International Humanitarian Law and the Law of Armed Conflict

COURSE AUTHOR

Antoine A. Bouvier

SERIES EDITOR

Harvey J. Langholtz, Ph.D.

Peace Operations Training Institute®

International Humanitarian Law and the Law of Armed Conflict

COURSE AUTHOR

Antoine A. Bouvier

SERIES EDITOR

Harvey J. Langholtz, Ph.D

Peace Operations Training Institute®

Peace Operations Training Institute
1309 Jamestown Road, Suite 202
Williamsburg, VA 23185 USA
www.peaceopstraining.org

First edition: 2000
Second edition: December 2012
Cover: UN Photo #531246 by Stuart Price, October 2012.

International Humanitarian Law and the Law of Armed Conflict

Foreword

Dear Student:

I am pleased you have enrolled in the correspondence course International Humanitarian Law and the Law of Armed Conflict. The Course Author, Mr. Antoine A. Bouvier, is a recognized expert in the field of International Humanitarian Law and he has written a thorough, detailed, and informative course.

Students familiar with other courses we offer at Peace Operations Training Institute will immediately recognise this course is different from any we have produced to date. This course deals with some very complex issues. What are the rights of the individual in times of armed conflict? What protections are there for civilians? What are the rights and safeguards accorded to refugees, displaced persons, or prisoners of war? What are the rights and protections for combatants? What are the rights of nations to defend themselves when attacked? How shall armed conflict be carried out? These questions address some of the fundamental means by which nations engage and in some ways define the concept of what it means to be civilised. This course attempts to address these questions from the point of view of International Law, specifically International Humanitarian Law.

The issues raised in any discussion of International Humanitarian Law will be complex and difficult and the questions posed will not have easy answers. Neither will there be full agreement between nations, organisations, or individuals. There are some issues within IHL where the International Committee of the Red Cross and the United Nations have taken different positions. Yet, your course author is a Legal Adviser for the ICRC, and the editor of the course is the Director of Peace Operations Training Institute. We have tried to write a balanced course that recognises the different views of the two organisations. Nothing we have said here should be taken as accepted policy or doctrine for either the ICRC or the UN. This course is for training purposes, not for the promulgation of official positions, and therefore should not be quoted as an official statement of either the UN or the ICRC.

I wish you, the student, every success as you study the material in this course. I congratulate you for your interest in studying International Humanitarian Law and the Law of Armed Conflict.

Sincerely,

Harvey J. Langholtz, Ph.D.,
Executive Director
Peace Operations Training Institute

To view a video introduction of this course by the course author, Antoine Bouvier, you can either log in to your virtual classroom, go to *https://www.peaceopstraining.org/videos/313/ihl-course-introduction/*, or use your mobile device to scan the QR code to the left.

Method of Study

The following are suggestions for how to proceed with this course. Though the student may have alternate approaches that are effective, the following hints have worked for many.

- Before you begin actual studies, first browse through the overall course material. Notice the lesson outlines, which give you an idea of what will be involved as you proceed.
- The material should be logical and straightforward. Instead of memorizing individual details, strive to understand concepts and overall perspectives in regard to the United Nations system.
- Set up guidelines regarding how you want to schedule your time.
- Study the lesson content and the learning objectives. At the beginning of each lesson, orient yourself to the main points. If you are able to, read the material twice to ensure maximum understanding and retention, and let time elapse between readings.
- When you finish a lesson, take the End-of-Lesson Quiz. For any error, go back to the lesson section and re-read it. Before you go on, be aware of the discrepancy in your understanding that led to the error.
- After you complete all of the lessons, take time to review the main points of each lesson. Then, while the material is fresh in your mind, take the End-of-Course Examination in one sitting.
- Your exam will be scored, and if you acheive a passing grade of 75 per cent or higher, you will be awarded a Certificate of Completion. If you score below 75 per cent, you will be given one opportunity to take a second version of the End-of-Course Examination.
- One note about spelling is in order. This course was written in English as it is used in the United Kingdom.

Key features of your course classroom:

- Access to all of your courses;
- A secure testing environment in which to complete your training;
- Access to additional training resources, including Multimedia course supplements;
- The ability to download your Certificate of Completion for any completed course; and
- Student fora where you can communicate with other students about any number of subjects.

Access your course classroom here:

http://www.peaceopstraining.org/users/user_login

LESSON 1
GENERAL INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW (IHL): DEFINITIONS AND FIELDS OF APPLICATION

LESSON 1

LESSON OBJECTIVES

This lesson will provide an overview of the origin and development of International Humanitarian Law. It will focus on the establishment of International Humanitarian Law and discuss classic principles on which regulations of the means and methods of conflict are generally based. The lesson also distinguishes between the different types of conflicts.

By the end of Lesson 1, the student should be able to meet the following objectives:

- Understand the development of customary humanitarian law;
- Understand the history of IHL treaty codification;
- Describe how IHL relates to Public International Law;
- Explain the differences between jus ad bellum and jus in bello;
- Understand the definition of International Humanitarian Law;
- Understand the historical development of International Humanitarian Law up to the Geneva Convention of 1864;
- Trace the development of IHL since 1864;
- Recognize the different foci of Geneva Law and Hague Law;
- Understand how International Humanitarian Law has its sources in Public International Law; and
- Understand the Basic Rules of IHL.

To view a video introduction of this course by the course author, Antoine Bouvier, you can either log in to your virtual classroom, go to *https://www.peaceopstraining.org/videos/314/definition-and-fields-of-application/*, or use your mobile device to scan the QR code to the left.

1.1 General Definition of International Humanitarian Law (IHL)

"International Humanitarian Law applicable in armed conflicts" means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems that arise directly from international or noninternational armed conflicts. For humanitarian reasons, these rules protect persons and property that are, or may be, affected by conflict by limiting conflicting parties' rights to choose their methods and means of warfare. The expression "international humanitarian law applicable in armed conflict" is often abbreviated to International Humanitarian Law or Humanitarian Law.[1] Though the military tends to prefer the expressions "Laws of Armed Conflicts" (LOAC) or "Laws of War", these two expressions should be understood as synonymous with "IHL".

1.2 Origin of International Humanitarian Law

The main subject of this course will be the study of contemporary international humanitarian law. Nevertheless, it is necessary to briefly examine the evolution of that body of law. One can say that the laws of war are almost as old as war itself. Even in ancient times, there were interesting — although rudimentary — customs that today would be classified as humanitarian. It is interesting to note that the content and aim of these customs were the same for almost every civilization around the world. This spontaneous generation of humanitarian standards, at different times and among peoples or states that possessed limited means of communication with each other, is also an important phenomenon.

