

AN EASY GUIDE TO
INTERNATIONAL HUMANITARIAN
LAW IN THE OCCUPIED
PALESTINIAN TERRITORY

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What is international law?

International law is a combination of rules and customs governing the relations between States and, sometimes, with non-State actors, in various fields, such as the protection of human life and dignity, the law of the sea, space law, trade law, territorial boundaries of States, and diplomatic relations. The primary sources of international law are treaty law and customary international law.

What is treaty law?

Treaty law is composed of written agreements that States willingly sign, ratify and are bound to follow. Agreements between States govern their mutual relations and may be called treaties, conventions, charters, statutes or protocols. Agreements are only legally binding on States that have signed and also ratified them. The basis of treaty law is the principle *pacta sunt servanda* ("agreements must be respected").

What is customary international law?

Customary international law consists of "general practice accepted as law".¹ It includes the "rules of law derived from the consistent conduct of States acting out of the belief that the law required them to act that way." Customary international law can be discerned by a widespread repetition by States of similar international acts over time (State practice), which have occurred out of sense of obligation (*opinion juris*). As such, these acts must be taken by a significant number of States and not be rejected by a significant number of States. International customary law is binding upon all States in the world.

What is international humanitarian law?

International humanitarian law (IHL), also referred to as the laws of war, or the law of armed conflict, defines the conduct and responsibilities of belligerent nations, neutral nations, armed groups and individuals engaged in warfare, in relation to each other and to the so-called protected persons, namely, combatants *hors de combat* (prisoners of war, sick, wounded and shipwrecked) and civilians.

Its fundamental purposes are to alleviate human suffering and regulate the use of means and weapons of warfare in armed conflicts. In IHL, a constant balance is maintained between the military needs and the needs of persons affected by hostilities (combatants and civilians).

When does IHL apply?

IHL applies to international armed conflicts - including situations of occupation - and non-international armed conflicts. Thus, IHL does not apply in internal disturbances or tensions, such as riots, demonstrations and isolated or sporadic acts of violence.

Armed conflicts between two or more States are called international armed conflicts. Armed conflicts within the territory of one State, i.e. between the State's regular armed forces and one or more armed groups or between several such armed groups, are called non-international armed conflicts or internal armed conflicts. The rules governing

¹ Art 38(1)(b) of the Statute of the International Court of Justice

international armed conflicts are more extensive and more detailed than those covering internal armed conflicts.

IHL applies equally to all parties regardless of the reason for the conflict.

What is international human rights law?

International human rights law (IHRL) codifies human rights in various international treaties. Fundamental human rights include, for example, the right to life, the right to food and water, the freedom of thought and expression, the right to health and the right to adequate housing.

International human rights law is applicable to the territory of a State but also extends to any territory which is under its effective jurisdiction, even outside its borders. Effective jurisdiction refers to the de facto level of control of one State over another territory or people, for example during an occupation.

What is the relation between IHL and IHRL?

In its Advisory Opinion on the Wall, the International Court of Justice (ICJ) considered the inter-relation between the two bodies of law – IHL and IHRL. It concluded that when dealing with a situation of armed conflict, IHL is *lex specialis* (governs a specific subject matter) in armed conflicts, while IHRL governs the applicability of rights generally, both in times of armed conflict and in times of peace. The Court elaborated three possible inter-relations between the two bodies of law:

- (i) situations in which only IHL applies;
- (ii) situations in which only IHRL applies; and
- (iii) situations where the legality of the actions needs to be examined under both branches of law, for example during armed conflict.

Therefore, each action needs to be examined under IHL, IHRL or both, depending on the circumstances.

What are the sources of IHL?

A major part of IHL is found in the four Geneva Conventions of 1949 and the two Additional Protocols of 1977. The Hague Regulations on the laws and customs of war are a set of conventions adopted at the Peace Conference held in The Hague (the Netherlands) in 1899 and in 1907.

