Methods in Armed Conflict: The Legal Framework
Issues Addressed

- Distinction between combatants and civilians
- Combatant status
- Definition of civilians
- Distinction between combatants and soldiers *hors de combat*
- Military objectives under IHL
- Legitimate targets
- Perfidy and ruses of war
- Reprisals
Arcadian and Utopian forces have been fighting for some time. In one military operation, Utopia sent two military aircrafts towards the second largest Arcadian city, Samazi. Their mission was to attack a bridge on the outskirts of this city. When the planes approached the bridge, the pilots saw two armored trucks approaching the bridge from the west, while one truck with a red cross on a white background painted on the roof was on the bridge, heading slowly westwards. They also saw that a number of individuals, around 40, in civilian clothing were standing on the bridge, and they assumed that most of the civilians would be killed if they bombed the bridge.

The pilots contacted their headquarters, who responded that the bridge was a legitimate military target of imperative importance, and that it had to be destroyed. They were told that the civilians should not be there in the first place, and that the civilians had to be viewed as voluntary human shields that could not de-legitimise the target. They were also told that Arcadia probably painted red crosses on military trucks to spare them from attack, and that the pilots should not worry about the cross. The two pilots then bombed the bridge without further warning, killing all civilians on the bridge and destroying the truck with the red cross. The two military trucks west of the bridge were not harmed.
After the bombing, the planes continued towards Semazi to make observations of the area. Suddenly they encountered anti-aircraft fire from an unspotted ground location, and both planes were critically damaged. After realising that the planes would go down, both pilots decided to eject to save their lives, and they parachuted. They were in Utopian uniforms and carried light handguns, but were otherwise unarmed. They landed about 500 meters apart.

One pilot heard a vehicle approaching, and he decided to surrender. When the vehicle came into sight, he had one hand on his handgun, and the other hand was on his back. Without any warning, a soldier in the vehicle shot and killed the pilot.

The second pilot managed to escape, and he hid in a cave some kilometres away. The Arcadian commander decided that he couldn’t spare personnel to locate the pilot, and he ordered instead two soldiers to hire some local shepherds to look for the pilot and to inform the soldiers if they found him. The shepherds were unarmed and wore their ordinary, civilian clothing. When one of the shepherds approached the cave where the pilot was hiding, the pilot shot and killed him from his hiding-place.
Distinction Between Civilians and Combatants

- Humanity
- Proportionality/unnecessary or superfluous injury
- Military necessity
- Distinction
Civilians and combatants

- Civilians
  - Persons who are not combatants

- Combatants
  - Lawful combatants
  - Unlawful combatants
  - Combatants *hors de combat*
  - Non-combatants (Members of the armes forces who are not combatants)
Primary and Secondary Status

- **Primary status**
  - **Combatant:**
  - *Legitimate target*
  - (Immunity for acts of war)

- **Civilian:**
  - *Protected person*
  - (No immunity for acts of war)

- **Secondary status**
  - **Hors de combat**
  - **POW**

- **Unlawful combatant**
  - **Detainee (not POW)**
Definition of Combatant (1)

- Members of the armed forces of States
  Art. 4 A (1), GC III
  Art. 43 (1) and (2), AP I

- Specific exceptions to this rule:
  - Medical and religious personnel
    Art. 43 (2) AP I and Art. 33 GC III
Members of resistance movements or guerrilla groups (irregular forces) belonging to a State party to the conflict

- **1949**: Art. 4 A (2) (GC III): Command structure, visible sign/uniform, visible arms, adherence to IHL

- **1977**: Art. 43 (AP I): Command structure, adherence to IHL. *But* (Art. 44 (3) AP I): must carry arms openly during military attacks and preparation (when visible)
Art. 44 (3):3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

(a) during each military engagement, and

(b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
Art. 44 (4) A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

(5) Any combatant who falls into the power of an adverse Party while not engaged in an attack or in a military operation preparatory to an attack shall not forfeit his rights to be a combatant and a prisoner of war by virtue of his prior activities.
Unlawful Combatants

