

## International Humanitarian Law III: The 1949 Geneva Conventions and Their Additional Protocols I-III

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### ABSTRACT

This chapter examines the 1949 Geneva Conventions and their Additional Protocols as the legal framework of modern international humanitarian law (IHL). Adopted in the aftermath of the Second World War, the Geneva Conventions universalized minimum standards of humane treatment during armed conflict and expanded protection for wounded combatants, prisoners of war, and civilians. The chapter situates the Conventions and their Additional Protocols within their historical and political context, and by doing so, it highlights also the influence of earlier humanitarian instruments.

A central focus of the chapter is the distinction between international and non-international armed conflicts and the legal rationale for preferring the functional concept of “armed conflict” over the politically charged term “war.” Particular attention is given to Common Article 3 of the Geneva Conventions, which establishes a minimum, non-derogable humanitarian baseline applicable to all armed conflicts and has attained customary international law status. The chapter further analyses the material scope of protection under each of the four Geneva Conventions and assesses the principal innovations introduced by Additional Protocols I and II, including the principles of distinction, proportionality, and civilian protection, as well as the regulation of means and methods of warfare. Additional Protocol III and the emblem regime are also addressed.

Finally, the chapter explores the relationship between the Geneva Conventions and international human rights law and the relationship between the Geneva Conventions and international criminal law with a focus on the concept of grave breaches and their transformation into prosecutable war crimes under the Rome Statute of the International Criminal Court. By linking humanitarian obligations with individual criminal responsibility, the chapter demonstrates how the Geneva framework continues to shape accountability mechanisms and remains central to the protection of human dignity in contemporary armed conflicts.

### KEYWORDS

Geneva Conventions and their Additional Protocols, international humanitarian law, armed conflict, war crimes and international criminal law

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## 1. Introduction

This chapter examines the normative basis of modern international humanitarian law: the four Geneva Conventions of 12 August 1949 and their Additional Protocols – Additional Protocol I and Additional Protocol II of 1977 and Additional Protocol III of 2005. These treaties have universalised the minimum standards of humane treatment during armed conflicts, irrespective of reciprocity or formal declarations of war and they have operationalised basic principles of international humanitarian law through detailed obligations on the conduct of hostilities and protection of persons and objects. Although these instruments differentiate between international and non-international armed conflicts, the Conventions’ common Article 3 establishes a minimum, non-derogable humanitarian baseline that has since achieved customary status.

The chapter consists of four subchapters. First, it analyses the adoption of the Geneva Conventions and their Additional Protocols in their historical and political context. Second, it clarifies the notion and classification of armed conflict and explains why contemporary practice favours the functional term “armed conflict” over the politically loaded “war.” Third, it sets out the material scope of protection under each Geneva Convention and the main innovations of Additional Protocols I and II as well as the emblem regime under AP III. Finally, it examines the relationship between the Geneva framework and international criminal law, focusing on how the Rome Statute translates grave breaches of the Geneva Conventions into prosecutable war crimes.

## 2. The Adoption of the 1949 Geneva Conventions and Its Additional Protocols in a Historical and Political Context

The 1949 Geneva Conventions<sup>1</sup> were adopted in the aftermath of World War II, a conflict that exposed unprecedented levels of civilian suffering, mass destruction, and war crimes, highlighting the need for stronger international humanitarian law.<sup>2</sup> These conventions were a significant expansion and revision of earlier treaties, not to forget to mention especially the 1864 Geneva Convention, the first international treaty in the area of international humanitarian law, and the subsequent 1906 and 1929 versions of the Geneva Conventions, which primarily addressed the protection of wounded soldiers.<sup>3</sup>

1 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War.

2 Pictet, 1958, pp. 3 et seq.

3 Bugnion, 2003, p. 313.

The horrors of World War II, including events like the Holocaust and the atomic bombings of Hiroshima and Nagasaki, called attention to the inadequacy of existing legal protection especially for civilians, prisoners of war (POWs), and also for the wounded during armed conflicts. This inadequacy is considered a material source of international humanitarian law.<sup>4</sup> The formal source is embodied in the 1949 Geneva Conventions that were adopted on August 12, 1949. These Geneva conventions consist of four treaties: the First Convention for the wounded and sick in the field, the Second one for naval warfare, the Third one for POWs, and the Fourth one for the protection of civilians. It was exactly the last treaty, the Fourth Geneva Convention that was a landmark in the development of international humanitarian law because it considerably extended humanitarian protections to civilians, a group that was severely impacted during World War II.<sup>5</sup>

The conventions were negotiated and adopted under the auspices of the International Committee of the Red Cross (ICRC), which played a very important role in drafting and promoting the adoption of the treaties.<sup>6</sup> There were 63 states participating in the diplomatic conference in Geneva during which they demonstrated a shared commitment to reinforce humanitarian norms after the atrocities of the World War II.<sup>7</sup> The Geneva Conventions became a cornerstone of modern international humanitarian law (IHL), a legal framework that regulates the conduct of armed conflicts and protects individuals who are not or are no longer taking part in hostilities, belonging to the principle treaties within this branch of international law.<sup>8</sup>

The principle of humanitarian protection, rooted in earlier legal norms, was significantly strengthened by the Geneva conventions, particularly concerning POW treatment, non-combatants, and medical personnel.<sup>9</sup> Moreover, the atmosphere of the Nuremberg Trials and the emerging focus on individual responsibility for war crimes reinforced the need for clear, universally applicable laws.<sup>10</sup> Therefore the Geneva conventions also included this approach and introduced the concept of grave breaches, obligating states to criminalise and prosecute serious violations of humanitarian law, such as torture, unlawful deportation, and wilful killing.<sup>11</sup> Although the Cold War had already begun, the Geneva Conventions were adopted despite the significant political tensions between the Western and Eastern blocs, since they reflected the universal nature of humanitarian concerns.<sup>12</sup>

As it has already been pointed out, there had previously been efforts to regulate the conduct of hostilities based on principles of neutrality, impartiality, and

4 Ondřej et al., 2010, p. 108.

5 Sassòli, 2024, p. 8.

6 Bugnion, 2003, pp. 313–314.

7 Kolb and Hyde, 2008, pp. 39–40; International Committee of the Red Cross (ICRC), 1949, Final Act of the Diplomatic Conference of Geneva of 1949.

8 Dinstein, 2010, pp. 14–15.

9 Meron, 2000, p. 38.

10 Cassese, 2008, pp. 27–31.

11 Henckaerts and Doswald-Beck, 2005, pp. 574 et seq.

12 van Dijk, 2019, pp. 209 et seq.; Schindler, 1999, p. 715.

humanity.<sup>13</sup> Moreover, despite important steps forward, several issues remained unaddressed at the Geneva Conventions. Therefore, the Additional Protocols of 1977 were adopted to address the growing complexities of modern warfare, particularly the increasing number of non-international armed conflicts.<sup>14</sup> Protocol I expanded protections for civilians and combatants in international armed conflicts, emphasising the principle of distinction between military and civilian targets.<sup>15</sup> Protocol II was even more crucial because it developed humanitarian protections for victims of non-international armed conflicts, such as civil wars, which had become more frequent in the post-colonial era.<sup>16</sup> The Additional Protocols also incorporated advancements in weaponry and tactics, such as restrictions on the use of indiscriminate weapons and effective advance warning prior to attacks.<sup>17</sup>

