

## INTERNATIONAL HUMAN RIGHTS IN ARMED CONFLICTS

- **Armed conflicts, particularly internal conflicts, are fraught with widespread violations of human rights**
- **Whereas international humanitarian law ordinarily regulates the conduct of parties in times of war or occupation, international human rights law has traditionally concerned the rights individuals can claim *vis-à-vis* governments**
- **There is some overlap between the two branches of law which serves to reinforce and complement protection for individuals or groups during war but sometimes stronger protection under international human rights law is affected by limitations stipulated by States and weak international implementation mechanisms**
- **There is an increasing trend towards applying international human rights principles more stringently to situations of war which is welcome although stronger enforcement mechanisms are required**

### BACKGROUND

*What is international human rights law and international humanitarian law?*

1. International humanitarian law (IHL) regulates the conduct of parties under an “armed conflict” and requires humane treatment of civilians, prisoners, the wounded and sick.<sup>i</sup> IHL binds all parties to an armed conflict individually including members of State and non-State armed groups. It applies regardless of the cause of the conflict or whether the opposing party abides by the rules.
2. International human rights law (IHRL) concerns the rights/entitlements individuals and groups can claim against governments. While IHRL, ordinarily, applied only in peacetime it is now widely accepted that it applies to situations of armed conflict or in times of belligerent occupation (where IHL is considered the *lex specialis*).<sup>ii</sup> IHRL only binds governments *vis-à-vis* their relations with individuals within their jurisdiction or control. As such, individuals are not bound specifically but IHRL treaties often provide a duty on States to hold individuals criminally responsible for crimes they commit contrary to IHRL (such as murder, torture, or sexual violence).<sup>iii</sup>
3. In terms of human rights applying to individuals during war: some are governed exclusively by IHL (for instance, the conduct of hostilities or the treatment of the wounded and sick); some exclusively by IHRL (for instance, the freedom of the press, the right to assembly, vote or strike); and others are covered by both (for instance, the prohibition on torture).<sup>iv</sup> Assessing which regime applies to an incident in an armed conflict, either IHRL or IHL, can be important because different standards and rules can apply.

### INTERNATIONAL LEGAL INSTRUMENTS

*What is the basis for IHRL and what obligations does it impose on States in situations of armed conflict?*

4. IHRL is embodied in laws either established by treaty, derived from the customary practice of States or in resolutions/guidelines issued by international organisations. The main treaty sources of IHRL relevant to armed conflict are the International Bill of Rights (Universal Declaration of Human Rights 1948 (UDHR), International Covenants on Civil and Political Rights 1966 (ICCPR) and Economic, Social and Cultural Rights 1966 (ICESCR)) and Conventions relating to Racial Discrimination 1965, Discrimination against Women 1979, Torture 1984, and Rights of the Child 1989.<sup>v</sup> Regional instruments such as the European Convention on Human Rights (ECHR) are increasingly important in expanding the applicability of IHRL norms in the theatre of war, for instance, in respect of extra-territorial application.<sup>vi</sup>
5. A number of fundamental rights guaranteed by IHRL via treaty correspond to the rights of combatants and civilians protected by IHL. IHRL can, therefore, be a complementary and reinforcing source of obligations on parties to armed conflict or belligerent occupation. For instance, the right to life, prohibition of torture or degrading treatment, right to a fair trial or prohibition of discrimination are reasonably applicable in most situations of armed conflict.<sup>vii</sup>
6. Not all provisions of IHRL, however, are amenable to reasonable application in every instance of armed conflict and battlefield realities can inhibit application. For instance, in preserving the ‘right to life’, IHL is concerned with distinction (between civilians and combatants), proportionality and precautions in any ‘legitimate’ attack, whereas, IHRL looks at the use of force as a last resort necessary to protect life. IHL provisions can also either expressly or implicitly cut across IHRL rights rendering their application questionable. Application is made difficult as there is no clear law on how to interpret, give precedence or reconcile provisions seemingly in conflict.<sup>viii</sup> For instance, IHL permits the censoring of correspondence addressed to prisoners of war which could engage human rights relating to privacy and freedom of expression.<sup>ix</sup>

7. A way of reconciling overlaps or conflicts of law is to defer, at first instance, to IHL as the specific law of armed conflict although stronger protections under IHRL could then be circumvented. Alternatively, the focus can be on substance over form with the view that the body of law providing the best human rights protection to achieve a common purpose prevails but such a view cannot assist with fundamental incompatibility.
8. There is an outstanding question of justiciability in cases of violation of human rights. Whereas IHRL lays down rules binding governments, there is a growing body of opinion according to which non-State actors, especially if they exercise government-like functions, are expected to respect human rights norms.<sup>x</sup> This applies to armed groups exercising control over a region or population, or peacekeeping forces. Given that the majority of armed conflicts are internal, the inclusion of non-State armed groups is critical to ending impunity.

