The relationship between international humanitarian law (IHL) and international human rights law (HR)

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International Law

• The law that regulates the relationship between States

• States are the core subject of international law - - states have rights and obligations under international law

• International organisations can be subjects of international law

• Individuals can to a certain extent be subjects under international law
Examples of International law areas:

- Trade
- Customs
- Outer space
- Airspace
- Sea
- Disarmament
- Waterways
- Post
- Environment
- Reindeer fences
- International Peace
• What is a State?

• Territory
• Population
• Control/jurisdiction on territory
• Sovereignty

• All states are sovereign
• All states are therefore formally equal
Autonomy and authority
Sources of international law

• Point of departure: states must agree:

Statute of the International Court of Justice art. 38:

Primary Sources:
• Treaties
• Customary law
• General Principles

Secondary Sources:
• Jurisprudence
• Literature
1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

   a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;

   b. international custom, as evidence of a general practice accepted as law;

   c. the general principles of law recognized by civilized nations;

   d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.
• **Article 31 General rule of interpretation**
  
  1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.

• ......

• **Article 32 Supplementary means of interpretation**

  Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

  • (a) leaves the meaning ambiguous or obscure; or
  • (b) leads to a result which is manifestly absurd or unreasonable.
Two areas of international law

• **International humanitarian law:**
  - Agreements between states on how to conduct war, and on protection of individuals (civilians and combatants)

• **International human rights law:**
  - Agreements between states regulating the relationship between each state and the individuals over which it has jurisdiction
The Content of IHL is PROTECTION of

1) Combatants:
   - Soldiers/officers
   - Others (participants in hostilities)

2) Non-combatants:
   - Soldiers *hors de combat* *(Sick, wounded, surrendered, POWs)*
   - Civilians
• International Humanitarian Law

• Point of departure:
  • Agreements between States on certain prohibited means and methods of war

• **Protection**: The four Geneva Conventions of 1949 and two Additional protocols of 1977

• **Means and methods of warfare**: treaties on specific weapons and ammunition
The Content of HRL is PROTECTION

of all persons within the jurisdiction of a State (regardless of citizenship) against abuse of power of State authorities, or failure by State authorities to ensure human rights
International Human Rights Law

Point of departure:
- State monopoly on legal use of violence – restrictions on arbitrary abuse of power by the state

General treaties:
• International Covenant on Civil and Political Rights (1966)
• International Covenant on Economic, Social and Cultural Rights
• European Convention on Human Rights and Fundamental Free

Special Treaties:
• Convention on Torture
• Convention on Racial Discrimination
• Convention on Discrimination of Women
• Etc..
Examples of civil and political rights:
• Freedom of speech / the right of expression
• The right of assembly/organisation (freedom of association)
• Freedom of religion/belief
• Prohibition against torture and cruel and degrading punishment
• The right to liberty and physical integrity (restrictions on the use of detention)
• The rights of fair trial (Independent courts, presumption of innocence, etc.)
• Prohibition against retroactive laws or judgements without legal basis

Examples of economic, social and cultural rights:
• The right to education
• The right to health
• Right to form and join trade unions
• Right to reasonable working conditions
• Right to housing

• Freedom from discrimination
• Race/ethnicity/national or social origin etc
• Gender
• Political opinion
• Disabilities
The duty bearers and the right holders

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<th>International humanitarian law (IHL)</th>
<th>Duty-bearers</th>
<th>Rights-holders</th>
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**Remedies and monitoring mechanisms**
under humanitarian law (IHL) and human rights law (HR)

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<td>Non-derogable (applicable) human rights</td>
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Article 15 ECHR :– Derogation in time of emergency

1. In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

2. No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.

3. Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.
Article 4  ICCPR

1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.
Derogation examples:

- In Europe: Northern Ireland and Turkey (detention)

- 12 September 2001: UK and USA proclaimed state of emergency and derogated from certain detention restrictions

- States very rarely derogate from all derogable rights (Because measures must be strictly required etc..)

- If it was strictly required by the exigencies of the situation to derogate from all derogable rights, one might assume that there would at least be a «Common Article 3 situation»
The relationship between human rights and humanitarian law in situations where both regimes apply:

Point of departure: HR law is always applicable
But: the principle of *lex specialis* applies

- Hess case (ECHR)
- Louzidou case (ECHR)
- Bankovic case (ECHR)
- Advisory Opinion – Nuclear weapons (ICJ)
- Advisory opinion - Wall in occupied Palestine territories (ICJ)
- General Comment of Article 2 (Jurisdiction) (HR Committee)
Discussions on the applicability of IHL and HR law in the aftermath of 11 September 2001

War on terror - which rules are applicable?

Full protection only to the “parties”

Article 75 of AP I: minimum standards (customary law status)

Implementation gap rather than “norm” gap