A. INTRODUCTION

International humanitarian law (IHL), also known as the laws of armed conflict or the laws of war, regulates the conduct of warfare and is the legal framework applicable to situations of armed conflict and occupation. In order to complete its objective, IHL aims to protect persons who are not, or are no longer, directly engaged in hostilities—the wounded, shipwrecked, prisoners of war and civilians; and to limit the effects of violence in fighting to the attainment of the objectives of the conflict, such as restrictions on the means of warfare (weapons, military tactics, etc). IHL prohibits all means and methods of warfare which: fail to discriminate between those taking part in the fighting and those, such as civilians, who are not, the purpose being to protect the civilian population, individual civilians and civilian property; cause superfluous injury or unnecessary suffering; or cause severe or long-term damage to the environment.

As IHL applies to armed conflicts, it does not regulate whether a State may actually use force. The latter is a framework known as the jus ad bellum, and is governed by a difference part of international law set out in the United Nations Charter. Furthermore, the latter regulates the conditions under which force may be used, like in cases of self-defense and pursuant to United Nations Security Council authorization. Once an armed conflict is established, IHL applies to all the parties, regardless if a party was legally justified in using force under jus ad bellum principles.

IHL distinguishes between international and non-international armed conflict. “International armed conflicts” are those that involve at least two States, and are subject to a wide range of rules, including those set out in the four Geneva Conventions and Additional Protocol I. “Non-international armed conflicts” are those that involve a territory of a single State, either regular armed forces fighting groups of armed dissidents, or armed groups fighting each other. Here, a more limited range of rules apply, including those set out in Article 3 common to the four Geneva Conventions as well as in Additional Protocol II. It is also important to distinguish between IHL and human rights law. Although these two bodies of law have similar rules, they are in fact not the same and are contained in different treaties. Specifically, human rights law applies in peacetime, unlike IHL and various provisions may be suspended during an armed conflict.

IHL became relevant in the second half of the nineteenth century, when nations finally agreed on international rules to avoid unnecessary suffering. These agreements were in the form of treaties and conventions, and whatever was missing from such agreements could possibly find resolution with the help of customary international law. Treaties and customary international law are the two main sources of IHL rules and

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1 Volunteers – Courtney McGinn
2 http://www.geneva-academy.ch/RULAC/international_humanitarian_law.php
4 https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf
5 https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf
6 http://www.ohchr.org/Documents/Publications/FactSheet13en.pdf
regulations. Treaties are agreements between states, and are binding to those who sign the treaty. Though a non-state armed group cannot sign a treaty, IHL treaty rules still apply to these actors. Customary international law consists of rules that come from “a general practice accepted as law” and exist independent of treaty law. Customary IHL plays a significant role in armed conflicts because it fills gaps that are left by treaty law, thereby providing further protection to those affected. The key IHL treaties include the Hague Regulations of 1907, four Geneva Conventions, and their Additional Protocols.

- 1907 Hague Regulations (Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907)
- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea. Geneva, 12 August 1949
- Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949
- Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977
- Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005

The following sections conduct an analysis of important international humanitarian law sub-themes, such as: engendering international humanitarian law; transitional justice; restorative and retributive justice; and the question of peace versus justice.

**Defining Armed Conflicts**

Common Article 2 of the Geneva Conventions of 1949 states that the Conventions will apply to ‘all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them’. A declaration of war is therefore not necessary for the existence of an armed conflict. International humanitarian law comes into play whenever

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8 http://www.ijrcenter.org/international-humanitarian-law
hostilities reach a certain threshold. The concept of armed conflict is also relevant to international criminal law, as violations of the laws and customs of war can only be prosecuted when they occur in the context of a conflict.

Common Article 2 goes on to clarify that the provisions of the Geneva Conventions also apply in cases of total or partial occupation of a state party’s territory, even when the occupation is met with no resistance. This extends the reach of the Conventions to situations where an occupation occurs without a declaration of war or armed hostilities. People who are affected by such an occupation will therefore still potentially receive the guarantees afforded to protected persons under the Geneva Convention IV.

An important definition of an armed conflict also comes from the International Criminal Tribunal for the Former Yugoslavia (ICTY) judgment in Prosecutor v Tadic, the first case to be heard before that body. The Appeals Chamber in Tadic confirmed that ‘for there to be a violation of international humanitarian law, there must be an armed conflict’. The Appeals Chamber then continued to say that ‘an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.

