

SESSION 7

HUMAN INTERNATIONAL LAW

INTERNATIONAL HUMANITARIAN LAW

I n t e r n a t i o n a l h u m a n i t a r i a n l a w

International humanitarian law – also called the law of armed conflict or the laws of war – regulates the conduct of warfare. Most of the applicable rules are to be found in the four *1949 Geneva Conventions* and their two *1977 Additional Protocols*. In addition, the

1907 Hague Conventions and the annexed Regulations lay down important rules on the conduct of hostilities, notably on military occupation. There are also several treaties that prohibit or restrict the use of specific weapons, including anti-personnel mines, exploding or expanding bullets, blinding laser weapons, and, most recently in 2008, cluster munitions.

An important distinction exists between international armed conflicts and those of a “non-international character”. (For a detailed discussion of this issue, see our paper on the legal qualification of armed conflict.) The legal regulation of international armed conflicts is more detailed and the protection afforded by the law greater than is the case with non-international armed conflicts. A notable example is the obligation on parties to an international armed conflict to accord captured combatants the status of prisoner of war (POW) with the associated rights and obligations. This prevents the prosecution of a POW for the mere fact of participation in hostilities. There is no such right to POW status in the law governing non-international armed conflicts (although captured fighters are still entitled to legal protection). (1)

The basis of international humanitarian law is the **principle of distinction**, which applies in **all** armed conflicts. This principle obliges “Parties to a conflict” (i.e. the warring parties, whether states or non-state armed groups) to target only military objectives and not the civilian population or individual civilians or civilian objects (e.g. homes, schools, and hospitals). Failing to make this distinction in military operations represents an indiscriminate attack and is a war crime.

Similarly, although it is understood that it is not possible for parties to a conflict always to avoid civilian casualties when engaged in military

operations, international humanitarian law also requires that parties to a conflict take precautions in any attack to minimise civilian deaths and injuries. Attacks likely to cause deaths or injuries among the civilian population or damage to civilian objects which would be "excessive" compared to the expected military advantage must be cancelled or suspended.

These rules are generally considered to be customary international law, which binds every party to a conflict – government or non-state armed group – whether or not the state on whose territory a conflict occurs has ratified the relevant treaty.

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International human rights law



Treaty law and international custom

Modern international human rights law developed in the wake of World War II with the adoption of the 1948 Universal Declaration of Human Rights (UNDHR). Since then the bulk of the international legal framework of human rights protection has emerged through treaties on specific rights or sets of rights intended to augment the Universal Declaration and make the rights contained within it legally binding and subject to monitoring and accountability mechanisms as treaty law. Most notably, the UN General Assembly adopted in 1966 the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR). Taken together with the Universal Declaration, these three documents are commonly referred to as the “International Bill of Human Rights”.

Other specialized treaties on human rights adopted at the universal level include the following:

- International Convention on the Elimination of All Forms of Racial Discrimination
- Convention on the Elimination of All Forms of Discrimination Against Women

- Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment
- Convention on the Rights of the Child
- Convention on the Rights of Persons with Disabilities [entered into force on 3 May 2008]
- International Convention for the Protection of All Persons from Enforced Disappearance [entered into force on 23 December 2010]

When states become parties to these treaties they commit themselves to not only refrain from interfering with the exercise and enjoyment of the rights, but also to take positive steps to protect their enjoyment as well as to restore them when they have been infringed. Furthermore, states parties have a duty to ensure that non-state actors do not impede the enjoyment of these rights.

In addition to treaty law, there exists a significant body of international custom, which binds every state regardless of whether they have adhered to a relevant treaty and even when no treaty exists in a particular area. Customary international law has two features: 1) the consistent “practice” of a wide range of states over a period of time, and 2) the belief that these actions are reflective of “law”. Whether or not a human right has become an obligation under customary international law is a complex question (although some studies exist). (1)

Mechanisms of implementation

Human rights conventions usually provide a monitoring body to scrutinize compliance and assist state parties in their implementation. For example, the UN Human Rights Committee exclusively monitors the implementation of the ICCPR. These specialized bodies examine periodic reports submitted by state parties.

To varying degrees the treaties create procedures for inter-state complaints, where one state can bring another state's actions to the attention of the supervisory body or the International Court of Justice, and communications from individuals detailing alleged violations can be considered under certain arrangements. Moreover, supervisory bodies can issue general comments on the interpretation of various provisions and subjects within the scope of the treaty as well as make informed pronouncements on situations of emergency or armed conflict with

aspects falling in their remit (see the RULAC paper on Derogation from human rights treaties in situations of emergency). Obviously, a major issue in human rights law is the effectiveness of these treaty bodies in ensuring that states conform to their treaty obligations.