The conventions represent the long accepted means and methods of warfare. They are binding on all states as customary international law. The Four Geneva Conventions of 1949 are the core of IHL. The Conventions, which are today universally ratified, were adopted to alleviate human suffering in times of armed conflict. The Fourth Geneva Convention, in particular, focuses on the protection of civilians in times of armed conflict and occupation.

As of August 2006, 194 states - almost all states in the world - have ratified the Four Geneva Conventions. According to many scholars, the Fourth Geneva Convention is today considered to reflect international customary law, which all States should abide by regardless of their status as a State party to the convention.

The First Additional Protocol of 1977 extends the protection of civilians and includes rules on the conduct of hostilities that define the type of weapons and methods of warfare that can be used in times of armed conflict. The protocol generally applies in international armed conflicts and is obligatory for the States that have ratified it.

Among others, Art 75 provides for the fundamental guarantees granted to all persons and reflect international customary law; thus it binds all States, regardless of its signatories.

The Second Additional Protocol of 1977 provides for additional protection in internal armed conflicts and is only binding on States that have ratified it. Some of its articles are also regarded as customary international law. For example, Art 4, which provides for the fundamental guarantees for all persons who do not, or no longer, take a direct participation to hostilities, is regarded customary international law.

The First Additional Protocol has been ratified by 166 states, and the Second Additional Protocol by 162 states. Israel has not ratified either of the Additional Protocols of 1977 and is therefore only bound by the norms that are customary within these treaties. Customary International Law is also a source of IHL.

What is a belligerent occupation?

A "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".²

Occupation does not give the Occupying Power sovereignty over the territory. Annexation of the occupied territory is unlawful; occupation is only temporary and permanent occupation may result in unlawful de-facto annexation. The notion of military control is a factual issue. The Occupying Power can have effective military control even if it is not physically present in the territory itself. If the Occupying Power is in a position to take military control over the whole area, effective military control persists.

Occupation ends when there is no effective military control over a territory, commonly seen when the Occupying Power no longer performs the functions of a government. The Occupying Power cannot unilaterally decide that occupation has ended.

A consensus concerning the status of a territory among the High Contracting Parties to the Four Geneva Conventions may reflect the most accurate legal interpretation about the existence of effective control. Sources of interpretations are, among others, UN Security Council resolutions, jurisprudence of international tribunals, and precedents such as World War II, Lebanon and Iraq.

What is the law of belligerent occupation?

The law of belligerent occupation mainly consists of the Hague Regulations of 1907 and the Fourth Geneva Convention of 1949.

The law of occupation applies when, during an international armed conflict, a territory comes under the effective control of a foreign power.

² Art 42 of the Hague Regulations

Who are the protected persons under IHL?

Protected persons are those who find themselves, at any moment or under any circumstance, in the hands of a party to the conflict or Occupying Power, of which they are not nationals.³ The sick and wounded, civilians and combatants *hors de combat* all fall within the category of protected persons. Specifically, protected persons are medical and religious personnel, humanitarian relief personnel, civilian journalists and personnel involved in peacekeeping operations.

What are the basic principles of IHL?

Distinction

The principle of distinction prohibits all means and methods that cannot make a distinction between those who do take part in hostilities – i.e. combatants – and those who do not – i.e. civilians and in particular, protected persons.

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 civilians and combatants on one hand; and between civilian objects and military objectives on the other.

Accordingly, they shall direct their operations only against military objectives.⁴ The principle of distinction is part of customary international law.

Proportionality

The principle of proportionality states that, even if there is a clear military target, it is not possible to attack it if the incidental risk for civilians or civilian property is excessive in relation to the concrete and direct military advantage sought.⁵

The principle of proportionality is part of customary international law. Some measures taken by an Occupying Power outside the combat zone should also be proportional, such as destruction of civilian property in occupied territory.⁶

A military objective is an object that effectively contributes to the military operation. This definition is difficult to apply in practice, especially when it comes to dual-use facilities. These are objects that may be used both for civilian and combat purposes. For example, a TV or a radio station can be a legitimate military target if used also by the military command or as a communication centre. However, if it is used for civilian purposes only, it cannot be targeted.