This phenomenon lends credence to the historical argument regarding:

- The necessity of having rules that apply to armed conflicts;
- The existence of a feeling in many civilizations that, under certain circumstances, human beings, friend or foe, must be protected and respected.

Although scholars generally agree that the birth of modern IHL was in 1864, with the adoption of the First Geneva Convention, it is also clear that the rules contained in that Convention were not entirely new. In reality, a large amount of the First Geneva Convention was derived from existing international customary law. In fact, there were rules protecting certain categories of victims in armed conflicts and customs concerning the means and methods of authorized or prohibited combat during hostilities as early as 1000 BC.

Although these ancient and often very rudimentary rules were not established for humanitarian reasons, but rather for purely economical purposes, their *effect* was humanitarian.

For example:

- The prohibition against poisoning wells (reaffirmed in 1899 in The Hague) was originally made in order to permit the exploitation of conquered areas;
- The first reasons for the prohibition against killing prisoners (reaffirmed and developed in the Third Geneva Convention of 1949) were to safeguard the lives of future slaves or to facilitate the exchange of prisoners.

Such prohibitions can be found in many different civilizations, throughout the world and throughout history. For example, in many parts of Africa there were specific rules regarding the commencement of hostilities between different peoples that correspond, to a large extent, to the classical European traditional obligation of declaring war. Moreover, in a treatise called "The Arts of the War", written in 500 BC, the Chinese writer Sun Tzu, expressed the idea that wars must be limited to military necessity, and that prisoners of war, the wounded, the sick, and civilians should be spared. Likewise, in the Indian subcontinent, similar rules can be found. For example, in the *Code of Manu* written in 200 BC, one finds rules relating to behaviour in combat. The Code declared that barbed or poisoned weapons were prohibited, that wounded soldiers had to be cared for, and that surrendering combatants must be spared.

1 Definition elaborated by the International Committee of the Red Cross and generally accepted. Source: Commentary on the Additional Protocols of 8 June 1977, ICRC, Geneva, 1987, p. XXVII.

These examples of humanitarian customs in various civilizations demonstrate that, even if the Geneva or Hague Conventions were not universal at inception, since they were drafted and adopted by lawyers and diplomats belonging to the European Christian culture, their sentiments are nearly universal, since the principles they contain can be found in very different systems of thought — both European and non-European.

The cultural history of Europe also provides examples of both barbarism and humanity. The first significant development in respect to the law of war occurred in 300 BC, with the Greek philosophical school called "stoicism". This school advocated a path towards humanity through understanding and "sympathy", the need to understand and respect each other.

Between the 16th and 18th centuries, in the Renaissance and Age of Reason, ---an interesting and humanitarian practice developed in Europe. Frequently, warriors met before the hostilities and decided on guidelines to be respected during the battle. These special agreements could, for example, establish the observance of an armistice two days per week, the obligation to collect the wounded, or a responsibility to release prisoners at the end of the war. Although these agreements were concluded on an ad hoc basis, and had a limited scope of application, such precedents played a very significant role in the creation of IHL.

From this historical perspective developed the documented origin of IHL in the mid-19th Century. Up to that point, the practice of the accepted rules of warfare reflected the theories of philosophers, priests or jurists with local and special agreements.[2] However, these customs were geographically limited and there were no international (states were not yet born) or universal rules. The first universal treaty on Humanitarian Law is the Geneva Convention of 1864.

How and why did the Convention come to life?

The conception of IHL can be traced to the Battle of Solferino, a terrible conflict between French and Austrian forces that took place in northern Italy in 1859. One witness of that carnage, a businessman from Geneva named Henry Dunant, was appalled not so much by the violence of that battle, but rather by the desperate and miserable situation of the wounded left on the battlefields. With the help of the local inhabitants, Dunant immediately decided to collect and care for the wounded.

Back in Geneva, Dunant published a short book in 1862, *A Memory of Solferino,* in which he vividly depicted the horrors of the battle:

> *"When the sun came up on the twenty-fifth June 1859 it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields…The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them… Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death struggle."*[3]

In his book, Dunant not only described the battle, but tried to suggest and publicize possible measures to improve the fate of war victims. He presented three basic proposals designed to mitigate the suffering of the victims of war. To this end he proposed:

1) That voluntary societies be established in every country which, in time of peace, would prepare themselves to serve as auxiliaries to the military medical services.

2) That States adopt an international treaty guaranteeing legal protection to military hospitals and medical personnel.

2 A good example of such agreements is the "Lieber Instruction of 1863", a Code of conduct promulgated by the President of the United States during the US Civil War. See also *infra*, Lesson 4, 4.1.

3 *A Memory of Solferino*, ICRC, Geneva 1986, p. 41.

3) That an international sign of identification and protection of medical personnel and medical facilities be adopted.

These three proposals were simple, but they have had deep and lasting consequences.

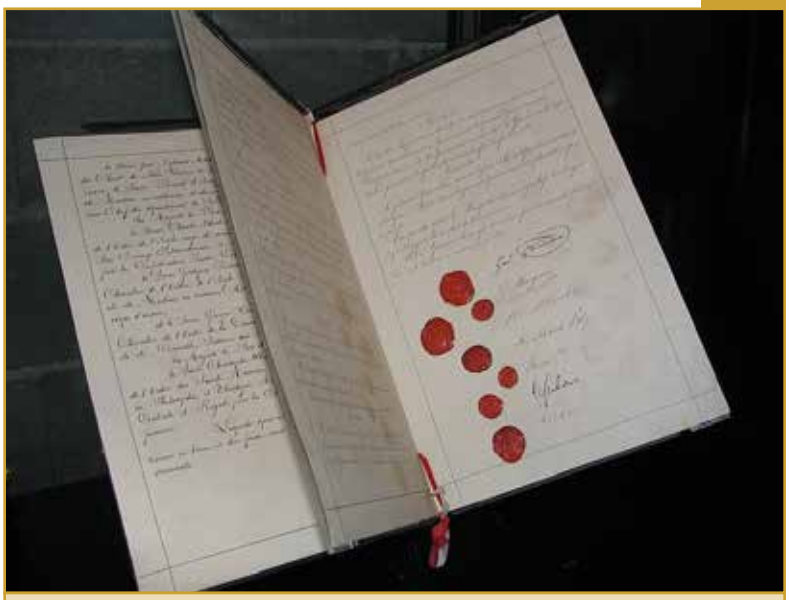
- The whole system of National Red Cross or Red Crescent Societies (of which there are today 188 around the world) stems from the first proposal;
- The second proposal gave birth to the "First Geneva Convention" in 1864;
- The third proposal led to the adoption of the protective emblem of the Red Cross or the Red Crescent.