## IMPLEMENTATION MECHANISMS<sup>xi</sup>

*What are the means of redress and supervision for IHRL violations in armed conflict and are they effective?*

9. The primary duty to uphold IHRL, under binding treaties, falls on States. Under the UN Charter and regional conventions, like the ECHR, States pledge to promote respect for human rights, without discrimination, in their jurisdictions.<sup>xii</sup> States assume duties to respect, protect and fulfil human rights and to pass measures and legislation compatible with treaty obligations.<sup>xiii</sup> Obligations, however, can be limited in certain respects. At the time of ratification States may lodge reservations against certain provisions. States may also be permitted restrictions (derogations) on certain rights during conflict or an official declaration of “public emergency” which threatens the State.<sup>xiv</sup> No derogations, however, are permissible under IHL which can strengthen the force of such rules.
10. If national legal proceedings fail to address the violations of IHRL, mechanisms for individual complaints or communications are available at the regional and international levels to ensure that standards are respected, implemented and enforced. The IHRL supervisory system consists of the principal UN Charter body, the Human Rights Council (Council) and treaty bodies (Committees) which derive their powers from the relevant conventions. The Committee of Ministers of the Council of Europe is the body responsible for implementation of ECtHR judgments.<sup>xv</sup>
11. The Council is a forum, of 47 elected States, which can pass resolutions promoting and protecting human rights although non-binding. Other tools at its disposal are “special procedures” (SPs) or confidential individual complaints procedures. SPs address either specific country situations or thematic issues via special rapporteurs or working groups. They report to the Council or General Assembly on their findings. While SPs raise awareness of issues, their effectiveness is limited by scarce resources for investigations or the voluntary co-operation of States. Individual complaints procedures are both assisted and constrained by the fact they are confidential in nature.
12. Committees of independent experts, under the seven core treaties, are tasked with monitoring implementation. Not all states are signatories to treaties so are not consequently bound. States that are signatories could still prohibit individual complaints. The jurisprudence of Committees, although public, is non-binding rendering its legal force persuasive unlike jurisprudence of regional bodies like the ECtHR which is binding on State parties.<sup>xvi</sup>
13. The UN Security Council (UNSC) is competent to intervene in a country for non-observance of human rights but only where there is a threat to international peace and security.<sup>xvii</sup> Intervention for violations of human rights alone is unlikely and outside the remit of the UNSC given the principle of sovereignty of nation States.<sup>xviii</sup> Measures which the UNSC can adopt include sanctions, referral to ICC (where a State is not a party) or the creation of *ad hoc* tribunals.<sup>xix</sup> Such measures, however, require the consent of permanent members which are entitled to veto resolutions.<sup>xx</sup>
14. The Office of the High Commissioner for Human Rights (OHCHR) complements the work of the Council and has primary responsibility for the overall protection and promotion of human rights via the Secretary General. It aims to provide an advisory service, technical and financial assistance and actively remove barriers to the realisation of human rights. Its activities mostly consist of monitoring and petitioning which requires the acquiescence of States.

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# LEGAL FACTSHEET

## REFERENCES

<sup>i</sup> International Committee of the Red Cross (ICRC), *Geneva Conventions*, 12 August 1949 and ICRC, *Protocols Additional to the Geneva Conventions of 12 August 1949*, 8 June 1977. Note that “armed conflicts” under international law can be international conflicts (involving two or more States or wars of liberation) or non-international conflicts (where government forces fight armed insurgents or armed groups fight one-another). IHL is applicable to both situations. It is beyond the scope of this note to outline the technicalities around “armed conflict” but further information is available in the documents suggested below.

<sup>ii</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, p.226, International Court of Justice (ICJ), 8 July 1996, para. 25; *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p.136, ICJ, 9 July 2004, para. 106. *Lex specialis*, in short, means the “law governing a specific subject matter” which when applied overrides more general laws.

<sup>iii</sup> UN General Assembly (UNGA), *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, Article 2 (3); Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, Article 13; UNGA, *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)*: resolution adopted by the General Assembly, 10 December 1984, A/RES/39/46. Article 2.

<sup>iv</sup> *Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p.136, International Court of Justice (ICJ), 9 July 2004, para. 106.

<sup>v</sup> UNGA, *Universal Declaration of Human Rights (UDHR)*, 10 December 1948, 217 A (III); UNGA, *International Covenant on Civil and Political Rights (ICCPR)*, 16 December 1966, United Nations, Treaty Series, vol. 999; UNGA, *International Covenant on Economic, Social and Cultural Rights (ESCR)*, 16 December 1966, United Nations, Treaty Series, vol. 993; UNGA, *International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)*, 21 December 1965, United Nations, Treaty Series, vol. 660. *CAT*, 10 December 1984, A/RES/39/46; UNGA, *Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)*, 18 December 1979, United Nations, Treaty Series, vol. 1249; Convention on the Rights of the Child (CRC), 20 November 1989, United Nations, Treaty Series, vol. 1577; *ECHR*.

