

Introduction

International humanitarian law (IHL) grants protection to certain persons and objects, but at the same time indicates which other categories of persons and objects can be lawfully attacked. Therefore, IHL is a battlefield of two principles: humanity and military necessity.

The overwhelming majority of publications on the subject focus on the protection afforded to persons and objects. This monograph takes a different approach. My intention is to examine the opposite question: who and what is not afforded protection, and ergo can be targeted and attacked in armed conflict?

I believe that the norms of IHL are currently interpreted to permit attacks against a wide array of targets, and I answer several research questions to prove it: What norms apply to the determination of lawful targets? What persons and objects may be lawfully targeted in armed conflict? What are the reasons, both legal and extra-legal, for losses among the persons and objects that should not be targeted in light of the law? What principles must be observed when attacking military objectives? Are states and non-state participants of armed conflict treated equally in IHL, and, if not (which may be a foregone conclusion considering how international law is created), does this strengthen the protection of persons who are not participating in hostilities? Is it possible to develop a consistent approach to targeting in armed conflict regardless of the legal qualification of the armed conflict?

In this monograph, I discuss definitions of the fundamental notions of IHL: ‘civilian’, ‘combatant’, ‘direct participation in hostilities’, ‘civilian object’, ‘military objective’, and ‘military advantage’. Without a clear grasp of these notions, it is impossible to apply IHL properly. Several of these terms have no treaty definitions, allowing for a lot of leeway in their interpretation. Yet leaving too much freedom of interpretation to the adversaries in armed

conflict is fraught with the risk of erosion of all restrictions that theoretically should apply in armed conflict. Therefore, it is vital that precision in defining these terms be achieved.

It is not my intention to discuss either the process of target selection in armed conflict or the decision-making that precedes an attack. This would require taking into account political and strategic aspects of targeting, and going far beyond purely legal issues.¹ In contrast, my interest here is in discussing the legal norms which indicate lawful targets under international law. I focus mainly on land warfare, because targeting in naval and aerial warfare is governed by specific rules² which require separate discussion and which are flagged only briefly in this monograph. My focus is on both the determination of potential lawful targets in pre-planned operations (deliberate targeting) and on dynamic targeting.

To improve readability, I use the following terms interchangeably: ‘member of the armed forces’ and ‘soldier’; ‘member of non-state armed group’ and ‘fighter’; ‘armed law enforcement agency’ and ‘police’; ‘goods’ and ‘objects’.

All references to online sources were up to date as of 10 December 2021. The judgments of international and national criminal tribunals were sourced from ICC Legal Tools (unless otherwise specified), the judgments of the European Court of Human Rights from HUDOC, and the judgments of the Permanent Court of International Justice/International Court of Justice from the official website of the court. The monograph reflects the legal regulations as of 10 December 2021.

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¹ Philip Pratzner, ‘The Current Targeting Process’ in Paul Ducheine, Michael Schmitt, Frans Osinga (eds), *Targeting: The Challenges of Modern Warfare* (Springer 2016) 77 ff.; Kenneth Watkin, ‘Targeting in Air Warfare’ (2014) 44 *IstYHR* 1, 17 ff.; Geoffrey Corn, Gary Corn, ‘The Law of Operational Targeting: Viewing the LOAC through an Operational Lens’ (2012) 47(2) *TexILJ* 337, 351.

² William Fenrick, ‘Legal Aspects of Targeting in the Law of Naval Warfare’ (1991) 29 *CanYIL* 238, 242–3. The author rejects possibility of application of the definition of military objective adopted in Article 52(2) AP I to naval warfare. A similar opinion, mainly based on the letter of Article 49(3) AP I, is expressed in, for example, Andrzej Makowski, Marek Ilnicki, *Wojna na morzu we współczesnym prawie międzynarodowym* (Adam Marszałek 1996) passim; Wolff Heintschel von Heinegg, ‘Naval warfare’ in Edoardo Greppi (ed.), *Conduct of Hostilities: The Practice, the Law and the Future* (FrancoAngeli 2015) 179 ff. On air warfare, see, for example, Anne-Sophie Millet-Devalle (ed.), *Guerre aeriennne et droit international humanitaire* (Editions A. Pedone 2015).

