IUS AD BELLUM AND IUS IN BELLO
Humanitarian Law of Armed Conflict[1]

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June 2022

This chapter on International Humanitarian Law and International Criminal Law deals firstly with the rules governing the conduct of hostilities, once an armed conflict has erupted. The term in latin for this body of law is **"*ius in bello*"** and is distinguished from the rules of the International Law relating to the use of armed force, which is the other category of the Law of War. The rationale behind the existence of this body of law lies in the fact that, if it is not possible to achieve deterrence of war (and international history shows that it is not really possible), at least the armed conflict must be subject to certain humanitarian rules and limitations, in order to protect, for example, prisoners, wounded soldiers and civilian population, and to prohibit the use of certain weapons systems.

Various problems arise in relation to the application of this sub-branch of the law. On the one hand, although the declaration of war is no longer an application criterion, as it has become a rather rare practice, however, is it very difficult occasionally to distinguish between the state of war and non-state of war. On the other hand, International Humanitarian Law requires some sort of synthesis between the Law of War and international Law of Human Rights. But this attitude is not generally accepted, because it is not clear which human rights are applicable in time of war. This does not mean that international conventions of human rights are irrelevant to armed conflict and military occupation.

Secondly, the International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons under the Law of Armed Conflict is being considered. International Criminal Law is analyzed in this respect, as violations of the rules of the Law of Armed Conflict constitutes simultaneously war crimes.

1. Lawful and Unlawful Conduct of War - International Humanitarian Law of Armed Conflict*:*

To many people it seems paradoxical that war should be conducted based on legal rules. Why should a nation fighting for survival allow its struggle to be hindered by legal constraints?[2] The answer lies in the fact that the

[1] See generally the leading authority on the subject matter, Roberts, Adam and Guelff, *Documents on the Laws of War* (Oxford: Oxford University Press, 2000).
[2] It is my submission that the view expressed by Michael Akehurst that "nations did not regard themselves as fighting for survival in the eighteenth and nineteenth centuries. Wars were seldom fought for ideological reasons and tended not to rouse the same intensity of passion as twentieth century wars" (*Modern Introduction to International Law*, Routledge, 1997, page 343). Proof of the opposite is the Greek revolution (the large-scale and perpetual war), which took place both for the national survival of the Greeks as well as for the protection and preservation of the ideology and conscience of Hellenism.

bipolar system of balance of power of the past century dictated flexibility in political alliances and meant that the present enemy of a State could be his tomorrow's ally. This, of course, has led to a reduction of the degree of intensity in wartime, for precisely the States did not wish to elicit endless bitterness among potential future allies.

A more important reason for these political calculations is that the laws of war, the rules of conduct of armed conflict, are intended to prevent unneeded or unnecessary suffering. Unnecessary suffering means that those tribulations that do not result in any military advantage, or those of which have a military advantage which is very small compared to the tribulations.

Wars during the eighteenth and nineteenth centuries were wars both among civilians and between armed forces. The great military writer of the nineteenth century, *Clausewitz*, wrote that *"the destruction of the war machine or the military power of the adversary is the cornerstone of all the mercurial action."*[3] According to this logic, it is legitimate for International Law to protect civilians. But this protection cannot always be absolute. For another reason, it is a fact that sometimes an army forces a city to surrender by foreclosing and cutting off supplies for citizens.

During the second half of the nineteenth century, States began issuing manuals of military law. A famous example is the ***Lieber Code***. It was prepared by *Francis Lieber* of the University of Columbia and was entitled "*Instructions for the Government of Armies of the United States in the Field*". The Code was drafted in 1863 under a committee of officers approved by President Lincoln, under the guidance of Lieber himself.[4] The first international conventions of the time were the Geneva Conventions of 1864 and 1906, the three Hague Conventions of 1899 (relating to the conduct of land and sea warships), and the thirteen Hague Conventions of 1907, which concerned all the remaining aspects of humanitarian law.

