

# Journal of Conflict Management & Sustainable Development



- |   |   |
|---|---|
| Transitioning from Fossil Fuel-Based Transport to Clean Energy Vehicles in Africa: Challenges and Prospects   | Kariuki Muigua                                |
| Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities   | Nzeki Daniel Mutunga<br>& Kenneth Wyne Mutuma |
| Investment Treaties and The Arbitrability of Illegal Contracts: A Review of the Arbitral Award World Duty Free Company Limited Versus the Republic of Kenya | Muthomi Thiankolu                             |
| Charting a New Path for Environmental Management and Conservation in Kenya  | Kariuki Muigua                                |
| The Law and Emerging Jurisprudence on the Jurisdiction of Political Parties Dispute Tribunal (PPDT) of Kenya  | Wilfred A. Mutubwa<br>& Rosemary Kamathi      |
| An Analysis of The Right of Refugees to Access Public and Private Services in Kenya   | Leah Aoko                                     |
| Managing Water Scarcity in Kajiado County   | Berita Musau                                  |
| Military Siege: A Contemporary Analysis of its Effects on Civilian Protection During Armed Conflict   | Daniel Mutunga Nzeki                          |
| Accountability – The Bloodline of Universal Health Coverage   | Oseko Louis D Obure                           |

Volume 8

Issue 4

2022

ISBN 978-9966-046-15-4

## **Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities**

**By: Kenneth Wyne Mutuma \***  
&  
**Nzeki Daniel Mutunga \***

### **Abstract**

*During armed conflict, there are numerous deaths and loss of property to unimaginable levels. However, the people who bear the biggest brunt of war are civilians, despite the fact that they do not take part in active hostilities. This paper seeks to examine the current international legal framework when it comes to the protection of the lives and property of non-combatants. It is the position of this paper that the human life is sacrosanct and should be kept exactly so, hence the need for heightened measures geared towards the protection of such lives.*

*First and foremost, the paper proffers a conceptual and contextual analysis of armed conflict in general, as well as the requirements put in place in that regard. The paper then goes ahead to discuss the key players in an armed conflict, such as the armed forces, combatants and non-combatants.*

*Further on, the paper conceptualizes International Humanitarian Law, (IHL), as the basis of civilian protection during armed conflict, in an attempt to justify the protective principle, compounded by the principle of distinction. This is further supported through a key discussion on prohibited acts against civilians, such as use of civilians as human shields,*

---

\* *PhD (UCT), LLM (UCT) LLB (Liverpool) B-Arch Studies (UON) Chartered Arbitrator, FCI Arb, CPS, Gov. Auditor, MAAK, Advocate of the High Court of Kenya.*

\* *LLM (QMUL, enrolled) LLB (UoN), ATP (KSL), Educ. For Justice (E4J), Nelson Mandela University (NMU), Arbitrator, MCI Arb, Mediator [MTI (EA)].*

*the prohibition against direct attacks, prohibition against indiscriminate attacks among others.*

*In order to achieve the ultimate goal of civilian protection during hostilities, the paper also discusses fundamental principles of IHL such as the principle of distinction, the principle of military necessity as well as the proportionality principle. The paper also discusses regulated means of warfare geared towards civilian protection, upon which it will proffer its conclusion.*

## **Introduction**

Armed conflict has evolved since the days of introduction and development of International Humanitarian Law (IHL). It was aimed initially at governing and regulating war among states following the Second World War that saw the need to make globalized rules formally and create sanctions to violations of such rules. The causes of armed conflict have also evolved in past years. The leading cause of war among states was conflict over boundaries and control of natural resources. In recent years however, we observe that political interests, identity and economic grievances have been the leading causes of armed conflict.<sup>1</sup>

If the protection of civilians during hostilities is anything to go by, then all the measures laid down within the existing legal framework must be taken into consideration, in order to ensure that the rules of IHL are fully respected by the parties to an armed conflict. These measures must be taken in both wartime and peacetime, and they ensure that: both civilians and the military personnel are familiar with the rules of humanitarian law; the structures, administrative arrangements and personnel required for compliance with the law are in place, and violations of humanitarian law are prevented and punished when they do occur.

The conduct of hostilities throughout the history of warfare has caused and continues to cause atrocious suffering on millions of families and

---

<sup>1</sup> Sassòli, M., Bouvier, A. A., & Quintin, A. *How does law protect in war?* (2011, ICRC).

individuals, and massive destruction of property.<sup>2</sup> Both civilians and combatants are killed, wounded, or maimed for life. For example, the Korean War of 1950 to 1953 had 2,730,000 civilian casualties and 793,000 combatant casualties- thrice as many civilian casualties as combatant casualties.

It has long been a central objective of International Humanitarian Law (IHL), therefore, to prohibit unrestricted warfare and to regulate the conduct of hostilities to mitigate, as much as possible, the "calamities of war." This is in line with the St. Petersburg declaration of 1868, which states that:

*the progress of civilization should have the effect of alleviating as much as possible the calamities of war; and the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy.*<sup>3</sup>

In summary, IHL in regulating the conduct of hostilities pursues two basic goals: First, to ensure the protection of the civilian population and civilian objects from the effects of the hostilities, and secondly, to impose restrictions on certain methods and means of warfare.<sup>4</sup>

### **1. IHL as a Basis for Protection of Civilians During Hostilities**

The basis of IHL is to protect the civilian population from the effects of hostilities. This is guided by the principle of distinction, which provides that belligerents must "*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*

---

<sup>2</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 79.

<sup>3</sup> Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

<sup>4</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 80.

military objectives.”<sup>5</sup> As a consequence, all States have the primary obligation to adopt and carry out measures implementing humanitarian law at the national level by putting in legislative measures to domesticate IHL and punish any breaches thereof.<sup>6</sup>

The protective purpose of this principle can only be achieved if civilians, civilian objects, combatants, and military objectives are well defined, and if the scope and conditions of the protection afforded to civilians and civilian objects are clearly set out.

This paper relies on the conceptual definition of combatants pursuant to Article 43(2) of Additional Protocol 1 as well as Rule 2 of Customary International Humanitarian Law (CIHL)<sup>7</sup> which defines combatants as “all members of the armed forces of a party to an international armed conflict, except medical and religious personnel assuming exclusively humanitarian functions.”<sup>8</sup> The only other category of weapon-bearers who may be regarded as combatants without being members of the armed forces are participants in a *Levée en masse*.<sup>9</sup>

---

<sup>5</sup>Article 48, *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, 1125 UNTS 3, available at:

<https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>6</sup> ICRC Customary International Humanitarian Law Rules, rules 1 and 7, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul) accessed 9 February 2022.

<sup>7</sup>Customary IHL, *Rule 3. Definition of Combatants (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3) accessed 9 February 2022.

<sup>8</sup>Article 43(2), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022]

<sup>9</sup>Article 2, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022]

Persons engaging in hostilities outside these categories, such as mercenaries,<sup>10</sup> or civilians taking a direct part in hostilities<sup>11</sup> are not entitled to combatant status. Having combatant status grants the combatants the “combatant privilege” which entails the right to participate directly in hostilities on behalf of a belligerent.<sup>12</sup> The consequences associated with this status are the loss of civilian status and loss of protection against direct attack.

From the above arguments, three key groups of people call for further analysis; members of the armed forces, participants in a *levée en masse* and civilians. They are as conceptualized below.

### 1.1.1 Members of the Armed Forces

Pursuant to Article 43 (1) of Additional Protocol 1 read with Rule 4 of CIHL<sup>13</sup> the armed forces of a party to a conflict comprise “*all organized armed forces, groups, and units which are under a command responsible to that party for the conduct of its subordinates.*”<sup>14</sup> However, this definition has evolved since the adoption of the 1907 Hague Regulations.<sup>15</sup> It recognizes that the laws, rights, and duties of war apply not only to the regular armed forces but also to irregular militia and volunteer corps, on

---

<sup>10</sup> Article 47(1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>11</sup> *Ibid*, Article 51 (3).

<sup>12</sup> *Ibid*, Article 43(2).

<sup>13</sup> Customary IHL, *Practice Relating To Rule 4. Definition Of Armed Forces (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2\\_rul\\_rule4](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule4) accessed 9 February 2022

<sup>14</sup> Article 43 (1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022]

<sup>15</sup> *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022].

condition that they fulfill conditions assimilating them to regular armed forces.

These conditions include:

- i. They are commanded by a person responsible for his subordinates
- ii. They wield a fixed distinctive emblem recognizable at a distance
- iii. They openly carry arms; and
- iv. They conduct their operations per the laws and customs of war.<sup>16</sup>

Most military manuals for most countries adopt the above criteria for establishing the members of the armed forces. For instance, Kenya's LOAC Manual (1997) defines the armed forces of a State or of a party to the conflict as consisting of:<sup>17</sup>

All organised units and personnel which are under a command responsible for the behaviour of its subordinates. The command of the armed forces must be responsible to the belligerent Party to which it belongs. The armed forces shall be subject to an internal disciplinary system which enforces compliance with the law of armed conflict. In the case of non-international armed conflict, in the sense of [the 1977 Additional Protocol II], the non-governmental forces or opposition forces have to fulfil two additional conditions in order to be considered "armed forces", namely:

- i. They must exercise control over a part of the State's territory
- ii. They must be able to carry out sustained and concerted military operations

---

<sup>16</sup> Ibid, Article 1.

