criteria of the case that could be submitted to the Court include the individuals who committed the crime must be over 18 to be prosecuted, and the Prosecutor must conduct a preliminary examination considering such matters as sufficient evidence,



International Criminal Court, About the Court, <https://www.icc-cpi.int/about/the-court>, Accessed 11th February 2024
 International Criminal Court, How the Court Works, <https://www.icc-cpi.int/about/how-works>, Accessed 11th February 2024
 n A. Schabas, 2011, *An Introduction to the International Criminal Court*, Oxford University Press, p. 64

jurisdiction, the gravity of the crimes, complementarity, and the interests of justice.¹²⁵ An example of the case of the Court regarding International Humanitarian Law is the Case of Ahmad Al Faqi Al Mahdi who was convicted guilty of a war crime by destroying historical and religious monuments in Timbuktu, Mali, in June and July of 2012.¹²⁶ Another example would be the Case of Germain Katanga who was convicted guilty of four counts of war crimes including murder, attacking a civilian population, destruction of property, and pillaging committed on 24th February 2003 during the attack on Bogoro, Democratic Republic of Congo.¹²⁷ This states that there are less than ten trials for war crimes that have been completed with only three people convicted ever since the Court was established.

There were accusations to the Court that the only convicted criminals so far are leaders from less influential African States, while powerful States who committed the same crime have yet to be tried.¹²⁸ Hence, the impact of ICC remains limited despite its mandate and jurisdiction as the powerful military States such as the United

¹²⁵ International Criminal Court, How the Court Works, <https://www.icc-cpi.int/about/how-the-court-works>, Accessed 11th February 2024

¹²⁶ Situation in the Republic of Mali, *The Prosecutor v. Ahmad Al Faqi Al Mahdi*, International Criminal Court, 27th September 2016, <https://www.icccpi.int/sites/default/files/CaseInformationSheets/Al-MahdiEng.pdf>,

11th February 2024

on in the Democratic Republic of Congo, *The Prosecutor v. Germain Katanga*, International Criminal Court, 23th May 2014, [w.icccpi.int/sites/default/files/CaseInformationSheets/KatangaEng.pdf](https://www.icccpi.int/sites/default/files/CaseInformationSheets/KatangaEng.pdf),

on 11th February 2024

elzer, *Op.Cit.* p. 296



States, Russia, and China have yet to ratify the Rome Statute to this day.

3. International Committee of the Red Cross

Founded in 1863, the International Committee of the Red Cross, known as ICRC is an 'impartial, neutral, and independent organization whose exclusively humanitarian mission is to protect the lives and dignity of victims of armed conflict and other situations of violence and to provide them with humanitarian assistance'.¹²⁹ The International Committee of the Red Cross (ICRC) was initially intended to be a coordination body for national societies tasked with providing medical assistance in the field. However, the Committee of Five appointed by the Geneva Society for Public Warfare, the predecessor of the ICRC, realized that the ICRC needed to be operational, and starting with World War I, the ICRC has continuously expanded the scope of its operations.¹³⁰

The ICRC is considered to have a hybrid legal character because it was granted international rights and duties under treaty law while also being established as an association under Swiss private law.¹³¹ The legal basis of ICRC can be found in Article 81 of the Additional Protocol I, stated that:



International Committee of the Red Cross, ICRC Mission Statement, www.icrc.org/en/who-we-are/mandate, Accessed 12th February 2024

¹²⁹ Badley, 2016, *Protecting Civilians in War: The ICRC, UNHCR, and Their Roles in Internal Armed Conflicts*, Oxford University Press, p. 24

¹³⁰ Kolb and Richard Hyde, *Op.Cit.* p. 114

“Any State party to an armed conflict shall grant ICRC all facilities within their power for ICRC to be able to carry out the humanitarian functions assigned to them and ensure protection and assistance to the victims of the conflicts.”

Moreover, the noble mission of ICRC is mentioned clearly in Article 5 of Statutes of the International of the Red Cross and the Red Crescent Movement with the following roles:

“(1) to work for the faithful application of international law applicable in armed conflicts;

(2) to endeavor at all times as a neutral institution whose humanitarian work is carried out, particularly in a time of international and other armed conflicts or internal strife to ensure the protection of and assistance to military and civilian victims of such events and of their direct results; and

(3) to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof.”

As a consequence of ICRC's mission in practical terms, devoted implementation of International Humanitarian Law means having its field delegates monitor how the parties to the conflicts comply and apply International Humanitarian Law.¹³² For instance, in the event that a violation takes place, the ICRC would try to convince the appropriate authorities—such as the government or an armed group—to change their ways to abide by International Humanitarian Law.¹³³ This attempt is called discreet diplomacy as the ICRC tries to conduct a constructive intervention with all the parties involved and



Salshoven and Liesbeth Zegveld, 2011, *Constraints on The Raging War: An Introduction to International Humanitarian Law (Fourth Edition)*, Cambridge University Press, 199–200.

if all attempted intervention fails, the ICRC maintains the authority to denounce the violations in public.¹³⁴

In pursuing ICRC's noble mission, ICRC operates with its fundamental principles, namely:¹³⁵

a) Humanity

Assisting the injured on the front lines without regard to race aims, both nationally and internationally, to stop and lessen suffering among people wherever it may occur. Serves the objectives of preserving human life, health, and dignity.

b) Impartiality

Does not discriminate based on political opinions, class, nationality, color, or religion. It concentrates on easing people's suffering by following their needs, and prioritizing the most serious situations of suffering.

c) Neutrality

Refraining from picking sides in conflicts or disputes about politics, race, religion, or ideologies at any point.

d) Independence

Retaining the freedom to behave following the core values at all times.

e) Voluntary Service



Statutes of the International Red Cross and Red Crescent Movement, Preamble.

It is a voluntary relief operation that is not motivated in any capacity by financial benefit.

f) Unity

Every nation may only have one Red Cross or Red Crescent Society, and that society must be accessible to everyone in order to continue providing humanitarian aid throughout the nation.

g) Universality

Every humanitarian society has the same standing and obligations to assist one another on an international level.

Hence, ICRC bears a significant responsibility for humanitarian aid and has consistently provided crucial aid, protection, and advocacy of victims in the events of armed conflicts and other humanitarian crises.

