



UiO • **Faculty of Law**
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JUS1730/5730 International Humanitarian Law (the Law of Armed Conflict), autumn 2011

Lecture 8, 24 October 2011:

- i) The application of IHL in peace operations**
- ii) The relationship between IHL and human rights law**

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Outline of the lecture

First hour: IHL in Peace Operations

1. Describing 'Peace Operations'
2. Outlining the legal framework
3. The *rights* and *obligations* of peacekeepers
4. International humanitarian law as binding on Troop Contributing States and on the UN
5. The United Nations as an occupying force

Second hour: IHL vs. HRL

1. The scope of the problem
2. Four theories on the relationship
3. A selected challenge: The application of IHL by human rights bodies

IHL IN PEACE OPERATIONS

What's the problem?

- Peacekeepers do not operate in a legal vacuum
- ...but which rules apply?
 - International humanitarian law?
 - International human rights law?
 - International criminal law?
 - National (criminal) law?
 - Of the host state?
 - Of the sending state?
 - 'UN Law'?
- ...and who can be held accountable for unlawful conduct?
 - The individual soldier?
 - His superior officer(s)?
 - The Troop Contributing State?
 - The United Nations?

Preparing the stage

- Our focus: International humanitarian law
- We address only the applicable law, not accountability for violations of the law.
 - The two issues are connected, but the latter raises different questions.
- We address the applicability of a norm as a matter of *law*, not as a matter of *policy*.
 - What is the difference?
- We address operations with a UN Security Council mandate.
 - Operations without UNSC mandate: National obligations apply in an ordinary manner.

International Peace Operations (POs)

- The development of POs
 - Peacekeeping
 - Peace enforcement
 - Peace building / transitional administrations
- Legal basis: The UN Charter
 - No mention of peacekeeping in the Charter
 - "Chapter VI ½", "Chapter VI ¾", Chapter VII
- Three guiding principles to traditional peacekeeping: Consent, impartiality, minimum use of force
- Civilian, military, police components
- Operations with and without UN mandates
 - POs as 'subsidiary organs' of the UN
 - POs with a UN mandate, but an independent operational structure
 - Or combinations of the two
 - 'POs' without a UN mandate – not discussed here.

Outline of the legal framework

- The UN Charter
- PO specific arrangements
 - Mandates / Security Council Resolutions
 - Status of Forces (Missions) Agreements (SOFA / SOMA)
 - Participating States Agreements (PSA) / Memorandum of Understanding (MOU)
 - Force Regulations, Rules of Engagement (ROE), etc.
- National law
 - Host State
 - Sending State
- International law
 - International humanitarian law (IHL)
 - International human rights law (IHRL)
 - International criminal law (ICL)
 - The Immunity Convention 1946
 - The Personnel Safety Convention 1994
 - Other international law regimes

Rights and obligations

- The ‘active’ element: The legal framework governing the *duties* of peacekeepers.
 - The actions of peacekeepers towards others
 - **Competence:** What are the forces *allowed* to do?
 - **Obligations:** What are the forces *obligated* to do?
 - In the negative sense: Refrain from conduct
 - In the positive sense: Perform conduct
- The ‘passive’ element: The legal framework governing the *protection* of peacekeepers.
 - The actions of others towards peacekeepers
 - **Rights:** What are the forces’ rights?

The applicability of IHL (1/10): History and background

- The historical development until 1992
 - Korea 1950-1953: Humanitarian principles, GC Art. 3, GC III
 - UNEF I 1956-1957: Principles and spirit
 - ONUC 1960-1964: Lump sum agreements
 - Model PSA 1991: Principles and spirit of the general international conventions
 - Rwanda SOFA 1992: Identical expression
- The events in the mid-1990s
 - Rwanda, Somalia, Bosnia
 - "Principles and spirit" proved insufficient
 - A contributing factor to many processes in the UN
 - The Secretary-General's Bulletin 1999
 - Protection of civilians an explicit item on the SC agenda since 1999
 - "Comprehensive review of the whole question of peacekeeping in all their aspects", 2000 (The Brahimi Report)
 - "The Responsibility to Protect", 2001
 - Mainstreaming of human rights in the UN system

The applicability of IHL (2/10): The obligations of States

- Obligations of Troop Contributing States
 - ICRC position since UNEF I: The obligations of Troop Contributing States (TCS) apply in full
 - Reluctance among member states, but appears now to be the prevailing view
- Is it sufficient to rely on TCS obligations?
 - The TCS does, in principle, not have authority over operational matters: The UN insists that it has (should have) exclusive command and control
 - UN efforts to protect peace and security may be jeopardized if the UN is perceived as ignoring IHL violations
 - Interoperability
 - Eventually a question of enforcement and accountability
 - No consistency in the accountability mechanisms

The applicability of IHL (3/10): The UN: Why is the issue discussed?

