

## IHL, ICL and the ICC in a glimpse<sup>1</sup>

The purpose of this leaflet is to provide the participants of the ICC Moot Court Competition<sup>2</sup> with rudimentary knowledge of the terms “International Humanitarian Law” (IHL) and “International Criminal Law” (ICL), a brief introduction to the International Criminal Court (ICC), and a general understanding of the interrelation between them.

Since the leaflet provides an overview and does not cover all the issues, theories and aspects that are relevant to IHL and ICL, it is suggested that participants review the non-exhaustive list of “recommended reading” at the end of each topic.

### International Humanitarian Law

*“Conflict is by its nature chaotic, and it is incumbent on the participants to reduce that chaos and to respect international humanitarian law.”<sup>3</sup>*

IHL is a branch of public international law that regulates the conduct of hostilities (*jus in bello*) whether on land, in the sea or in the air. IHL strikes a delicate balance between the legitimate military objectives of the parties “to weaken the military forces of the enemy” (also known as **the principle of military necessity**) and the aspiration to alleviate “as much as possible the calamities of war” (also known as **the principle of humanity**).<sup>4</sup>

**“Until a more complete code of the laws 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 they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.”**  
([Hague Convention IV](#), 18 October 1907, Preamble (also known as the ‘Martens Clause’))

IHL governs the conduct of both internal and international armed conflicts. It applies from the moment armed conflicts are initiated and extends beyond the cessation of hostilities, until a general conclusion of peace has been reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, IHL continues to apply throughout the

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<sup>2</sup> <http://iccmoot.com/>

<sup>3</sup> ICTY (Appeals Chamber), *Blaškić, Judgement*, 29 July 2004, § 711.

<sup>4</sup> [Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Saint Petersburg, 1868](#). See also, e.g., Hague Convention IV, 18 October 1907, [Preamble](#), [Reg. 23\(g\)](#); [AP I](#), art. 1(2).

territory of the warring States or, in the case of internal conflicts, the entire territory under the control of a party, whether or not actual combat takes place there.<sup>5</sup>

“A large number of customary rules have been developed by the practice of States and are an integral part of the international law relevant to the question posed. The ‘laws and customs of war’ - as they were traditionally called - were the subject of efforts at codification undertaken in The Hague (including the Conventions of 1899 and 1907), and were based partly upon the St. Petersburg Declaration of 1868 as well as the results of the Brussels Conference of 1874. This ‘Hague Law’ and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations and limited the choice of methods and means of injuring the enemy in an international armed conflict. One should add to this the ‘Geneva Law’ (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities. These two branches of the law applicable in armed conflict have become so closely interrelated that they are considered to have gradually formed one single complex system, known today as international humanitarian law.”<sup>6</sup>

The customary rules of IHL apply to all belligerent States, regardless of their justification for or their position on the legality of the armed conflict (*jus ad bellum*). Compliance with customary IHL is obligatory and is not dependent upon reciprocity or the compliance of the other party to the conflict with the IHL rules.

***“[T]he tu quoque argument is flawed in principle. It envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations. Instead, the bulk of this body of law lays down absolute obligations, namely obligations that are unconditional or in other words not based on reciprocity...it became clear to States that norms of international humanitarian law were not intended to protect State interests; they were primarily designed to benefit individuals qua human beings.”***  
 ICTY (Trial Chamber), *Kupreškić et al.*, [Judgement](#), 14 January 2000. §§ 517-518.

Customary IHL can be found in international provisions that codify it, such as the Hague Conventions of 1899 and 1907, the Geneva Conventions of 1949 (GC) and the two Additional Protocols to the Geneva

Conventions of 1977 (AP); and in general customary international law. A treaty, a convention, or other similar documents may include provisions codifying (or that may become in time) customary IHL when there is “evidence of a general practice accepted as law”<sup>7</sup> (looked for primarily in the actual practice and *opinion juris* of States). For example, not all the provisions of the Additional Protocols of 1977 reflect customary IHL, and as a result these specific provisions (that do not coincide with the general practice of States that is accepted as law) are not binding for States that are not parties to these protocols.