Dunant's book enjoyed enormous success throughout Europe. Although it did not present entirely original ideas, the merit of the book is in large part due to the timeliness of its message.

At that time, a private welfare association existed in Geneva: The Society for the Public Good. Its President, Gustave Moynier, was impressed by Dunant's book and proposed to the members of the Society that they try to carry out Dunant's proposals. This suggestion was accepted and five members of the Society, Mssrs. Dunant, Moynier, Dufour, Appia and Maunoir, created a special committee [in 1863], the "International Standing Committee for Aid to Wounded Soldiers." This committee would, 15 years later, become the International Committee of the Red Cross (ICRC, See *infra*, Lesson 8.).

In 1863, the Committee convened military and medical experts at a conference in Geneva. The aim of that meeting was to examine the practicability and feasibility of the proposals made by Dunant. The results of the meeting were encouraging, and the members of the Committee persuaded the Swiss Federal Council to convene a diplomatic conference, whose task would be to give a legal form to Dunant's proposals.

To this end, a diplomatic conference was held in 1864 in Geneva and the 16 states represented finally adopted the "Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field." Its result was an international treaty open to universal ratification (i.e. an agreement *not* limited to a specific region or conflict, with binding effects on the States that would formally accept it) in which states agreed to voluntarily limit their own power in favour of the individual. For the first time, armed conflict became regulated by written, general law.



The original document of the first Geneva Convention from 1864, on loan to the International Red Cross and Red Crescent Museum in Geneva, Switzerland. (Photo by Kevin Quinn, June 2005)

The Birth of Modern International Humanitarian Law

In ten concise articles, the First Geneva Convention gave a legal format to Dunant's proposals and established a special status for medical personnel. The fact that this conference lasted less than 10 days provides a clear indication of the general support given to the propositions.

Of course, this original convention has been replaced by more modern and comprehensive treaties. However, it illustrates in a concise manner the central objectives of humanitarian law treaties. The original convention is reproduced on the following page.

Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864

Art. 1. Ambulances and military hospitals shall be recognized as neutral, and as such, protected and respected by the belligerents as long as they accommodate wounded and sick.

Neutrality shall end if the said ambulances or hospitals should be held by a military force.

Art. 2. Hospital and ambulance personnel, including the quartermaster's staff, the medical, administrative and transport services, and the chaplains, shall have the benefit of the same neutrality when on duty, and while there remain any wounded to be brought in or assisted.

Art. 3. The persons designated in the preceding Article may, even after enemy occupation, continue to discharge their functions in the hospital or ambulance with which they serve, or may withdraw to rejoin the units to which they belong.

When in these circumstances they cease from their functions, such persons shall be delivered to the enemy outposts by the occupying forces.

Art. 4. The material of military hospitals being subject to the laws of war, the persons attached to such hospitals may take with them, on withdrawing, only the articles which are their own personal property.

Ambulances, on the contrary, under similar circumstances, shall retain their equipment.

Art. 5. Inhabitants of the country who bring help to the wounded shall be respected and shall remain free. Generals of the belligerent Powers shall make it their duty to notify the inhabitants of the appeal made to their humanity, and of the neutrality which humane conduct will confer.

The presence of any wounded combatant receiving shelter and care in a house shall ensure its protection. An inhabitant who has given shelter to the wounded shall be exempted from billeting and from a portion of such war contributions as may be levied.

Art. 6. Wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for.

Commanders-in-Chief may hand over immediately to the enemy outposts enemy combatants wounded during an engagement, when circumstances allow and subject to the agreement of both parties.

Those who, after their recovery, are recognized as being unfit for further service, shall be repatriated.

The others may likewise be sent back, on condition that they shall not again, for the duration of hostilities, take up arms.

Evacuation parties, and the personnel conducting them, shall be considered as being absolutely neutral.

Art. 7. A distinctive and uniform flag shall be adopted for hospitals, ambulances and evacuation parties. It should in all circumstances be accompanied by the national flag.

An armlet may also be worn by personnel enjoying neutrality, but its issue shall be left to the military authorities.

Both flag and armlet shall bear a red cross on a white ground.

Art. 8. The implementing of the present Convention shall be arranged by the CommandersinChief of the belligerent armies following the instructions of their respective Governments and in accordance with the general principles set forth in this Convention.

Art. 9. The High Contracting Parties have agreed to communicate the present Convention with an invitation to accede thereto to Governments unable to appoint Plenipotentiaries to the International Conference at Geneva. The Protocol has accordingly been left open.

Art. 10. The present Convention shall be ratified and the ratifications exchanged at Berne, within the next four months, or sooner if possible.

In faith whereof, the respective Plenipotentiaries have signed the Convention and thereto affixed their seals.

Done at Geneva, this twentysecond day of August, in the year one thousand eight hundred and sixtyfour.

Beginning in 1866, the Geneva Convention proved its worth on the battlefield. By 1882, 18 years after its adoption, it had been universally ratified[4].

1.3 The Progressive Development of IHL (1864 – 2012)

Figure 1-1 shown below illustrates the key developments in IHL since the adoption of the 1864 Geneva Convention. A thorough and detailed discussion of the post-1864 development of IHL would be beyond the scope of this correspondence course. However, the student should be aware of the three main characteristics that marked this evolution:

a) The constant enlargement of the categories of war victims protected by humanitarian law (military wounded; sick and shipwrecked; prisoner of war; civilians in occupied territories; the entire civilian population), as well as the expansion of the situations in which victims are protected (international and noninternational armed conflicts);

b) The regular updating and modernization of the treaties to account for the realities of recent conflicts. For example, the rules protecting the wounded adopted in 1864 were thus revised in 1906, 1929, 1949, and 1977 (critics have therefore accused IHL of being always "one war behind reality").

c) Two separate legal currents have, up until 1977, contributed to this evolution:

- The **Geneva Law,** mainly concerned with the protection of the victims of armed conflicts- *i.e.* the noncombatants and those who no longer take part in the hostilities; and
- The **Hague Law**, whose provisions relate to limitations and prohibitions of specific means and methods of warfare.

These two legal currents were practically merged with the adoption of the two Additional Protocols of 1977.

NB: Geneva Law Treaties are reproduced in bold; Hague Law instruments in normal font.

4 Under Art 2 of the 1969 Vienna Convention on the Law of Treaties, "ratification (…) mean[s] in each case the international act so named whereby a State establishes on the international plane its consent to be bound by a treaty".