The legal obligations adopted within the Geneva Conventions are binding on states, regardless of whether they are party to the conflict or whether reciprocity exists.<sup>18</sup> The universality of the 1949 Geneva Conventions has gradually been achieved, with nearly every state in the world becoming a party to the treaties over time.<sup>19</sup> Moreover, in addition to treaty-based obligations, the Geneva Conventions contributed to the development of customary international humanitarian law, which applies universally.<sup>20</sup> Violations of the Geneva Conventions, such as during the Vietnam War, led to increased scrutiny and reaffirmation of their importance in regulating modern conflicts.<sup>21</sup> The Geneva Conventions and their Additional Protocols have also been invoked in the case-law of international criminal tribunals, such as the International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR) or the International Criminal Court (ICC), to hold individuals accountable for violations.<sup>22</sup>

### **3. The Notion of Armed Conflict, International and Non-International, Respectively**

With regard to international humanitarian law, it is important to note that it applies during all armed conflicts, whether international, which take place between two or more states, or non-international, which take place essentially on the territory of a single state. This division of conflicts is crucial for the reason that a different set of norms of international humanitarian law is applied in international conflicts if

13 Geneva Conventions, 1929.

14 Sandoz, Swinarski and Zimmermann, 1987, p. xxix.

15 Henckaerts and Doswald-Beck, 2005, pp. 3–4, 8, 12, 14, 18, 20.

16 Kolb and Hyde, 2008, pp. 96, 275.

17 Dinstein, 2010, p. 144.

18 Sassòli, 2024, p. 81.

19 Compare with other IHL treaties in Henckaerts and Doswald-Beck, 2005, p. xliv.

20 Henckaerts and Doswald-Beck, 2005, p. xxviii.

21 Schindler, 1999, p. 718.

22 Meron, 2000, pp. 91 et seq.

compared to those in non-international conflicts. Given the rich history of international conflicts, the legal norms governing these conflicts are much more elaborated and more detailed than those governing non-international conflicts. Non-international armed conflicts were for a long period of time regulated mostly by national law, as international law only began to deal with them after World War II. International humanitarian law, which is applied during international armed conflicts, has several hundred treaty provisions. Non-international armed conflicts are regulated by 19 treaty articles. This disparity is significant both quantitatively and qualitatively. It is related to the fact that international humanitarian law applied during non-international armed conflicts is binding on all belligerents, but the content of the treaty regulation itself is decided upon only by states as the primary subjects of international law. This, understandably, leads, on the one hand, to the fact that non-state actors do not feel bound by such a legal arrangement. On the other hand, states do not want to bind themselves to what other parties to a conflict would not respect either, all the more so since treaties in the area of international humanitarian law are not conditioned by mutual compliance, reciprocity. Moreover, the fact that one party to a conflict fails to comply with the norms of international humanitarian law does not exempt the other party to the conflict from implementing those norms.<sup>23</sup>

The determination of the type of armed conflict is therefore important in terms of the applicability of the various norms of international humanitarian law. The Geneva Conventions of 1949 are applicable during international armed conflicts according to their common Article 2. The only exception is their common Article 3, which provides for minimum protection during non-international armed conflicts. In addition, Additional Protocol II of 1977 also applies to non-international armed conflicts under certain conditions, and Additional Protocol I to international ones. However, real situations are not so easily definable; drawing the line between international and non-international conflicts can be a complicated task.<sup>24</sup>

While there is no overall treaty definition of an armed conflict as such, according to the generally accepted definition of armed conflict in the ICTY decision, the existence of an armed conflict is determined by whether armed violence was used and also by the temporal aspect of the conflict.<sup>25</sup> In addition to the long-term perspective, other circumstances have to be taken into account when engaging the armed forces of multiple states. Where two states are a common party to a conflict in which the opposing side is an armed opposition group to a state or states, the conflict is a non-international armed conflict. However, if the States Party to Additional Protocol I were a national liberation movement, it would be an international armed conflict and this Protocol, and the Geneva Conventions of 1949 would apply. This legal classification is related to Article 1(4) of Additional Protocol I, which states that international

23 See: art. 1 of the 1949 Geneva Conventions; See also *Prosecutor v. Kupreškić et al.*, 2000, paras. 511, 517 et seq.

24 Dinstein, 2010, pp. 26 et seq.

25 *Prosecutor v. Duško Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 1995, para. 70.

armed conflicts include armed conflicts in which peoples struggle against colonial rule and foreign occupation and against racist regimes in order to exercise their right to self-determination.

The qualification of non-international armed conflicts and the determination of the legal norms that are applicable during their duration are even more complicated. As referred to above, this is related to the historical development of their legal regulation at the international level. Classical public international law, which international humanitarian law is part of, is the law governing relations between states. Since the Peace of Westphalia in 1648, given the sovereign equality of all states, they have been obliged to refrain from acting in a way that might interfere in the internal affairs of another State. This changed partially with the Second World War, which gave rise to a change in the understanding of the concept of ‘internal affairs of a State’.<sup>26</sup> A consequence, in the field of international humanitarian law is the adoption of the foundations of the law of non-international armed conflicts. As already stated, the Geneva Conventions of 1949 dealt with non-international armed conflicts in only one article, Common Article 3. This is an article which, in short, contains the basics of humanitarian action that should be considered during any conflict. For this reason, it is also referred to as a “Convention in miniature” within the Geneva Conventions.<sup>27</sup>

International humanitarian law does not specify who is to determine whether a conflict is a non-international armed conflict. This is one of the peculiarities of international law as such; it lacks a central decision-making body. However, in its decision, the ICTY cited the intensity of the conflict and its organisation as qualifiers to help determine whether Common Article 3 of the Geneva Conventions is applicable.<sup>28</sup> This Article 3 of the 1949 Geneva Conventions thus applies in the case of a conflict involving organised elements both on the part of the state and on the part of or between anti-government belligerent groups, and not involving short-term and sporadic acts of violence.

According to the wording of Article 1 of Additional Protocol II, this Protocol develops and supplements Common Article 3 of the Geneva Conventions. The fact remains, however, that this Protocol applies only to those armed conflicts that occur between armed forces and dissident armed forces, not between different armed groups. Another limitation is the control of part of the territory of a state, which allows armed groups to conduct sustained and coordinated military operations. Common Article 3 of the Geneva Conventions also requires organisation but does not stipulate the need to control territory.<sup>29</sup> However, a positive aspect of Additional Protocol II is its explicit definition of internal disturbances and tensions, such as riots, isolated and sporadic

26 See e.g. Simma, 2012, pp. 269 et seq.

27 Pictet, 1958, p. 34; See also *Prosecutor v. Kayishema and Ruzindama*, 2001, para. 165.

28 *Prosecutor v. Tadić*, 1997, para. 562.

29 The International Court of Justice applies so-called effective control in relation to the level of control (see, for example, its decision in the case of *Military and Paramilitary Activities in and Against Nicaragua*), the International Criminal Tribunal for the former Yugoslavia applies so-called overall control (see, for example, its decision in the case of *Tadić*).

acts of violence and other acts of a similar nature that are not considered to be armed conflicts.<sup>30</sup>

Of course, the above division of armed conflicts into international and non-international is usually a theoretical framework. In real situations, conflicts may overlap, or there may be an international conflict even though it has the characteristics of a non-international conflict, and *vice versa*.<sup>31</sup> Moreover, a conflict similar to the one that took place during the disintegration of Yugoslavia, where the different types of conflicts seemed to be intertwined, may happen again. This conflict has been described by the ICTY as a mixed one.<sup>32</sup> Nevertheless, it is important to establish which rules of international humanitarian law apply in any case, so that the rights and obligations of both states and individuals are as clearly defined as possible during a particular armed conflict.