- Arguments against applicability for the UN
 - The UN can not be a "party" to an armed conflict, and UN personnel can not be "combatants" – to consider the UN as a party may jeopardise the neutrality of the forces
 - The application of IHL will compromise the effectiveness of an operation.
 - The UN is not a party to the Geneva Conventions or other treaties under IHL
 - Many rules under IHL can only be enforced by states.
 - GC Common Art. 1: "respect and ensure respect"
 - The obligations of TCS satisfy the UN's own obligations
- None of these arguments are convincing

The applicability of IHL (4/10): The official solution: Unilateral commitment

- The Secretary-General's Bulletin on Observance by United Nations Forces of International Humanitarian Law (6 August 1999 – ST/SGB/1999/13).
 - 'The fundamental principles and rules of international humanitarian law set out in the present bulletin are applicable to United Nations forces when in situations of armed conflict they are actively engaged therein as combatants, to the extent and for the duration of their engagement. They are accordingly applicable in enforcement actions, or in peacekeeping operations when the use of force is permitted in self-defence.' (Section 1.1)
 - 'The present provisions do not constitute an exhaustive list of principles and rules of international humanitarian law binding upon military personnel ...' (Section 2)

The applicability of IHL (5/10): The SG Bulletin

- An overview over the Bulletin
 - Operations shall be conducted with full respect for the principles and rules of the general conventions applicable to the conduct of military personnel.
 - In case of violations of IHL, members of the force are subject to prosecution in their national courts.
 - Protection of the civilian population
 - Means and methods of combat
 - Treatment of civilians and persons *hors de combat*
 - Treatment of detained persons
 - Protection of the wounded, the sick, and medical and relief personnel
- A summary of fundamental rules and principles under Geneva law and Hague law.

The applicability of IHL (6/10): The effect of the SG Bulletin

- The legal effect of the Bulletin
 - Binding as UN Law
 - Otherwise a political document
 - Not a military order
- Not an exhaustive document
- Does not settle the question of the *de jure* applicability of IHL

The applicability of IHL (7/10): The Capstone Doctrine

- "International humanitarian law ... is relevant to United Nations peacekeeping operations because these missions are often deployed into post-conflict environments where violence may be ongoing or conflict could reignite."
- "United Nations peacekeepers must have a clear understanding of the principles and rules of international humanitarian law and observe them in situations where they apply."
- Reference to the SG Bulletin.

The applicability of IHL (8/10): Which rules apply *de jure*?

- Treaty law or customary law?
 - The UN not party to the Geneva or Hague Conventions, and can not become so.
 - Treaty law not applicable for the UN.
 - ICRC position: Forces remain bound by the treaty obligations of the sending States.
 - Potential problem: Interoperability
 - Customary law is applicable, also to the UN.
 - What is customary IHL?
 - Problems: GC AP I and II, certain area specific conventions
 - ICRC Customary Law Study
- Is IHL relevant below the threshold of armed conflict?

The applicability of IHL (9/10): The qualification of a conflict

- International or non-international armed conflicts?
 - GC common Art. 2: "armed conflict ... between two or more of the High Contracting Parties" – is the UN a 'party'?
 - Can an otherwise non-international armed conflict be "internationalized" by the deployment of UN forces?
 - The answer is not clear. Technically speaking, the conflict is rendered international only if UN forces enter as a party to the conflict against the state.
- But is the UN bound by the rules of international armed conflict regardless of the qualification?