FORMATION OF INTERNATIONAL HUMANITARIAN LAW

1000 A.D.	Formation of initial humanitarian customs
	Formation of regional humanitarian customs (all over the world)
	Conclusion of treaties containing humanitarian clauses(Clauses on peace, armistice, capitulation)
1864	**First Geneva Convention**
1868	Declaration of St. Petersburg
1899	The Hague Conventions
1906	**Review of the First Geneva Convention**
1907	The Hague Conventions
1925	Geneva Protocol on chemical weapons
1929	**"First" and "Third" Geneva Conventions**
1949	**First, 2nd, 3rd and 4th Geneva Conventions + Common Art. 3 ***
1954	Convention for the protection of cultural property
1977	**Additional Protocols to the 1949 Geneva Conventions**
1980	Convention on the use of conventional weapons
1993	Convention on chemical weapons
1995	Protocol relating to blinding laser weapons
1996	Revision of the 1980 Convention
1997	Convention on anti personnel mines (Ottawa Treaty)
1998	Adoption in Rome of the Statute of the International Criminal Court
1999	Protocol II to the 1954 Convention for the protection of cultural property
2000	Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts
2003	Protocol on explosive remnants of war (Prot V to the 1980 Convention)
2005	**Protocol III to the 1949 Geneva Conventions, relating to the adoption of an additional distinctive emblem (the "Red Crystal")**
2008	Convention on cluster munitions

*The Conventions currently in force have replaced the older Geneva Conventions.

Strictly speaking, the "Hague Current" originated in the Declaration of St Petersburg, which was proclaimed by a Conference convened by Alexander III, the Tsar of Russia in 1868. The Declaration prohibited the use of explosive bullets and enunciated some basic principles relating to the conduct of hostilities (see Lesson 4).

In 1899 the so-called "First Peace Conference" was convened in the Netherlands by another Tsar, Nicholas II, in The Hague. That Conference adopted several Conventions whose general goal was to limit the evils of war. Among other things, these Conventions prohibited:

- the launching of projectiles from balloons;
- the use of poisonous gases;
- the use of dumdum bullets.

The main achievement of this Conference was the adoption of a principle named for its initiator, F. Martens, the legal adviser of the Russian Tsar. The "Martens Clause" says that:

> *"until a more complete code of the law of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as the result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience."*[5]

Another important success of the 1899 Conference was the extension of the humanitarian rules from the Geneva Convention of 1864 to the victims of naval conflicts. This adaptation is included at the origin of the present Second Geneva Convention.

In 1906, the Convention of 1864 that protected the wounded and the sick of armies in the field was revised. Although the revision expanded the convention to 33 articles from the original 10 in the 1864 version, the fundamental principles remained the same.

In 1907, a second Peace Conference was convened in The Hague. On this occasion, the Conventions of 1899 were revised and some new rules were introduced. Among the additions were a definition of combatants, rules on naval warfare, rules on the rights and duties of neutral powers, rules on military occupation, and rules regarding Prisoners of War (POW).

In 1925, as a direct result of the suffering endured during the First World War (19141918), a Protocol prohibiting the use of gas was adopted. Although it was adopted in Geneva, this Protocol clearly belongs, according to its content, to the legal current of The Hague Law.

In 1929, a diplomatic Conference was convened in Geneva by the Swiss Confederation. The main results of that Conference were:

- The second revision (after 1906) of the 1864 Convention. This Convention was again modified. Among the new provisions, mention should be made of the first official recognition of the emblem of the Red Crescent. Although that emblem had been used as early as 1876, it was only in 1929 that it was authorized by law;
- The other remarkable success of the 1929 Conference was the adoption of the "Convention relative to the treatment of Prisoners of War" (also a result of the First World War). Partially examined during the Peace Conference of 1899 and 1907, this important issue was not deeply studied before 1929.

In 1949, just after the Second World War (note the parallel to World War I and the Conference of 1929), the four current Geneva Conventions were adopted. The First (protection of sick and wounded), Second (protection of shipwrecked), and Third Conventions (prisoners of war), are mainly revised versions of former Conventions. The Fourth Convention, establishing protection for the

---

5 This Martens Clause was developed and reaffirmed in subsequent treaties; e.g. in Article 1 paragraph 2 of Additional Protocol I of 1977 and preambular paragraph 4 of Additional Protocol II of 1977.

civilian population, is an entirely new amendment and constitutes the greatest success of the 1949 Conference. Another decisive improvement of the 1949 Diplomatic conference was the adoption of Article 3 common to the four Conventions, the first international provision applicable in situations of noninternational armed conflicts.

In 1977, after four sessions of Diplomatic Conferences, two additional Protocols to the Geneva Conventions of 1949 were adopted. The First Protocol is related to the protection of victims of international armed conflicts; the second to the protection of victims of noninternational armed conflicts. To some degree, this Second Protocol can be regarded as an enlargement of Article 3 common to the four Geneva Conventions.

In 1980, another important convention was adopted under the UN auspices, the "Convention on prohibition or restrictions on the use of conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects." This instrument limits or prohibits the use of mines, boobytraps, incendiary weapons, and nondetectable fragments.

In 1993, a comprehensive Convention prohibiting the development, production, stockpiling, and use of chemical weapons was adopted. This treaty supplements the basic prohibition contained in the 1925 Geneva Protocol.

In 1995, a new Protocol, an appendage to the 1980 Convention, was adopted. This new instrument prohibited the use of laser weapons designed to cause permanent blindness.

In 1997, a Convention prohibiting the use, stockpiling, production, and transfer of antipersonnel mines was signed in Ottawa.

In 1998, the **Statute of the International Criminal Court (ICC)** was adopted in Rome. This accomplishment was the culmination of years of effort and showed the resolve of the international community to ensure that those who commit grave crimes do not go unpunished. The ICC has jurisdiction over serious international crimes (Genocide, Crimes against Humanity, War crimes, and Aggression) regardless of where they are committed.

In 1999, a new Protocol to the 1954 Convention on cultural property was adopted. **Protocol II** enables the States party to that Convention to supplement and reinforce the protection system established in 1954. It clarifies the concepts of safeguarding and respect for cultural property; it lays down new precautions in attacks and against the effects of attacks; and institutes a system of enhanced protection for property of the greatest importance for humanity.

In 2000, an **optional protocol to the 1989 Convention on the rights of the child** was adopted. This protocol raises the minimal age for compulsory recruitment from 15 to 18 and calls on States to raise the minimum age for voluntary recruitment above 15. It provides that armed groups should not use children under 18 in any circumstances and calls on States to criminalize such practices.