#### 4. The Rationale of Avoiding the Term “War”

The avoidance of the term “war” within international law comes from its historical ambiguity and the complexities surrounding the formal declaration of hostilities, which could lead to legal uncertainties in conflict classification.<sup>33</sup> Historically, under the Hague Conventions of 1899 and 1907, the term “war” required formal declarations for legal recognition,<sup>34</sup> but many conflicts occurred without such declarations, complicating the application of international law.<sup>35</sup> The more neutral term “armed conflict” in the 1949 Geneva Conventions and the 1977 Additional Protocols reflects the need for a broader and more functional legal framework to address hostilities regardless of formal declarations.

The term “war” has political and emotional connotations, which states often try to avoid for strategic reasons, such as avoiding domestic consequences, maintaining diplomatic relations, or sometimes even limiting their accountability.<sup>36</sup> By using the term “armed conflict”, international humanitarian law is called to ensure that basic humanitarian protection applies to hostilities based on factual circumstances, rather than on formal political or legal recognition or reciprocity.<sup>37</sup> The use of the term “armed conflict” helps to avoid manipulation by states that might refuse to label their involvement as “war” to evade obligations under international law, such as protections for prisoners of war or civilians.<sup>38</sup> This is especially remarkable in relation to the

30 See: art. 1 of the AP II.

31 See: e.g. Solis, 2010, pp. 154 et seq.

32 *Tadić*, 1995, para. 77.

33 Dinstein, 2010, p. 28.

34 Roberts and Guelff, 2000, p. 67.

35 Pictet, 1958, pp. 18 et seq.

36 Kolb and Hyde, 2008, pp. 9 et seq.; Clapham, 2021, pp. 1–40.

37 Henckaerts and Doswald-Beck, 2005, p. 498.

38 Ondřej et al., 2010, p. 38.

armed conflict in Ukraine, where a state whose armed forces have illegally crossed national borders has decided to label the war a special military operation.<sup>39</sup>

The adoption of the term “armed conflict” in the Geneva Conventions also reflects a broader recognition of non-international armed conflicts, such as civil wars or insurgencies, which historically fell outside the legal scope of the term “war”.<sup>40</sup> As it has been pointed out, the distinction between international armed conflicts and non-international armed conflicts allows IHL to be applied within different forms of warfare, which is important especially within asymmetrical conflicts.<sup>41</sup> Furthermore, modern conflicts, particularly those that involve terrorist groups or hybrid warfare, challenge a formalist approach, and therefore promote the more inclusive term of “armed conflict”.<sup>42</sup>

Avoidance of the term “war” has also been analysed by focusing on the functions of the international humanitarian law. Some legal scholars argue that the refrainment from using the term “war” is associated with the principle of humanitarian universality that helps the application of humanitarian legal norms regardless of the political or legal characterisations of the conflict.<sup>43</sup> Moreover, blurring between international and non-international armed conflicts has also been aimed at.<sup>44</sup> The ICTY emphasised in the *Tadić* case that IHL applies to any armed conflict.<sup>45</sup> Moreover, as it has been indicated, the rationale is considered to be rooted in the legal principle of objectivity which focuses on the facts on the ground rather than the subjective intent or declarations of parties involved.<sup>46</sup> Furthermore, scholars highlight that constant use of the term “armed conflict” supports the growing body of customary international law, which applies to all types of conflicts without reliance on legal formalities.<sup>47</sup> There is also an influence from contemporary concerns regarding human rights violations and individual responsibility, ensuring that humanitarian protection is provided to all victims of violence in armed conflicts.<sup>48</sup> Avoiding the term “war” can thus underscore the protective function of IHL, focusing on the humanitarian consequences of violence rather than the political or legal status of the conflict itself.<sup>49</sup>

39 See e.g. the speech of the Russian President, 2022, Speech of 24 February 2022.

40 Bothe, Partsch and Solf, 2013, pp. 1–2.

41 Dinstein, 2010, p. 28.

42 Kolb and Hyde, 2008, p. 16.

43 Ondřej et al., 2010, pp. 7–10; Crowe and Weston-Scheuber, 2013, pp. 2 et seq.

44 Meron, 2000, pp. 29–33.

45 *Tadić*, 1995, para. 119.

46 Sandoz, Swinarski and Zimmermann, 1987, pp. 1319 et seq.

47 Henckaerts and Doswald-Beck, 2005, pp. xxxi et seq.

48 Meron, 2000, pp. 33 et seq.

49 Solis, 2010, p. 22.

## 5. The Scope of the 1949 Geneva Conventions and Its Additional Protocols

As it has been pointed out, the 1949 Geneva Conventions, although not being the first international treaties regulating armed conflicts, are currently considered to form the cornerstone of modern international humanitarian law, establishing rules for the humane treatment of individuals during armed conflict, namely those who are not (no longer) active participants in armed conflicts.<sup>50</sup>

The First Geneva Convention focuses on the wounded and sick in the field, ensuring medical care and humane treatment for those who are *hors de combat*.<sup>51</sup> It builds upon the previous Geneva Conventions that were adopted in 1864, 1906 and 1929. It contains 64 articles, to point out at least a few of them: it provides protection not only for the wounded and sick, but also for medical and religious personnel, medical units and medical transports, it mandates the neutrality of medical units, prohibiting attacks on hospitals, ambulances, and medical personnel providing aid to the wounded.<sup>52</sup> If they fall into the hands of the enemy, they may continue to pursue their duties, while medical supplies that have fallen into the hands of the enemy remain reserved for the wounded and sick and may not be destroyed. This protection shall cease if the protected personnel is used for committing acts harmful to the enemy, but only after a due warning has been given for refraining from such acts and this warning has remained unheeded.<sup>53</sup>

The Second Geneva Convention adapts the protection under the First Geneva Convention to naval warfare, extending safeguards to the wounded, sick, and shipwrecked members of armed forces, it being understood that the term “shipwreck” means shipwreck from any cause and includes forced landings at sea by or from aircraft. Article 12 of the Second Geneva Convention stipulates that shipwrecked soldiers must be “rescued and cared for” without discrimination. Special provisions apply to hospital ships intended to assist the wounded, sick and shipwrecked, including their treatment by transport. The parties to the conflict have the right to inspect and search hospital ships and may place neutral observers on them to guarantee respect for the Second Geneva Convention. As with land-based medical units, the protection of hospital ships ceases if they are found to have been used to commit acts harmful to the enemy. A similar regime applies to medical aircraft, which are aircraft used for the transport of the wounded, sick and shipwrecked and for the transport of ambulance personnel. These aircraft cannot be attacked either and must be respected as long as they operate within the areas, altitudes and directions agreed upon between the parties to the conflict. If an ambulance aircraft is forced to make an emergency

50 Pictet, 1958, p. 14.

51 Clapham, 2015, pp. 789 et seq.

52 Geneva Convention I, 1949, art. 19.

53 Geneva Convention I, 1949, art. 21.

landing and falls into the hands of the enemy, the wounded, sick and shipwrecked on board as well as the crew shall be considered prisoners of war.