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[3] On War (1832)

[4] In his lecture at the beginning of the seventh annual meeting of the American Society of International Law, which was dedicated to the Lieber Code, the president of Elihu Root stressed the humanitarian content of the Code: *"While the instrument was a practical presentation of what the laws and usages of war were, and not a technical discussion of what the writer thought they ought to be, in all its parts may be discerned an instinctive selection of the best and most humane practice and an assertion of the control of morals to the limit permitted by the dreadful business in which the rules were to be applied."* (Opening Address by Elihu Root at the Seventh Annual Meeting of the American Society of International Law April 24, 1913, reprinted in 7 *American Journal of International Law* 453 (1913)). Evaluating Lieber's work, Bluntschli, a professor in Heidelberg, said the following: *"His legal injunctions rest upon the foundation of moral precepts. The former are not always sharply distinguished from moral injunctions, but nevertheless, through a union with the same, are ennobled and exalted. Everywhere reigns in this body of law the spirit of humanity, which spirit recognizes as fellow-beings, with lawful rights, our very enemies, and which forbids our visiting upon them unnecessary injury, cruelty, or destruction. But at the same time, our legislator remains fully aware that, in time of war, it is absolutely necessary to provide for the safety of armies and for the successful conduct of a campaign; that, to those engaged in it, the harshest measures and most reckless exactions cannot be denied; and that tender-hearted sentimentality is here all the more out of place, because the greater the energy employed in carrying on the war, the sooner will it be brought to an end, and the normal condition of peace restored."* (*Introduction: Lieber's Service to Political Science and International Law*, in 2 Francis Lieber: *The Miscellaneous Writings of Francis Lieber: Contributions to Political Science* 12-13 (1881)). In some respects, including the absolute prohibition of rape and the protection of the occupied territories, the Code was more advanced than the Hague Regulations: All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense (Code Lieber, article 44). It is remarkable that the aforementioned crimes are punishable with the death penalty.

Since the end of the First World War, human rights treaties were developed from time to time. The London Treaty of 1930 and the London Protocol of 1936 attempted to regulate the use of submarines, but they were already abolished from the start of the Second World War. The Geneva Protocol banned the use of gas, while a Convention and a Protocol were signed in Hague in 1954 to protect the cultural heritage in time of armed conflict.

It is noteworthy to state that the basic provisions of the Convention constituted a landmark in International Humanitarian Law.

Definition of Cultural Property: ***Article 1***: For the purposes of the present Convention, the term *"cultural property"* shall cover, irrespective of origin or ownership: **(a)** movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art;…objects of artistic or archaeological interest; as well as collections…

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in subparagraph (a) such as museums, depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in subparagraph (a).

The second, third and fourth Article of the Convention define and explain the protection of cultural property.

Article 2: Protection of Cultural Property: For the purposes of the present Convention, the protection of cultural property shall comprise the safeguarding of and respect for such property.

Article 3: The High Contracting Parties undertake to prepare in time of peace for the safeguarding of cultural property situated in their own territory against the foreseeable effects of an armed conflict, by taking such measures as they consider appropriate.

Under the ***Article 4.1.***: Respect for Cultural Property: The High Contracting Parties undertake to respect cultural property situated within their own territory as well as within the territory of other High Contracting Parties by refraining from any use of the property and its immediate surroundings or of the appliances in use of its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict; and by refraining from any act of hostility directed against any such property.

Article 4.2.: The obligations mentioned in paragraph 1 of the present Article may be waived only in cases where military necessity imperatively requires such a waiver.

Article 4.3.: The High Contracting Parties further undertake to prohibit, prevent, and if necessary to put a stop to any form of theft or misappropriation of, and of any acts of vandalism directed against, cultural property.

Article 4.4.: They shall refrain from any act directed by way of reprisals against cultural property.

Article 4.5.: No High Contracting Party may evade the obligations incumbent upon it under the present Article, in respect of another High Contracting Party, by reason of the fact that the latter has not applied the measures of safeguard referred to in Article.

The *Hague Convention*, furthermore, in ***Article 5*** refers to the significant protection that the Contracting Parties undertake to provide for cultural property in time of military occupation. Under ***Article 5.1.***, any High Contracting Party in occupation of the whole or part of the territory of another High Contracting Party shall as far as possible support the competent national authorities of the occupied country in safeguarding and preserving its cultural property. Under ***Article 5.2.***, should it prove necessary to take measures to preserve cultural property situated in occupied territory and damaged by military operations, and should the competent national authorities be unable to take such measures, the Occupying Power shall, as far as possible, and in close co-operation with such authorities, take the most necessary measures of preservation.