<sup>5</sup> ICTY (Appeals Chamber), *Tadić*, [Decision on Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, § 70. See also ICC (Trial Chamber III), *Bemba*, [Judgment](#), 21 March 2016, §§ 128, 141.

<sup>6</sup> ICJ, [Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion](#), § 75.

<sup>7</sup> [Statute of the International Court of Justice](#), art. 38(1)(b).

In addition to the principles of military necessity and humanity, IHL rules include other fundamental principles, such as the principle of distinction and the principle of proportionality –

## The principle of distinction

The principle of distinction, a fundamental pillar of IHL, requires parties to the conflict to differentiate between combatants and civilians, and between military objectives and civilian objects.<sup>8</sup>

A **combatant** is defined as either (i) a member of the armed forces of a party to the conflict (including members of militias or volunteer corps forming part of such armed forces); or (ii) a member of militias or other volunteer corps belonging to a party to the conflict that fulfill four cumulative conditions: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; *and* (4) conducting their operations in accordance with the laws and customs of war.<sup>9</sup>

A **military target** is defined as an object that: (1) by its nature, location, purpose or use make an effective contribution to military action; *and* (2) its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>10</sup> As a result of this definition certain objects are considered to be ‘dual use’ objects (such as roads and bridges) and therefore, depending on the circumstances, could be considered as military targets.

**Civilians** and **civilian objects** are defined by the negative – as long as there is doubt about the status of a person or object, they are to be considered civilian.<sup>11</sup>

However, a **civilian who takes an active part in the hostilities** (DPH) loses the immunity that is attached to every civilian and which prevents them from being targeted by the opposing party to the conflict “for such time as they take a direct part in hostilities”.<sup>12</sup> To what extent and at which point the civilian loses such protection or potentially even the civilian status is a contentious issue.<sup>13</sup>

In addition to requiring the parties to distinguish between military and civilian, the principle requires that, in an armed conflict, only combatants, DPH, and military objectives be directly

<sup>8</sup> [API](#), art. 48. See, e.g., ICTY (Appeals Chamber), *Kordić and Čerkez*, [Judgement](#), December 17, 2004, § 54.

<sup>9</sup> [GC III](#), art. 4(2). See also [API](#), arts. 1., 43, 44, and *infra* fn. 13.

<sup>10</sup> [API](#), art. 52(2),

<sup>11</sup> [API](#), arts. 50(1), 52(1), 52(3).

<sup>12</sup> [API](#), arts. 51(3). See also ICC, [Rome Statute](#), Art. 8(2)(b)(i).

<sup>13</sup> See, e.g., Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge Uni. Press, 2007, ed. 5<sup>th</sup>), pp. 29-33; ICRC, [Commentary on the Additional Protocols](#), p. 513-515 (ICRC, 1987); ICRC [Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law](#); Israel (Supreme Court), [HCJ 769/02](#), (targeted killings case). See also, ICC (Appeals Chamber), *Lubanga*, [Judgment](#), 1 December 2014, § 335; ICTY (Appeals Chamber), *Strugar*, [Judgement](#), 17 July 2008, §§ 172-178.

targeted. Care should be taken to spare the civilian population, individual civilians and civilian objects. For example, in planning or deciding upon an attack the person must do “everything feasible” to verify that the objectives to be attacked are indeed military targets.<sup>14</sup>

## ✚ The principle of proportionality

The principle of proportionality is a specific example of the broader principle of humanity. According to the principle of proportionality an attack is to be considered as indiscriminate if it may be expected to cause incidental loss of civilian life, damage

**“It is [ . . . ] accepted that attacks aimed at military objectives, including objects and combatants, may cause ‘collateral civilian damage’.”**

ICTY (Appeals Chamber), *Kordić and Čerkez*, [Judgement](#), 17 December 2004, § 52.