<sup>17</sup> Kenya, *Law of Armed Conflict, Military Basic Course (ORS)*, (4 précis, The School of Military Police, 1977, précis, No. 2) pp. 7-8.



### 1.1.2 Participants in a *Levée en masse*

In IHL, the term *levée en masse* is used to describe the inhabitants of a non-occupied territory who, on the approach of the enemy,<sup>18</sup> spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.<sup>19</sup> It is the French term for a “mass uprising”.

Participants in a *levée en masse* are the only armed actors regarded as combatants even though, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces.<sup>20</sup> As soon as a *levée en masse* becomes continuous and organized, it is no longer regarded as such, but as an organized resistance movement.<sup>21</sup>

### 1.1.3 Civilians & Civilian Population

Within the confines of IHL, the civilian population is negatively defined as comprising all persons who are neither members of the armed forces of a party to the conflict<sup>22</sup> nor participants in a *levée en masse*.<sup>23</sup> This definition

---

<sup>18</sup>Article 4 (a), *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html> [accessed 9 February 2022]

<sup>19</sup>Article 2, *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022]

<sup>20</sup>Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 82

<sup>21</sup>Ibid pp. 84.

<sup>22</sup>Customary IHL, *Rule 5. Definition Of Civilians (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule5#:~:text=international%20armed%20conflicts-,Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule5#:~:text=international%20armed%20conflicts-,Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.) accessed 9 February 2022.

<sup>23</sup>Article 50(1) & (2), *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*



also includes civilians accompanying the armed forces without being incorporated in the war, for example, war correspondents who are journalists who cover stories first-hand from a war-zone.<sup>24</sup> If there is any doubt about a person's civilian status, that person must be considered a civilian.<sup>25</sup> In the judgment of *Prosecutor v Tihomir Blaskic*, commonly referred to as *the Blaskic Case*,<sup>26</sup> the International Criminal Tribunal for the Former Yugoslavia also defined civilians as "persons who are not, or no longer, members of the armed forces.

### Specific Prohibitions Geared Towards Civilian Protection

In order to ensure the protection of civilians from harm during hostilities, several prohibitions have been put in place within the larger IHL framework. They are as discussed below.

First, the prohibition against direct attacks on civilians or civilian objects. Pursuant to Article 51(2) of Additional Protocol 1 read with Rule 5 of CIHL,<sup>27</sup> direct attacks against civilians are expressly prohibited.<sup>28</sup> The

---

(Protocol I), 8 June 1977, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>24</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 85

<sup>25</sup> Article 50(1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>26</sup> *Prosecutor v Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 3 March 2000, available at <https://www.refworld.org/cases,ICTY,4146f1b24.html> accessed 9 February 2022.

<sup>27</sup> Customary IHL, *Rule 5. Definition Of Civilians (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule5#:~:text=international%20armed%20conflicts-.Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule5#:~:text=international%20armed%20conflicts-.Rule%205.,all%20persons%20who%20are%20civilians.&text=Some%20practice%20adds%20the%20condition,do%20not%20participate%20in%20hostilities.) accessed 9 February 2022.

<sup>28</sup> Article 51(2), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

word “attacks” does not only refer to offensive operations, but also includes defensive operations against the enemy.<sup>29</sup> For instance, Israel’s Military Court in the *Kassem Case of 1969*, recognized the immunity of civilians from direct attack as one of the basic rules of IHL.<sup>30</sup> In the case of *Prosecutor v. Kunarac, Kovac and Vukovic*,<sup>31</sup> the term ‘attack’ was regarded as referring to the general mistreatment of civilians and not just to acts of violence alone.

The second prohibition regards prohibition on acts of terror against the civilian population. Pursuant to Article 51(2) of Additional Protocol 1 read with Rule 2 of CIHL,<sup>32</sup> acts or threats of violence, the primary purpose of which is to spread terror among the civilian population is prohibited.<sup>33</sup>

Thirdly, prohibition against indiscriminate attacks. Article 51(4) and (5) and CIHL rules 8-11<sup>34</sup> prohibit indiscriminate attacks which are of a nature to strike military objectives and civilians and civilian objects without distinction, either because they are not or cannot be directed at a specific military objective or because their effects cannot be limited as required by IHL.<sup>35</sup> Indiscriminate attacks also include attacks that may be expected to

---

<sup>29</sup> Ibid, Article 49(1).

<sup>30</sup> *Military Prosecutor v Omar Mahmud Kassem and Others*, Israel Military court in Ramallah, April 13, 1969.

<sup>31</sup> ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic*, "Appeals Judgement", IT-69-23/IT-96-23-1, 12 June 2002, paras. 71-105.

<sup>32</sup> Customary IHL, *Rule 2. Violence Aimed At Spreading Terror Among The Civilian Population* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule2](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule2) accessed 9 February 2022

<sup>33</sup> Article 51(2), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>34</sup> Customary IHL, *Rules 11-13. Indiscriminate Attacks* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule11) accessed 9 February 2022.

<sup>35</sup> Article 51(4) & (5), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

cause incidental harm to civilians or civilian objects that would be excessive compared to the concrete and direct military advantage anticipated.<sup>36</sup>

In other words, failure to apply the principle of proportionality. Indiscriminate attacks are governed by the principle of distinction, which is enunciated in the *Additional Protocol I to the Geneva Conventions* where *Article 48* proscribes that parties to a conflict shall at all times make a distinction between civilian population and combatants and between civilian objects and military objectives while directing their operation only against military objectives.<sup>37</sup> *Article 51* states the protection of civilian population, whereby *Article 51(2)* denotes that civilian population shall not be the object of attack while *Article 51(4)* prohibits indiscriminate attacks. *Article 52* provides for the general protection of civilian objects where *Article 53(2)* mentions that attacks shall be limited to military objective.

According to the provisions of *Rule 1 of the Study on Customary International Humanitarian Law (CIHL)* in conjunction with the *Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*,<sup>38</sup> the principle of distinction is premised on the concept that combatants must be distinguished from civilians.<sup>39</sup> In consequence, Rule 1

---

<sup>36</sup> *Ibid*, Article 51(5)(b).

<sup>37</sup> *Article 51, 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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>38</sup> Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) accessed 9 February 2022.

<sup>39</sup> Henckaerts, J.M. *Study on customary international humanitarian law: a contribution to the understanding and respect for the Rule of Law in Armed Conflict*. 2005, 857 IRRC 198; see also *Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna, 1965.

CIHL<sup>40</sup> makes it a requirement that combatants must not launch an attack to hurt civilians, indiscriminately or disproportionately.<sup>41</sup>

The distinction between who falls within the ambit of a ‘combatant’ or a ‘civilian’ is therefore essential in international humanitarian law.<sup>42</sup>

The principle of distinction is palpable in international customary law as seen in the case of *Prosecutor vs Tadic, the decision on the defence motion for Interlocutory Appeal on jurisdiction*<sup>43</sup>, together with the case of *Prosecutor vs Martić case*<sup>44</sup> where Rule 1 of the Study of Customary International Law was iterated: “*the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilian*”.<sup>45</sup> In their pleadings before the International Court of Justice in *the Nuclear Weapons Case*, Australia, India, Mexico, New Zealand, and the United

---

<sup>40</sup> Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) accessed 9 February 2022

<sup>41</sup> Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) accessed 9 February 2022

<sup>42</sup> Kleffner, J. K. *From “belligerents” to “fighters” and civilians directly participating in hostilities. On the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference*, (2007, LIV NILR 315) p. 321.

<sup>43</sup> *Prosecutor v. Tadic*, Case N° IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 87.

<sup>44</sup> *Prosecutor v. Martić*, Case N° IT-95-11-I, Trial Chamber, 8 March 1996, paragraph. 10.

<sup>45</sup> Customary IHL, *Rule 1. The Principle Of Distinction Between Civilians And Combatants* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1) accessed 9 February 2022

States of America invoked the prohibition of indiscriminate attacks in their assessment of whether an attack with nuclear weapons would violate IHL.<sup>46</sup>

The fourth prohibition regards the prohibition of the use of civilians as human shields. Pursuant to Article 51(7) of Additional Protocol 1 and CIHL rule 97,<sup>47</sup> IHL prohibits belligerent parties from using civilians as “human shields.” It prohibits the use of the presence or directing the movement of the civilian population or individual civilians to attempt to shield military objectives from attack or to shield, favor or impede military operations.<sup>48</sup> However, even unlawful recourse to human shields by the defending party does not absolve the attacking party from its obligations under IHL, especially the principles of proportionality and precaution in the attack.

An example of an instance where human shields were used by parties in armed conflicts is the *Wola Massacre of 1944* in Poland where the Nazis forced civilian women onto armored vehicles as human shields to enhance their effectiveness.<sup>49</sup>

Lastly, the prohibition against reciprocity and prohibition of attacks by way of reprisal. All of the above-mentioned prohibitions are non-reciprocal in that their violation by the enemy. However, pursuant to Article 51(8) of

---

<sup>46</sup> *The legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ) 8 July 1996, available at <https://www.refworld.org/cases/ICJ,4b2913d62.html> accessed 9 February 2022.