Both the First and Second Convention emphasise the protection of the Red Cross, Red Crescent, and other humanitarian emblems, ensuring their neutrality in conflict zones.<sup>54</sup>

The Third Geneva Convention addresses the treatment of prisoners of war. Article 4 of the Third Convention defines POWs, including members of armed forces, militias, and volunteer corps under certain conditions, namely a condition of organised command, a fixed distinctive sign recognisable at a distance (there are limited exceptions to this among countries who observe the 1977 Additional Protocol I), open arms carrying, conduct of their operations in accordance with the laws and customs of war. POWs must be treated humanely, just to mention Article 13 that particularly prohibits acts of violence or intimidation and insults and public curiosity. It also prohibits medical experiments on POWs, responding to the horrific abuses committed during World War II. Moreover, Article 17 prohibits coercion of POWs to obtain information and guarantees their right to provide only their name, rank, date of birth, and serial number. Furthermore, the Third Convention guarantees POWs adequate food, shelter, medical care, and communication with their families.<sup>55</sup>

The Fourth Geneva Convention represents the most significant evolution in IHL by addressing the protection of civilians during armed conflicts, especially in occupied territories.<sup>56</sup> Article 27 states that civilians must at all times be humanely cared for and protected against all acts of violence. More specifically, the Fourth Convention prohibits collective punishment, reprisals, hostage-taking, and forced labour against civilians in occupied territories.<sup>57</sup> Article 49 bans the forcible transfer or deportation of population from occupied territories, a provision widely referred to in subsequent conflicts. The Fourth Geneva Convention obliges occupying powers to ensure public order, health, and food supply for the civilian population.<sup>58</sup>

The Geneva Conventions emphasise the principle of distinction applicable to individuals and objects as well: combatants must distinguish between military objectives and civilians during hostilities.<sup>59</sup> On the other hand, the principle of non-discrimination is another important principle applicable during armed conflicts, any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria is prohibited.<sup>60</sup> The conventions also reinforce the principle

54 Geneva Convention I and II, 1949, art. 38.

55 Geneva Convention III, 1949, arts. 25–30.

56 Pictet, 1958, pp. 199 et seq.

57 Geneva Convention IV, 1949, arts. 33–40.

58 Geneva Convention IV, 1949, art. 55.

59 Sassòli, 2024, pp. 22 et seq.

60 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 12(2); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 12(2); Geneva Convention relative to the Treatment of Prisoners of War, art. 16; Geneva Convention relative to the Protection of Civilian Persons in Time of War, arts. 13 and 27(3), 1949.

of proportionality, requiring military actions to avoid excessive harm to civilians relative to the anticipated military advantage.<sup>61</sup>

As it has already been pointed out, the Geneva Conventions were established to regulate international armed conflicts. However, their Common Article 3 was groundbreaking when adopted, as it extends minimum humanitarian protection to individuals involved in non-international armed conflicts, which was revolutionary at the time when the Geneva Conventions were adopted.<sup>62</sup> Common Article 3 prohibits violence to life, torture, humiliating treatment, and the taking of hostages, establishing a “minimum humanitarian standard” applicable to all conflicts, therefore it is considered to be a convention in miniature as such. Furthermore, the universality of Common Article 3 was also reaffirmed in the *Tadić* case before the ICTY, which recognised even its customary legal status.<sup>63</sup>

The conventions place obligations on all parties to the conflict, they thrive to ensure that their humanitarian principles are widely applicable.<sup>64</sup> Being classical international treaties, they allow denunciation, with a separate provision on denunciation, but the Martens Clause is included to ensure that even if specific treaty provisions do not apply, “the laws of humanity and the dictates of public conscience” remain binding.<sup>65</sup>

Unlike e.g. international human rights law, there is no specific control mechanism established for the Geneva Conventions. However, the International Committee of the Red Cross (ICRC) serves as the guardian of the Geneva Conventions, ensuring compliance and providing humanitarian aid during conflicts.<sup>66</sup> Moreover, the conventions introduced the concept of protecting powers, neutral states or other organisations that supervise the application of IHL. They also formalised the role of National Red Cross and Red Crescent Societies, which act as auxiliaries to the ICRC during conflict.<sup>67</sup>

Although international humanitarian law is applicable during armed conflicts, there are several obligations adopted within the Geneva Conventions that have established obligations for the States Parties outside an armed conflict, as well. States Parties to the Geneva Conventions are obligated to educate their military personnel and civilian populations on IHL principles.<sup>68</sup> Furthermore, states are obligated to

61 Dinstein, 2010, p. 129. For a detailed analysis of the IHL principles see a separate chapter of this publication.

62 Ondřej et al., 2010, p. 169.

63 *Tadić*, 1995, paras. 89 et seq.

64 Hassanová, 2023, p. 84.

65 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 63; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 62; Geneva Convention relative to the Treatment of Prisoners of War, art. 142; Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, art. 158.

66 Bugnion, 2003, pp. 317 et seq.

67 Bugnion, 2003, pp. 363 et seq., 475, 508.

68 Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949, art. 83.

disseminate the conventions' text and principles widely, ensuring awareness and adherence during peacetime and conflict.

By protecting POWs, civilians, and the wounded, the Geneva Conventions humanise war and thrive to balance military necessity with humanitarian imperatives. Moreover, they protect religious and cultural property in conflict zones, promoting broader principles of international law.

Although the 1949 Geneva Conventions are rather lengthy, international treaties, political considerations at the time of their adoption have left some of the related issues unregulated and some other issues have been reconsidered during subsequent times. The three Additional Protocols to the 1949 Geneva Conventions were therefore adopted to address new challenges in armed conflict and to enhance protections provided under international humanitarian law, also by merging the Hague<sup>69</sup> and Geneva law<sup>70</sup> together.<sup>71</sup>

Adopted in 1977, Additional Protocol I (AP I) expanded the legal framework for international armed conflicts, addressing modern methods and means of warfare.<sup>72</sup> Article 1 paragraph 4 of AP I extended its scope to include armed conflicts involving peoples struggles against “colonial domination, alien occupation, and racist regimes”, reflecting the post-colonial struggles of the time. Additional Protocol II (AP II), also adopted in 1977, addressed non-international armed conflicts, building on Common Article 3 of the Geneva Conventions. Separation of the Additional Protocols confirmed the division of the legal framework for international and non-international armed conflicts. Article 1 paragraph 1 of AP II defines its scope as applying to conflicts between state forces and organised armed groups controlling territory, thus setting stricter conditions than Common Article 3.

AP I envisages the principle of distinction, obligating parties to distinguish between civilians and combatants and between civilian objects and military targets.<sup>73</sup> The prohibition of indiscriminate attacks in Article 51 paragraph 4 of AP I reinforced the protection of civilians by banning attacks not directed at specific military objectives. AP I codifies the principle of proportionality under Article 51(5)(b), requiring that potential civilian harm must not be excessive in relation to the anticipated military advantage. In Article 54, AP I prohibits the starvation of civilians as a method of warfare, including attacks on objects indispensable to survival, such as food, water, and crops.