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1

Sources, Scope, and Application of the Law on Legitimate Targets in Armed Conflicts

1.1 FRAGMENTATION OF INTERNATIONAL LAW ON LEGITIMATE TARGETS IN ARMED CONFLICT

Several branches of international law must be consulted to establish which targets are considered legitimate in armed conflict.¹ First, we must consider not only international humanitarian law, specifically designed to regulate the methods and means of warfare and the protection vested in persons and objects in armed conflict, but also international human rights law, the purpose of which is to protect human rights and freedoms both in the time of peace and in armed conflict.

These two branches of law differ significantly. Their roots and origins are different, as is the scope of their regulation (geographical, temporal, material, and personal), method of enforcement, formulation of norms,² fundamental principles, and the essential approach to the very existence of armed conflict.³ It is therefore a challenge to find a conceptual area where both international humanitarian law and international human rights law concede that certain specific persons and objects are legitimate targets in armed conflict.

¹ See ILC, *Report: Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (2006), § 104; Patrycja Grzebyk, 'Fragmentation of the law of targeting – a comfortable excuse or dangerous trap' in Andrzej Jakubowski, Karolina Wierczyńska (eds.), *Fragmentation vs the Constitutionalisation of International Law: A Practical Inquiry* (Routledge, 2016) 132 ff.

² More in Robert Cryer, 'The interplay of human rights and humanitarian law: The approach of the ICTY' (2010) 14:3 *JC&SL* 511, 523.

³ See ICTY, *Prosecutor v. Dragoljub Kunarac et al.* (2001) § 470–1; ICTY, *Prosecutor v. Milorad Krnojelac* (2002) § 181; Jean Pictet, *Humanitarian Law and the Protection of War Victims* (A. W. Sijthoff, Henry Dunant Institute 1975) 14; Cordula Droege, 'The interplay between international humanitarian law and international human rights law in situations of armed conflict' (2007) 40:2 *IsrLR* 310, 312 ff; Michelle Hansen, 'Preventing the emasculation of warfare: Halting the expansion of human rights law into armed conflict' (2007) 194 *MLR* 1, 6 ff.

Fragmentation of the law on legitimate targets in armed conflict goes beyond IHL and IHRL. International criminal law is also relevant because it defines war crimes (which include attacking illegitimate targets) and the principles of responsibility for these crimes. Consequently, it can impact the interpretation of the fundamental notions of IHL and IHRL.

1.1.1 International Humanitarian Law

International humanitarian law was specifically designed to determine who and what is protected in armed conflict. *A contrario*, it therefore indicates which targets are legitimate. Among the treaties that constitute the core of IHL, the primary role is definitely played by the four Geneva Conventions for the Protection of War Victims of 1949 and their Additional Protocols of 1977. More states are parties to the GCs (196) than to the UN Charter of 1945 (193).⁴ This universal acceptance means that all the regulations of these conventions qualify as customary law.⁵

As regards legitimate targets, the GCs did not supersede, but only complemented (and even that to a fairly small extent) the regulations of, for example, the Convention respecting the Laws and Customs of War on Land and its annex, Regulations concerning the Laws and Customs of War on Land, both of 1907.⁶ Consequently, in this area the APs are much more important than the GCs, because they contain both the norms on protection of specific categories of persons and objects, and the law on legitimate attacks.

Compared to the GCs, the APs have significantly fewer ratifications: 174 for AP I and 169 for AP II, respectively. Several states that currently are or recently have been involved in an armed conflict (and thus they can be qualified as *States whose interests are specially affected*⁷ with regard to the emergence of

⁴ The following subjects are parties to the GCs and at the same time they are not members of the UN: Cook Islands, the Holy See, Palestine.