The applicability of IHL (10/10): Protection of personnel

- The status of peacekeepers: Civilians or combatants?
- The 1994 Personnel Safety Convention
- Rules for the protection of UN personnel
 - Art. 7.1: UN personnel shall not be made the object of attack or of any action that prevents them from discharging their mandate.
 - Art. 8: Duty to release captured or detained UN personnel
 - Art. 9: Obligation to make crimes against UN personnel a crime under national law
- Art. 2.2: The Convention does not apply to a UN operation authorized by the Security Council as an enforcement action under Chapter VII of the UN Charter in which any of the personnel are engaged as combatants against organized armed forces and to which the law of international armed conflict applies.
- ICC Rome Statute: Art. 8.2.b(iii) and Art. 8.2.e(iii): It is a war crime to attack a “peacekeeping” mission

The UN as occupying force

- Does the law of occupation apply?
 - Hague Regulations Art. 42: Territory actually placed under the authority of a hostile army
 - Benvenisti's definition of occupation: "the effective control of a power (be it one or more states or an international organization, such as the United Nations) over a territory to which that power has no sovereign title, without the volition of the sovereign of that territory."
- UN Transitional Authorities
 - UNSF, West Irian/West New Guinea, 1962–1963
 - UNTAC, Cambodia, 1992–1993
 - UNTAES, Eastern Slavonia, 1996–1998
 - UNTAET, East Timor, 1999–2002
 - UNMIK/KFOR, Kosovo, 1999–ongoing (EULEX)

The UN as occupying force (contd.)

- Challenges:
 - Hague Regulations Art. 43, GC IV Art. 64: The occupant shall respect the laws in force.
 - The responsibility to protect fundamental human rights.
- The UN as an occupying force
 - West Irian, Eastern Slavonia, Cambodia: The mandate to administer was limited.
 - East Timor, Kosovo: Less clear. The *de jure* application of the law of occupation not recognized by the UN.
 - But the law of occupation forms guidelines

The UN Charter Art. 103

- “In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail.”
- Exceptions for jus cogens / erga omnes
- In principle relevant also for international humanitarian law

Summary

- The legal picture is complex
- ...and therein lies some of the problem
 - Application: Difficult for actors to know what the applicable law is
 - Enforcement: Difficult for injured parties to present claims
- “If legal norms are to be effective in a military context, the norms must be clear and not so complex as to be incapable of practical application.”
 - This goal is not achieved in POs.

IHL VS. HUMAN RIGHTS LAW

The basis of the problem

- Traditional view: A clear dichotomy between the mutually exclusive ‘law of war’ and ‘law of peace’
 - An outdated dichotomy
- International humanitarian law applies during armed conflict
 - ...but some rules also apply in peacetime
- International human rights law applies at all times, also during armed conflict

The application of human rights law during armed conflict: Sources

- The text of human rights instruments
- Two ICJ Advisory Opinions:
 - Nuclear Weapons (1996)
 - The Wall (2004)
- The European Court of Human Rights
- The UN Human Rights Committee
- The Inter-American Commission on Human Rights
- The European Union
- The Venice Commission
- ...and so on

The application of human rights law during armed conflict: Remaining opposition

- USA and Israel
- The close relationship with the extraterritorial application of human rights treaties
- Michael Dennis: The application of human rights law during international armed conflicts is not confirmed by State practice

The scope of the problem: Selected systemic differences

	Duty-bearers	Rights-holders	Remedies
IHL	<ul style="list-style-type: none">• States• Armed groups• Individuals	<ul style="list-style-type: none">• States• Individuals	<ul style="list-style-type: none">• ICJ• Specific treaty regimes• International criminal tribunals• National courts
HRL	<ul style="list-style-type: none">• States	<ul style="list-style-type: none">• Individuals• States	<ul style="list-style-type: none">• ICJ?• International human rights bodies• National courts

The scope of the problem: Norm-conflicts

- What about *norm-specific* differences?
 - Does it *matter* if you apply IHL or HRL?
- Common assumption: In most cases, the legal regimes will produce the same result
- But some differences cannot be escaped:
 - “Collateral damage”
 - Targeted killings
 - Detention, security internment
- Categories of “conflicts” (in a wide sense):
 - Both IHL and HRL govern a situation, with same outcome
 - Both IHL and HRL govern a situation, with different outcome
 - Only IHL governs a situation, while HRL is silent
 - Only HRL governs a situation, while IHL is silent

The scope of the problem: Factual situations

De facto situations	Applicable IHL	Applicable HRL
International armed conflicts	Geneva Conventions + 1 st Add Protocol	Human rights that are not derogated from
Non-international armed conflicts, cat. 1	2 nd Add Protocol	Human rights that are not derogated from
Non-international armed conflicts, cat. 2	GC Common Art. 3	Human rights that are not derogated from
Disturbances, riots, etc. below the threshold of armed conflict		Human rights that are not derogated from
Peace		International human rights treaties

The scope of the problem: Combat operations only?