to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>15</sup>

### ➤ Recommended reading:

- M.N. Shaw, *International Law*, (Cambridge Uni. Press, 6<sup>th</sup> ed., 2008) pp. 1167-1203;
- J.S. Pictet, *The Geneva Conventions of 12 August 1949 Commentary*, (ICRC);
- J.M. Henckaerts & L. Doswald-Beck, [Customary International Humanitarian Law \(Vol. I\)](#), (ICRC, Cambridge, 2005);
- Y. Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge Uni. Press, 2007, 5<sup>th</sup> ed.);
- T. Meron, “Revival of Customary Humanitarian Law”, 99 *American Journal of International Law*, 2005, p. 817;
- M.N. Hayashi, ‘The Martens Clause and Military Necessity’, in H.M. Hensel, *The Legitimate Use of Military Force*, (Ashgate, 2008), pp. 135-159;
- N. Melzer, [International Humanitarian Law: A Comprehensive Introduction](#) (ICRC, 2016);
- [Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion](#), *I.C.J Reports* 1996, p.226;
- ICTY (OTP), [Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia](#);
- ICTY(Appeals Chamber), *Kordić and Čerkez*, [Judgement](#), 17 December 2004, §§ 47-53.

<sup>14</sup> See, e.g., [AP I](#), art. 57(2).

<sup>15</sup> [AP I](#), arts. 51(5)(b), 57(2)(a)(iii). See also ICC, [Rome Statute](#), Art. 8(2)(b)(iv).

## International Criminal Law

***"Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."***<sup>16</sup>

ICL is a branch of public international law that concerns the criminal responsibility of individuals for international crimes. It is premised on the idea that international legal prescriptions may impose obligations on individuals.

ICL is considered to be a relatively new branch of public international law and has developed from different sources. For example, war crimes originate in IHL, whereas genocide and crimes against humanity find their origins in international human rights law. Since many IHL violations are criminalized as a war crime, IHL serves as a point of reference in understanding the corresponding crime.

Like other branches of public international law, the sources of ICL may be found in treaties, customary international law and general principles of law. However, contrary to other fields of public international law, the rights that guarantee a fair trial, and in particular the principle of legality, require to ascertain that the crime was sufficiently defined and clear as to give a fair notice to the perpetrator that the conduct is criminal.

***"[I]t is hoped that the Tribunal and other international courts are bringing about the development of a culture of respect for the rule of law and not simply the fear of the consequences of breaking the law, and thereby deterring the commission of crimes."***

ICTY (Trial Chamber I), *Nikolić*, [Judgement](#), 2 December 2003, § 89.

ICL can be enforced by national courts, hybrid courts or by international courts, but it was primarily enforced by the former. However, already in the Convention on the Prevention and Punishment of the Crime of Genocide, from 1948, the possibility that a perpetrator could be tried by "a competent tribunal of the State in the territory of which the acts was committed, or by such international penal tribunal"<sup>17</sup> was envisaged.

## **International Crimes**

There are no unanimously agreed upon characteristics for an international crime, and consequently, no clear list of international crimes, and even less is defined regarding their elements.<sup>18</sup> However, it is generally agreed that international crimes consist of violations of customary rules that are considered so grievous that the international community as a whole has the interest, and the right, to repress such behavior and to bring the perpetrator

<sup>16</sup> Trial of Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, [Judgment](#), p. 223. See also ICTY (Appeals Chamber), *Tadić*, [Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction](#), 2 October 1995, §§ 128-137.

<sup>17</sup> [Convention on the Prevention and Punishment of the Crime of Genocide](#), 9 December 1948, art. 6 (emphasis added).

<sup>18</sup> See, e.g., A. Cassese, *International Criminal Law*, (Oxford Uni. Press, 2008, 2<sup>nd</sup> ed.), pp. 11-13; T. Einarsen, [The Concept of Universal Crimes in International Law](#), (Torkel Opshal Academic EPublisher, 2012).

to justice. As a result, the jurisdiction to try perpetrators for international crimes before national courts may be found in the legislation of most States,<sup>19</sup> regardless of the perpetrators' or the victims' nationality or the territory in which the crime was committed (universal jurisdiction).