It is unlawful to target a dual use object if the expected damage to the civilian use of the object is excessive to the concrete and direct military advantage sought.

Precautions in attack

As part of the principle of distinction, the conflicting parties are obliged to respect the principle of precautions in attack, which supplements the general obligation to distinguish at all times between civilians and combatants, and between civilian and

³ Art 4 IVGC

⁴ Art 48 IAP

⁵ Art 51(5) (b) IAP

⁶ Art 53 IVGC

military objects. Accordingly, whenever civilians are present, the parties to an armed conflict must:

- take precautionary measures during military operations to spare the civilian population and civilian objects;⁷ and
- take precautionary measures to protect the civilian population and civilian objects that are under their control against the effects of military operations.⁸

The principle of precaution is part of customary international law.

What is military necessity?

Military necessity has been defined as “those measures which are indispensable for securing the ends of the war and are lawful according to the modern laws and usages of war”. It is a principle whereby a belligerent has the right to apply any measure that is required to bring about the successful conclusion of a military operation and that is not forbidden by the laws of war.⁹

Military necessity is not a carte blanche to achieve the military goal at any price. It balances between military victory and humanity stemming from the need to minimize human suffering during armed conflicts. Some prohibitions under IHL can never be justified under military necessity. For example, the prohibition against confiscation of private property is absolute.¹⁰

What does the obligation to protect mean?

The concept of protection of civilians and civilian objects derives from the principle of distinction but is extended beyond the conduct of hostilities. Protected persons are entitled, in all circumstances, to respect for their persons, their honour, their family rights, their religious convictions and practices, and their manners and customs.¹¹ Private property must be respected and not confiscated.¹² Parties to the conflict must respect and protect cultural property,¹³ humanitarian relief objects¹⁴ and medical units and transports.¹⁵ They must protect relief objects and facilitate Relief actions.¹⁶ Discriminatory measures are forbidden.¹⁷

Protection is enhanced during military occupations, i.e. the Occupying Power must facilitate the work of all institutions devoted to the care and education of children;¹⁸ the work of relief organizations;¹⁹ and civilian civil defence organizations.²⁰

⁷ Art 57 of IAP

⁸ Art 58 IAP

⁹ Lieber Code, Art 14

¹⁰ As stipulated in Art 46 of the Hague Regulations (1907)

¹¹ Art 27 IVGC

¹² Art 46 of the Hague Regulations

¹³ Rules 38, 39 and 40 ICRC Customary IHL Rules

¹⁴ Ibid: Rule 32

¹⁵ Ibid: Rules 28 and 29

¹⁶ Art 70 IAP

¹⁷ Art 27 IVGC

¹⁸ Art 50 IVGC

¹⁹ Art 59 IVGC

²⁰ Art 63(1) IAP

Protection is also provided for the civilian population as a whole: collective punishment is prohibited,²¹ forced transfer and deportations are prohibited,²² the Occupying Power must ensure adequate food and medical supplies and requisition of civilian objects is permitted only when population needs are taken into account.²³ Objects essential for the survival of the population should not be attacked, destroyed, removed or rendered useless²⁴ and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly, amounts to war crimes.²⁵

Who are combatants?

Combatants are members of regular armed forces or armed groups who are clearly distinguished from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. They may be considered prisoners of war if captured, and are therefore entitled to special protection defined by the Third Geneva Convention relative to the treatment of prisoners of war.

Members of armed groups that are not part of regular armed forces need to follow four conditions:

- be commanded by a person responsible for his subordinates;
- have a fixed distinctive emblem recognizable at a distance;²⁶
- carry arms openly; and
- conduct their operations in accordance with the laws and customs of war.