In 2003, the international community adopted a treaty to help reduce the human suffering caused by **explosive remnants of war** and bring rapid assistance to affected communities. Explosive remnants of war are unexploded weapons such as artillery shells, mortars, grenades, bombs, and rockets left behind after an armed conflict.

Ugandan soldiers serving with the African Union Mission in Somalia (AMISOM) sort through a haul of munitions that were used by the extremist group Al Shabaab to make improvised explosive devices (IEDs), at a former steel factory in Mogadishu. AMISOM and Transitional Federal Government (TFG) forces dislodged remnants of Al Shabaab from the factory following the withdrawal of most of the extremist group's forces from Mogadishu. (UN Photo # 482443 by Stuart Price, August 2011)

In 2005, a diplomatic conference held in Geneva adopted a **Third Additional Protocol** to the Geneva Conventions, creating an additional emblem alongside the red cross and red crescent. The additional emblem, known as the red crystal, should provide a comprehensive and lasting solution to the emblem question. It will appear as a red frame in the shape of a square on a diagonal on a white background, and is free from any religious, political, or other connotation.

In 2008, governments negotiated and adopted the **Convention on Cluster Munitions**. This important international humanitarian law treaty prohibits the use, production, stockpiling, and transfer of cluster munitions, and requires States to take specific action to ensure that these weapons claim no future victims.

It is worth noting the support lent by the international community to the Treaties of IHL. Since 194 states are parties to these texts, the four Geneva Conventions are now among the most universal instruments of international law. Additionally, 172 States are parties to the First Protocol and 166 are parties to the Second.[6]

1.4 The Standing of IHL within Public International Law

It should be emphasized that the rules and principles of IHL are actually legal rules, not just moral or philosophical precepts or social custom. The corollary of the legal/normative nature of these rules is, of course, the existence of a detailed regime of rights and obligations imposed upon the different parties to an armed conflict. For those states that have accepted them, the treaties of IHL are of a **binding** character. This means, *inter alia*, that the most serious violations thereof trigger individual criminal responsibility (see *infra*, Lesson 5).

International Humanitarian law must be understood and analysed as a distinct part of a more comprehensive framework: the rules and principles regulating the coordination and cooperation between the members of the international community; i.e. Public International Law.

The following table illustrates this fact: IHL should thus be considered as an integral (but distinct) part of Public International Law.

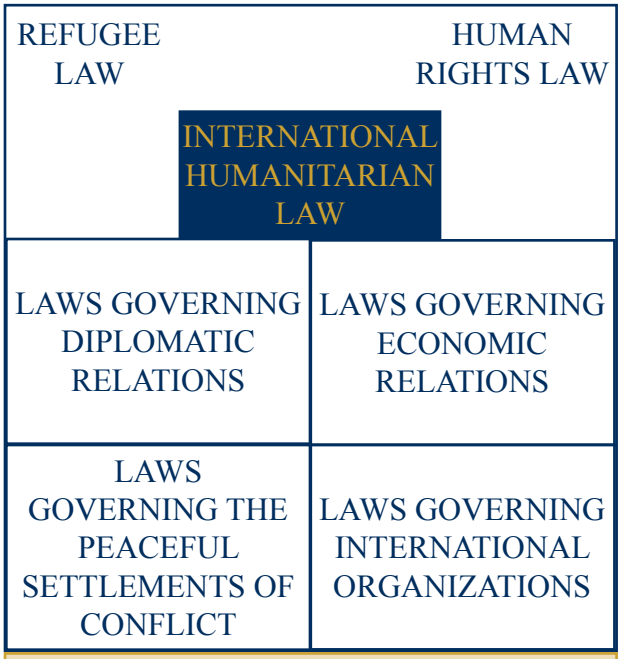


Figure 1-1

The next figure shows more precisely how IHL fits into the general framework of Public International Law, and how it differs from another distinct part of this whole, the principles of *jus ad bellum.*

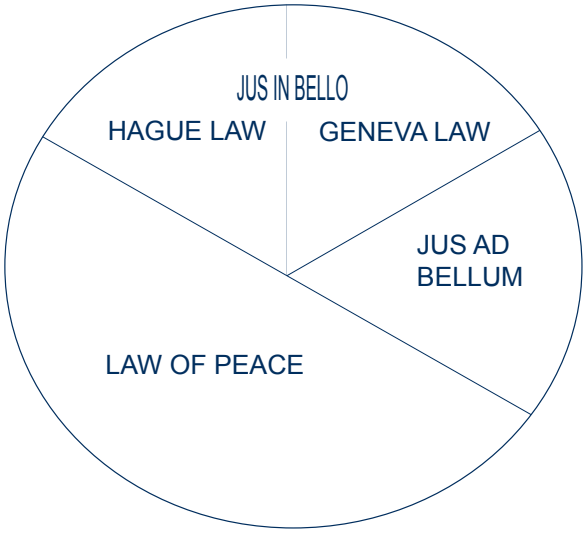


Figure 1-2: Relationship between Public International Law and Interntational Humanitarian Law

6 An updated table showing the states party to the main treaties is available online at: http://www.icrc.org/eng/resources/documents/misc/party_main_treaties.htm

The Distinction between *Jus ad Bellum* and *Jus in Bello*

Jus ad bellum (which regulates the *resort* to armed force) refers to the principle of fighting a war based on precise causes, such as self-defence. On the other hand, *jus in bello* (the rules applicable in armed conflicts a.k.a IHL) refers to the principle of fighting a war justly, and encompasses standards of proportionality and distinctions between civilians and combatants. International Humanitarian Law (IHL) developed at a time when the use of force was a lawful form of international relations, when states were not prohibited from waging war, when they, in fact, had the right to make war (i.e. when they had the *jus ad bellum*). Consequently, it was not a problem logically for international law to contain certain rules of behaviour for states to observe in war (the *jus in bello*, or law regulating the conduct of war), if they resorted to that means. Today, however, the use of force between states is prohibited by a peremptory rule of international law[7] (the *jus ad bellum* has changed into a *jus contra bellum*). Exceptions to this general prohibition are allowed in cases of individual and collective selfdefence,[8] Security Council enforcement measures,[9] and arguably to enforce peoples' right to selfdetermination[10] (national liberation wars).

Logically, at least one side of a contemporary international armed conflict is therefore violating the rules of *jus ad bellum*, just by using force, however respectful of IHL. All municipal laws of the world equally prohibit the use of force against (governmental) law enforcement agencies.