<sup>47</sup> Customary IHL, *Rule 97. Human Shields* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule97](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule97) accessed 9 February 2022

<sup>48</sup> Article 51(7), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>49</sup> Grzebyk, P. *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials*, (2019, MPILux Research Paper).

Additional Protocol 1 and CIHL Rule 140,<sup>50</sup> the non-compliance by one party does not absolve belligerent parties from their obligations concerning the civilian population under IHL.<sup>51</sup> Precisely, attacks by way of reprisal against civilians are prohibited.<sup>52,53</sup>

### **Civilian Participation in Hostilities**

As a basic rule, civilians in situations of armed conflict are entitled to protection against direct attack “unless and for such time as they take a direct part in hostilities.”<sup>54</sup> In other words, if civilians participate in direct hostilities, they may be directly attacked as if they were combatants, but only for the duration of their direct participation in these hostilities. However, IHL provides no definition of conduct that amounts to direct participation in hostilities.<sup>55</sup> Consequently, the International Committee of the Red Cross (ICRC) conducted an informal expert process from 2003 to 2009, which resulted in the publication of its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International*

---

<sup>50</sup> Customary IHL, *Rule 140. Principle Of Reciprocity* (*Ihl-databases.icrc.org*, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule140](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule140) accessed 9 February 2022

<sup>51</sup> Article 51(8), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>52</sup> Articles 28 & 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html> [accessed 9 February 2022]. and CIHL, rules 145 and 146.

<sup>53</sup> Article 51(6), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>54</sup> *Ibid*, Article 51(3).

<sup>55</sup> Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) pp. 87.

*Humanitarian Law*. However, this document is not binding, but persuasive.<sup>56</sup>

### **Meaning of “Direct Participation in Hostilities”**

Under the *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, the concept of direct participation in hostilities comprises two basic components, which are of “hostilities” and that of “direct participation” in these hostilities. Hostilities refer to the collective recourse by belligerent parties to means and methods of warfare.<sup>57</sup> Participation in hostilities refers to the individual involvement of a person in these hostilities.<sup>58</sup> Depending on the quality and degree of such involvement, individual participation in hostilities may be described as “direct” or “indirect.” Direct participation refers to specific hostile acts carried out as part of the conduct of hostilities between parties to an armed conflict and leads to loss of protection against direct attack.<sup>59</sup>

Indirect participation may contribute to the general war effort, but does not directly harm the enemy and therefore does not entail the loss of protection against direct attacks.<sup>60</sup>

The *Interpretive Guidance* further gives a criterion to determine if an act qualifies as direct participation in hostilities. To qualify as direct participation in hostilities, a specific act must meet all the following requirements:

- i. *Threshold of Harm*: The harm likely to result from the act must be either specifically military in nature or involve death, injury, or destruction

---

<sup>56</sup> Goodman, R., & Jinks, D. *The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law: an introduction to the forum*, (2009, NYUJ Int'l L. & Pol., 42, 637).

<sup>57</sup> *Ibid*, p. 640

<sup>58</sup> *Ibid*, p. 641

<sup>59</sup> *Ibid*, p. 644.

<sup>60</sup> *Ibid*, p. 643.



- ii. *Direct Causation*: There must be a direct causal relationship between the act and the expected harm
- iii. *Belligerent Nexus*: The act must be an integral part of the hostilities occurring between parties to an armed conflict and must, therefore, aim to support one belligerent party to the detriment of another.<sup>61</sup>

### **Protection of Civilian Objects, Certain Areas & Institutions**

Pursuant to Article 52(2) of the Additional Protocol I, civilian objects are those objects which are not military objectives. Article 8(2)(b)(ii) of the Rome Statute, prohibits the intentional and direct attack against civilian objects.<sup>62</sup> Rule 10 of CIHL states that civilian objects lose its protection from attack, when the civilian object is being used for *military purposes*.<sup>63</sup> This is as conceptualised below.

#### **1.1.4 Military Objectives & Civilian Objects**

IHL provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks or reprisals.<sup>64</sup> In *the Nuclear Weapons Case* before the International Court of Justice, several States invoked the principle of distinction between civilian objects and military objectives.<sup>65</sup> In its advisory opinion, the Court stated that the

---

<sup>61</sup> Ibid, p. 644.

<sup>62</sup> Article 8(2)(b)(ii), *Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at: <https://www.refworld.org/docid/3ae6b3a84.html> [accessed 9 February 2022].

<sup>63</sup> Customary IHL, *Rule 10. Civilian Objects' Loss Of Protection From Attack (Ihl-databases.icrc.org, 2022)*  
[https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule10](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule10) accessed 9 February 2022.

<sup>64</sup> Article 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html> [accessed 9 February 2022].

<sup>65</sup> *The legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ) 8 July 1996, available at <https://www.refworld.org/cases.ICJ.4b2913d62.html> accessed 24 March 2021.

principle of distinction was one of the core principles of IHL and one of the intransigent principles of international customary law.<sup>66</sup>

Civilian objects are negatively defined as all objects that are not military objectives.<sup>67</sup> Military objectives, on the other hand, are defined as “*those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*”<sup>68</sup> In cases of uncertainty as to whether an object normally used for civilian purposes, for example, a place of worship, a building or other dwelling or a school, is being used to make an effective contribution to military action, it is presumed not to be so used.<sup>69</sup>

### ***The General Meaning of a "Military Objective"***

To qualify as a military objective, an object must meet this two-part test. First, it must contribute effectively to the adversary’s military action, and this contribution must be by its nature, location, purpose, or current use.<sup>70</sup> Second, its destruction, capture, or neutralization offers the attacker a definite military advantage. This advantage must be concrete and perceptible, not merely speculative or hypothetical.<sup>71</sup>

The Hague Convention, Article 23 (g) stipulates that “*it is especially forbidden . . . [t]o destroy or seize the enemy’s property, unless such destruction or seizure be imperatively demanded by the necessities of*

---

<sup>66</sup> Ibid

<sup>67</sup> Article 52(1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>68</sup> Ibid, Article, 52(2).

<sup>69</sup> Ibid, Article, 52(3).

<sup>70</sup> Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016) 92

<sup>71</sup> Ibid

war”.<sup>72</sup> This provision forms the backbone of military necessity as it is widely recognized in international humanitarian law and was featured in the first official codification of the modern laws of international law.<sup>73</sup> In essence, military necessity permits force that is necessary to weaken the enemy.

This definition is clearly belaboured in the 1868 St. Petersburg Declaration and states that the only legitimate purpose that should be accomplished during war is to *weaken the military forces of the enemy* and “*for this purpose it is sufficient to disable the greatest number of men*”.<sup>74</sup> It further states that “*disablement of able-bodied, non-surrendering enemy combatants is hereby deemed materially unnecessary*”<sup>75</sup> for attaining the military objective since, “*the employment of such arms would, therefore, be contrary to the law of humanity*”.<sup>76</sup> This Declaration lays a salient emphasis on the fact that anything other than the military goal is considered to be beyond the confines of the law and therefore, a breach of the law of war.<sup>77</sup>

A legal commentary by Nobuo Hayashi perfectly describes the concept of military necessity, “*To the rational soldier of Clausewitzian cast, a good war is one in which every act is “militarily necessary” - that is, executed professionally and with the optimal resource mobilization, and directed*

---

<sup>72</sup> Article 23(g), *Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at:

<https://www.refworld.org/docid/4374cae64.html> [accessed 20 July 2021].

<sup>73</sup> Lieber, F., Hartigan, R. S., & U.S.A. *Lieber's Code and the law of war*, (1983, Chicago: Precedent).

<sup>74</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868.

<sup>75</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid, supra 75.*

towards a clearly defined, strategically sound and reasonably attainable military goal".<sup>78</sup>

To further expound on the conceptual analysis of what constitutes a military objective, let us take the example of the journalists who act as war correspondents and the media in armed conflict. Do the media and war correspondents engaged in war propaganda amount to a military objective? Article 79 of the 1977 Additional Protocol I provides, a) that journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians,<sup>79</sup> within the meaning of Article 50 (1) of the same protocol,<sup>80</sup> b) they shall be protected as such under Conventions and the protocol, provided they *take no action adversely affecting their status as civilians* and without prejudice to the right of war correspondents accredited to the armed forces to the status provided for in 4(A)(4) of the third convention.<sup>81</sup>

According to The Committee of Ministers of the Council of Europe in *Recommendation No. 4*,<sup>82</sup> media personnel encompass all the

---

<sup>78</sup> Hayashi, N. *Requirements of military necessity in international humanitarian law and international criminal law*, (2010, BU Int'l LJ, 28) pp. 39.