- Irregular forces (or saboteurs) outside the scope of POW protection under either
  1) Art. 4 A (2) GC III, or
  2) Art. 44 (3) AP

- Civilians who participate in hostilities (except *levée en masse*)
- Spies
- Mercenaries
Difficult to determine status of detained persons – therefore:

All captured persons who have taken part in hostilities must be treated as POWs until status is determined, if necessary by a competent tribunal: Art. 45 (1), AP I and Art. 5, GC III
Combatant Status in NIACs

• The law on NIACs (Non-International Armed Conflicts) does not deal with combatant status;

• Members of dissident armed groups/forces remain liable to prosecution under domestic law;

• Any person detained in NIACs must be treated humanely: Common Art.3, GC and Art.4, AP II.
Civilian Casualties

- WWI: civilian casualties 5%
- WWII: civilian casualties 50%

- Caused by indiscriminate air warfare by both sides

- (Violations of the principle of distinction was excluded from the charges brought at the Nuremberg and Tokyo trials)
Distinction: Article 48 AP I

Art 48. Basic rule

In order to ensure respect for 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 civilian objects and military objectives and accordingly shall direct their operations only against military objectives.
1. "Attacks" means acts of violence against the adversary, whether in offence or defense.
Art 50. Definition of civilians and civilian population

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
Function as a Basis for Distinction

- Persons referred to in Article 4 A, (1), (2), (3) and (6) of GC III, and art. 43 AP I are not civilians:
  - Members of the armed forces
  - Members of militias etc.
  - Members of armed forces of a government not recognized by the detaining power
  - Civilians taking up arms against invasion

- Conversely: persons referred to in article 4 A, (4) and (5) and art. 43 (2) AP I are to be treated as civilians
  - Medical personnel and chaplains and other persons accompanying the armed forces or members of technical crews
Article 50 (continued)

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.
Protection of the Civilian Population

Art. 51, API

- Art 51. - Protection of the civilian population

1. The civilian population and individual civilians shall enjoy general protection against dangers arising from military operations. To give effect to this protection, the following rules, which are additional to other applicable rules of international law, shall be observed in all circumstances.
Protection Against Being Targeted

- Art.51 (2) The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.
Direct Participation in Hostilities (DPH)

- Art. 51 (3) Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.
- Common Article 3 of the GCs: Persons taking no active part in the hostilities....
- In order to qualify as direct participation in hostilities, a specific act must meet the following cumulative criteria (ICRC, Interpretive Guidance, 2009):
  1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
  2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
  3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus).
**Protection Against Indiscriminate Attacks (1)**

- **Art. 51 (4) Indiscriminate attacks are prohibited.** Indiscriminate attacks are:
  (a) those which are not directed at a specific military objective;
  (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
  (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol; and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.
Protection Against Indiscriminate Attacks (2)

- Article 51 (5) Among others, the following types of attacks are to be considered as indiscriminate:

- (a) an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects;
Excessive Loss of Civilian Lives – (Proportionality)

- Art. 51(5), AP I
- (b): an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.
Protection of Civilians under IHL

- Being targeted deliberately;
- Indiscriminate attacks;
- To fire blindly without clear idea of the target;
- To release random bombs;
- To release bombs when visibility is bad (night, high altitudes, weather, etc.);
- To release bombs over areas with both military and civilian installations;
- Excessive loss of civilian lives.
Persons *Hors de Combat*

- Humanity
- Distinction
- Military necessity
- Proportionality/unnecessary suffering or superfluous injury
Common Art. 3, GCs (1949)

1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
‘Hors de Combat’: Article 41, AP I

1. A person who is recognized or who, in the circumstances, should be recognized to be 'hors de combat' shall not be made the object of attack.