Despite the prohibition against armed conflicts, they continue to occur. Today states recognize that international law has to address this reality of international life, not only by combating the phenomenon, but also by regulating it to ensure a level of humanity in this fundamentally inhumane and illegal situation. For practical, policy, and humanitarian reasons, IHL must apply impartially to both belligerents; the one resorting lawfully to force and the one resorting unlawfully to force. Otherwise it would be impossible to practically maintain respect for IHL as, at least between the belligerents, it is always controversial which party resorted to force in conformity with the *jus ad bellum* and which violates the *jus contra bellum*. In addition, from a humanitarian standpoint, the victims on both sides of the conflict need the same protection, and they are not necessarily responsible for the violation of the *jus ad bellum* committed by "their" party.

Therefore, IHL must be honoured independently of any argument for *jus ad bellum* and has to be completely distinguished from *jus ad bellum*. Any past, present, and future theory of "just" war only concerns *jus ad bellum* and cannot justify (but is in fact frequently used to imply) that those fighting a "just" war have more rights or less obligations under IHL than those fighting an unjust war.

This complete separation between *jus ad bellum* and *jus in bello* has been recognized in the preamble of Additional Protocol I of 1977 reading:

---

7 Expressed in Art. 2 (4) of the UN Charter: " All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations"..

8 Recognized in Art. 51 of the UN Charter: " Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security". .

9 Established in Chapter VII of the UN Charter.

10 The legitimacy of the use of force to enforce the right of peoples to selfdetermination (recognized in Art. 1 of both UN Human Rights Covenants) was recognized for the first time in Resolution 2105 (XX) of the UN General Assembly (20 December 1965).

"The High Contracting Parties,

Proclaiming their earnest wish to see peace prevail among peoples,

Recalling that every State has the duty, in conformity with the Charter of the United Nations, to refrain in its international relations from the threat or use of force against the sovereignty, territorial integrity or political independence of any State, or in any other manner inconsistent with the purposes of the United Nations,

Believing it necessary nevertheless to reaffirm and develop the provisions protecting the victims of armed conflicts and to supplement measures intended to reinforce their application,

Expressing their conviction that nothing in this Protocol or in the Geneva Conventions of 12 August 1949 can be construed as legitimising or authorizing any act of aggression or any other use of force inconsistent with the Charter of the United Nations,

Reaffirming further that the provisions of the Geneva Conventions of 12 August 1949 and of this Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict."

This complete separation between *jus ad bellum* and *jus in bello* implies that IHL applies whenever there is *de facto* (in fact) an armed conflict, however that conflict can be qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used in interpreting IHL. However, it also implies that the rules of IHL may not render the *jus ad bellum* impossible to implement, e.g., render legitimate selfdefence unlawful.

JUS AD BELLUM

RULES GOVERNING PARTIES WHO RESORT TO ARMED FORCE (PRACTICALLY DISAPPEARED)

NB: 3 POSSIBLE CASES IN INTERNATIONAL LAW:

- COLLECTIVE SECURITY OPERATIONS
- WAR OF NATIONAL LIBERATION
- LEGITIMATE DEFENCE

JUS IN BELLO

RULES OF INTERNATIONAL LAW APPLICABLE BETWEEN THE PARTIES TO AN ARMED CONFLICT AND RELATED TO ARMED CONFLICT (A.K.A. IHL, FORMED BY 2 MAIN CURRENTS: GENEVA LAW AND THE HAGUE LAW)

1.5 The Sources of International Humanitarian Law

Since IHL is an integral part of Public International Law, its sources correspond, logically enough, to those of the latter, as they are defined in Article 38 of the Statute of the International Court of Justice.

According to Art 38 (1) of the Statute of the International Court of Justice, which is regarded as an authoritative statement of the sources of international law, the Court shall apply:

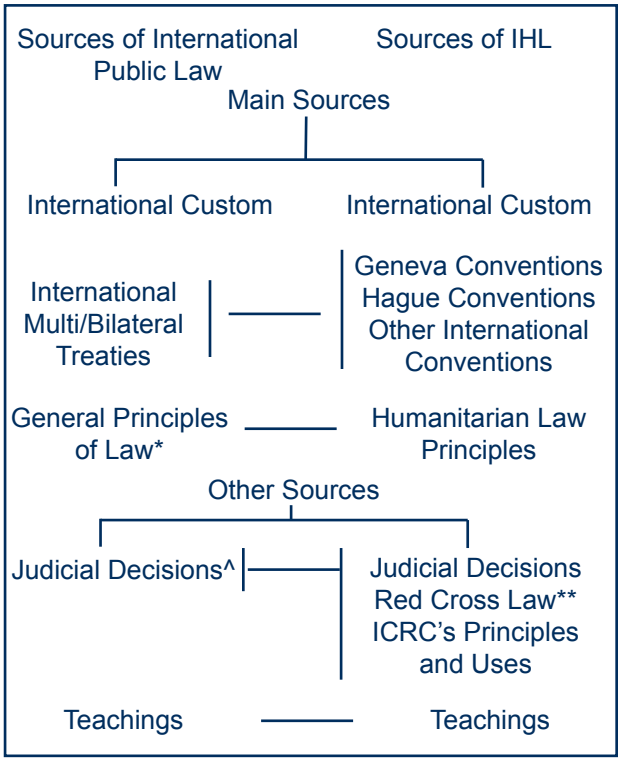
- international conventions (please note convention is another word for treaty);
- international custom, as evidence of a general practice accepted as law;
- the general principles of law recognised by civilised nations; and
- judicial decisions and the teachings of the most highly qualified publicists, as subsidiary means for the determination of rules of law.

Treaties and custom are the main sources of international law. In respect to IHL, the most important treaties are the Geneva Conventions

of 1949, the Additional Protocols of 1977, and the so-called Hague Conventions. While treaties are only binding upon parties to a treaty, States can also be bound by rules of customary international law. However, this requires that there is usage to be found in the practice of states and considered by those states as practice. There is wide consensus among scholars that the rules contained in the four Geneva Conventions of 1949 for the Protections of Victims of War and in The Hague Convention (IV) of 1907 on the Laws of War on Land (with the exception of administrative, technical and logistical regulations) reflect customary international law. There is also agreement that many provisions of Additional Protocol I and, to a lesser degree, that the rules contained in Additional Protocol , reflect custom. When treaty rules are considered to reflect custom, they become binding for all States

States are also bound by general principles of law. In regard of IHL one may think of the fundamental principles of IHL such as the principle of distinction or the principle of proportionality.[11]

However, as shown in the diagram below, some sources specific to IHL must also be taken into consideration.