<sup>79</sup> Article 79, *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, 1125 UNTS 3, available at:

<https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>80</sup> Article 4 (a) (1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>81</sup> Persons who accompany the armed forces without being members thereof, such as civilian members of military aircraft crew a, war correspondents, supply contractors, members of labour units or services responsible for the welfare of armed forces, if they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

<sup>82</sup> Defined by the *Committee of Ministers of the Council of Europe in Recommendation No. 4* as 'covering all representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters.

representatives of the media, namely all those engaged in the collection, processing and dissemination of news and information including cameramen and photographers, as well as support staff such as drivers and interpreters.<sup>83</sup> According to Oxford Learner's Dictionaries, propaganda, are ideas or statements that may be false or exaggerated and that are used to gain support for a political leader or party.<sup>84</sup>

Propaganda is a powerful weapon in war; it is used to dehumanize and create hatred toward a supposed enemy, either internal or external, by creating a false image in the mind of soldiers and citizens.<sup>85</sup> *NewsWatch Canada's* Co- Director, Rober A Hackett stated, "in war time, media are not mere observers but simultaneously a source of intelligence, combatant, a weapon, target and a battlefield. Due to the media's power in influencing the audience's opinion, news coverage of war can function as an effective propaganda strategy to obtain a competitive advantage."<sup>86</sup>

In the *Nuremberg Trials*, the prosecutor stated that the propaganda released by the radio division had a role in shaping the German public opinion of the Jews, thus, preparing them psychologically for an orchestrated state-sponsored programme to exterminate the Jews<sup>87</sup>. The same sentiments were said by the chamber in *Prosecutor v Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze*<sup>88</sup>, paragraph 242 and 243, that the newspaper *Kangura*, had the effect of poison, and at times explicit on its

---

<sup>83</sup> Recommendation CM/Rec (2021) 4.

<sup>84</sup> Oxford's Learner's Dictionaries, *Definition of Propaganda noun from the Oxford Advanced American Dictionary* [Oxford University Press] Accessed on the 14<sup>th</sup> of July 2021.

<sup>85</sup> Alex Carey, *Taking the Risk out of Democracy: Propaganda in the Us and Australia*, (1995, University of NSW Press,.214).

<sup>86</sup> RA Hackett, *Journalism versus Peace? Notes on a Problematic Relationship*, (2007, 2 Global Media Journal: Mediterranean Edition 47) pp. 48.

<sup>87</sup> Richard A.W., *Propaganda and History in International Criminal Trials*, (Journal of International Criminal Justice, Volume 14, Issue 3, July 2016) pp. 519-541.

<sup>88</sup> *The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze* (Appeal Judgment), ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007

readers to take action, its message of prejudice and fear paved the way for massacres of the Tutsi population.

In the *Tadic trial*,<sup>89</sup> all media was Serb controlled. The radio and Television pounded out the same unrelenting message the Serbs were about to be overwhelmed by *Ustasha* (Fascist). Prior to the armed conflict break, the Serbian Democratic Party, started waging a propaganda war which had a disastrous impact in the people of all ethnicities, creating mutual fear and hatred and particularly inciting the Bosnian Serb population against other ethnicities. Within a short period of time, citizens who had previously lived together peacefully, became enemies and killers influenced by the media. In the ICTR case of *Prosecutor v Georges Ruggiu*<sup>90</sup>, the chambers held;

The media, particularly RTLM radio, was a key tool used by extremists within the political parties to mobilize and incite the population to commit the massacres. RTLM had a large audience in Rwanda and became an effective propaganda instrument. The accused, who was a journalist and broadcaster with the RTLM, played a crucial role in the incitement of ethnic hatred and violence, which RTLM vigorously pursued. In his broadcasts at the RTLM, he encouraged setting up roadblocks and congratulated perpetrators of massacres of the Tutsis at these roadblocks. In his broadcasts, he continued to call upon the population, particularly the military and the Interahamwe militia, to finish off the 1959 revolution. His broadcasts incited massacres of the Tutsi population.

Generally, media houses and journalists enjoy civilian protection, to the extent journalists, take no action adversely affecting their status as civilians and the civilian objective is not being used for a military purpose. However, their potential involvement in war propaganda may in effect, transform

---

<sup>89</sup> Richard A.W., *Propaganda and History in International Criminal Trials*, (Journal of International Criminal Justice, Volume 14, Issue 3, July 2016) pp. 519-541.

<sup>90</sup> *The Prosecutor v. Georges Ruggiu (Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000,

them into a military objective. This argument is effectively based on the *Dual-Use Objects Doctrine*. Most civilian objects can be used for military purposes and can, therefore, be a military objective for the duration of such use. For example, infrastructure such as roads, bridges, railways, ports and airports, power plants, and communication networks. To the extent that such specific dual-use objects make an "effective contribution" to the enemy's military action and their destruction, neutralization or capture offers a definite military advantage, they qualify as military objectives regardless of their simultaneous civilian use.<sup>91</sup> The principle of proportionality must be used in the attack of such dual-use objects. Accordingly, an attack against a dual-use object qualifying as a military objective would be unlawful if it is expected to cause excessive civilian harm compared to the concrete and direct military advantage anticipated by such an attack.<sup>92</sup>

## **Fundamental Tools/Principles for Protection of Civilians During Hostilities**

### **1.1.5 The Principle of Unnecessary Suffering**

The principle of unnecessary suffering considers it unlawful to inflict suffering or injury on a combatant beyond what would necessarily render them *hors de combat*. Essentially, war should, at least in principle, be aimed at achieving a military objective or weakening an opposing high contracting party.<sup>93</sup> It is directly related to the principle of military necessity, as proclaimed in the St. Petersburg declaration; that to some extent, military necessity must be subservient to requirements of humanity.<sup>94</sup> The principle is primarily intended to protect combatants. Non-combatants or civilians who take up arms are also deemed as falling within the purview of individuals protected by the principle.

---

<sup>91</sup> *Ibid*, par. 93.

<sup>92</sup> *Ibid*, *supra*, par. 95.

<sup>93</sup> Preamble, *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868.

<sup>94</sup> *Ibid*.



Scholars have used both the proportionality test and comparative test in applying this principle. The proportionality test balances between military objective and injury suffered while the comparative test looks at suffering or injury caused to civilians and civilian objects from collateral damage. Adjectives ‘unnecessary’ and ‘superfluous’ are comparative and not absolute in nature. The test of unnecessary and superfluous damage would not be met in two instances:

- i. When no military advantage will be obtained.
- ii. When causing excessive injuries in pursuing a military objective.

The ICJ in its *Advisory Opinion on Nuclear Weapons* espoused that the principle of proportionality should be applied in choosing weapons.<sup>95</sup> Further, Article 35 (2) of Additional Protocol I prohibits the use of weapons likely to cause superfluous injury and unnecessary suffering.<sup>96</sup> Article 22 of the 1907 Hague Regulations also explains that the rights of belligerents to adopt means of injuring the enemy is not unlimited, hence the principle of proportionality should be applied.<sup>97</sup>

### ***Meaning of ‘Suffering’ and ‘Injury’***

In order to effectively conceptualize the meaning of the term(s) suffering and injury in the context of civilian protection, a three-part test is used in assessing the level of suffering:

- i. The likelihood of death
- ii. The intensity of pain
- iii. The degree of permanent disability.

---

<sup>95</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ GL No 95, [1996] ICJ Rep 226, ICGJ 205 (ICJ 1996), 8th July 1996, United Nations [UN]; International Court of Justice [ICJ].

<sup>96</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1).

<sup>97</sup> Hague Conventions of 1899 and 1907.

Suffering includes both physical and psychological elements. Thus, suffering still accrues in case of loss of a leg even when physical pain ceases. The Saint Petersburg Declaration conceptualized ‘suffering’ through the logic of excessiveness though it is less objective and quantifiable,<sup>98</sup> unlike the term ‘injury.’ Suffering cannot be graphically or numerically related to wounding.<sup>99</sup> Military manuals of most States in this regard refer against the aggravation of injuries. State practice recognizes psychological and physical suffering together with injury as constituting components of the principle of unnecessary suffering.<sup>100</sup>

*Means of Warfare Deemed to be of a Nature to Cause Superfluous Injury or Unnecessary Suffering*

As stated earlier, this principle includes both means and methods of warfare. Where means of warfare are concerned, the ICRC in 2005 explicitly prohibits or restricts the use of certain weapons. Article 23(e) of the 1899 Hague Regulations considers it ‘especially’ prohibited to employ arms, projectiles, or material of a nature to cause superfluous injury. Moreover, Article 35 (2) of Additional Protocol I espouses that it is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering. The latter is focused on the extent and nature of the effects of weapons and how these weapons are used. The following weapons have been restricted or altogether prohibited by instruments of international humanitarian law: chemical and biological weapons, nuclear weapons, landmines, and cluster munitions, and expanding bullets.

---

<sup>98</sup> M.A. Meyer (ed.), *Armed Conflict and the New Law*, (British Institute of International and Comparative Law, London, 1989) p. 277.

<sup>99</sup> R. Scott, *Unnecessary Suffering? A Medical View* (1989).

<sup>100</sup> W. H. Parks, *Memorandum of Law: The Use of lasers as Antipersonnel Weapons*, (29 September 1988, in *The Army Lawyer*, November 1988) p. 3.