One convention and three protocols were concluded in 1980 to reduce the use of hard conventional weapons, for example, napalm bombs. The First Review Convention of the Convention on Certain Conventional Weapons of 1980, which was convened in Vienna in 1995, adopted new protocols, which concern blinding laser weapons and landmines. More importantly, however, are the two Geneva Conventions of 1929 for the protection of sick and injured soldiers, sick and injured sailors and war prisoners, and the four Geneva Conventions of 1949 on the Protection of Wounded Soldiers, Prisoners of War and Civilians, accompanied by two protocols of 1977. It primarily aims to protect only two categories of citizens: those who are in hostile territory at the beginning of war, and those who live in territory ruled and occupied by the enemy during the war. It is noteworthy that in the case of the Geneva Conventions of 1949 ratification is now literally universal. With the accession of the Republic of Cyprus on 18 March to Protocol II of 1977, the number of Member States in the Protocol reached 135.

The codification of International Law Humanitarian Law through treaties has not diminished the continuing role of the principles of international customary law. This is expressed by the so-called Martens proposal (*Martens Clause*) in the Preamble of the Hague II Convention:

> *"Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of International Law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of public conscience."*

Nowadays, technological changes occur so rapidly that each war differs dramatically from previous wars. It is astonishing that there is no judicial declaration or judicial precedent on the legality or illegality of bombardment. There are two additional causes which encouraged violations of the laws of war during the twenty and twenty-first centuries. In the first place, the First and Second World Wars caused bitter feelings than previous wars. Secondly, economic and technological developments have greatly increased the military advantage that one can gain by violating the laws and rules of war.

2. The International Court of Justice's Advisory Opinion on the Threat or Use of Nuclear Weapons

In 1961, the United Nations General Assembly adopted a resolution declaring that the use of nuclear weapons is illegal. Fifty-five States (mainly Communist and Third-Party) have voted in favor of the resolution, twenty (mainly Western countries) voted against, and twenty-six States (mainly Latin American countries) abstained. The diametric difference between the positions of Communist and Western countries is explained by the fact that the Soviet supremacy of conventional (i.e. non-nuclear) weapons in Europe was so great (before the Red Army's withdrawal from Eastern Europe) so that the Western States would most probably be forced to use nuclear weapons to defend themselves against an invasion of Western Europe by Soviet forces using conventional weapons. Some rules of International Law can proportionately be applied to nuclear weapons. Nuclear weapons could be compared with massive bombing attacks during the Second World War. However, there was no treaty prohibiting such bombings then. The First Protocol of the Geneva Convention of 1977, nevertheless, set some barriers to this practice of bombardments.

Geneva Convention **Article 48** of the 1977 Protocol I provides:

> *"In order to ensure respect and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between objects and military objectives, and accordingly shall direct their operation only against military objectives."*

However, the United States, when signing the Convention, pointed out in the minutes that the rules established by this Protocol would not apply to and would not determine the use of nuclear weapons. Similar statements were made by the British and French Governments.

The question of the lawful use of nuclear weapons was raised before the International Court of Justice on the basis of a Request from the United Nations General Assembly on 6 January 1996. The General Assembly requested the International Court of Justice to urgently submit its Opinion on the following question: *"Is the threat or use of nuclear weapons under any circumstances permissible under International Law?"* Different majorities arose between the judges during the various phases and steps of the decision. The Court ruled that there is no specific licensing of the threat or use of nuclear weapons (unanimously) in international customary law or in international treaty law, but also that there is no total and universal ban (eleven votes against three). The Court furthermore unanimously adopted the verdict that *"the threat or use of force by form of nuclear weapons, which is contrary to* ***Article 2(4)*** *of the United Nations Charter, and which does not satisfy all the requirements of* ***Article 51****, is illegal"*. In essence, the Court has advised that the use of nuclear weapons is legal, legitimate and permissible only for the purposes of self-defence of States under ***Article 51*** of the UN Charter, a provision which constitutes an exception to the general prohibition on the use of armed force.