11 See *infra*, Lesson 2.

* E.g. Good faith; nonretroactivity; principle of legality (*Nullum crimen sine lege; nulla poena sine lege*; no crime without law; no penalty without law)

^Decisions made by both national and international Courts

**Resolutions adopted by International Conferences of the Red Cross and Red Crescent, see also Lesson 8

1.6 The Material Field of Application of IHL: When Does IHL Apply?

International Humanitarian Law (IHL) applies in two very different types of situations: international armed conflicts and noninternational armed conflicts. Before defining these two situations of application a few words should be said about the notion of "armed conflict," which has, from 1949 onwards, replaced the traditional notion of "war."

According to the "Commentary to the First Geneva Conventions of 1949,[12] "The substitution of this much more general expression ("armed conflict") for the word "war" was deliberate. One may argue almost endlessly about the legal definition of "war." A State can always pretend when it commits a hostile act against another state, that it is not making war, but merely engaging in a police action, or acting in legitimate selfdefence. The expression "armed conflict" makes such arguments less easy. Any difference arising between two States and leading to the intervention of armed forces is an armed conflict ... even if one of the Parties denies the existence of a state of war."

Although the treaties of IHL systematically refer to different types of "armed conflicts", they do not provide for a general definition of that concept. The first comprehensive definition has been developed by the International Tribunal for the former-Yugoslavia (ICTY). According to this definition "(…) an armed conflict exists whenever there is a resort to armed force between States or

12 See Pictet, J.S., *Commentary of the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, Geneva, International Committee of the Red Cross, 1952, p. 32.

protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[13]

This definition is now widely accepted and has since been used in a number of military manuals and in numerous court cases (which demonstrate how judicial decisions can become sources of IHL).

International armed conflict

IHL relating to international armed conflict applies "to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."[14] The same set of provisions also applies " to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no resistance".[15]

According to traditional doctrine the notion of international armed conflict was thus limited to armed contests between states. During the Diplomatic Conference which led to the adoption of the two Additional Protocols of 1977, this conception was challenged and it was finally recognized that "wars of national liberation"[16] should also be considered international armed conflicts.

Non-international armed conflict

Traditionally non-international armed conflicts (or, to use an outdated terminology: civil wars) were considered purely internal matters for states, for which no international law provisions applied. This view was radically modified with the adoption of Article 3 common to the four Geneva Conventions of 1949. For the first time, the community of States agreed on a set of minimal guarantees to be respected during non-international armed conflicts. In spite of its extreme importance, Article 3 does not offer a clear definition of the notion of non-international armed conflict.[17]

During the Diplomatic Conference of 19741977, the need for a comprehensive definition of the notion of non-international armed conflict was reaffirmed and dealt with accordingly in Article 2 of Additional Protocol II.

According to that provision, it was agreed that Protocol II "Shall apply to all armed conflicts not covered by Article 1 of Protocol I and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."

This fairly restrictive definition applies only to the situations covered by Additional Protocol II. The definition does not apply to the situations covered by Article 3 common to the four Geneva Conventions.[18] Practically, there are thus situations of noninternational armed conflicts in which only Article 3 will apply, the level of organization of the dissident groups being insufficient for Protocol II to apply. Conversely, common Art 3 will apply to all situations covered by Additional Protocol II.

Other situations

IHL is not applicable in situations of internal violence and tensions. This point has been clearly made in Article 1 (2) of Additional Protocol II, which states, "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[19]

---

13 See ICTY, The Prosecutor v. Tadic, Jurisdiction, § 70, available at: http://www.icty.org/x/cases/tadic/acdec/en/51002.htm

14 Art. 2, common to the 1949 Geneva Conventions.

15 *Ibid*.

16 Situations defined, in Article 1 (4) of Additional Protocol I, as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of selfdetermination."

17 Art. 3 merely states that it is applicable "[I]n the case of armed conflict not of an international character occurring on the territory of one of the High Contracting Parties [...]."

18 Art. 1 of Additional Protocol II: "This Protocol, which develops and supplements Article 3 common to the Geneva Conventions [...] without modifying its existing conditions of application [...]."

19 The notion of internal disturbances and

1.7 The Basic Rules of IHL[20]

1) The parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and civilian property. Neither the civilian population as a whole, nor individual civilians, may be attacked. Attacks may be made solely against military objectives.

2) People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity. Such people must in all circumstances be protected and treated with humanity, without any unfavourable distinction whatsoever.

3) It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in the fighting.

4) Neither the parties to the conflict nor members of their armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.

5) The wounded and sick must be collected and cared for by the party to the conflict which has them in its power. Medical personnel and medical establishments, transports, and equipment must be spared. The red cross or red crescent or red crystal on a white background is the distinctive sign indicating that such persons and objects must be respected.

The International Red Cross assisted in removing bodies killed during the violence in Bunia, DRC, and the surrounding areas as the situation became calmer. (UN Photo #25776, May 2004)

6) Captured combatants and civilians who find themselves under the authority of the adverse party are entitled to respect for their lives, their dignity, their personal rights, and their political, religious, and other convictions. They must be protected against all acts of violence or reprisal. They are entitled to exchange news with their families and receive aid. They must enjoy basic judicial guarantees.

---

tensions have not made the object of precise definitions during the 1974-1977 Diplomatic Conference. See also Lesson 3.

20 These rules, drawn up by the ICRC, summarize the essence of international humanitarian law. They do not have the authority of a legal instrument and in no way seek to replace the treaties in force. They were drafted with a view to facilitating the promotion of IHL. See: http://www.icrc.org/eng/assets/files/other/icrc_002_0703.pdf

End-of-Lesson Quiz

1. Those who create IHL rules are:

A. The ICRC;
B. The United Nations;
C. The states;
D. Public Opinion.

2. IHL

A. Is part of public international law;
B. Is a law created by states;
C. Is composed of treaty regulations and customary rules;
D. All of the above.

3. Which sentence is correct?

A. Rules of the Geneva Conventions are generally considered customary law;
B. Some of the rules governing the conduct of hostilities and contained in Additional Protocol I are customary laws;
C. The provisions of the Hague Conventions IV of 1907 are customary rules;
D. All of the above

4. Which sentence is correct?

A. IHL existed before the Geneva Convention of 1864, but mainly as customary law.
B. The Geneva Convention of 1864 is considered the first treaty of IHL in the modern sense of the word, since it contained rules intended to apply to all future armed conflict and was intended to be universal.
C. Only a and b
D. IHL was born with the Lieber Instructions of 1863.

5. Which sentence is correct?

A. The *Hague Law* is composed of rules governing conduct in hostilities and the*Geneva Law* is composed of rules protecting people in the power of the enemy;
B. Hague Law regulates the use of both means and methods of warfare;
C. An important part of Additional Protocol I is composed of *Hague Law* rules
D. All of the above.