### 1.1.6 The Principle of Distinction

Among the founding principles of IHL is the principle of distinction. It illustrates that to protect civilians in armed conflict a distinction has to be made between the underlying categories of person ("civilians" and "combatants") and objects ("civilian objects" and "military objectives").<sup>101</sup> These are set out in articles 48 and 52 of Additional Protocol 1 to Geneva Conventions.<sup>102</sup> Among the most fundamental maxims of IHL relevant to the conduct of hostilities is the general protection of both the civilian population and individual civilians against dangers arising from military operations.<sup>103</sup>

Regarding the natural environment, rule 43 of CIHL<sup>104</sup> provides the general principles on the conduct of hostilities that apply to the natural environment as follows:

- i. No part of the natural environment may be attacked unless it is a military objective.
- ii. Destruction of any part of the natural environment is prohibited unless required by imperative military necessity.
- iii. Launching an attack against a military objective that may be expected to cause incidental damage to the environment which

---

<sup>101</sup> Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, November 2019.

<sup>102</sup> and Additional Protocol I, Article 52(1) & (2), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>103</sup> Article 51(1), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>104</sup> Customary IHL, *Rule 43. Application Of General Principles On The Conduct Of Hostilities To The Natural Environment* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule43#:~:text=the%20natural%20environment,Rule%2043.,it%20is%20a%20military%20objective.&text=Destruction%20of%20any%20part%20of,required%20by%20imperative%20military%20necessity.](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule43#:~:text=the%20natural%20environment,Rule%2043.,it%20is%20a%20military%20objective.&text=Destruction%20of%20any%20part%20of,required%20by%20imperative%20military%20necessity.) accessed 9 February 2022.

would be excessive compared to the concrete and direct military advantage anticipated is prohibited.

Regarding military objectives and protection of civilian objects, as earlier discussed, IHL provides that attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks.<sup>105</sup> If there is any doubt whether an object normally used for civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it is presumed not to be so used.<sup>106</sup>

Regarding the protection of works and installations containing dangerous forces, certain installations, namely dams, dykes, and nuclear power stations, are specially protected from attack because their partial or total destruction would likely have catastrophic humanitarian consequences for the surrounding civilian population and objects. As long as such works and installations constitute civilian objects they are protected against direct attack. However, even dams, dykes, and nuclear power stations that qualify as military objectives, as well as other military objectives located in their vicinity, must not be attacked if such attack can cause the release of dangerous forces and consequent severe losses among the civilian population.<sup>107</sup>

This special protection against attack ceases only if the military objective in question is used in regular,<sup>108</sup> significant, and direct support of military

---

<sup>105</sup>Article 33, *Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html> [accessed 9 February 2022].

<sup>106</sup>Article 52(3), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>107</sup>*Ibid.*, Article 56(1).

<sup>108</sup>'Customary IHL - Rule 42. Works And Installations Containing Dangerous Forces' (*Ihl-databases.icrc.org*, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule42](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule42) accessed 9 February 2022

operations and if such attack is the only feasible way to terminate such support.<sup>109</sup> Also, such works, installations, or military objectives should not be made objects of reprisals.<sup>110</sup> If special protection ceases and any such works, installations, or neighboring military objectives are attacked, in addition to the precautionary measures required by the general rules on the conduct of hostilities, all practical precautions must be taken to avoid the release of the dangerous forces.<sup>111</sup> To facilitate their identification, such objects should be marked with a special sign consisting of a group of three bright orange circles placed on the same axis.<sup>112</sup> Such marking is purely indicative in nature and is not a precondition for the special protection afforded by IHL.<sup>113</sup>

### ***The Ruses of War***

Ruses of war are defined as acts intended to confuse the enemy.<sup>114</sup> Under the UK Military Manual, for instance, these may include surprises, ambushes, feigning attacks, transmitting bogus signals, retreats, and building of roads and bridges that you do not intend to use among others.<sup>115</sup> Rule 57 of CIHL states that ruses of war are generally accepted for so long

---

<sup>109</sup> Article 56(2), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>110</sup> Customary IHL, *Rule 147. Reprisals Against Protected Objects (IHL-databases.icrc.org, 2022)*

[https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule147](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule147)  
accessed 9 February 2022

<sup>111</sup> Article 56(3), *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>112</sup> *Ibid*, Annex I & Article 17.

<sup>113</sup> *Ibid*, *supra* 111, Article 56 (7).

<sup>114</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press) p. 204.

<sup>115</sup> UK Government, *The Joint Service Manual of The Law of Armed Conflict* (2004) available at [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf) > accessed 9 February 2022.

as they do not violate any rule of IHL. Generally, they are accepted, however, improper use of a white flag of truce<sup>116</sup>, improper use of the emblems of the Geneva Conventions,<sup>117</sup> improper use of United Nations emblems,<sup>118</sup> Further, Article 39 of the Additional Protocol I and Rule 62 and 63 of the ICRC CIL, prohibit the use of military emblems, uniforms of neutral states, where those of the adverse parties may be used as a ruse.<sup>119</sup>

### ***Perfidy***

Additional Protocol I define perfidy as “acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.<sup>120</sup> Such acts may include feigning intention to negotiate by flying the white flag of truce, feigning being injured or sick, and feigning protected status by use of the emblems of the United Nations or States not a party to the conflict.<sup>121</sup>

What sets aside perfidy from improper use is the intention to betray the adversary's confidence that is, an abuse of good faith. Thus, perfidy is considered to be a more serious violation than improper use. Rule 65 of CIHL prohibits the killing, injury, or capture of an adversary by resort to perfidy.<sup>122</sup>

---

<sup>116</sup> Customary IHL, *Rule 58. Improper Use of The White Flag of Truce* (Ihl-databases.icrc.org, 2022)

[https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule58](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule58) accessed 9 February 2022

<sup>117</sup> Ibid, Rule 59.

<sup>118</sup> Ibid, *supra* 116, Rule 60.

<sup>119</sup> Ibid, Rules 62&63.

<sup>120</sup> Article 37, *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, 1125 UNTS 3, available at:

<https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>121</sup> Ibid.

<sup>122</sup> Customary IHL, *Rule 65. Perfidy* (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule65](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule65) accessed 9 February 2022.

## Reprisals

Reprisals are defined as actions that would otherwise be unlawful but that in exceptional cases are considered lawful under international law when used as an enforcement measure in reaction to unlawful acts of an adversary.<sup>123</sup>

Rule 145 of CIHL states that where not prohibited by international law, belligerent reprisals are subject to stringent conditions.<sup>124</sup> The general trend by many States has been to outlaw reprisals altogether. This is because many states view it as an ineffective tool to countering the unlawful actions of an adversary. More often than not, reprisals may lead to escalation of tension through reprisals and counter-reprisals rather than aiding in ending the unlawful actions.

However, where reprisals are still legal, they are subject to five strict conditions:

- i. *Purpose of Reprisals.* The reprisal may only be taken in reaction to a prior serious violation of international humanitarian law, and only to make the adversary cease the unlawful violation.
- ii. *Measure of last resort.* Reprisals may only be carried out as a measure of last resort when no other lawful measures are available or have already been exhausted in making the adversary cease the violation.
- iii. *Proportionality.* Reprisals must be proportionate to the violation it aims to stop. In the *Kappler Case*,<sup>125</sup> on 24<sup>th</sup> March 1944, 335 Italians were killed in a mass execution, known as the '*Fosse Ardeatine Massacre*'. The attack was carried out by Nazi occupation troops in reprisal for a partisan attack conducted on the

---

<sup>123</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press) p. 513

<sup>124</sup> Customary IHL, *Rule 145. Reprisals* (*Ihl-databases.icrc.org*, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule145](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule145) accessed 9 February 2022

<sup>125</sup> *The Prosecutor v. Herbert Kappler* [1948] The Supreme Military Court of Rome, 25 October 1960.



previous day in Rome in which 33 German soldiers were killed. The Court held that the actions of the accused could not amount to reprisal as *inter alia*, it was not proportional to the violation alleged.

- iv. *Decision at the highest level of government.* In the *Kupreskic Case*,<sup>126</sup> the ICTY held that the decision to resort to a reprisal must be taken at the highest political or military level and may not be decided by local commanders.
- v. *Termination.* Reprisal action must cease as soon as the adversary complies with the law.

### **Civilian Protection Through Regulation of the Means & Methods of Warfare**

Pursuant to Rule 17 of the CIHL, each party to the conflict has a mandate to take all feasible precautions in the choice of means and methods of warfare to avoid, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>127</sup> This rule was established through state practice and soon became a norm in international law.<sup>128</sup>

This norm was included in the Additional Protocol to the Geneva Convention of 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) of 1977 article 57(2)(ii) and in several military manuals and supported by official statements and reported practice.<sup>129</sup> Article 7(b) of the second convention to the Hague Convention for the protection of Cultural Property requires parties in a conflict take all feasible precautions in the choice of means and methods of attack to avoid, and in any event to minimizing, incidental damage to cultural

---

<sup>126</sup> *Prosecutor v Zoran Kupreskic & others* [2000] ICTY.

<sup>127</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press, CIHL).