In this Opinion, Judge Higgins, a former Professor of International Law at London School of Economic and Political Science in the University of London, disagreed on the issue of the use of nuclear weapons. It is noteworthy that ***Article 51*** of the UN Charter, as well as ***Article 42***, on the basis of which the Security Council is legally entitled to take armed action to restore the legal regional order in accordance with VII of the UN Charter, does not refer to certain weapons. It refers to any use of armed force, regardless of the weapons systems. The UN Charter neither allows nor does it clearly prohibit the use of nuclear weapons. On the other hand, it should be pointed out that the use of armed force according to Article 51 of the UN Charter (self-defence) is subject to the requirements of necessity and proportionality. In the Case concerning *Military and*

Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America, International Court of Justice – I.C.J. – Reports 1986, p. 94, para. 176): the Court held: *"there is a specific rule whereby self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary International Law"*. The principle of proportionality, however, does not in itself prohibit the use of nuclear weapons in self-defence. At the same time, the use of an armed force which is proportionate to the law or to the doctrine of self-defence must, in order to be lawful and legal, fulfil the conditions of and rules of Humanitarian Law of Armed Conflict. In this regard, the Court points out that the nature of nuclear weapons and the obvious risks associated with their use must be taken into account by States which intend to use nuclear weapons in the form of self-defence in accordance with the principle of proportionality. In such case, there will probably be some kind of violation of the *Ius in Bello*, that is the rules of the humanitarian law of the armed conflict. This suggests the general superiority of "*Ius ad Bellum"* over "*Ius in Bello"*. The irrefutable fact remains that the International Court of Justice allows in its Opinion the use of nuclear weapons for the purposes of Self-Defence.

In this context, it is also necessary to underline the fact that the Treaty on Non-Proliferation of Nuclear Weapons has also emerged in this field. Nevertheless, this Treaty confirms the privilege of the official nuclear nations, the five permanent members of the UN Security Council, to possess nuclear arsenal and excludes the possession of such weapons by other Countries.

3. International Criminal Law

However, the violation of the Law of the Armed Conflict on part of States generally amounts to commission of war crimes, so International Criminal Law and the need for its implementation is brought into the picture, which virtually penalizes the commission of such crimes. Significant developments have occurred with the adoption of the *Statute of Rome*, which states in ***Article 1***: The Court: An International Court is hereby established. It shall be a permanent institution and shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern, as referred to in this statute. Let us analyze in succession the crimes that the Court may try, and the exact definition of these crimes.[5]

Statute of Rome ***Article 5:*** Crimes within the jurisdiction of the Court: The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole. The Court has jurisdiction in accordance with this Statute with respect to the following crimes:

(a) The crime of genocide
(b) Crimes against humanity
(c) War crimes
(d) The Crime of aggression

[5] See the excellent textbook of Cassese, *The Rome Statute of the International Criminal Court* (Oxford University Press, 2002). Respect to the Constitution of the International Criminal Court useful are the reports of Christopher Keith Hall: *The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 *American Journal of International Law* 177 (1997); *Idem: The Third and Fourth Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 *American Journal of International Law* 124 (1998); *Idem, The Fifth Session of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 92 *American Journal of International Law* 331 (1998).

Violence or aggression in International Law, is defined as the use of armed violence by one State against another, which is not justified by self-defence or any other legally recognized exception to the general prohibition of the use of force as enshrined in the UN Charter.

Genocide, for the purposes of the *Statute of Rome* is defined in ***Article 6*** as follows*:* Genocide: For the purpose of this Statute *"genocide"* means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such:

(a) Killing members of the group
(b) Causing serious bodily harm to members of the group
(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
(d) Imposing measures intended to prevent births within the group
(e) Forcibly transferring children of the group to another group

Statute of Rome ***Article 7.1.:*** Crimes against humanity: for the purpose of this Statute, *"crime against humanity"* means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

(a) Murder
(b) Extermination
(c) Enslavement
(d) Deportation or forcible transfer of population
(e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of International Law
(f) Torture
(g) Rape, sexual slavery, enforced prostitution, forced pregnancy, or any other form of sexual violence of comparable gravity[6]
(h) Persecution against any identifiable group on political, racial, national, ethnic, cultural, religious, gender or other grounds that are universally recognized as impermissible under International Law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court.