⁵ ICJ, *Military and Paramilitary Activities in and against Nicaragua* (1986) § 218; *Legality of the Threat or Use of Nuclear Weapons* (1996) § 79; see also *Eritrea-Ethiopia Claims Commission, Partial Award, Prisoners of War, Ethiopia's Claim 4*, between the Federal Democratic Republic of Ethiopia and the State of Eritrea (2003), (2009) 26 RIAA 75, § 32, where the Commission stated: 'hat the law applicable to this Claim is customary international law, including customary international humanitarian law as exemplified by the relevant parts of the four Geneva Conventions of 1949 ... Whenever either Party asserts that a particular relevant provision of these Conventions should not be considered part of customary international law at the relevant time, the Commission will decide that question, and the burden of proof will be on the asserting Party.'

⁶ Article 135 GC III; Article 154 GC IV.

⁷ See ICJ, *North Sea Continental Shelf* (1969) § 73–74. Cf. ILC, *Text of the Draft Conclusions on Identification of Customary International Law*, A/71/10 (2016), where there is no reference to this notion.

customary norms of IHL) have not ratified the AP I or II.⁸ Importantly, there are often discrepancies between the practices of these states and the norms codified in the APs. This is crucial, because the case law of the International Court of Justice suggests that it is precisely the practice of states, not parties to a given treaty, that has particular impact on the assessment of whether or not the treaty regulations can be considered part of customary law.⁹ It is therefore arguable whether the regulations of the APs in their totality now have the status of customary law, and, in my opinion, there are good reasons to believe that it is not the case.

As a result, while a large proportion of the regulations in the APs is considered customary law,¹⁰ the APs in their totality are not applicable to all subjects of international law as customary law.¹¹ This is particularly true with regard to AP I,¹² because many states that have decided to ratify it have submitted reservations or declarations of interpretation concerning, for

⁸ For example, the following states are not parties to AP I: Iran, Israel, Pakistan, Somalia, Turkey, USA. In case of AP II, none of the above-mentioned states, nor Syria, are parties to it.

⁹ ICJ, North Sea Continental Shelf (1969) § 73.

¹⁰ The list of norms with clear customary status and with relevance to legitimate targeting includes: prohibition to use methods and means of warfare of a nature to cause superfluous injury or unnecessary suffering (Article 35 AP I), prohibition to order that there shall be no survivors (Article 40 AP I), prohibition of perfidy (Article 37 AP I), prohibition of attacks directed against civilian population (Articles 48 and 51(2) AP I) or civilian objects (Article 52(2) AP I), prohibition of attacks against person parachuting from an aircraft in distress (Article 42 AP I), prohibition of attacks against non-defended localities (Article 59 AP I) or demilitarized zones (Article 60 AP I), obligation of effective advance warning of attacks which may affect the civilian population (Article 57(2)(c) AP I), partial definition of a combatant (Articles 43 and 47). It is disputed to what extent definition of civilian population (Article 50 AP I) and precautions in attack and against the effects of attacks (Articles 57 and 58) achieved customary law status. See Fausto Pocar, 'To what extent is Protocol I customary international law?' (2002) 78 ILS 337, 344 ff; Theodor Meron, *Human Rights and Humanitarian Norms as Customary Law* (Clarendon Press 1989), 64 ff; Michael Schmitt, 'The principle of distinction and weapon systems on the contemporary battlefield: A US perspective on challenges for a military commander' (2008) 37 *Collegium* 53; Jean-Marie Henckaerts, 'Study on customary international humanitarian law: A contribution to the understanding and respect for the rule of law in armed conflict' in Anthony Helm (ed.), *The Law of War in the 21st Century: Weaponry and the Use of Force* (Naval War College 2006) 37 ff.