Regional human rights law

Concurrent with the development of international human rights law, significant instruments and mechanisms of protection developed at the regional level. In Europe, all members of the European Union and the Council of Europe have adhered to the 1950 European Convention on Human Rights. The Organization of American States has under its auspices the 1948 American Declaration of the Rights and Duties of Man, 1969 American Convention on Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights. Similarly, the African Union established the African Commission on Human and Peoples' Rights to review state compliance with the 1981 African Charter on Human and Peoples' Rights. Recently, an African Court of Human and Peoples' Rights has been created. The 2004 Arab Charter on Human Rights was adopted by the Council of the League of Arab States, and a Committee of Experts on Human Rights should consider state reports.

Domestic human rights law

Most states have domestic laws, usually enshrined in constitutional documents, that provide for basic rights within the national legal system. Consequently, assessing human rights protection involves studying international, regional, and domestic commitments and mechanisms.

Interaction between humanitarian law and human rights in armed conflicts



I. Applicability of international human rights law to armed conflicts

The applicability of international human rights law during armed conflicts – both international and non-international - has been addressed by multiple international bodies including the International Court of Justice.

The International Court of Justice first affirmed the applicability of international human rights law during armed conflicts in its 1996 Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons:

“The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency.” (§25)

In the 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the 2004 Wall Advisory Opinion), the Court confirmed the applicability of international human rights law to situations of military occupation (1). A year later, the Court delivered a binding judgment in the case Democratic Republic of the Congo v. Uganda where it applied international human rights law to an occupation citing the findings from its 2004 Wall Advisory Opinion.

“The Court first recalls that it had occasion to address the issues of the relationship between international humanitarian law and international human rights law and of the applicability of international human rights law instruments outside national territory in its Advisory Opinion of 9 July 2004 on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory...It thus concluded that both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration. The Court further concluded that international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’, particularly in occupied territories.” (2)

Other international courts have applied the human rights treaties over which they have jurisdiction to situations of armed conflict. The European Court of Human Rights (ECtR) has notably applied the European Convention on Human Rights to the conflict in the Russian Federation (Isayeva, Yusupova and Bazayeva v. Russia) and to Turkish occupation of Northern Cyprus (Cyprus v. Turkey). The Inter-American Court on Human Rights has also applied international human rights law

in a conflict situation:

“The Court considers that it has been proved that, at the time of the facts of this case, an internal conflict was taking place in Guatemala (supra 121 b). As has previously been stated (supra 143 and 174), instead of exonerating the State from its obligations to respect and guarantee human rights, this fact obliged it to act in accordance with such obligations.” (3)

The UN Human Rights Committee has recognized the applicability of the 1966 Covenant on Civil and Political Rights to both international and non-international armed conflicts (including situations of occupation). The Committee has dealt with this issue at the level of a General Comment (4) , and in its observations on States’ Periodic Reports (5).

In addition to these applications of international human rights treaty law by international bodies, intergovernmental resolutions and national case law support this approach. For example, UK courts took into consideration the European Convention of Human Rights during the British occupation in Iraq (Al-Skeini and Al-Jedda cases), and the Israeli High Court of Justice reviewed the legality of a military order dealing with detention of Palestinians in the Occupied Territories in light of the 1966 Covenant on Civil and Political Rights (the Marab case).

II. Extraterritorial application of international human rights law

Armed conflicts often involve operations outside the territorial boundaries of a state. A preliminary question concerning the territorial scope of application of human rights law usually has to be addressed.

Today the scope of application of human rights obligations is considered to be a question of effective control and not necessarily related to the state’s territory. This position was affirmed by the International Court of Justice in the Advisory Opinion in the Wall Advisory Opinion (2004) and in the case Democratic Republic of the Congo v. Uganda (2005).

The European Court of Human Rights also refers to the effective control of a territory for the application the European Convention:

“Bearing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a

consequence of military action, whether lawful or unlawful, it exercises effective control of an area outside its national territory.” (6)

The Inter American Commission of Human Rights has taken the following position:

“In principle, the inquiry turns not on the presumed victim's nationality or presence within a particular geographic area, but on whether, under the specific circumstances, the State observed the rights of a person subject to its authority and control.” (7)

The UN Human Rights Committee stated that under the 1966 Covenant on Civil and Political Rights the protection is for “anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party” (8). National courts have applied the effective control standard as well (Al-Skeini and Al-Jedda cases in the UK).