2. A person is 'hors de combat' if:

(a) he is in the power of an adverse Party;

(b) he clearly expresses an intention to surrender; or

(c) he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;

provided that in any of these cases he abstains from any hostile act and does not attempt to escape.
Legitimate Military Targets

- Is everything which is not specifically prohibited a legitimate target?

- Rules on legitimate military objectives:
  - ‘Military objective’ was not defined in the Geneva Conventions

- AP I, Chapter III – Civilian Objects (Negative definition: everything that is not a military objective is a civilian object.)
1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military objectives as defined in paragraph 2.

2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
Military objectives are limited to those objects which by their nature, location, purpose or use *make an effective contribution to military action*
Prime Military Objectives

- Military objectives are limited to those objects which by their *nature, location, purpose* or *use* make an effective contribution to military action.

- Military fortifications, military bases, military training facilities, military units of all kinds, weapons, weapons launching systems, military vehicles and aircrafts, military airfields, warships, military storages, weapons and ammunition factories, ministries of defence, military headquarters....
3. In case of *doubt* whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.
Other Rules on Limitations to Targeting

- **Art. 53**: Cultural objects and places of worship
- **Art. 54**: Objects indispensable to the survival of the civilian population (food, water)
- **Art. 55**: Protection of the natural environment
- **Art. 56**: Protection of works and installations containing dangerous forces—such as dams, dykes and nuclear electrical generating stations
Precautions in Attack (1)

- Art. 57 (2) With respect to attacks, the following precautions shall be taken:
  (a) those who plan or decide upon an attack shall:

- (i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them;
Precautions in Attack (2)

- (b) an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated;

- (c) effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit.
3. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.
It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.
Perfidy and Ruses of War

- Perfidy is prohibited
- Ruses of war are not prohibited
- Both involve deception: How to tell them apart?
1. It is prohibited to kill, injure or capture an adversary by resort to perfidy. Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy.
Three Elements of Perfidy

1. The existence of a norm of international law applicable in armed conflict, which would give protection under certain circumstances;
2. Inducing the enemy to trust that such circumstances has arisen;
3. An intent to break that trust.
Examples of Perfidy: Article 37, AP I

- The following acts are examples of perfidy:

  (a) the feigning of an intent to negotiate under a flag of truce or of a surrender;

  (b) the feigning of an incapacitation by wounds or sickness;

  (c) the feigning of civilian, non-combatant status; and

  (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other States not Parties to the conflict.
2. Ruses of war are not prohibited. Such ruses are acts which are intended to **mislead** an adversary or to induce him to **act recklessly** but which **infringe no rule of international law** applicable in armed conflict and which are not perfidious because they **do not invite the confidence of an adversary with respect to protection under that law**.

The following are examples of such ruses: the use of camouflage, decoys, mock operations and misinformation.
Reprisals

- Reprisals are acts that would normally be illegal – and which have the purpose of enforcing compliance with international law.

- Reaction to illegal acts committed by the enemy, with the purpose of making such acts stop – NOT REVENGE
Exempt from Reprisals: Examples

- Article 46, GC I: Reprisals against the wounded, sick, personnel, buildings or equipment protected by the Convention are prohibited.

- Art. 51 (6), AP I: Attacks against the civilian population or civilians by way of reprisals are prohibited.

- Articles 51 to 56 of AP I.
Concluding Remarks

- Military objectives: qualification on the basis of a number of relevant criteria, instead of agreeing a list of permissible military objectives;
- Persons and objects immune/liable to attacks;
- Unlawful attacks—deliberate, indiscriminate or disproportionate;
- The importance of precautions in attack;
- Prohibition of certain methods of combat: denial of quarter, starvation, perfidy, etc.
Additional Sources


• Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, (ICRC, 2001)

• *International Review of the Red Cross, 2006, No. 864 – Methods of warfare*

• [http://www.icrc.org/eng/resources/international-review/review-864-methods-warfare/index.jsp](http://www.icrc.org/eng/resources/international-review/review-864-methods-warfare/index.jsp)