It is commonly stated that war crimes, crime of aggression, crimes against humanity, torture and genocide are international crimes. Other international crimes may also include slavery, piracy and, possibly, terrorism and some transnational crimes. However, the definition of each crime, its elements, the scope of the criminal act and criminal responsibility are not always perceived in a uniform manner. Scholars have even been arguing in regard to the crime of piracy, which is traditionally considered one of the most ancient of international crimes, claiming that it fails to fulfill the requirements necessary to be classified as an international crime.<sup>20</sup>

## International Criminal Tribunals

International criminal tribunals are one of the enforcement branches of ICL (also considered to be the procedural aspect of ICL). In the previous century, ICL was enforced at the international level, for example, by the Nuremberg Tribunal, the International Military Tribunal for the Far East, the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda. All the above tribunals were created to deal

***"The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1994 so as to end impunity. It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed."***

ICTR (Trial Chamber II), *Rugambarara*,  
[Sentencing Judgement](#), 16 November 2007, §

with a specific conflict. The ICC is different in this regard, and will be discussed further below.

It should be noted that international criminal tribunals do not have, like national courts, a criminal code or penal laws, but rather statutes that include the crimes over which they have jurisdiction. The statutes do not purport to list all the international crimes. In line with the principle of *nullum crimen sine lege*, the General opined that the ICTY "should apply rules of international

<sup>19</sup> See, e.g., Amnesty International, ["Universal Jurisdiction a Preliminary Survey of Legislation Around the World - 2012 Update"](#).

<sup>20</sup> See, e.g., A. Cassese, *International Criminal Law*, (Oxford Uni. Press, 2008, 2<sup>nd</sup> ed.), p. 12; E. Kontorovich, ["The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation"](#), *Harvard International Law Journal*, Vol. 45, 183.

humanitarian law which are beyond any doubt part of customary law so that the problem of adherence of some but not all States to specific conventions does not arise".<sup>21</sup>

By bringing to justice those most responsible for the international crimes, international criminal tribunals have developed this corpus of law, while simultaneously contributing to the standardization of laws that safeguard the accused human rights.

***"Four conditions must be fulfilled before an offence may be prosecuted under Article 3 of the Statute [violations of the laws or customs of war]: (i) the violation must constitute an infringement of a rule of international humanitarian law; (ii) the rule must be customary in nature or, if it belongs to treaty law, the required conditions must be met; (iii) the violation must be serious, that is to say, it must constitute a breach of a rule protecting important values, and the breach must involve grave consequences for the victim; and (iv) the violation of the rule must entail, under customary or conventional law, the individual criminal responsibility of the person breaching the rule."***

ICTY (Appeals Chamber), *Kunarac, Kovać, and Vuković*, [Judgement](#), 12 June 2002, § 66.

➤ Recommended reading:

M.N. Shaw, *International Law*, (Cambridge Uni. Press, 6<sup>th</sup> ed., 2008) pp. 397-443;

A. Cassese, *International Criminal Law*, (Oxford Uni. Press, 2<sup>nd</sup> ed., 2008);

M.C. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, (Martinus Nijhoff Publishers, 2013);

Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge Uni. Press, 2<sup>nd</sup> ed., 2011).

<sup>21</sup> [Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 \(1993\)](#), UN Doc. S/25704, 3 May 1993, § 34.

## International Criminal Court

The ICC is a treaty-based permanent institution with legal personality, created to put an end to impunity for the perpetrators of “the most serious crimes of concern to the international community as a whole”,<sup>22</sup> namely, the crime of genocide, crimes against humanity, war crimes and the crime of aggression.

Since the definition of crimes was not tailored to a specific conflict but was formulated from a more general and relatively detail-oriented point of view, the Rome Statute is an important milestone in the codification of international crimes. While, ICL is a mixture of both public international law combined with terms and principles derived from national criminal laws, the establishment of the ICC “has given a stupendous impulse to the evolution of a corpus of international criminal rules proper”.<sup>23</sup>

***“[Article 6-8 of the Rome Statute] will take on a life of their own as an authoritative and largely customary statement of international humanitarian and criminal law.”***