However, the exact meaning of the term “effective control” is yet to be determined. For now, international case law and the views of UN treaty bodies, have clarified a number of situations:

First, a range of situations have been recognized as amounting to effective control, from ‘prolonged’ occupations, such as the 30-year Turkish occupation in Northern Cyprus (the Loizidou case, ECtHR) or the Israeli occupation of the Palestinian territories (the 2004 Wall Advisory Opinion, ICJ), down to situations which have lasted only a short time, as in the case of *Ilascu v. Moldova*. In this case the ECHR found Russia to be responsible for human rights violations, although Russia had only a few troops present on the territory of Moldova. It appears that this situation would not amount to an occupation under international humanitarian law (IHL) as defined in Article 42 of the 1907 Hague Convention, but it was found to constitute effective control for the application of extraterritorial human rights obligations. (9)

Second, effective control can be exercised over persons, even if this control is only temporary. This covers places of detention or situations in which state agents arrest persons abroad (e.g. the Ocalan case, ECtHR; and the Lopez Burgos case, Human Rights Committee). (10)

In the Bankovic case, the ECtHR found that NATO's aerial bombing of Belgrade did not amount to effective control, thereby creating a distinction between ground operations (that can exercise effective control) and air power (which the Court found did not amount to effective control in this case).

In the Al-Skeini case the UK House of Lords distinguished situations of conduct of hostilities during occupation from "calm occupation". Accordingly, if hostilities break out in occupied territories, these territories are not always under effective control as this Court required for the extraterritorial applicability of Human Rights obligations.

The US and Israel, in particular, have raised objections to the application of international human rights law in occupied territories or during armed conflicts. (11)

III. The relationship between international humanitarian law and international human rights law

While it is generally agreed that international human rights law and international humanitarian law both apply in situations of armed conflict, their relationship remains quite complex. Various approaches have been taken by international bodies.

A. The *lex specialis* approach

The International Court of Justice has identified three situations concerning the interaction between international humanitarian law and international human rights law:

"As regards the relationship between international humanitarian law and human rights law, there are thus three possible solutions: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law." (12)

Accordingly, contradictory provisions should be regulated according to

the principle of *lex specialis*. As international humanitarian law was specially designed to be applied in armed conflicts it represents the specific law that should prevail over certain other general rules.

The Inter American Commission of Human Rights in the *Coard* case followed this approach (13), as did the International Commission of Inquiry on Darfur presided by Professor Antonio Cassese:

“Two main bodies of law apply to the Sudan in the conflict in Darfur: international human rights law and international humanitarian law. The two are complementary. For example, they both aim to protect human life and dignity, prohibit discrimination on various grounds, and protect against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights including those related to health, food and housing. They both include provisions for the protection of women and vulnerable groups, such as children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis* which applies only in situations of armed conflict.” (14)

B. The Complementary and Harmonious approach

The Human Rights Committee stated that

“the Covenant applies also in situations of armed conflict to which the rules of international humanitarian law are applicable. While, in respect of certain Covenant rights, more specific rules of international humanitarian law may be specially relevant for the purposes of the interpretation of Covenant rights, both spheres of law are complementary, not mutually exclusive.” (15)

The Human Rights Committee does not use the term *lex specialis* but refers to the more specific norms of international humanitarian law. By avoiding the *lex specialis* approach the Human Rights Committee seems to indicate that there is no need to choose one branch of law over the other, but rather to look for their simultaneous and harmonizing application.

According to this approach, as international human rights law and

international humanitarian law are two branches of law that have a common objective of protecting persons, they should be harmonised and interpreted in a way that they complement and reinforce each other. In some cases, international humanitarian law will specify the extant rules and their interpretation, and in other cases it will be international human rights law, depending on which branch of law is more detailed and adapted to the situation.

C. Towards an interpretive approach?

The approach proposed by Professor Marco Sassòli seems to offer an alternative approach to the *lex specialis* and the complementarity approaches mentioned above (16). According to Sassòli, the relationship between human rights law and humanitarian law

“must be solved by reference to the principle ‘*lex specialis derogat legi generali*’ ... The reasons for preferring the more special rule are that the special rule is closer to the particular subject matter and takes better account of the uniqueness of the context”.

However, Sassòli points out that using the *lex specialis* paradigm does not necessarily result in humanitarian law prevailing over human rights law.

“The principle does not indicate an inherent quality in one branch of law, such as humanitarian law, or of one of its rules. Rather, it determines which rule prevails over another in a particular situation.”

Thus, each situation need to be analyzed individually in order to determine which rule would apply: it could be an international humanitarian law rule or a human rights rule, depending which rule is more detailed and adapted to the situation. After determining that the *lex specialis* rule applies, Sassòli emphasises that the other branch of law, the *lex generalis*

“still remains in the background. It must be taken into account when interpreting the *lex specialis*; to the extent possible, an interpretation of the *lex specialis* that creates a conflict with the *lex generalis* must be avoided, and, instead, an attempt to harmonize the two norms made.”