[6] As far as rape is concerned, it is noteworthy that the Statute for the establishment of an international arbitral in the case of the former Yugoslav proposed by the Secretary-General of the United Nations involves rape as a crime against humanity (UN Doc. S/ 25704). This statute was approved by the Security Council resolution 827 (SC Res. 827). In the same climate is notable the letter of Robert Bradtke, executing U.S. Secretary of State for legislative affairs to Senator Arlen Specter, 27th of 1993: violation of the Geneva Conventions is a war crime (FM 27-10, para 499). Article 27 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that women shall be "especially protected…against rape". Article 13 of the Geneva Convention Relative to the Treatment of Prisoners of War provides that prisoners "must at all times be protected, particularly against acts of violence"; article 14 requires that women "be treated with all the regard due to their sex". Both Conventions list grave breaches, including willful killing, torture or inhuman treatment, and (with regard to civilians) willfully causing great suffering or serious injury to body or health. Under the Geneva Conventions and customary international law, all parties to an international conflict (including all parties to the conflict in the former Yugoslavia) are required either to try persons alleged to have committed grave breaches or to extradite them to a party that will. In our reports to the United Nations on human rights violations in the former Yugoslavia, we have reported sexual assaults as grave breaches. We will continue to do so and will continue to press the international community to respond to the terrible sexual atrocities in the former Yugoslavia.

At this point, an identification of crimes against humanity with the crime of genocide is evident, or otherwise it is possible to commit crimes that constitute both crimes against humanity and genocide.
(i) Enforced disappearance of persons
(j) The crime of apartheid
(k) Other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to or physical health[7]

Statute of Rome ***Article 8*** *paragraph 2*: War crimes: For the purpose of this Statute, *"war crimes"* means: **(a)** Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Conventions:

i. Willful killing;
ii. Torture or inhuman treatment, including biological experiments;
iii. Willfully causing great suffering, or serious injury to body or health;
iv. Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully;
v. Compelling prisoner of war or other protected person to serve in the forces of a hostile Power;
vi. Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial;
vii. Unlawful deportation transfer or unlawful confinement;
viii. Taking of hostages;

(b) Other serious violations of the laws and practices applicable to armed conflict, within the established framework of International Law, below the name of any of the following:

i. Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;
ii. Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;
iii. Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United

[7] In the case Tadic the International Criminal Court delivered the following important: It is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all. Thus, by requiring that crimes against humanity be committed in either internal or international armed conflict, the Security Council may have defined the crime in Article 5 more narrowly than necessary under customary international law. There is no question, however, that the definition of crimes against humanity adopted by the Security Council in Article 5 [of the Statute] comports with the principle "*nullum crimen sine lege*". The statement by the American Government of 23 March 1998 on the criminalisation of acts carried out during non-international conflicts is also on the same wavelength: The United States strongly believes that serious violations of the elementary customary norms reflected in common Article 3 should be the centerpiece of the ICC's subject matter jurisdiction with regard to non-international armed conflicts. Finally, the United States urges that there should be a section…covering other rules regarding the conduct of hostilities in non-international armed conflicts. It is good international law, and good policy, to make serious violations of at least some fundamental rules pertaining to the conduct of hostilities in non-international armed conflicts a part of the ICC jurisdiction (Meron, *War Crimes Law comes of Age*, Oxford University Press, 1998). I think, however, that this approach is a bit dangerous, because it allows international criminal law to intervene in cases which may have a purely internal character and an ethnic dimension.

Nations, as long as they are entitled to the protection given to civilians or civilian objects under the International Law of armed conflict.

iv. 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;

v. Attacking or bombarding by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives;

vi. Killing or wounding a combatant who, having laid down his arms or having no longer means of defence, has surrendered at discretion.

Statute of Rome ***Article 77.1.:*** The Court may impose one of the following penalties on a person convicted of a crime referred to in article 5 of this Statute:

(a) Imprisonment for a specified number of years, which may not exceed a maximum of 30 years or
(b) A term of life imprisonment when justified by the extreme gravity of the crime and the individual circumstances of the convicted person.

Statute of Rome ***Article 77.2.:*** In addition to the imprisonment the Court may order:

(a) A fine under the criteria provided for in the Rules of Procedure and Evidence;
(b) A forfeiture of proceeds, property and assets derived directly or indirectly from that crime.

It is high time for States such as Cyprus and at this very hour Ukraine, which have suffered enormously from the commission of war crimes in the context of expansionist illegal interventions, to appeal to the International Criminal Court and bring to trial those individuals criminally responsible, in order that international justice be properly done and public catharsis be achieved.