AP I also addresses environmental concerns in warfare, with Article 35(3) prohibiting ‘methods of warfare intended to cause widespread, long-term, and severe damage to the natural environment’. Additionally, the protection of cultural objects and places of worship was reinforced in AP I, which prohibited their use for military

69 Regulation of means and methods of warfare.

70 Regulation of the protection of so-called protected persons, victims of war.

71 Kolb and Hyde, 2008, p. 40.

72 Sandoz, Swinarski and Zimmermann, 1987, p. xxxiv.

73 Protocol I, 1977, art. 48.

purposes and intentional attacks against them.<sup>74</sup> Moreover, reflecting technological development, Article 36 of AP I obligates states to review new weapons to ensure they comply with IHL principles, marking a key advancement in regulating the use of technology in warfare.<sup>75</sup>

The protection of medical personnel and facilities was strengthened in AP I, ensuring their neutrality and prohibiting attacks on medical units.<sup>76</sup> AP I introduced provisions for the treatment of the wounded, sick, and shipwrecked, ensuring they receive medical care and protection.<sup>77</sup> AP I incorporated rules for journalists, stating that ‘journalists engaged in dangerous professional missions’ are to be treated as civilians.<sup>78</sup> AP I reinforced the protection of refugees and stateless persons, expanding obligations under the Fourth Geneva Convention (Article 73, Geneva Protocol I, 1977). Moreover, AP II introduced measures to protect children during conflicts, prohibiting their recruitment and use in hostilities.<sup>79</sup> Finally, to present at least some of the AP I articles, Article 75 of AP I guarantees fundamental protections for all individuals in the power of a party to the conflict, establishing safeguards against summary executions and unfair trials.

As for AP II, it expanded protections for civilians in non-international armed conflicts, prohibiting e. g. acts of violence, collective punishments, and slavery under Article 4. Article 5 of AP II established minimum guarantees especially for those who have been deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained: it requires humane treatment and prohibits extrajudicial executions and torture since it outrages upon personal dignity. Moreover, Article 13 of AP II reinforced the principle of civilian immunity, prohibiting direct attacks on civilians and civilian objects. AP II also forbids “acts of terrorism” against civilians by the wording of Article 4(2)(d), reflecting concerns about brutal tactics during internal conflicts. Finally, within AP, there is no reference to combatants but rather to persons taking part in hostilities.

Additional Protocol III (AP III), adopted in 2005, differs from the previous Additional Protocols that regulate material aspects of armed conflicts. It introduced the Red Crystal as an additional emblem to the Red Cross and Red Crescent, addressing neutrality concerns. The Red Crystal emblem under AP III is supposed to enhance the universal reach of humanitarian relief.<sup>80</sup> AP III was thus adopted to accommodate states and organisations that could not use the existing Red Cross or Red Crescent emblems due to cultural or political reasons.<sup>81</sup>

74 Additional Protocol I, 1977, art. 53.

75 Sandoz, Swinarski and Zimmermann, 1987, pp. 421 et seq.

76 Additional Protocol I, 1977, art. 12.

77 Geneva Protocol I, 1977, art. 10.

78 *Ibid.*, art. 79.

79 Geneva Protocol II, 1977, art. 4:3.

80 See: Preamble, Additional Protocol III, 2005.

81 International Committee of the Red Cross (ICRC), 2005, Commentary on Additional Protocol III to the Geneva Conventions.

AP I and AP II reflect the growing importance of human rights law within IHL, as evidenced by their prohibitions on torture, arbitrary executions, and collective punishments.<sup>82</sup> The two 1977 protocols recognise that ‘civilians are the principal victims of armed conflict’ and aim to mitigate the devastating impact of warfare on non-combatants.<sup>83</sup> Together, the Additional Protocols adapt the 1949 Geneva Conventions to modern realities, strengthen legal protection for both civilians and combatants in both international and internal conflicts.

### ***5.1. The Relationship Between the 1949 Geneva Conventions and International Human Rights Law***

The Geneva Conventions of 1949 and their Additional Protocols that form a basis of international humanitarian law and international human rights law share a common objective, namely the protection of human dignity and individual security. However, they achieve this common goal through distinct methods and frameworks. IHL governs conduct during armed conflicts to mitigate human suffering by regulating warfare and protecting civilians, non-combatants and prisoners of war.<sup>84</sup> International human rights law, on the other hand, applies both in peacetime and wartime and establishes universal standards for the protection of fundamental rights. Their interplay becomes relevant during armed conflicts, when both systems are applicable.

As a consequence of several questions originating from this interplay, it was finally the International Court of Justice (ICJ) that has consistently affirmed that international human rights law remains applicable during armed conflict,<sup>85</sup> except where states lawfully derogate under relevant treaties.<sup>86</sup> Nevertheless, even then, certain rights, such as the prohibition of torture, are non-derogable.<sup>87</sup> In its advisory opinions on Nuclear Weapons<sup>88</sup> and the Construction of a Wall,<sup>89</sup> and in the Armed Activities in the Congo judgement,<sup>90</sup> the ICJ emphasised that both analysed legal areas are applicable during armed conflicts. The ICJ has identified three possibilities of the interplay between international humanitarian law and international human rights law. First, certain rights fall exclusively within the scope of humanitarian law, such

82 See e.g. Additional Protocol I, 1977, art. 38.

83 Sandoz, Swinarski and Zimmermann, 1987, p. xxix.

84 See e.g. Henckaerts and Doswald-Beck, 2005, p. 3. For more information about the principle of distinction see also Additional Protocol I, art. 48.

85 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004, para. 106.

86 See e.g. ECHR, art. 15.

87 ECHR, art. 15.

88 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 8 July 1996.

89 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 9 July 2004.

90 International Court of Justice, Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005, p. 168, at para. 216.

as the specific status of prisoners or war. Second, some rights are governed only by human rights law, e. g. the right to vote. Third, there are rights that are protected under both regimes, nevertheless, the ICJ characterised humanitarian law as *lex specialis* in relation to human rights law.<sup>91</sup>

A very good example of the interplay between international humanitarian law and international human rights law is presented within the jurisprudence of the European Court of Human Rights (ECtHR) that was established by the European Convention on Human Rights and Fundamental Freedoms (ECHR). According to the Vienna Convention on the Law of Treaties, interpretation of human rights treaties is provided in light of any relevant rules of international law that enables dynamic interplay between these two areas of international law.<sup>92</sup> The European Court of Human Rights has reflected this in its evolving jurisprudence. In earlier cases, such as *Loizidou v. Turkey*,<sup>93</sup> the ECtHR applied only the European Convention on Human Rights and avoided reference to IHL. Later, in *Varnava v. Turkey*,<sup>94</sup> it explicitly invoked the Geneva Conventions.

A landmark in integrating both regimes came in *Hassan v. United Kingdom* that dealt with detention during the Iraq conflict. The ECHR held that the right to liberty and security protected by the ECHR could be interpreted consistently with the provisions of the Geneva Conventions, even without a formal derogation under Article 15 of the ECHR. This reflected an interpretive approach that interlinks the ECHR with IHL norms to avoid fragmentation and ensures meaningful protection.

More recent inter-state cases, such as *Georgia v. Russia (II)* further illustrate the ECHR's attempt to bring together procedural complexities with substantive protection.<sup>95</sup> The court has recognised that chaos during active hostilities limits the reach of Article 1 of the ECHR dealing with jurisdiction, however, it has decided upon positive procedural obligations on states to investigate deaths and detentions arising during armed conflicts. This decision has reflected the practical interplay between IHL's operational rules on e.g. distinction, proportionality, and precaution and insistence of the international human rights law on the responsibility of states.

To sum up this interplay, it is interesting to point out that although historically distinct, since one emerged from the law of armed conflicts and the other one from post-World War II commitments to individual rights, today international humanitarian law and international human rights law are deeply interlinked. Contextual application of both frameworks aims to ensure that human dignity is upheld, even in the chaos of war.

Nevertheless, it is not only international human rights law that interplays with international humanitarian law. Specific interplay is visible between international

91 International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004, para. 106.

92 Vienna Convention on the Law of Treaties, art. 31 para. 3 (c).

93 *Loizidou v. Turkey*, 1996.