In case of doubt whether a person falls under one of the above mentioned categories, she/he should be presumed to be a prisoner of war until a competent court has decided otherwise.

Members of groups that do not follow these conditions, and individuals that are not part of armed groups who take direct part in the hostilities (violent resistance) are not regarded as combatants and do not enjoy the status of prisoners of war. They are therefore protected civilians and lose their immunity only for such time as they take direct part in hostilities.

Who are civilians?

IHL defines a "civilian" as anyone who is not a combatant. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.²⁷

What are the responsibilities of a State under IHL?

The basic principle of "state responsibility" in international law provides that any State that violates its international obligations must be held accountable for its acts. More concretely, the notion of state responsibility means that States that do not respect their international duties are responsible for immediately ceasing their illegal actions, offering

²¹ Arts 33 IVGC, 50 Hague Regulations

²² Art 49 IVGC

²³ Art 55 IVGC and Art 69 IAP

²⁴ Art 54 IAP

²⁵ Art 147 IVGC

²⁶ Art 44(3) IAP sets an exception to this rule when the nature of the hostilities prevents the combatant from distinguishing himself or herself. There is an ongoing legal debate about the scope of a distinctive sign that combatants of non-regular armed forces need to wear.

²⁷ Art 50(1) IAP

appropriate assurances and guarantees of non-repetition if required, and making reparations to the injured.

States have legal responsibilities both towards States and individuals according to different sources of international law.

What are responsibilities of third States?

The general principle of state responsibility not only refers to what the violating State has to do, but also includes rules on the responsibility of third States – the international community - to react against violations of international law.

Art 1 common to the Four Geneva Conventions places an obligation on third States who are not involved in the conflict “to respect and ensure respect” for IHL in all circumstances. This means that, by having ratified the Geneva Conventions, third States are bound to ensure the respect of IHL by those who violate it. Third States should not do anything to encourage a party to a conflict to violate IHL. States should also not take action that would assist in violations, such as arms transfer and sale of weapons. Art 1 should not be considered to be an illegal interference in the internal affairs of a sovereign State.

The ICRC commentary to Art 1 mentions that “the Contracting Parties should not be content merely to apply its provisions themselves, but should do everything in their power to ensure that the humanitarian principles underlying the Conventions are applied universally”.

In case of grave breaches, all States are under the obligation to search for suspected war criminals and bring them to trial or extradite them to another State or an international tribunal where they would be tried for their actions.²⁸

A State is responsible to cease the violation, provide guarantees for non-repetition and offer reparations if either (i) it aids or assists; (ii) it directs and controls the commission of a violation of international law; (iii) or it coerces another State to do so.²⁹

In case there is a serious breach of a pre-emptory norm of international law (*jus cogens*) there are additional responsibilities on all States also to cooperate to end the breach and not to recognize as lawful the situation created by the breach as well as not to aid or assist in the maintenance of that situation.³⁰

What are offenses in international criminal law?

War crimes / Grave breaches of the Geneva Conventions

War crimes are serious violations of IHL which give rise to individual criminal responsibility. For example, war crimes are serious violations of Common Art. 3 of the Four Geneva Conventions, which is also applicable in internal armed conflicts, i.e. wilful killing, or extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly.

²⁸ Arts 146, 147 IVGC

²⁹ Arts 16-18 International Law Commission Draft Arts on State Responsibility (2001)

³⁰ Art 41 International Law Commission Draft Articles

In addition, acts described as “grave breaches” in the Four Geneva Conventions such as torture, wilful killing or the taking of hostages may also qualify as war crimes. Grave breaches are defined in Art 147 IVGC.³¹

War crimes can be committed both in international and non-international armed conflicts. This was affirmed by the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda, and it has subsequently been upheld in the International Criminal Court (ICC) Statute.

³¹ see also Art 50 GC I, Art 51 GC II, Art 130 GC III, Art 85 IAP