IHL, Its Place Within and the Relationship with Other Branches of International Law

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Outline

• Scenario for discussion;
• IHL’s place within IL;
• IHL and disarmament;
• IHL and environmental protection;
• IHL and treaty law;
• IHL and international criminal law;
• Concluding remarks.
Scenario

• Serious violations of IHL have been taking place in State A over a period of several years, including summary killings, use of chemical weapons, forced displacement and deportation of considerable parts of the population and the destruction of several old mosques and churches. Not only government forces, but also rebel armed groups are considered responsible for such serious IHL breaches. Other countries are mulling over and weighing the options of how to deal with the humanitarian situation that has resulted from this armed conflict. All States have the right and the obligation to ensure that any other State respects treaty and customary IHL.

• What steps can these States take in order to ensure compliance by State A and rebel armed groups with existing IHL obligations?
IHL within International Law

- IHL interacts with other branches of int’l law:
  - Int’l law on the use of force (jus ad bellum);
  - International law of human rights;
  - International refugee law;
  - International criminal law;
  - International (peace and) disarmament law;
  - International peace operations law;
  - International environmental law;
- Public international law:
  - Int’l law on responsibility;
  - State immunity and State officials’ immunity;
  - Treaty law (effect of armed conflict on treaties, ILC).
Connection of IHL with PIL and more

- Martens Clause, Article 1(2) of AP I:

  “In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”

G. Zyberi, NCHR, 28 October 2013
IHL and Disarmament (1)

- **1868** Saint Petersburg Declaration;
- **1925** Geneva Gas Protocol;
- **1968** Non-Proliferation Treaty;
- **1972** Bacteriological and Chemical Weapons Convention;
- **1976** Convention on the Prohibition of Military or Any Other Hostile Use of Environmentally Modification Techniques of (ENMOD);
- **1981** Conventional Weapons Convention and its Protocols on prohibiting use of non-detectable fragments, mines, booby-traps and other similar devices and incendiary weapons;
- **1997** Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction (Mine Ban Treaty, or Ottawa Treaty);
- **2008** Convention on Cluster Munitions.
Disarmament (arms control) Law (2)

- Informed by two cardinal principles of IHL (ICJ, Nuclear Weapons Advisory Opinion):
- The prohibition of unnecessary suffering or superfluous injury.
- Compliance with the principle of distinction between combatants and non-combatants.
- **Art. 35(2), AP I:** “It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous or unnecessary suffering.”
- **Art. 36, AP I:** “In the study, development, acquisition or adoption of a new weapon, means or method of warfare, a High Contracting Party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this Protocol or by any other rule of international law applicable to the High Contracting Party.”

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IHL and the Protection of the Environment

• **Art. 35(3)** (Methods and Means of Warfare – Basic Rules) and **Art. 55** (Protection of the natural environment) of AP I deal with the protection of the environment.

• **Article 35(3), AP I:** “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause **widespread, long-term and severe damage** to the natural environment.”

• While AP I speaks about **widespread, long-term, and severe damage** to the natural environment, the **1978 ENMOD Convention** uses the three qualifications **disjunctively**, and presupposes destruction, damage, or injury to any other State Party.
Environmental Considerations in IHL

• The environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn (ICJ, *Nuclear Weapons*, par. 29).

• States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives (ICJ, *Nuclear Weapons*, par. 30).
The ICJ on Environment Protection under IHL

• The Court emphasized that because of their radiation, nuclear weapons have harmful effects on health, agriculture, natural resources and future generations (underlining the potential to destroy all civilization and the entire ecosystem of the planet).