¹¹ The purpose behind AP I was not only to codify the existing customary law but also to introduce new principles (see its preamble: *Reaffirm and Develop*).

¹² There is no doubt as to the customary character of AP II, given the rudimentary nature of its provisions. For instance, the United States has been declaring its intention to ratify AP II for decades, and applies it in the armed conflicts to which Article 3 GCs applies (i.e. in a wider range of conflicts than strictly required by Article 1(1) AP II); see more in Michael Meier, 'A treaty we can live with: The overlooked strategic value of Protocol II' (2007) Sept. AL 28, 37. However, the US Senate continues to refuse to ratify AP II, despite requests to do so made by several US presidents: see Letter of Transmittal of Protocol II by President Reagan to the Senate (1987); Letter of Transmittal from President William Clinton, Hague Convention for

example, the definition of combatant (status of members of irregular forces and the obligation to distinguish themselves from the civilian population), the presumption of civilian status of a person or object, the definition of a mercenary, the prohibition of reprisals, the principle of proportionality, and the obligation to undertake relevant precautionary measures before and during attack.¹³ The same issues have prevented some states from ratifying AP I.¹⁴

As a result, it is still important to consider whether an armed conflict should be viewed through the lens of the GCs and the AP I or II, or whether the GCs alone apply. This is particularly important with regard to non-international armed conflicts, which – depending on the circumstances – either fall solely under the regulation of Article 3 GCs, or are also governed by the norms of AP II. It should be noted that AP II is quite modest in extent, having only twenty-eight articles, of which ten are final provisions. This is hardly impressive compared to GC IV on the protection of civilian persons in time of war, with its 159 articles (of which 10 are also final provisions) – and this is not counting the annexes. To recapitulate: in a great majority of situations that qualify as armed conflict,¹⁵ the only applicable laws are the select few provisions of IHL treaties, modest as they are in both volume and content.

Beside treaty provisions proper, customary norms of IHL apply in each armed conflict.¹⁶ Customary law is particularly important when it comes to non-international armed conflict, due to the above-mentioned scarcity of treaty regulations in this regard, and in armed conflict where international

the Protection of Cultural Property in the Event of Armed Conflict, and reiterating support for Protocol II (1999).

¹³ See more in: Julie Gaudreau, 'The reservations to the protocols additional to the Geneva Conventions for the Protection of War Victims' (2003) 849 IRRC 143; Pocar (2002) 345 ff. Text of reservations to the GCs and APs is available at www.icrc.org/applic/ihl/ihl.nsf/vwTreatie.s1949.xsp.

¹⁴ Letter of Transmittal of Protocol II by President Reagan to the Senate (1987) III, where it is stated: *Protocol I is fundamentally and irreconcilably flawed*. See also Amanda Alexander, 'A short history of international humanitarian law' (2015) 26:1 EJIL 109, 127.

¹⁵ Since World War II, the great majority of armed conflicts have been non-international in nature: see statistics on Armed Conflict Database – International Institute for Strategic Studies; Data on Armed Conflict – PRIO, www.prio.org/Data/Armed-Conflict/; and Department of Peace and Conflict Research, Uppsala Universiteit, www.pcr.uu.se/research/ucdp/charts_and_graphs/.

¹⁶ International custom is listed in Article 38(1) ICJ Statute (1945) on a par with international conventions and 'the general principles of law recognized by civilized nations' as a basis for the Court's rulings. The same provision reads that the function of the Court is to decide in accordance with international law such disputes as are submitted to it. As a result, the list in Article 38(1) is considered the fundamental catalogue of formal sources of international law.

organizations are involved, taking into account the way non-state parties to armed conflicts are bound by IHL.

Customary law on the conduct of hostilities in armed conflict is not itself fragmented. There is just a single body of norms, although it is influenced by many branches of international law. Custom emerges where a general uniform practice (*usus*) is accepted as law (*opinio juris*).¹⁷ This is why, in my opinion, customary norms regarding the use of lethal force in armed conflict cannot vary depending on the lens of a specific branch of law applied to their analysis.¹⁸ In other words, no customary norms on legitimate targets and methods of attack can exist that would be contradictory to one another.