<sup>128</sup> *Ibid.*

<sup>129</sup> *Ibid.*

property.<sup>130</sup> Restrictions on the means of war focus on the particular weapons employed in warfare while the methods of warfare focus on the military tactics employed in warfare.

Means and methods of warfare are prohibited if they;<sup>131</sup>

### **a. Cause superfluous injury or unnecessary suffering**

Restrictions and prohibitions on the usage of certain weapons were inspired by the desire to protect combatants from disproportionate harm and suffering.<sup>132</sup> The St Petersburg Declaration of 1868 stated that the use of particular weapons is only legitimate if it is aimed at weakening the military forces of the enemy and disable the greatest possible number of men.<sup>133</sup> This objective would have been exceeded by the employment of arms which uselessly aggravate the suffering of disabled men or render their death inevitable and therefore such an act would be contrary to the laws of humanity.<sup>134</sup> This is the reasoning behind the principle of prohibiting the employment of weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.<sup>135</sup>

The *Advisory Opinion of the ICJ on Nuclear Weapons* argues that the prohibition against causing superfluous injury or unnecessary suffering makes it unlawful to subject the combatants to harm greater than that

---

<sup>130</sup> Article 7(b), *Convention for the Protection of Cultural Property in the Event of Armed Conflict*, 14 May 1954, available at:

<https://www.refworld.org/docid/40422c914.html> [accessed 9 February 2022]

<sup>131</sup> 'Customary IHL, Rule 70. Weapons of A Nature to Cause Superfluous Injury or Unnecessary Suffering (Ihl-databases.icrc.org, 2022) [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule70](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule70) accessed 9 February 2022.

<sup>132</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

<sup>133</sup> *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight* 1868.

<sup>134</sup> *Ibid.*

<sup>135</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

unavoidable to achieve legitimate military objectives.<sup>136</sup> Where the same military advantage can be achieved through less harmful means, considerations of humanity would require the use of such means.<sup>137</sup> This is also official position of the ICRC.

### **b. Are indiscriminate in nature**

This is based on the principle of distinction in general.<sup>138</sup> The laws on humanity prohibit indiscriminate attacks. Indiscriminate attacks involve the use of weapons that are by nature indiscriminate.<sup>139</sup> Weapons that either cannot be directed at a specific military objective or the effects of which cannot be limited as required by humanitarian law. Indiscriminate weapons include weapon systems that, as an inherent feature of the technology employed and their intended use, may be expected to inflict excessive collateral harm on the civilian population.

Like superfluous injury or unnecessary suffering, weapons of warfare have to be measured. These indiscriminate weapons have spurred the development of several treaties regulating specific weapons. Some weapons have been cited in practice as being indiscriminate in certain or all contexts, for example, chemical, biological and nuclear weapons.<sup>140</sup>

### **c. Cause severe or long-term damage to the environment**

Laws of humanity prohibit the use of weapons that are intended or may be expected to cause widespread, long-term, and severe damage to the natural environment.<sup>141</sup> This principle has drawn focus to nuclear weapons

---

<sup>136</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: <https://www.refworld.org/cases/ICJ.4b2913d62.html> [accessed 9 February 2022].

<sup>137</sup> *Ibid.*

<sup>138</sup> Nils Mezer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

<sup>139</sup> Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press, CIHL).

<sup>140</sup> *Ibid.*

<sup>141</sup> *Ibid.*

because they almost inevitably cause damage to the environment that is widespread, long-term, and severe. In the 1996 ICJ advisory, *Legality of the Threat or Use of Nuclear Weapons*, the Court recognized that important environmental factors had to be considered in the implementation of IHL, but did not conclude that the use of nuclear weapons would necessarily be unlawful on this account.<sup>142</sup> However, it found that such weapons would generally be contrary to other IHL rules.

### 1.1.7 Specifically Regulated Weapons

Based on the three principles above, numerous specific means of the ward are having been prohibited or restricted in separate treaties.

Below is a table of weapons and the regulating treaties

<b>Weapon</b>	<b>Regulating Treaties</b>
1. Poison	Hague regulations article 23(a) The Rome Statute Article 8(2)(b)(xvii) The Geneva Gas Protocol Customary International Humanitarian Law, Rule 72
2. Exploding bullets	1868 St Petersburg Declaration Customary International Humanitarian Law, Rule 78
3. Expanding bullets	Customary International Humanitarian Law, Rule 77
4. Non-detectable fragments	Customary International Humanitarian Law, Rule 79

---

<sup>142</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: <https://www.refworld.org/cases/ICJ.4b2913d62.html> [accessed 9 February 2022].

5. Booby-traps and other remote- or timer-controlled devices	1996 amended protocol II on the Convention on Certain Conventional Weapons
6. Landmines	The Anti-Personnel Mine Ban Convention Article 1 of The 1997 Anti-personnel Mine Convention The Amended Protocol II to the Convention on Certain Conventional Weapons (for the countries that are not party to the Anti-Personnel Mine Ban Convention) Customary International Humanitarian Law Rule 81, 82, 83
7. Incendiary weapons	Protocol III to the Convention on Certain Conventional Weapons
8. Blinding laser weapons	Protocol on Blinding Laser Weapons (Protocol IV to the 1980 Convention)
9. Cluster munitions	Convention on Cluster Munitions
10. Chemical weapons	1899 Hague Declaration concerning Asphyxiating Gases The 1925 Geneva Gas Protocol The 1993 Chemical Weapons Convention The Rome Statute
11. Biological weapons	1925 Geneva Gas Protocol 1972 Biological Weapons Convention
12. Nuclear weapons	It is not expressly banned in IHL The 1996 advisory opinion by the ICJ concluded that the use of nuclear weapons is contrary to the rules of IHL.

	States are obligated to conduct negotiations with the goal of nuclear disarmament. <sup>143</sup>
--	---

However, weapons that may incidentally cause the same effects as poison, exploding bullets, expanding bullets or non-detectable fragments containing plastic are not prohibited. Finally, despite IHL efforts to prevent the production of weapons that cause unnecessary suffering during armed conflict, states have been found to actively funding research and development in this sector,<sup>144</sup> especially the anti-aircraft bullets other exploding anti-materiel ammunition, and grenades lighter than 400 grams.

### 1.1.8 Methods of Warfare

International Humanitarian law limits the methods and means used to wage war.<sup>145</sup> These restrictions apply to the category of weapons used, the way they are used, and the general conduct of all those engaged in the armed conflict.<sup>146</sup> Methods of warfare encompass prohibition or restriction of how such weapons can be used or hostilities can be conducted.<sup>147</sup>

International Humanitarian Law has some prohibited methods of warfare. They include:

- i. Prohibition of direct attacks against civilian objects, cultural property, and installations containing dangerous forces.
- ii. Starvation as a method of warfare targeted towards civilians is banned.

---

<sup>143</sup> Ibid.

<sup>144</sup> Nils Melzer, *supra* note 92.

<sup>145</sup> International Committee of the Red Cross, *Methods and Means of Warfare* 2010 [https://casebook.icrc.org/law/conduct-hostilities#\\_ftn\\_076](https://casebook.icrc.org/law/conduct-hostilities#_ftn_076) accessed 9 February 2022.

<sup>146</sup> Ibid.

<sup>147</sup> Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016).

- iii. Using civilians or protected persons as human shields is forbidden
- iv. Use of acts of violence, to cause terror among civilian populations
- v. Indiscriminate attacks
- vi. Any method of warfare that causes, long term harm or severe harm to the environment.

### **1.1.9 Protection of Persons *Hors De Combat***

Article 41(1) (2) of the Additional Protocol I to the Geneva Conventions<sup>148</sup> and Rule 47 of Customary International Law (CIL), enshrine the principle that it is prohibited to attack persons considered *hors de combat*.<sup>149</sup> A *Hors de combat* is a person belonging to the opposite side who has expressed intentions to surrender or is incapable of self-defense due to wounds or sickness, shipwreck, unconsciousness. Further, this is someone who abstains from hostile acts or escapes.<sup>150</sup>

The protection of *hors de combatant* ceases if the person considered so attempts to escape or commits a hostile act.<sup>151</sup> Additionally, the Geneva Convention III provides that using any weapon against prisoners of war constitutes an extreme measure.<sup>152</sup>

---

<sup>148</sup>Article 41, *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, 1125 UNTS 3, available at:

<https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022]

<sup>149</sup> Customary IHL, *Rule 47. Attacks Against Persons Hors De Combat (Ihl-databases.icrc.org*, 2022)

[https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1\\_rul\\_rule47](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v1_rul_rule47) accessed 9 February 2022

<sup>150</sup> Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016)

<sup>151</sup> *Ibid.*

<sup>152</sup> *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html> [accessed 9 February 2022]



### 1.1.10 Denial of Quarter

Simply put, denial of quarter refers to the refusal to spare the life of anybody up to and including persons who are classified as *Persons Hors De Combat*. Denial of a quarter is prohibited by international law Article 40 and 41 of the Additional Protocol I and Customary Rule 46 enshrines that it is prohibited to threaten an advisory on the basis that there will be no survivors.<sup>153</sup> There is no derogation of this principle. Any method of warfare utilized to achieve the extermination of adversaries, including the wounded and sick is prohibited. Surrender should be provided to those who choose to surrender.<sup>154</sup>

### Autonomous Weapon Systems

Throughout history, there has been constant radical developments in the way battles are waged and the weapons used in warfare. This extraordinary predisposition of humans to develop new weapons has often shown itself in parallel with efforts to limit or regulate their use.<sup>155</sup> The advancement of technology has led to the development of new weapons systems such as cyber weapons, autonomous weapons, and Nano-weapons *inter alia*.<sup>156</sup> These new technologies in warfare are not specifically regulated by the Geneva Conventions or their Additional Protocols.