• The Court concluded that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.
Armed Conflicts and Treaty Law (1)

• International Law Commission (ILC) articles on “The effect of armed conflict on treaties”, 2011:
  • First, the traditional view held that treaties did not survive armed conflict.
  • Second, early twentieth century view maintained that war does not affect treaties, subject to some exceptions.
  • Third, the modern view is embodied in the general statement that armed conflict does not ipso facto terminate or suspend treaties (Art. 3, ILC articles on ‘The effect of armed conflict on treaties’, 2011).
Effects of Armed Conflict on Treaties (2)

- Factors indicating whether a treaty is susceptible to termination, withdrawal or suspension (Article 6):
  - (a) The nature of the treaty, in particular its subject matter, its object and purpose, its content and the number of parties to the treaty; and
  - (b) The characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration and, in the case of non-international armed conflict, also the degree of outside involvement.
Continued Operation of Treaties in Armed Conflict (3)

- (a) **Treaties on the law of armed conflict**, including treaties on international humanitarian law;
- (b) Treaties declaring, creating or regulating a **permanent regime or status or related permanent rights**, including treaties establishing or modifying **land and maritime boundaries**; ...
- (d) Treaties on **international criminal justice**; ...
- (f) Treaties for the **international protection of human rights**;
- (g) Treaties relating to the **international protection of the environment**; ...
- (j) Treaties which are **constituent instruments of international organizations**;
- (k) Treaties relating to the **international settlement of disputes by peaceful means**, including resort to conciliation, mediation, arbitration and judicial settlement;
- (l) Treaties relating to **diplomatic and consular relations**.

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IHL and International Criminal Law

- **Creation of the ad hoc Tribunals and hybrid/internationalized criminal judicial bodies to enforce IHL:**
  - **ICTY:**
    - Article 2: grave breaches of the Geneva Conventions of 1949;
    - Article 3: violations of the laws or customs of war.
  - **ICTR:**
    - Article 4: Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II
  - **Hybrid/internationalized tribunals:**
    - Special Court for Sierra Leone, Panels of East Timor, Extraordinary Chambers in the Courts of Cambodia, etc.
Highlights: ICTY Case Law

• After recalling the ICJ’s *Nuclear Weapons* precedent that the principle of distinction between civilian and combatants was a cardinal principle of humanitarian law, the ICTY went further holding that the customary rule as determined by the Court was applicable in any type of armed conflict, hence in both international and internal armed conflicts.

• In dealing with the question as to when attacks on military objectives are unlawful because they cause indiscriminate damage to civilians even though the objectives in themselves are legitimate the Trial Chamber held that the concept of ‘elementary considerations of humanity’ as developed by the Court in the *Corfu Channel* and in the *Nicaragua* cases and in the *Nuclear Weapons* advisory opinion had to be used to interpret and apply this principle in practice (*Prosecutor v. Kupreškić*, 2000).
Violations of IHL under the ICC Statute

- Article 8 of the ICC Statute gives a very detailed description of war crimes, distinguishing between international and non-international armed conflicts:
  - (a) Grave breaches of the Geneva Conventions of 1949, Art. 8(2)(a)(i)-(viii);
  - (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, Art. 8(2)(b)(i)-(xxvi);
  - If one reads the 26 items listed under this paragraph then it is possible to discern the criminalization of behaviour prohibited under the international humanitarian law instruments.
  - (c) In the case of an armed conflict not of an international character, serious violations of article 3 common to the four Geneva Conventions of 12 August 1949, Art. 8(2)(c)(i)-(iv).
Relationship under Article 21 ICC Statute

• The Court shall apply [In the second place], where appropriate, applicable treaties and the principles and rules of international law, including the established principles of the international law of armed conflict;

• The application and interpretation of law pursuant to this article must be consistent with internationally recognized human rights, and be without any adverse distinction founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.
Concluding Remarks

• IHL intersects and interacts with several other branches of PIL.
• General rules and principles of PIL are important for the interpretation and application of IHL.
• There is considerable convergence on specific issues between IHRL and IHL, but there remain also fundamental differences.
• The interaction of IHL with other branches of PIL depends on the situation in need of regulation.
Relevant Literature/ Materials

- **ILC Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries, 2011.**