94 *Varnava and others v. Turkey*, 2009.

95 *Georgia v. Russia (II)*, 2021.

humanitarian law and international criminal law. This interplay is perfectly detectable within the legal framework of prosecuting war crimes, which is addressed in the following subchapter.

### **5.2. *The Relationship Between the 1949 Geneva Conventions and the Rome Statute***

The 1949 Geneva Conventions and the Rome Statute of the International Criminal Court (ICC) share a foundational relationship in the codification and enforcement of international humanitarian law, particularly concerning war crimes and the protection of civilians and combatants during armed conflicts.<sup>96</sup> Humanitarian organisations, mainly the ICRC, play an essential role in monitoring compliance with the Geneva Conventions and providing assistance in conflicts. Nevertheless, there is a distinction between international humanitarian law and international criminal law that lies in the fact that the Geneva Conventions regulate substantive legal norms for the protection of victims of armed conflicts, while the Rome Statute provides a mechanism for prosecuting individuals responsible for grave breaches of these principles.<sup>97</sup>

Grave breaches of the Geneva Conventions, such as torture, wilful killing, and unlawful deportation, require states to prosecute perpetrators under universal jurisdiction or to hand them over for trial to another High Contracting Party concerned.<sup>98</sup> Nevertheless, states do not often fulfil this obligation. The Geneva Conventions impose obligations primarily on states, on the other hand, the Rome Statute extends accountability to individuals, representing a significant step in the evolution of international (humanitarian) law enforcement.<sup>99</sup> The relationship between the Geneva Conventions and the Rome Statute reinforces a comprehensive legal framework for addressing war crimes, ensuring that grave breaches are not only prohibited but also effectively prosecuted to uphold justice and accountability in armed conflict.<sup>100</sup>

For more concrete interplay between the Geneva Conventions, i.e. the cornerstone of international humanitarian law and international criminal law, it is very important to understand the development that took place before the adoption of the Rome Statute and to point out that the earliest records of the laws and customs governing warfare can be traced back to ancient times.<sup>101</sup> Gradually, this set of standards evolved and became more specific through national codes,<sup>102</sup> until finally, thanks to one man in particular, Henri Dunant, it was also adapted to the international level.<sup>103</sup> Since then, international humanitarian law, or the international law of armed conflicts, has been

96 Sassòli, 2024, pp. 481 et seq.

97 Henckaerts and Doswald-Beck, 2005, pp. 551 et seq.

98 Geneva Convention IV, 1949, art. 146.

99 Meron, 2000, p. 177.

100 Sassòli, 2024, pp. 481 et seq.

101 Cryer et al., 2010, p. 267.

102 For example the Lieber Code.

103 On the role of Henri Dunant and his experience of the soldiers' suffering after the Battle of Solferino in 1859 see e.g. Ondřej et al., 2010, pp. 96 et seq.

developing, which is fundamental to the concept of war crimes, while the *sine qua non* condition for their definition is the existence of an armed conflict and the link to it. On the other hand, however, it was not until after the Second World War that the international criminal responsibility of individuals for committing war crimes was really imposed: it happened so during Nuremberg Tribunals.

Since international treaties regulating the means and methods of warfare had already been adopted at the end of the 19th century and especially at the beginning of the 20th century, there was no concern about the conflict with the principle of *nullum crimen sine lege* when the Charter of the Nuremberg Tribunal was drafted. Thus, during the Nuremberg trials of the Nazi officials, some of them were prosecuted for war crimes pursuant to Article 6(b) of the Nuremberg Charter, according to which war crimes are considered to be:

‘violations of the laws or customs of war. Such violations shall include, but not be limited to, murder, ill-treatment or deportation to slave labour or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns or villages, or devastation not justified by military necessity.’

In its Judgement, the Tribunal stated that the crimes in question are crimes arising from the so-called Hague Law, i.e. the regulation of the means and methods of warfare, namely Articles 46, 50, 52 and 56 of the 1907 Hague Convention and Articles 2, 3, 4, 46 and 51 of the 1929 Geneva Convention, the violation of which is punishable at the international level.<sup>104</sup>

Despite such a clearly defined notion of war crimes, it was problematic for states to use the notion of war crimes after the World War II within the 1949 Geneva Conventions, which govern the protection of victims of war, the so-called Geneva law.<sup>105</sup> Instead of the concept of war crimes, the Geneva Conventions introduced the concept of grave breaches, and it was not until 1977, in Additional Protocol I to the Geneva Conventions, that states adopted an explicit provision considering grave breaches to be war crimes.<sup>106</sup>

The concept of war crime has been understood differently in terms of the development of the doctrine of international law.<sup>107</sup> On the one hand, the existence of armed conflict has always been inherent. On the other hand, the other elements depended

104 International Military Tribunal, United States of America, French Republic, United Kingdom of Great Britain and Northern Ireland and Union of Soviet Socialist Republics v. Goering and others, 1 October 1946, p. 253.

105 The Nuremberg Charter was based on the so-called Hague Law, which regulates the ways and means of waging wars; the Geneva Conventions regulate the so-called Geneva Law, i.e. the protection of the victims of wars. See also Schabas, 2011, p. 123.

106 Additional Protocol I, 1977, art. 85:5.

107 See also Solis, 2010, pp. 301 et seq.

on whether the term war crime was understood to mean only a grave breach of the Geneva Conventions of 1949 or any violation of international humanitarian law. However, the latter concept has not found resonance in the conduct of states, and currently only selected, serious violations of international humanitarian law are considered war crimes.<sup>108</sup> These undoubtedly include serious violations of the Geneva Conventions, a list of which is contained in the individual Geneva Conventions of 1949. In each of these Conventions, grave breaches include intentional killing, torture or inhumane treatment and intentional infliction of great suffering or serious injury. In addition, each Geneva Convention contains other grave breaches that correspond to the focus of the Convention concerned. Thus, not every violation of international humanitarian law is a grave breach. For example, the prohibition against prisoners of war wearing their own insignia or decorations, which constitutes a violation of international humanitarian law, does not result in individual criminal responsibility, but rather “only” in state responsibility for an internationally wrongful act.

The articles themselves, which introduce the concept of grave breaches, state that there are simple violations of international humanitarian law that are not serious. At the same time, however, they lay down the obligation on each High Contracting Party to take the necessary measures to suppress all acts contrary to the provisions of the Convention, even if they are not grave breaches.<sup>109</sup> In this context, it is worth noting that serious violations of the 1949 Geneva Conventions are not subject to statute of limitations; as referred to above, they may be prosecuted at any time by any States Party to those Conventions on the basis of the universal jurisdiction provided for in those Conventions.<sup>110</sup> Although there is no statute-limitation provision in the Conventions themselves, it has been reaffirmed in 1968 UN Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity and in the 1977 Additional Protocol I.

The first prosecution of grave breaches of the Geneva Conventions took place in relation to the conflicts in the former Yugoslavia. The treatment of the concept of war crimes in the ICTY Statute reflected developments that had been made in the field of international humanitarian law. Since the Nuremberg Charter, not only have the aforementioned Geneva Conventions been adopted, but so have their Additional Protocols and other international treaties regulating the use or prohibition of the use of specific weapons or means of warfare. Gradually, therefore, there has been a kind of split in this area, which has highlighted the distinction between customary

108 Cassese, 2008, pp. 84–85.

109 Compare art. 49, Geneva Convention I., art. 59, Geneva Convention II, art. 129, Geneva Convention III, and art. 146, Geneva Convention IV, 1949.