T. Meron, “[International Humanitarian law from Agincourt to Rome](#),” *International Law Studies*, Vol. 75, p. 309.

In addition to the subject-matter parameter, mentioned above, the ICC **jurisdiction** is qualified as follows:

- **‘Natural person’ jurisdiction** – the Court only has jurisdiction over natural persons over the age of 18 at the time of the alleged commission of the crime. (Arts. 1, 25-26).
- **Temporal jurisdiction** – the Court has jurisdiction over conduct that occurred after the Rome Statute entered into force, *i.e.*, 1 July 2002 (Arts. 11, 24(1)). If the State became a Member State at a later date, the Court will only have jurisdiction for conduct committed following the entry into force of the Rome Statute for that State. However, every State (including Member States that joined after 1 July 2002) may accept the Court’s jurisdiction for prior events (Art. 12(3)). A different temporal jurisdiction exists for the crime of aggression (see Arts. 15 *bis* and 15 *ter*).
- **Territorial and personal jurisdiction** – the Court has jurisdiction for crimes committed in the territory of Member States (the territorial principle) or on board a vessel or aircraft registered in a Member State (the flag principle). In addition, the Court has jurisdiction over individuals who are nationals of a Member State (the active personality principle). The Court has similar jurisdiction with regard to States which are not members of the Rome Statute, but have accepted the Court’s jurisdiction on an ‘ad hoc’ basis (see Art. 12(3)).

Notwithstanding the above, if the case is referred to the ICC by the United Nations Security Council under Chapter VII, the Court has jurisdiction, according to the referral, regardless of the above ‘geographical’ limitations (the universality principle).

<sup>22</sup> [Rome Statute](#), Preamble.

<sup>23</sup> A. Cassese, *International Criminal Law*, (Oxford Uni. Press, 2<sup>nd</sup> ed., 2008), p. 7.

The exercise of the Court's jurisdiction is bound by **admissibility** limitations:

- According to the **complementarity principle** (see Arts. 1 and 17), which forms the basis of the ICC's existence, the Court can only exercise its jurisdiction where national jurisdictions are "unwilling or unable genuinely to carry out the investigation or prosecution" (Art. 17(1)(a)). It is a court of last resort.<sup>24</sup> As a corollary to the complementarity principle, the Court is prevented from exercising its jurisdiction according to the *ne bis in idem* principle (see Arts. 20 and 17(1)(c)), except in cases where the relevant proceedings were conducted for the purpose of shielding the individual from the Court's jurisdiction (Art. 17(2)(a)).
- The case must be of sufficient **gravity** to justify further action by the Court (Art. 17(1)(d)).<sup>25</sup> In addition, taking into account the gravity of the crime and the interests of victims, the Prosecutor may consider that there are "substantial reasons to believe that an investigation would not serve the **interest of justice**" (Art. 53(1)(c)).<sup>26</sup>

➤ Recommended reading:

M.C. Bassiouni, *Introduction to International Criminal Law: Second Revised Edition*, (Martinus Nijhoff Publishers, 2013);

Cryer, Friman, Robinson and Wilmschurst, *An Introduction to International Criminal Law and Procedure*, (Cambridge Uni. Press, 2<sup>nd</sup> ed., 2011);

O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court*, (C.H.Beck, Hart, Nomos, 3<sup>rd</sup> ed., 2015).

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<sup>24</sup> See, e.g., ICC (Appeals Chamber), *Situation in the Republic of Côte d'Ivoire*, [Judgment](#), 27 May 2015, §§ 58-72.

<sup>25</sup> ICC (Pre-Trial Chamber I), *Situation in Georgia*, [Decision on the Prosecutor's request for authorization of an investigation](#), 27 January 2016, § 51; ICC (Appeals Chamber), *Situation in DRC*, [Judgment](#), 13 July 2006, §§ 69-79.

<sup>26</sup> [Policy Paper on the Interests of Justice](#) (ICC-OTP, 2007); [Policy Paper on Case Selection and Prioritisation](#) (ICC-OTP, 15 September 2016). See also, ICTY (Appeals Chamber), *Kordić and Čerkez*, [Judgement](#), 17 December 2004, §§ 80-83.