6. A state that is the victim of aggression has

A. More rights under IHL than its aggressor has;
B. Less duties under IHL than its aggressor has;
C. No obligations under IHL;
D. Similar rights and duties to what its aggressor has.

7. *Jus ad bellum*

A. Is part of IHL;
B. Is an old expression replaced by IHL;
C. Has no influence on the applicability of IHL;
D. Has been superseded by the UN Charter.

8. Protocol II of 1977 applies in

A. Wars of national liberation;
B. Non-international armed conflict;
C. Internal tensions;
D. Riots in occupied territories.

9. Compared with Article 3 common, Protocol of 1977

A. Applies in the same situations;
B. Covers more situations;
C. Covers less situations;
D. None of the above

10. Article 3 commonly applies to

A. Non-international armed conflict;
B. Wars of national liberation;
C. Situations of internal violence;
D. Aggression.

ANSWER KEY

1C, 2D, 3D, 4C, 5D, 6D, 7C, 8B, 9C, 10A

Appendix A: Acronyms

ACHR	American Convention on Human Rights
ECHR	European Convention on Human Rights & Fundamental Freedoms
HR	Human Rights
HRL	Human Rights Law
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Tribunal for Rwanda
ICTY	International Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
LOAC	Laws of Armed Conflicts
NB	*Nota bene*
NIAC	Non-international Armed Conflict
POW	Prisoners of War
SOFA	Status of Forces Agreement
UN	United Nations
UNESCO	United Nations Educational, Scientific, and Cultural Organisation
UNHCR	United Nations High Commissioner on Refugees
UNICEF	United Nations Children's Fund
WHO	World Health Organization

ONUCA	United Nations Observer Group in Central America
ONUMOZ	United Nations Operation in Mozambique
ONUSAL	United Nations Observer Mission in El Salvador
UNAMA	United Nations Mission in Afghanistan
UNAMIC	United Nations Advance Mission in Cambodia
UNAMID*	African Union/United Nations Hybrid Operation in Darfur
UNAMIR	United Nations Assistance Mission for Rwanda
UNAMSIL	United Nations Mission in Sierra Leone
UNASOG	United Nations Aouzou Strip Observer Group
UNAVEM	United Nations Angola Verification Mission
UNCRO	United Nations Confidence Restoration Operation
UNDOF*	United Nations Disengagement Observer Force
UNEF	United Nations Emergency Force
UNFICYP*	United Nations Peacekeeping Force in Cyprus
UNGOMAP	United Nations Good Offices Mission in Afghanistan and Pakistan
UNIFIL*	United Nations Interim Force in Lebanon
UNIIMOG	United Nations Iran-Iraq Military Observer Group
UNIKOM	United Nations Iraq-Kuwait Observation Mission
UNIPOM	United Nations India-Pakistan Observation Mission
UNISFA*	United Nations Interim Security Force in Abyei
UNMEE	United Nations Mission in Ethiopia and Eritrea
UNMIBH	United Nations Mission in Bosnia and Herzegovina
UNMIH	United Nations Mission in Haiti
UNMIK*	United Nations Interim Administration Mission in Kosovo
UNMIL*	United Nations Mission in Liberia
UNMISS*	United Nations Mission in the Republic of South Sudan
UNMIS*	United Nations Mission in the Sudan
UNMISET	United Nations Mission of Support in East Timor
UNMIT*	United Nations Integrated Mission in Timor-Leste
UNMOGIP*	United Nations Military Observer Group in India and Pakistan
UNMOP	United Nations Mission of Observers in Prevlaka
UNMOT	United Nations Mission of Observers in Tajikistan
UNOCI*	United Nations Operation in Côte d'Ivoire
UNOGIL	United Nations Observation Group In Lebanon
UNOMIG	United Nations Observer Mission in Georgia
UNOMIL	United Nations Observer Mission in Liberia
UNOMSIL	United Nations Observer Mission in Sierra Leone

UNOMUR	United Nations Observer Mission Uganda-Rwanda
UNOSOM	United Nations Operation in Somalia
UNPREDEP	United Nations Preventive Deployment Force
UNPROFOR	United Nations Protection Force
UNPSG	United Nations Civilian Police Support Group
UNSF	United Nations Security Force in West New Guinea (West Irian)
UNSMIH	United Nations Support Mission in Haiti
UNTAC	United Nations Transitional Authority in Cambodia
UNTAES	United Nations Transitional Authority in Eastern Slavonia, Baranja, and Western Sirmium
UNTAET	United Nations Transitional Administration in East Timor
UNTAG	United Nations Transition Assistance Group
UNTMIH	United Nations Transition Mission in Haiti
UNTSO*	United Nations Truce Supervision Organization
UNYOM	United Nations Yemen Observation Mission

* Ongoing operations, as of November 2011.

About the Author

Antoine A. Bouvier studied Law and International Relations at Geneva University. He has been a member of the Legal Division of the International Committee of the Red Cross (ICRC) from 1984 to 1993 and again from 1995 to 1996. In the interim year, he was Head of the ICRC office in Malawi.

From 1996 to 1998 he was Deputy Head of the ICRC Division for Policy and Co-operation within the Movement. From 1998 to 2008 he has held the position of Legal Adviser and Delegate to Academic Circles in the Communication Division. He is presently a Legal Adviser in the ICRC Advisory Service on IHL, a unit helping States to implement their obligations under IHL.

He is the author of several articles on specific problems of the interpretation and implementation of International Humanitarian Law. Together with Mr. Marco Sassòli, he co-authored a Casebook on International Humanitarian Law How does Law Protect in War?, ICRC, Geneva, 3rd Edition, 2011, from which several parts of this course have been adapted.

The views expressed in this course are those of the author alone and do not necessarily reflect those of the International Committee of the Red Cross.

Acknowledgements

The author wishes to thank the following persons:

Ms. Rose-Marie Mottier, Secretary-assistant at the ICRC Communication Division, for her considerable assistance in typing and editing this course;

Ms. Edith Baeriswyl, Head of the ICRC Education and Behaviour Unit, for her useful suggestions and careful reading of the manuscript;

Mr. Bertrand Levrat, Legal Adviser at the ICRC Legal Division, who contributed numerous and useful suggestions and documents;

Dr. Harvey Langholtz, Executive Director of Peace Operations Training Institute, who suggested the preparation of this course and greatly assisted the author in the finalisation of the draft.

All photographs in the course were selected by the Peace Operations Training Institute.

The author takes responsibility for any error that may appear in this course.