The International Committee of the Red Cross (ICRC) undertook the task of identifying customary international norms of IHL in its 2005 *Study on Customary International Humanitarian Law* (hereinafter: *Study on Customary IHL*).¹⁹ The ICRC regularly updates the database on state practice to enable the verification of the status of each norm.²⁰

A lot of criticism has been directed at the *Study on Customary IHL*, focusing mostly on the methodology that underlies the document.²¹ The problematic issue is that the ICRC, when it accepted that there is sufficient *opinio iuris* to attest to the existence of the norms, did so in reliance on documents adopted by international organizations (including non-governmental organizations) and declarations of non-state armed groups. Furthermore, the decisive factor in the ICRC's assessment of state practice is official declarations of states and documents such as military manuals (often comprising both legal and political elements), rather than actual conduct of states' organs during armed

¹⁷ See ICJ, *North Sea Continental Shelf* (1969) § 77; ILC *A/71/10* (Conclusion no. 2).

¹⁸ Marco Sassòli, Laura Olson, 'The relationship between international humanitarian and human rights law: where it matters: admissible killing and internment of fighters in non-international armed conflict' (2008) 90:871 *IRRC* 599, 605; Marco Sassòli, 'The role of human rights and international humanitarian law in new types of armed conflict' in Orna Ben-Naftali (ed.), *International Humanitarian Law and International Human Rights Law* (Oxford University Press 2011b) 72.

¹⁹ Jean-Marie Henckaerts, Louise Doswald-Beck, *Customary International Humanitarian Law*, Volumes I–III (ICRC, Cambridge University Press 2005).

²⁰ See www.icrc.org/customary-ihl/eng/docs/home.

²¹ See, for example, Timothy McCormack, 'An Australian perspective on the ICRC customary international humanitarian law study' in Helm (2006) 88 ff; Yoram Dinstein, 'The ICRC customary international humanitarian law study' in *ibid.* 99 ff; Michael Bothe, 'Customary international humanitarian law: Some reflections on the ICRC study' (2005) 8 *YIHL* 143 ff; Elizabeth Wilmshurst, Susan Breau (ed.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* (Cambridge University Press 2007) *passim*; John Bellinger III and William Haynes II, 'A US government response to the International Committee of the Red Cross Study Customary International Humanitarian Law' (2007) 89:866 *IRRC* 443.

operations.²² On the one hand, it must be noted that the *custom is built up . . . by practice, and not only by a promise of practice or by opinions as to its necessity*.²³ On the other hand, in certain situations the existence of the norm is not challenged even when the norm itself is breached.²⁴ In my opinion, both the practice and the official statement(s) of the state commenting on its practice must be analysed in order to clearly indicate a particular customary norm.

Finally, according to the *Study on Customary IHL*, the norms applicable to international and non-international armed conflict appear to be nearly identical, a claim that is vigorously rejected by several states and by part of the doctrine.²⁵

In view of the criticism of the *Study on Customary IHL*, its conclusions must be approached with caution – but they should not be disregarded. There are many years of work behind this document, numerous highly regarded experts have made their contributions to this effort, and it is supported by the ICRC, an independent humanitarian organization with special status under international law. Under the Statutes of the International Red Cross and Red Crescent Movement, it is the responsibility of the ICRC to work for the faithful application of international humanitarian law applicable in armed conflict and to take cognizance of any complaints based on alleged breaches of that law, and to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflict and to prepare any development thereof.²⁶

The ICRC exercised these rights, for example, by launching an effort to develop more precise definitions of the notions used in the GCs and APs, such as ‘direct participation in hostilities’ (Article 3 GCs, Article 51(3) AP I, Article 13(3) AP II) and ‘civilian’ in non-international armed conflict (Article 13 AP II). After years of consultations with experts, the ICRC published its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under*

²² Michael Schmitt, ‘Military necessity and humanity in international humanitarian law: Preserving the delicate balance’ (2010b) 50:4 *VirJIL* 796, 830. The author also notes that there are too few examples of such practice of states to conclude that a customary norm has emerged, and that too little consideration has been given to the arguments made by states whose interests are specially affected. As a result, the practice of states with little experience of involvement in armed conflict has been given the same weight as that of states which are engaged in armed conflict on a larger scale.