Timeline

1815 The Congress of Vienna expresses international concern for human rights. Freedom of religion is proclaimed, civil and political rights discussed, and slavery condemned.

. . .

1864 The First Geneva Convention protects the wounded in battle and gives immunity to hospital staff and the Red Cross during war.

. . .

1919 The League of Nations is established with the aim of guaranteeing and protecting the basic rights of members of minority groups.

. . .

1945 The United Nations is formed to build peace, protect human rights, oversee international law and to promote social progress and better standards of life.

. . .

1948 The Universal Declaration of Human Rights (UDHR) outlines protection of rights for all people.

. . .

1949 The Fourth Geneva Convention provides for the humane treatment and medical care of prisoners of war.

. . .

1965 The International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) resolves to abolish racial discrimination and promote understanding between races.

. . .

1966 The International Covenant on Civil and Political Rights (ICCPR) protects the individual from any misuse of government power and affirms the individual's right to participate in the political processes of their nation.

. . .

1966 The International Covenant on Economic, Social and Cultural Rights (ICESCR) guarantees access to the resources needed for an adequate livelihood, such as food, health care, clothing, shelter, education and personal safety, and ensures participation by all in the life of society, religion and culture.

. . .

1979 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) defines discrimination against women and sets up an agenda to end it.

. . .

1984 The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) defines tortures and similar activities in order to prevent their use.

. . .

1989 The Convention of the Rights of the Child (CRC) sets out the civil, political, economic, social and cultural rights of children, defined as those under 18 year of age.

. . .

1993 The Vienne Declaration from the Second World Conference on Human Rights reaffirms the Universal Declaration on Human Rights, emphasising that human rights are universal and indivisible and rejecting arguments that some should be optional or subordinated to cultural practices and traditions.

. . .

1995 The Beijing Declaration of The Fourth World Conference on Women declares "Women's rights are human rights".

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1999 The Convention concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour is adopted by the International Labour Organisation (ILO)

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2002 The International Criminal Court (ICC) is established. It is an independent, permanent court that tries persons accused of the most serious crimes of international concern, namely genocide, crimes against humanity and war crimes.

civilian any person who is not a combatant

• • •

civilian object any object that is not a military objective

• • •

combatant member of armed forces, member of an armed group under the orders of a party to the conflict

• • •

military objective object which by its nature, location, purpose or use makes an effective contribution to military action and whose destruction offers a definite military advantage

• • •

hors de combat means "out of the fight" describes combatants who have been captured, wounded, sick, shipwrecked, and no longer in a position to fight

• • •

principle of proportionality the expected number of deaths or injuries to civilians or damage to civilian objects must not be excessive compared to the anticipated military advantage

What is public international law? Rules that govern relationships involving states and international organizations. Covers a huge field involving war, human rights, refugee law, international trade, the law of the sea, environmental issues, global communications, outer space

. . .

What is private international law? Concerned with the clash between laws from different jurisdictions and is sometimes referred to as the conflict of laws.

. . .

What is the International Court of Justice and what does it do? Part of the UN and based in The Hague, Netherlands

Only hear cases relating to conflicts between states

Also gives legal advice to UN bodies

Doesn't follow a precedent system

NZ is one of the 60 nations that has accepted the ICJ's compulsory jurisdiction

All UN members must comply with ICJ decisions that apply to them

. . .

What is the International Criminal Court and what does it do? It was established in July 2002

Jurisdiction of the ICC includes genocide, crimes against humanity and war crimes

Put individuals on trial not their states

ICC can only act when nations won't or are unwilling to

Can only hear cases from participating nations or the SC can call upon others

. . .

What is the United Nations? Formed in 1945 after WWII

Charge with the task preventing a WWIII

Encourages cooperation and compromise among different nations

Constitutional document establishing the UN is called the Charter of the UN

. . .

What is the Security Council? It is an executive body made up of the 5 most powerful members of the allied forces that defeated Nazi Germany and imperial Japan

Us, Russia, China UK and France permanently sit on the SC and each has the power to veto any SC decision

These are joined by 10 other nations each of which get a 2 year temporary membership

. . .

What does Article 24 of the charter state? The SC has primary responsibility of the maintenance of international peace and security and acts on behalf of UN members nations

. . .

What does article 42 of the charter state? The council can order military action to maintain or restore international peace and security

. . .

What does article 43 of the charter state? It instructs member nations to make military service available for UN use if necessary