Autonomous weapon systems (AWS) pose particularly difficult challenges for IHL. First, there is no internationally agreed-upon definition of

---

<sup>153</sup> Article 40 & 41, *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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>154</sup> Nils Melzer & Kuster Etienne, *International Humanitarian Law. A Comprehensive Introduction* (2016).

<sup>155</sup> Adjust Isabelle, Coupland Robin & Isohel Rikki, *New wars, and new weapons? The Obligation of States to assess the legality of means and methods of warfare* (2002, *International Review of the Red Cross*, 84(846)) p. 345–363.

<sup>156</sup> Backstrom A et al; He, *New capabilities in Warfare: An overview of contemporary technological developments and the associated legal and engineering issues in Article 36 weapons reviews* (2012, *International Review of the Red Cross*, Vol 886, 483).

autonomous weapon systems. Secondly, while there are still no fully autonomous weapons, it is widely accepted that AWS is set to revolutionize how wars are fought.<sup>157</sup> This has seen commentators call for a total ban on autonomous weapons as the existing system of law is inadequate to regulate these weapons.<sup>158</sup> It has been argued that the deployment of lethal autonomous robots “may be unacceptable because no adequate system of legal accountability can be devised and because robots should not have the power of life and death over human beings.”

On the other hand, in making a case for autonomous weapons, Schmitt states that autonomous weapon systems have a place on the battlefield because whereas some conceivable autonomous weapon systems might be prohibited as a matter of law, the use of others will be unlawful only when employed in a manner that runs contrary to IHL's prescriptive norms.<sup>159</sup> Schmitt restates the position that the true value of these systems is not to provide a direct human replacement, but rather to extend and complement human capability by providing potentially unlimited persistent capabilities, reducing human exposure to life-threatening tasks, and, with proper design, reducing the high cognitive load currently placed on operators or supervisors.<sup>160</sup>

However, even those scholars who argue against such a complete ban agree that there is no existing regulatory framework governing the employment of autonomous weapons in the GCs or their Additional Protocols. Thus, there is an urgent need to revisit the current legal regime governing weapons, means, and methods of warfare in the conduct of hostilities to

---

<sup>157</sup> Robin Geiss, *The International-Law Dimension of Autonomous Weapon Systems* (2015).

<sup>158</sup> Human Rights Watch [HRW] & International Human Rights Clinic [IHRC], *Losing Humanity: The Case Against Killer Robots*.

<sup>159</sup> Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics*, (2013, Harvard National Security Journal Features).

<sup>160</sup> Undersecretary of Defense for Acquisition, Technology, and Logistics, Memorandum in DEP'T OF DEF., *The Role of Autonomy in DOD Systems* (July 2012, Defense Science Board).

ensure that new weapons systems such as autonomous systems are specifically regulated by IHL and that decisions concerning their use in armed conflict are not left to the arbitrary judgment of military commanders.

Further, while Article 36 of Additional Protocol (AP) 1 imposes an obligation on the states party to determine whether the employment of a new weapon, means, or method of warfare would, in some or all circumstances, be prohibited by international law,<sup>161</sup> the article does not provide the procedure or any practical guidelines on how reviews of new weapons are to be carried out. As a result, only a handful of states have developed mechanisms to review new weapons to ensure compliance with IHL.

Even for States that have adopted such measures, the novelty of the technology used in the design or deployment of certain new weapons can in some cases make the process of conducting legal reviews very difficult. Further, existing Article 36 reviews do not consider context as they should. Ultimately, these challenges lead one to conclude that the existing law is not sufficiently clear and thus there is a need to clarify IHL or develop new rules to deal with these challenges.

## **Conclusion**

In spite of the many benefits that have been brought about by the institutionalization of IHL and the existing legal framework with regards to protection of civilians during hostilities, the fact that there is noncompliance with IHL remains a big challenge, which has had a long-lasting effect to civilians, their families and the communities they are part of.<sup>162</sup> Conflicts are inherently messy, complex and difficult to resolve.

---

<sup>161</sup> Article 36 (1), *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, 1125 UNTS 3, available at:

<https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

<sup>162</sup> Bugnion, F. *The International Committee of the Red Cross and the development of international humanitarian law*, (2004, Chi. J. Int'l L., 5, 191).

However, this should not be taken as an excuse to continue with the non-compliance of laws and therefore accept the devastating impact of conflict on civilians. A number of courses of action, mechanisms and processes can improve the protection of civilians, both on the normative as well as the operational level.<sup>163</sup>

Upon occupation of a territory, an occupying power assumes responsibilities to ensure the protected persons' guarantees under the Geneva Convention IV and international humanitarian law are satisfied. When the civilian falls outside the protection by the Geneva Convention IV, protection can be derived from Article 75 of the Additional Protocol I. This ensures that civilians who find themselves in a form of occupation that is not exactly hostile within the definition of Article 42 of The Hague Regulations, such their state of nationality consents to the occupation, or where the occupying power is allies with their state of nationality, or when the occupying power is of their nationality. Additional Protocol II, Articles 4-6 has similar protections and guarantees to civilians in non-international conflicts.

Further, protection should also be accorded to the women, against rape, prostitution and indecent assault.<sup>164</sup> Any other forms of discrimination are also prohibited. The civilians can only be subjected to internment under adverse security reasons, and this should only be in accordance to Articles 41, 42, 43, 68 and 78 of the Geneva Convention IV. As a consequence, this paper presupposes that there is need for heightened prosecutions carried out against those who engage in activities that harm civilians, such as starvation of civilians during hostilities.<sup>165</sup>

---

<sup>163</sup> Eva Svoboda & Emanuella-Chiara Gillard, *Protection of Civilians in Armed Conflict: Bridging the Gap Between Law and Reality* (2015) p. 8.

<sup>164</sup> Ibid.

<sup>165</sup> Power, S. *Siege Warfare in Syria: Prosecuting the Starvation of Civilians*, (2016, Amsterdam LF, 8, 1).

## **Bibliography**

### **Books**

Alex Carey, *Taking the Risk out of Democracy: Propaganda in the Us and Australia*, (1995, University of NSW Press,.214).

Oxford's Learner's Dictionaries, *Definition of Propaganda noun from the Oxford Advanced American Dictionary* [Oxford University Press] Accessed on the 14<sup>th</sup> of July 2021.

### **Journal Articles**

Adjust Isabelle, Coupland Robin & Isohel Rikki, *New wars, and new weapons? The Obligation of States to assess the legality of means and methods of warfare* (2002, International Review of the Red Cross, 84(846))

Backstrom A et al; He, *New capabilities in Warfare: An overview of contemporary technological*

Bugnion, F. *The International Committee of the Red Cross and the development of international humanitarian law*, (2004, Chi. J. Int'l L., 5, 191).

*developments and the associated legal and engineering issues in Article 36 weapons reviews* (2012, International Review of the Red Cross, Vol 886, 483).

Eva Svoboda & Emanuella-Chiara Gillard, *Protection of Civilians in Armed Conflict: Bridging the Gap Between Law and Reality* (2015)

Goodman, R., & Jinks, D. *The ICRC interpretive guidance on the notion of direct participation in hostilities under international humanitarian law: an introduction to the forum*, (2009, NYUJ Int'l L. & Pol., 42, 637).

Grzebyk, P. *Hidden in the Glare of the Nuremberg Trial: Impunity for the Wola Massacre as the Greatest Debacle of Post-War Trials*, (2019, MPILux Research Paper).

Hayashi, N. *Requirements of military necessity in international humanitarian law and international criminal law*, (2010, BU Int'l LJ, 28)

Henckaerts, J.M. *Study on customary international humanitarian law: a contribution to the understanding and respect for the Rule of Law in Armed Conflict*. 2005, 857 IRRC 198; see also *Protection of Civilian Populations against the Dangers of Indiscriminate Warfare*, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna, 1965.

Human Rights Watch [HRW] & International Human Rights Clinic [IHRC], *Losing Humanity: The Case Against Killer Robots*.

Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press)

Jean-Marie Henckaerts, *Customary International Humanitarian Law Volume I: Rules*, (2009, Cambridge University Press, CIHL).

Kenya, *Law of Armed Conflict, Military Basic Course (ORS)*, (4 précis, The School of Military Police, 1977, précis, No. 2)

Kleffner, J. K. *From “belligerents” to “fighters” and civilians directly participating in hostilities. On the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference*, (2007, LIV NILR 315)

Lieber, F., Hartigan, R. S., & U.S.A. *Lieber's Code and the law of war*, (1983, Chicago: Precedent).