Historically, the application of international humanitarian law to insurgent groups depended on the members of the group being recognised as belligerents by either the state they were opposing or a third state. If the state to which the insurgents were opposed recognised them as belligerents, the laws of war would apply in their entirety. However, this was rare and usually occurred only when it suited the recognising state. The applicability of the rules of international humanitarian law to a non-state group no longer depends upon recognition of the group by a state. Rather, it depends primarily on whether or not an armed conflict exists under international law.

An international armed conflict is conflict between the armed forces of two or more states. A non-international armed conflict is a conflict between a state and an organised armed group within the state’s territory or between two or more non-state groups within a state territory.

**Protracted Armed Violence**

According to the ICTY Appeals Chamber in Tadic, an armed conflict involving non-state groups arises only if the violence is protracted and the non-state groups are organised. The ICTY Trial Chamber has clarified that ‘protracted armed violence’ contrasts with banditry, unorganised and short-lived insurrections. This was reiterated by the Inter-American Commission on Human Rights (IACHR) in the case of Juan Carlos Abella v Argentina. Among the examples given by the IACHR in Abella of situations falling short of armed conflict were violent civilian demonstrations,

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11 Prosecutor v Tadic, ICTY Trial Chamber Judgment, 7 May 1997 [562].
students throwing stones at police, bandits holding hostages for ransom and political assassinations. The IACHR observed in Abella that ‘in making a determination, what is required in the final analysis is a good faith and objective analysis of the facts in each particular case’. A legalistic adherence to any particular definition is inappropriate. Rather, a holistic assessment of the facts is required.

**Organised Armed Groups**

Typically, an organised armed group will have a clear chain of command. However, it is not necessary that each group involved in an armed conflict be clearly differentiated and defined. The ICTY Trial Chamber in the case of Prosecutor v Haradinaj viewed the following factors as indicative of organisation: the existence of command structure and disciplinary rules, control of a determinate territory, access to weapons, equipment and military training and the ability to define military strategy and military tactics.

No one factor can be considered determinative and whether hostilities involve organised armed groups must accordingly be considered on a case-by-case basis. The requirement of a certain level of organisation of a group as a pre-requisite for the applicability of international humanitarian law is also significant in the context of modern terrorism. Common rhetoric in relation to the ‘war on terror’ might give rise to a perception that armed resistance to terrorists automatically constitutes an armed conflict.

**Scope of Armed Conflict**

The existence of an armed conflict brings international humanitarian law into operation. In its jurisdictional decision in the Tadic case, the ICTY Appeals Chamber observed that ‘the temporal and geographical scope [of the conflict] extends beyond the exact time and place of hostilities’. At least some aspects of international humanitarian law apply within the ‘entire territory’ of the parties for the duration of the conflict.\(^{13}\) It follows that ‘a violation of the laws or customs of war may occur at a time when and in a place where no fighting is actually taking place.\(^{14}\) In the case of non-international conflicts, international humanitarian law applies in so much of the territory as is under the control of one or more of the parties to the conflict.\(^{15}\)

The temporal reach of international humanitarian law extends from the initiation of hostilities until a general conclusion of peace is reached. Declaration of an armistice or ceasefire does not have the effect of terminating an armed conflict unless it constitutes a peace agreement and is followed by a general cessation of hostilities. A temporary cessation of hostilities does not mean international humanitarian law ceases to apply. The Geneva Convention specifically provide for the temporal application of international humanitarian law ceases to apply. The Geneva

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13 Prosecutor v Tadic, ICTY Appeals Chamber Decision on Jurisdiction, 2 October 1995 [67]-[68].
14 Prosecutor v Kunarac, ICTY Appeals Chamber Judgment, 12 June 2002 [64].
15 Prosecutor v Tadic, ICTY Appeals Chamber Decision on Jurisdiction, 2 October 1995 [64],[70].
Conventions specifically provide for the temporal application of international humanitarian law in respect of particular groups. Prisoners of war gain the protection of Geneva Convention III from the time they fall into the power of the enemy until their final release and repatriation.  