²³ Karol Wolfke, *Custom in Present International Law* (Prace Wrocławskiego Towarzystwa Naukowego, Seria A, No. 101, 1964) 79.

²⁴ Pocar (2002) 345.

²⁵ Among 161 rules identified in *Study on Customary IHL*, 146 rules are applicable in IACs and NIACs, 2 are applied only in NIACs and 13 only in IACs.

²⁶ Article 5(2)(g) Statutes of the International Red Cross and Red Crescent Movement (1986 with amendments of 1995 and 2006). On the role of the ICRC in interpretation and reaction to IHL violations, see more in François Bugnion, *Le Comité International de la Croix-Rouge et la Protection des Victimes de la Guerre* (CICR 1994) 1067 ff.

International Humanitarian Law (hereinafter: *ICRC Interpretive Guidance*).²⁷ The document is not binding and falls under the umbrella of soft law, with all its attendant consequences.

ICRC Interpretive Guidance has been wildly controversial, to the point that allegedly some of its authors, after having invested years of work (2003–8) in the effort, have opted not to have their authorship acknowledged in the document.²⁸ Yet again, given the unique status of the ICRC and the uncontested significance of the analytical insights and arguments presented in the *ICRC Interpretive Guidance*, it is necessary to invoke it when interpreting the notions that are crucial for consideration in this monograph.

Other soft law instruments that may have an impact on the status and scope of application of IHL norms include the resolutions of intergovernmental organizations,²⁹ as well as resolutions and guidelines issued by recognized expert institutions, for example the Institute of International Law³⁰ and the International Institute of Humanitarian Law.³¹

1.1.2 *International Human Rights Law*

Nowadays, it is widely accepted that in an armed conflict, IHRL³² applies beside IHL.³³ IHRL is designed to safeguard rights (generally) vested in

²⁷ Guidance was adopted by Assembly of the International Committee of the Red Cross on 26.02.2009. Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC 2009).

²⁸ Hays Parks, 'Part IX of the ICRC "Direct Participation in Hostilities" study: No mandate, no expertise, and legally incorrect' (2010) 42 NYU JILP 769, 784–5; William Fenrick, 'ICRC guidance on direct participation in hostilities' (2009b) 12 YIHL 287, 288; Charles Garraway, "'To kill or not to kill?' – Dilemmas on the use of force' (2009) 14 JCS&SL 499, 505, wherein the author states 'To some extent, the process ended in failure'.

²⁹ See also ILC, *A/71/10* (Conclusion 4.2).

³⁰ For example, Resolution of IIL: The Distinction between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, 1969 (hereafter: IIL, Edinburgh Resolution (1969)).

³¹ See, for example, *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (1994), <https://ihl-databases.icrc.org/ihl/INTRO/560>; *San Remo Manual relating to Non-International Armed Conflict* (2006), www.legal-tools.org/doc/ccf497/pdf/.

³² The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights (1966) are basic human rights treaties of general nature. In addition, there is a number of regional conventions of general nature, such as the Convention for the Protection of Human Rights and Fundamental Freedoms (1950) (ECHR); conventions dealing with protection of particular categories of persons like Convention on the Rights of the Child (1989); or conventions on particular rights/freedom, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

³³ Interestingly, codification of IHL was originally commenced outside the UN (ILC), because the UN took the view that in the face of delegalization of war, further development of IHL