110 See e.g. Geneva Convention I, 1949, art. 49.

international humanitarian law and the international humanitarian law of treaties.<sup>111</sup> The ICTY Statute thus regulates war crimes in its Articles 2 and 3, distinguishing between treaty and customary international humanitarian law. Article 2 of the ICTY Statute is based on grave breaches of the 1949 Geneva Conventions and as the ICTY's jurisdiction *ratione materiae*, it regulates the investigation and prosecution of wilful killing, torture or inhuman treatment, including biological experimentation, widespread destruction and appropriation of property unjustified by military necessity and carried out unlawfully and arbitrarily, the unlawful deportation or transfer or unlawful restraint of a civilian, and other grave breaches. Article 3 of the ICTY Statute adds to these crimes 'violations of the laws and customs of war', including the use of poisoned weapons or other weapons intended to cause unnecessary suffering, the arbitrary destruction of towns or villages or devastation not justified by military necessity, the attack or bombardment by any means of undefended towns, villages, dwellings or buildings, and pillaging.

According to Common Article 3 of the 1949 Geneva Conventions, in the event of a non-international armed conflict, each party to the conflict will, at the minimum, govern itself by treating persons *hors de combat* humanely and without discrimination. This positive obligation is concretised in a negative manner, i.e. it prohibits specified conduct, namely:

- 'a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- b) taking of hostages;
- c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognised as indispensable by civilised peoples.'

Moreover, human conduct is regulated in a positive way as well, in Article 3 (2) of the Geneva Conventions, according to which the wounded and sick will be collected and cared for.

As expressed by the International Court of Justice in the *Nicaragua* case, Common Article 3 constitutes the minimum benchmark of the rules of international

111 This distinction, stricter than in other areas of international law, was sought to be reversed by the International Committee of the Red Cross study on customary international humanitarian law. The study focuses on national legislation and the practice of national armed forces and identifies a set of principles and rules which, according to the study, already form part of customary international humanitarian law. For further information, see the ICRC study materials available online, International Committee of the Red Cross, Customary International Humanitarian Law.

humanitarian law for both types of conflicts.<sup>112</sup> In the case of non-international armed conflicts, it should be remembered that no other article of the Geneva Conventions applies, except for Article 3. This means, among other things, that, for example, prisoner-of-war status cannot be granted during such conflicts. However, the question of whether it is possible to commit war crimes and serious violations of the Geneva Conventions during a non-international armed conflict is currently answered differently. Since the 1949 Geneva Conventions apply only during international armed conflicts, the very notion of grave breaches of the Geneva Conventions would not be possible to be established in non-international armed conflicts. This was also the initial position of the ICTY.<sup>113</sup> However, a few years later, the Appeals Chamber of the same judicial body held that to maintain a legal distinction between two legal regimes and their legal consequences in relation to similar acts because of differences in the nature of the conflict would ignore the very purpose of the Geneva Conventions.<sup>114</sup> Theodor Meron, then President of the ICTY, commented that there was no moral justification and indeed no compelling legal reason to treat perpetrators of horrors in internal conflicts more leniently than those who perpetrated those horrors in international armed conflicts.<sup>115</sup>

Article 8 of the Rome Statute is based on the experience and decisions of the *ad hoc* tribunals, in particular the ICTY.<sup>116</sup> Despite its complexity, however, even Article 8 of the Rome Statute does not bridge the divide between war crimes according to whether they were committed during an international or non-international armed conflict and whether they are governed by customary international law or international treaty law. The above is also interesting because the reasoning explaining the extension of the applicability of war crimes under Article 3 of the ICTY Statute (laws and customs of war, i.e. customary international humanitarian law) to non-international armed conflicts was already adopted by the ICTY Appeals Chamber in the *Tadić* case and is fully accepted nowadays. In that decision, the Chamber stated that for this applicability, the war crimes must satisfy the elements of a crime in relation to international humanitarian law, the rule in question must be of a customary or applicable treaty nature, the violation must be of a serious nature,<sup>117</sup> i.e. the rule must be one that protects important values, its violation must entail serious consequences for the victim, and the violation refers to individual criminal liability, whether under customary or treaty law.<sup>118</sup> Some of the most common war crimes, such as deliberate attacks against

112 International Court of Justice, *Military and Paramilitary Activities in and Against Nicaragua*, Advisory Opinion, para. 218.

113 *Tadić*, 1995, para. 84.

114 *Prosecutor v. Delalić et al.*, ICTY, 2001, para. 172.

115 Compare Meron, 1995, p. 561.

116 La Haye, 2008, p. 112.

117 See also Henckaerts and Doswald-Beck, 2005, p. 569.

118 *Tadić*, 1995, para. 95.

civilians or looting of private property, violate basic rules of international humanitarian law linked to the distinction between military and civilian objectives.<sup>119</sup>

Article 8 of the Rome Statute divides war crimes into four categories according to the way war crimes have been progressively regulated under the influence of historical development. The first category includes grave breaches of the 1949 Geneva Conventions; the second group consists of other grave breaches of the laws and customs applicable during international armed conflict,<sup>120</sup> the third category covers serious violations of Common Article 3 of the 1949 Geneva Conventions, and the fourth category lists other serious violations of the laws and customs applicable in non-international armed conflicts.<sup>121</sup> Such a distinction is not practical in the sense that, for example, where an offender is charged with an attack on protected property during an armed conflict, he or she may be prosecuted for:

- a) the extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; [Article 8(2)(a)(IV) of the Rome Statute],
- b) intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated [Article 8(2)(b)(IV) of the Rome Statute],
- c) destroying or seizing the enemy's property unless such destruction or seizure be imperatively demanded by the necessities of war [Article 8(2)(b)(XIII) of the Rome Statute].

It would therefore be more pragmatic to categorise war crimes according to the value they aim to destroy (e. g. the protection of civilian life or civilian property). Moreover, several provisions of Article 8 of the Rome Statute require proof of the same *actus reus* and *mens rea*, irrespective of the nature of the conflict, i.e. it makes no difference whether the conduct is in the context of an international or non-international conflict.<sup>122</sup> The factual result is also the frequent repetition or duplication of the same elements of war crimes, such as the war crime of attacking civilians, which is referred to both in Article 8(2)(b)(I) of the Rome Statute (customary law in international armed conflict) and in Article 8(2)(e)(I) of the Rome Statute (customary law in non-international armed conflict). The only difference, even when comparing relevant provisions

119 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion delivered on 8 July 1996, ICJ Reports, 1996, paras. 95, 79.

120 These war crimes are primarily based on the 1907 Hague Convention on Land Warfare, the 1977 Additional Protocol I to the Geneva Conventions, the Hague Declaration IV on cluster missiles and the 1925 Geneva Protocol, which prohibits the use of biological and chemical weapons.

121 The wording of this group of war crimes stems mainly from the 1907 Hague Conventions and the 1977 Additional Protocol II to the Geneva Conventions.

122 Cassese, 2011, p. 121.

of the more detailed document *Elements of Crimes*,<sup>123</sup> is that in the former case the crime must be committed during an international armed conflict and in the latter case during a non-international armed conflict.