<sup>vi</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5. See, for instance, *Hassan v. the United Kingdom*, Application no. 29750/09, Grand Chamber Judgment, Council of Europe: European Court of Human Rights, 16 September 2014 and *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, Grand Chamber Judgment, Council of Europe: European Court of Human Rights, 7 July 2011.

<sup>vii</sup> *UDHR*, Article 3; *ICCPR*, Article 6; *ECHR*, Article 2; *UDHR*, Article 5; *ICCPR*, Article 7 and 10; *CAT*, Article 2; *ECHR*, Article 3; *UDHR*, Article 10; *ICCPR*, Article 10; *ECHR*, Article 6; *UDHR*, Art 7. *ICCPR*, Article 26; *ICERD*, Article 1; *ECHR*, Article 14; *CEDAW*, Article 1; *CRC*, Article 2; See further, Ilija Siasitsa et al. *Human Rights in Armed Conflict from the Perspective of the Contemporary state practice in the United Nations: Factual answers to certain hypothetical challenges*.

<sup>viii</sup> See further, Bethlehem, Daniel Sir., *The Relationship between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict*, Cambridge Journal of International and Comparative Law, Volume 2, Issue 2 (2013), pp. 180-195.

<sup>ix</sup> ICRC, *Geneva Convention Relative to the Treatment of Prisoners of War (Third Geneva Convention)*, 12 August 1949, 75 United Nations Treaty Series (UNTS) 135, Article 76; *ICCPR*, Articles 17 and 19.

<sup>x</sup> The UNSC routinely includes non-State armed groups as the addressees of resolutions relating to human rights violations as do UNGA and Council resolutions. Such groups have sometimes responded by unilaterally adopting IHRL norms or interacting with the UN to assess compliance.

<sup>xi</sup> Whilst this factsheet deals with the implementation mechanisms under the UN treaties and ECHR, there are other international and regional bodies that attempt to realise the application of human rights norms in situations of armed conflict. Such bodies include but are not limited to: the Council of Europe Parliamentary Assembly; the Organization for Security and Co-operation in Europe; the International Criminal Court under the Rome Statute 1998; Inter-American Commission on Human Rights; and African Commission on Human and Peoples' Rights.

<sup>xii</sup> UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 1, 55 and 56; *ECHR*, Article 1.

<sup>xiii</sup> UN Human Rights Committee (HRC), General Comment no. 31 [80], *The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, CCPR/C/21/Rev.1/Add; UN, *Vienna Convention on the Law of Treaties*, 23 May 1969, UNTS, vol. 1155, Article 26.

<sup>xiv</sup> Any reduction in rights during public emergencies are often required to be exceptional, temporary and limited to the extent strictly required by the exigencies of the particular situation; See, for instance, *ICCPR*, Article 4 and *ECHR*, Article 15.

<sup>xv</sup> *ECHR*, Article 46.

<sup>xvi</sup> *Ibid.*

<sup>xvii</sup> UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 24, 39, 41, and 42.

<sup>xviii</sup> UN, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Articles 2(1) and 2(7).

<sup>xix</sup> *Rome Statute of the International Criminal Court*, 17 July 1998, A/CONF.183/9, Article 13(b); United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 41.

<sup>xx</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI, Article 27.

## RELATED DPI PUBLICATIONS

<sup>1</sup> Yildiz, Kerim; Breaux, Susan, *International Humanitarian Law and Post-Conflict Mechanisms*, London: Routledge, 2010.

## OTHER USEFUL PUBLICATIONS

<sup>1</sup> Alston, Philip; Goodman, Ryan, *International Human Rights*, Oxford: Oxford University Press, 2013.

<sup>2</sup> Harris, David; Moekli, Daniel; Shah, Sangeeta; Sivakumaran, Sandesh, *International Human Rights Law*, Oxford: Oxford University Press, 2013.

<sup>3</sup> International Committee of the Red Cross, *International Humanitarian Law and the challenges of contemporary armed conflicts*, 2011.

<sup>4</sup> Lubell, Noam, *Challenges in Applying Human Rights Law to Armed Conflict*, International Review of the Red Cross, Volume 87 (Number 860), 2005.

<sup>5</sup> Ratner, Steven R.; Abrams, Jason S.; Bischoff, James L., *Accountability for Human Rights Atrocities in International Law: Beyond the Nuremberg Legacy*, Oxford: Oxford University Press, 2009.

<sup>6</sup> Steiner, Henry, ‘The International Protection of Human Rights’, In Evans Malcom (ed.), *International Law*, 3rd edition, Oxford: Oxford University Press, 2010, pp. 784-813.

<sup>7</sup> UN, Office of the High Commissioner for Human Rights, *International Legal Protection of Human Rights in Armed Conflict*, 2011.