The provisions of Geneva Conventions IV apply from the outset of the conflict until the general close of military operations. Those aspects of Geneva Convention IV governing occupied territories are further stipulated to apply for one year after the general close of military operations, with the exception of some articles that apply until the occupying power ceases to exercise the functions of government. The position has now been clarified by Additional Protocol I of 1977, which states that all provisions applicable to occupation continue to operate until the occupation terminates.

**Connection to the Conflict**

The ICTY has held that a charge of violating the laws and customs of war can only be established if the acts have an appropriate connection to the armed conflict. Rather, they must take place in the context of the conflict. In the words of the ICTY Appeals Chamber: ‘The existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator’s ability to commit the crime, the decision to commit it, the manner in which it was committed or the purpose for which it was committed.’

This requirement is necessary to distinguish acts committed during an armed conflict that properly fall within international humanitarian law from those that properly fall under domestic law. On the other hand, ethnically motivated assaults during the Yugoslavian and Rwandan conflicts have been treated as violations of international humanitarian law, since the motivation was related to the conflict.

The ICTY Appeals Chamber has made it clear that an act may be sufficiently related to the conflict to enliven international humanitarian law, even though it does not occur ‘in the midst of battle’. The Appeals Chamber judgment in Kunarac sets out a list of factors that may be considered in assessing whether an act is related to the conflict. These include: the fact that the perpetrator is a combatant; the fact that the victim is a non-combatant; the fact that the victim is from a group associated, with the enemy; the fact that the act may be said to serve the ultimate goal of a military campaign and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties.

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16 Geneva Convention III, art 5.
18 Prosecutor v Tadic, ICTY Appeals Chamber Decision on Jurisdiction, 2 October 1995 [69].
19 Prosecutor v Kunarac, ICTY Appeals Chamber Judgment, 12 June 2002 [58].
20 Prosecutor v Delalic, ICTY Trial Chamber Judgment, 16 November 1998.
21 Prosecutor v Tadic, ICTY Appeals Chamber Judgment, 2 October 1995 [69].
22 Prosecutor v Kunarac, ICTY Appeals Chamber Judgment, 12 June 2002 [59].
**Types of Armed Conflict**

International humanitarian law has traditionally distinguished between international and non-international armed conflicts. Prior to the Geneva Conventions of 1949, it was generally thought that civil conflicts were outside the scope of international law. They were a matter for states to deal with internally. However, there was growing international awareness of the need for regulation in this area, fuelled by the bloody and protracted nature of the conflicts such as the Spanish Civil War (1936-19390. The importance of placing limits on internal armed conflicts has only increased since then.

The requirements of international humanitarian law still differ between international and non-international conflicts. It is now widely accepted that some common guarantees apply in conflicts of both types.\(^{23}\) Common Article 3 of the Geneva Conventions was the first provision to bring non-international conflicts within the reach of international humanitarian law. It was supplemented by the adoption of Additional Protocol II to the Geneva Conventions in 1977.

The rationale behind the protections contained in Common Article 3 is that there are certain principles of humanity so fundamental that they apply to combatants and civilians in all kinds of conflicts. Prior to 1949, the Geneva Conventions assisted only persons caught up in international conflicts. Belligerent groups in civil conflicts were widely perceived as domestic criminals and attempts by the Red Cross Movement to aid those belligerents as inadmissible aid.\(^{24}\) For this reason, suggestions that the Conventions in their entirety should be applied to non-international conflicts were rejected; their implementation would have greatly restricted states in their capacity to deal with insurgents, including having to treat them as prisoners of war, rather than using ordinary criminal procedures. Common Article 3 is accordingly limited to the most fundamental of principles underlying the Geneva Conventions.

Common Article 3 has a broader scope than the Additional Protocol II. It applies to armed conflicts not covered by Additional Protocol I that take place in the territory of a state party. Additional Protocol II applies to armed conflicts not covered by Additional Protocol I that takes place in the territory of a state party between its armed forces and dissident armed forces or other armed groups. The non-state groups in question must be under responsible command and control enough of the state’s territory to carry out ‘sustained and concerted military operations’ and to implement the Protocol.\(^{25}\)

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\(^{23}\) Prosecutor v Tadić, ICTY Appeals Chamber Decision on Jurisdiction, 2 October 1995 [96]-[127].


\(^{25}\) Additional Protocol II, art1(1).