

PRIMERS FOR INTERNATIONAL ACCOUNTABILITY IN ASIA: INTERNATIONAL HUMANITARIAN LAW

What Is International Humanitarian Law (IHL)?

International Humanitarian Law is the body of law regulating the conduct of hostilities and protection of victims during armed conflict. This form of law has existed for millennia. For example, the epic *Mahabharata* suggests the notion of a ‘just war’ regulated combat in ancient India.¹

The foundational treaty framework for International Humanitarian Law consists of the [Geneva Conventions \(1949\)](#) and the [Hague Conventions \(1899 and 1907\)](#). These treaties are considered customary international law,² and thus binding on all States – the Geneva Conventions have obtained near universal ratification.³

The Hague Conventions regulate the conduct of hostilities, establishing prohibitions on certain means and methods of warfare used by parties to a conflict. The Geneva Conventions concern the protection of victims. The [first](#) protects the wounded and sick. The [second](#) expands protections to cover shipwrecked members of Armed forces. The [third](#) outlines conditions for the treatment of prisoners of war. And the [fourth](#) concerns the protection of civilians. Two Additional Protocols supplement the Geneva Conventions. The [first Additional Protocol \(1977\)](#) covers the protection of victims and the [second Additional Protocol \(1977\)](#) covers Non-International Armed Conflicts. Most of the provisions covered by the first Additional Protocol to the Geneva Conventions (1977) are also [customary international law](#).

International Humanitarian Law has a wide scope of application, with rules governing various aspects of war. For example, there are customary prohibitions on certain weapons, such as those likely to cause [superfluous injury or unnecessary suffering](#) (e.g: dum-dum bullets) and those that are [indiscriminate in nature](#) (e.g: chemical weapons).

When Does IHL Apply?

International Humanitarian Law applies wherever there is an armed conflict. It does not apply to isolated attacks or situations of generalized violence. Additionally, the classification of the conflict as an International Armed Conflict (IAC) or Non-International Armed Conflict (NIAC) determines the obligations and protections which are applicable. The ongoing conflict in Myanmar is a NIAC, since the Myanmar Armed Forces (Tatmadaw) are fighting multiple non-State armed groups. To learn more about conflict classification, see our [primer here](#).

All IHL provisions apply in IACs. In NIACs, the provisions in Common Article 3 of the Geneva Conventions form the minimum threshold of applicable rules. The upper threshold is found in Article 1 of Additional Protocol II, which expands application to all armed conflicts not covered by earlier conventions. [According to the ICRC](#), the majority of customary IHL rules apply during both IACs and NIACs.

The classification of a conflict significantly affects the rights and responsibilities of affected persons. For example, IACs have extensive provisions regulating detention across multiple treaties: the third Geneva Convention (for prisoners of war), the fourth Geneva Convention (for protected persons and those awaiting trial), and Additional Protocol I (for detainees without protected person status). In comparison, treaty law relating to detention during NIACs is limited, e.g non-State actors are not entitled to prisoner-of-war status, and there are no rules mandating processes to review their detention and when they must be released⁴.

¹ S Subedi, ‘The Concept in Hinduism of ‘Just War’ (2003) *Journal of Conflict and Security Law* 339, 355-356 as cited in G Solis, *The Laws of War* (Cambridge 2010) 5.

² See [UN Security Council, Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 \(1993\)](#), “The part of conventional international humanitarian law which has beyond doubt become part of international customary law is the law applicable in armed conflict as embodied in: the Geneva Conventions of 12 August 1949 for the Protection of War Victims; the Hague Convention (IV) Respecting the Laws and Customs of War on Land and the Regulations annexed thereto of 18 October 1907...” [35]

³ To learn more about the implementation and practice of international humanitarian law in Asia, see S Linton, [‘Deciphering the landscape of international humanitarian law in the Asia-Pacific’](#) (2019) *International Review of the Red Cross* 911

⁴ For more information, see L Hill-Cawthorne, *Detention in Non-International Armed Conflict* (Oxford 2016)

What Is The Difference Between International Humanitarian Law (IHL) And International Human Rights Law (IHRL)?

Although International Humanitarian Law and International Human Rights Law protect similar interests, there are significant differences between them. These include:

- *Differences in when the law applies.* Aside from a few peace-time obligations, most IHL obligations are only applicable during armed conflict. On the other hand, IHRL is always operating. The specific context of IHL also necessitates certain distinctions. For example, IHL differentiates between combatants and civilians. IHRL makes no such distinctions.
- *Differences in the conduct addressed.* IHL covers the prohibited conduct of individuals during war. IHRL is concerned with the action (or inaction) of States in providing rights to people.
- *Differences in avenues for accountability.* IHL violations are usually adjudicated in military, domestic, or international courts. IHRL violations are often addressed by international treaty bodies, such as the UN Human Rights Council, and in domestic or regional human rights courts that allow citizens to bring complaints against States. Notably, there is no regional human rights court in Asia.

Can Someone Be Held Accountable For Breaching IHL?

As covered in our [War Crimes Primer](#), parties can be held accountable for violations of International Humanitarian Law by any court with competent jurisdiction. This includes military, [domestic](#), and international courts. IHL violations can elicit both State responsibility and individual criminal responsibility.

- *State responsibility:*

When involved in an armed conflict, States are responsible for any violations of international humanitarian law attributable to them. This principle is a part of [customary international law](#) and has been applied in both domestic and international case law.

Although the majority of IHL provisions apply to parties to the conflict, the Geneva Conventions impose several collective obligations on States. Common Article 1 obliges States to “respect and ensure respect” for International Humanitarian Law. The phrase “ensure respect” is often read as referring to each State’s obligations to the international community⁵. The ICRC emphasizes that any military or material support must be [predicated on parties respecting IHL](#). The Myanmar Tatmadaw have been [alleged to commit numerous war crimes](#), including murder, torture, collective punishment, indiscriminate attacks, and forced displacement.⁶ Despite this, multiple States continue to supply the regime with arms, potentially contravening their own IHL obligations.

- *Individual Criminal Responsibility*

Under international law, multiple tribunals have exercised jurisdiction over violations of international humanitarian law. The International Criminal Court, established by the [Rome Statute](#), has jurisdiction over war crimes. The substantive elements of the war crimes covered by the Rome Statute were largely drawn from corresponding offences in the Geneva Conventions.⁷ However, the International Criminal Court has treaty-based jurisdiction. The Rome Statute only applies to State parties, whilst the Geneva Conventions are applicable to all States.

Since 2019, the International Criminal Court has an active investigation in the [‘Situation of Myanmar/Bangladesh’](#), examining crimes related to the alleged forced deportation of Rohingya refugees from Rakhine State to Bangladesh. Myanmar is not a party to the Rome Statute, so the Court cannot investigate crimes committed solely in Myanmar’s territory, thus excluding most war crimes. However, the Security Council can grant jurisdiction by referring the situation in Myanmar to the Court. International, regional, and local human rights organizations, including Asia Justice Coalition members, have long [demanded](#) such a referral.

⁵ L Boisson de Chazournes et al , [“Common Article 1 of the Geneva Conventions revisited: Protecting collective interests”](#), (2000) International Committee of the Red Cross 837

⁶ See 2023 Annual [Report of the Independent Investigative Mechanism for Myanmar](#)

⁷ Case law from International Criminal Tribunals can progressively develop IHL. For example, in [Prosecutor v. Ntaganda](#), Trial Chamber VI found that that certain war crimes can be committed against one’s own forces, not just against opposing parties [54]