M.A. Meyer (ed.), *Armed Conflict and the New Law*, (British Institute of International and Comparative Law, London, 1989) p. 277.

*Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities: Kenneth Wyne Mutuma & Nzeki Daniel Mutunga*

(2022) *Journal of CMSD* Volume 8(4)

Michael N. Schmitt, *Autonomous Weapon Systems and International Humanitarian Law: A Reply to Critics*, (2013, Harvard National Security Journal Features).

Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction* (ICRC, 2016)

Nils Melzer, *International Humanitarian Law: A Comprehensive Introduction*, ICRC, November 2019.

Power, S. *Siege Warfare in Syria: Prosecuting the Starvation of Civilians*, (2016, Amsterdam LF, 8, 1).

R. Scott, *Unnecessary Suffering? A Medical View* (1989).

RA Hackett, *Journalism versus Peace? Notes on a Problematic Relationship*, (2007, 2 Global Media Journal: Mediterranean Edition 47)

Richard A.W., *Propaganda and History in International Criminal Trials*, (Journal of International Criminal Justice, Volume 14, Issue 3, July 2016)

Robin Geiss, *The International-Law Dimension of Autonomous Weapon Systems* (2015).

Sassòli, M., Bouvier, A. A., & Quintin, A. *How does law protect in war?* (2011, ICRC).

UK Government, *The Joint Service Manual of The Law of Armed Conflict* (2004) available at

<[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/27874/JSP3832004Edition.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/27874/JSP3832004Edition.pdf)> accessed 9 February 2022.

*Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities: Kenneth Wyne Mutuma & Nzeki Daniel Mutunga*

(2022) *Journal of CMSD* Volume 8(4)

Undersecretary of Defense for Acquisition, Technology, and Logistics, Memorandum in DEP'T OF DEF., *The Role of Autonomy in DOD Systems* (July 2012, Defense Science Board).

W. H. Parks, *Memorandum of Law: The Use of lasers as Antipersonnel Weapons*, (29 September 1988, in *The Army Lawyer*, November 1988)

### **International Instruments**

*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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022]

Customary IHL, *Practice Relating To Rule 4. Definition Of Armed Forces (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2\\_rul\\_rule4](https://ihl-databases.icrc.org/customary-ihl/eng/docindex/v2_rul_rule4) accessed 9 February 2022

Customary IHL, *Rule 3. Definition of Combatants (Ihl-databases.icrc.org, 2022)* [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule3](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule3) accessed 9 February 2022.

Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.

*Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention)*, 12 August 1949, 75 UNTS 287, available at: <https://www.refworld.org/docid/3ae6b36d2.html> [accessed 9 February 2022]

*Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 UNTS 135, available at: <https://www.refworld.org/docid/3ae6b36c8.html> [accessed 9 February 2022]



*Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities: Kenneth Wyne Mutuma & Nzeki Daniel Mutunga*

(2022) *Journal of CMSD* Volume 8(4)

*Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022]

*Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022].

*Hague Convention (IV) Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land*, 18 October 1907, available at: <https://www.refworld.org/docid/4374cae64.html> [accessed 9 February 2022]

ICRC Customary International Humanitarian Law Rules, Rules 1 and 7, available at [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul) accessed 9 February 2022.

Preamble, *Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight*. Saint Petersburg, 29 November / 11 December 1868.

*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, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 9 February 2022].

*Rome Statute of the International Criminal Court (last amended 2010)*, 17 July 1998, ISBN No. 92-9227-227-6, available at:

<https://www.refworld.org/docid/3ae6b3a84.html> [accessed 9 February 2022].

### **Case Law**

ICTY, *Prosecutor v. Kunarac, Kovac and Vukovic, "Appeals Judgement"*, IT-69-23/IT-96-23-1, 12 June 2002

*Military Prosecutor v Omar Mahmud Kassem and Others*, Israel Military court in Ramallah, April 13, 1969.

*Prosecutor v Tihomir Blaskic (Trial Judgement)*, IT-95-14-T, International Criminal Tribunal for the former Yugoslavia (ICTY) 3 March 2000, available at <https://www.refworld.org/cases,ICTY,4146f1b24.html> accessed 9 February 2022.

*Prosecutor v Zoran Kupreskic & others* [2000] ICTY.

*Prosecutor v. Martić*, Case N° IT-95-11-I, Trial Chamber, 8 March 1996

*Prosecutor v. Tadić*, Case N° IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

*The legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ) 8 July 1996, available at <https://www.refworld.org/cases,ICJ,4b2913d62.html> accessed 9 February 2022.

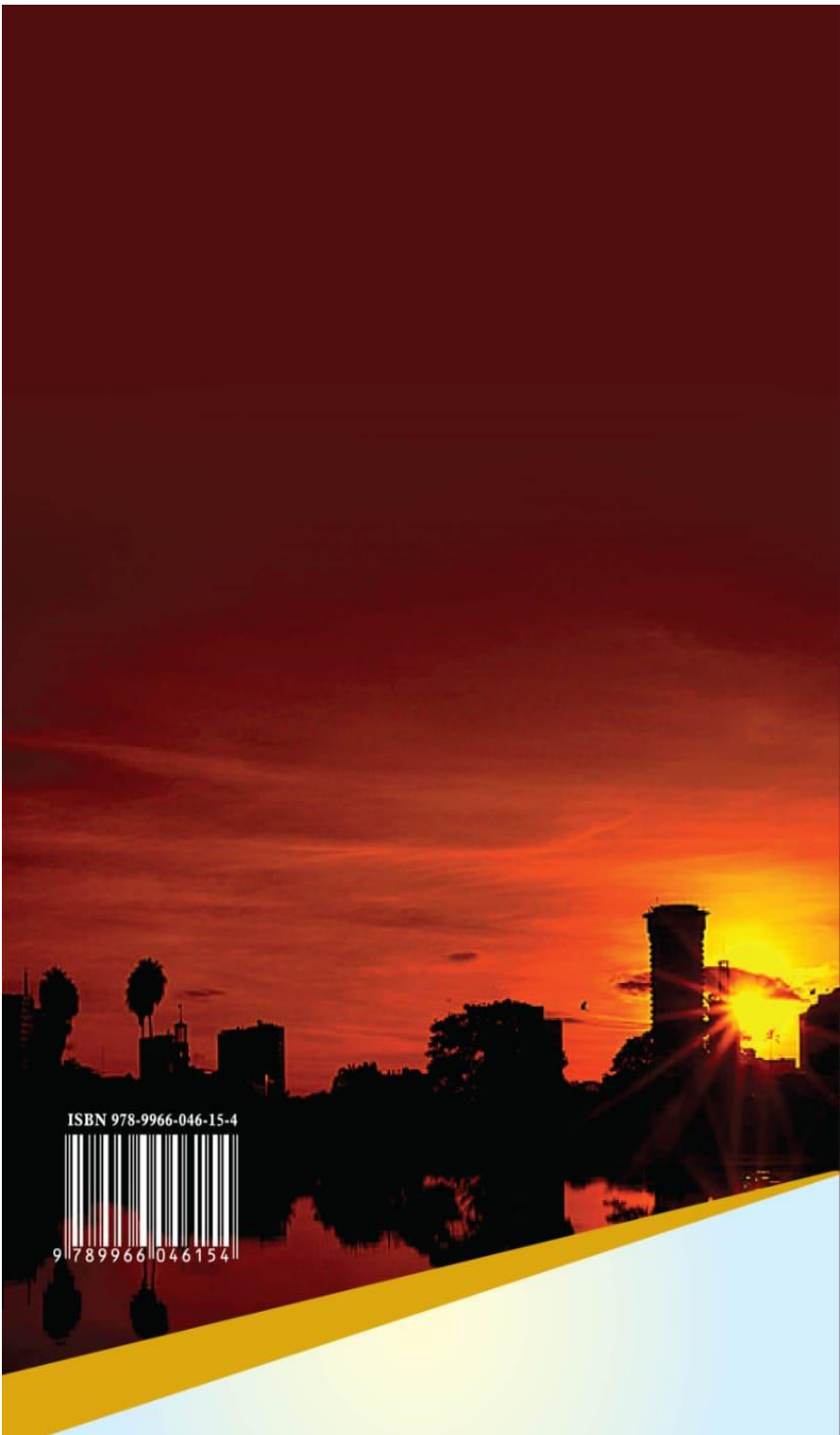
*The Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza, Hassan Ngeze (Appeal Judgment)*, ICTR-99-52-A, International Criminal Tribunal for Rwanda (ICTR), 28 November 2007

*The Prosecutor v. Georges Ruggiu (Judgement and Sentence)*, ICTR-97-32-I, International Criminal Tribunal for Rwanda (ICTR), 1 June 2000

*Civilian Protection in War; An Insurmountable Task? Prohibited & Legally Permissible Conduct During Hostilities: **Kenneth Wyne Mutuma** & Nzeki Daniel Mutunga*

**(2022) Journalofcmsd Volume 8(4)**

*The Prosecutor v. Herbert Kappler* [1948] The Supreme Military Court of Rome, 25 October 1960.



ISBN 978-9966-046-15-4



9 789966 046154