- The relationship between IHL and HRL may need to be assessed differently in relation to *combat operations* than in relation to *other circumstances during armed conflicts*
- The administration of a society does not stop because of an armed conflict; HRL may continue to govern the relationship between authorities and citizens, even if IHL applies to combat operations

Four theories on the relationship:

1. *Lex specialis*

- ICJ, *The Wall*: “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.”
- Not a “strong” form of *lex specialis* – human rights law is not excluded *per se*.
- A “weak” form: A particular norm of IHL may be considered as *lex specialis* to a particular norm in HRL

Four theories on the relationship:

1. *Lex specialis*: Criticism

- Fundamental objection: *Lex specialis* was developed as a conflict-solution technique in national law, and is not appropriate in international law
- More specific objections:
 - Does it refer to specificity of *norms* or of *facts*?
 - If norms: What is the specific norm and what is the general norm?
 - Applicable only to international armed conflicts?
 - Applicable only when the IHL norms are sufficiently specific, clear and well-established

Four theories on the relationship:

2. Complementarity

- The core: The two regimes complement and mutually reinforce each other
- Particularly two elements:
 - HRL can fill gaps in IHL
 - HRL can provide mechanisms for the implementation of specific IHL norms

Four theories on the relationship:

2. Complementarity: Criticism

- The complementarity theory means that both sets of norms must be interpreted – reduces the clarity
- How should one address the systemic differences?
- Intellectually comforting, but operationally difficult

Four theories on the relationship:

3. Most favorable protection of victims

- When there is a conflict between IHL and HRL, the norm shall prevail which provides the better protection of individuals
- The “belt and suspenders” approach
- Main difference from the complementarity theory lies in the singling out of one main value
- Defence of the theory: State voluntarism

Four theories on the relationship:

3. Most favorable protection of victims: Criticism

- Does not take the reality of a conflict environment sufficiently into consideration
 - Contradicts important elements in IHL
- Makes it necessary to establish which regime that actually provides the better protection
- Singles out the “direct” victim, without regard to other, “indirect” victims

Four theories on the relationship:

4. Human rights-based law of war

- Two forms:
 1. The regimes are incompatible in their attitude to aggressive wars, the aggressor, per definition, does not pursue a "legitimate" aim under human law. "Lawful acts of war" are not aggressive acts. (Schabas)
 2. "Unified" theories
 - Use of force should be assessed by placing primary value on human beings rather than on military necessity (Mackinnon)
 - Examines the distinction between combatants and non-combatants. The latter can be killed just because they are combatants while others cannot, constitutes a violation... (Koller)



An objectively correct solution? Or everyone decides for himself?

- The status of ICJ Advisory Opinions
- Dominant view in literature (?):
Complementarity
- Actual situation: Different actors take different approaches

A practical challenge: The application of IHL by human rights bodies

- Do human rights bodies have competence to apply international humanitarian law?
- Practical problem: Respondent States do not recognise the existence of an armed conflict
 - Should human rights bodies apply IHL *ex officio*, when States do not recognise its application and it could reduce the level of protection of individuals?
 - But a legal regime, such as IHL, is (or is not) applicable as a *matter of law*, and not because someone recognises its applicability or not (ICTR, Akayesu)

The European Court of Human Rights

- Ergi (Turkey/Kurdistan, NIAC, 1998): Standards from IHL applied within the framework of HRL
- Banković (NATO/Serbia, IAC, 2001): Impact of IHL not considered
- Isayeva (Russia/Chechnya, NIAC, 2005): In the absence of a valid derogation, the “operation in question ... has to be judged against a normal legal background”.
- Al-Jedda (UK/Iraq, internationalised NIAC?, 2011): The final annulment of IHL?