However, there is a politico-legal rationale for this wording of Article 8 of the Rome Statute. This justification relates to the fact that, despite its breadth, Article 8 of the Rome Statute does not cover all serious violations of international humanitarian law. During the 1998 Rome Conference, when the Statute was adopted, the negotiations on war crimes were influenced by two requirements: first, the norm in question had to be customary in nature, since, apart from the Geneva Conventions of 1949, other treaty arrangements on international humanitarian law had not been universally ratified. Second, the violation of the norm in question had to give rise to individual criminal responsibility under customary international law.<sup>124</sup> As a number of states have not ratified Additional Protocol I to the Geneva Conventions and do not recognise it as a customary law norm, some serious violations of international humanitarian law have not been included in draft Article 8 of the Rome Statute, and some have been added only after the wording of the relevant treaty provisions has been modified.<sup>125</sup> The Rome Statute thus lacks some war crimes related to the protection of victims of war<sup>126</sup> and some of those dealing with the use of prohibited ways and means of waging armed conflict.<sup>127</sup> However, as a result of the 1998 Rome Conference negotiations, Article 8(2)(b)(XX) of the Rome Statute allows for the addition of prohibited weapons to the list.

On the other hand, the listing of certain war crimes in relation to the protection of the victims of war could be used to investigate and prosecute those war crimes that give rise to criminal responsibility of an individual for the use of prohibited ways and means of war but are not listed in Article 8 of the Statute. In such a case, attacking civilians with biological or chemical weapons would also be prosecutable before the ICC, albeit “only” as part of the war crime of attacking civilians, and not under the use of biological or chemical weapons.

123 International Criminal Court (ICC), 2011, *Elements of Crimes*.

124 Lee, 1999, p. 104.

125 International Committee of the Red Cross (ICRC), *War Crimes under the Rome Statute of the International Criminal Court and Their Source in International Humanitarian Law: Comparative Table*.

126 For example, conducting an attack that does not distinguish between civilians and combatants, even though the International Court of Justice has already stated in its judgement, in addition to the prohibition of attacking civilians, the prohibition of the use of weapons that are incapable of distinguishing between civilians and combatants as a fundamental rule of international humanitarian law. For more details, see: *Use or Threat of Use of Nuclear Weapons*, para. 78.

127 As there was no consensus among states on the inclusion of a ban on the use of nuclear weapons, several states refused to include other types of weapons of mass destruction, such as biological and chemical weapons. Therefore, in relation to weapons of mass destruction, the Rome Statute only included weapons that were undoubtedly prohibited by customary law, such as poisoned weapons. See also von Hebel and Robinson in Lee, 1999, pp. 113-116. A slight change followed only during the Review Conference in Kampala.

When comparing the provisions governing war crimes during an international armed conflict and those war crimes occurring during a non-international armed conflict, it is clear from a quantitative point of view that the latter group lists approximately half as many war crimes. Although some of the elements of war crimes committed during an international armed conflict are formulated in a way that would not be applicable to war crimes committed during a non-international armed conflict, there are some missing elements whose application would not be a problem. In this regard, there is a clear conflict between the position of some states that these norms prohibiting the conduct in question do not yet meet the characteristics of customary law and the 1995 ICTY decision that customary norms prohibiting the use of certain weapons are equally applicable to international and non-international armed conflicts.<sup>128</sup> The best example is probably the prohibition of the deliberate starvation of civilians, which is a war crime under the Rome Statute in an international armed conflict for all States Parties, but it is not the case for non-international armed conflicts when a States Party has not accepted an amendment of the Rome Statute adopted in 2019.<sup>129</sup>

Building upon the ICTY case-law, the Rome Statute expands accountability by criminalising violations of the Geneva Conventions not only in international armed conflicts but also in non-international armed conflicts,<sup>130</sup> further building on Common Article 3. Under Article 8 of the Rome Statute, war crimes include “grave breaches” of the Geneva Conventions, such as wilful killing, torture, inhumane treatment, and unlawful deportation (Rome Statute, 1998; Geneva Conventions, 1949). The Rome Statute’s enumeration of war crimes in international armed conflicts thus directly reflects the protections enshrined in the First to Fourth Geneva Conventions, particularly regarding the wounded, prisoners of war, and civilians. For instance, the Rome Statute prohibits targeting medical units and personnel under Article 8(2)(b)(IX), which is consistent with the Geneva Conventions’ rules on protecting the wounded and sick in armed conflicts.<sup>131</sup> Another example is about criminalising torture: the Geneva Conventions prohibit torture,<sup>132</sup> and the Rome Statute recognises torture as both a war crime and a crime against humanity.<sup>133</sup>

The Rome Statute also reflects the criminalisation of the violation of IHL principles what is confirmed e.g. by the inclusion of “attacks on civilians” and the deliberate targeting of protected persons or objects in Article 8 of the Rome Statute that aligns with the Geneva Conventions’ principles of distinction and proportionality.

128 What is inhumane and therefore prohibited in international armed conflicts cannot be other than inhumane and unacceptable in a non-international armed conflicts. Compare *Tadić* 1995, para. 119.

129 See: The Amendment to article 8 of the Rome Statute of the International Criminal Court (Intentionally Using Starvation of Civilians as a Method of Warfare), 2019.

130 See: Rome Statute, art. 8:2 (c).

131 Geneva Convention I, 1949, art. 19.

132 Arts. 3, 12, 17.

133 Rome Statute of the International Criminal Court, 1998, art. 7:1 (f); art. 8:2 (a)(II).

Moreover, Article 8(2)(b)(XX) of the Rome Statute criminalises the use of “weapons of a nature to cause unnecessary suffering”, reflecting the Geneva Conventions’ broader principle of limiting superfluous injury or unnecessary suffering. The Rome Statute also criminalises attacks on humanitarian and peacekeeping personnel under Article 8(2)(b)(III), reflecting obligations to protect humanitarian assistance enshrined in the Geneva Conventions.<sup>134</sup>

Grave breaches of the Geneva Conventions, as defined under the articles specific for each of these Conventions,<sup>135</sup> are prosecutable under the Rome Statute, ensuring that individual criminal responsibility is imposed for serious violations of IHL.<sup>136</sup> The Rome Statute thus provides an enforcement mechanism that was previously absent from the Geneva Conventions, enabling the prosecution of perpetrators by a permanent international court.<sup>137</sup>

## 6. Conclusion

The legacy of the 1949 Geneva Conventions lies in their continuing relevance to contemporary armed conflicts, as demonstrated by the ongoing disputes in the Middle East, Africa, and other regions, including Ukraine.<sup>138</sup> The adoption of the conventions was a milestone in international law, symbolising a collective effort to “humanise war”, while acknowledging the limits of what law can achieve in wartime. Ultimately, the 1949 Geneva Conventions and their 1977 Additional Protocols remain foundational instruments in international humanitarian law and their universal commitment to protect human dignity in times of armed conflict.<sup>139</sup>

134 Henckaerts and Doswald-Beck, 2005, pp. 112–114, 582.

135 Geneva Convention I, art. 50; Geneva Convention II, art. 51; Geneva Convention III, art. 130; Geneva Convention IV, art. 147.

136 Henckaerts and Doswald-Beck, 2005, pp. 568 et seq.

137 Sassòli, 2024, pp. 485 et seq. Even the first ICC judgement that was adopted on 14 March 2012 in a case against Thomas Lubanga Dyilo convicted the accused of having committed war crimes (specifically the conscripting, enlisting, and using of children under the age of 15 to participate actively in hostilities).

138 Sassòli, 2024, p. 704.

139 International Committee of the Red Cross (ICRC), 2024, Campaign – Respect the Rules of War, Respect Humanity during Armed Conflicts; see also Crowe and Weston-Scheuber, 2013, pp. 2 et seq.

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