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The use of force in international law

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Introduction

In this free course, *The use of force in international law*, you will study the law on the use of force. This is one of the central topics in public international law, as it contains the body of principles aimed at ensuring territorial sovereignty and independence of states, which are the main actors in international law.

The prohibition of the use of force and the principle of non-intervention in the internal or external affairs of other states are two of the fundamental principles of international law governing international relations. However, through studying this course, you will discover that the operation of the rules on the use of force is a contentious topic in contemporary international affairs. The traditional set of rules on the use of force is increasingly being challenged in the modern world by complex emergency situations and also by the growing participation of actors other than the states on the international scene, whose presence and acts pose a challenge to the application of international law.

By engaging in online activities and considering the real scenarios presented in this course you will have a chance to experience for yourself how challenging the application of the rules can be and to identify some of the main difficulties that lie ahead. After studying this course, test your knowledge on international law and humanitarian intervention by playing the game *Saving Setrus*.

This OpenLearn course is an adapted extract from the Open University course W821 *Exploring the boundaries of international law*.

Learning Outcomes

After studying this course, you should be able to:

- explain the rules governing the law on the use of force and their evolution
- analyse case examples relating to the use of force in international law and be able to critically analyse how the rules of international law have been (mis)applied in particular situations
- understand how international law regulates the conduct in wars of both international and non-international character
- comment on the key challenges to the operation of the rules on the use of force in the contemporary international setting
- demonstrate enhanced skills and confidence in conducting research in international law.

1 History of the law on the use of force

For centuries, states have resorted to force in their international relations in order to achieve particular, desired aims. The use of violence has proved to be an accepted, although tragic in its consequences, method of resolving disputes between states. States reserved the right to wage war without any internationally agreed regulatory framework. Nevertheless, over time, the concepts of 'just and unjust war' emerged. The distinction between the two can be traced back to ancient Rome and the Fetials (*fetiales*), a group of priests who were responsible for maintaining peaceful internal and external relations and who gave rise to fetial law (*ius fetiale*) – religious law regarding the process of creation, interpretation and application of treaties and regulations on the declaration of war. The concept of 'just war' has changed over centuries (Von Elbe, 1939).

Roman law of war and peace

> Deliberations about war were expected to pass through these priests, who would seek a judgment of the gods about the justice of the proposed course of action. If it was decided that a grave breach of the peace had in fact occurred, such that a just war would be warranted, the fetials would first approach the guilty city to demand redress. If, after a certain period of time, no satisfaction was given, war could begin. (...) Declarations of war were cast in form of a lawsuit, in which the verdict transmitted by the fetials was meant to decide on the question whether the war could be rightly waged. Whether or not a war should be waged (to enforce a verdict) would then be the matter for a new decision, to be rendered by the king, the senate, or even (in later periods) the entire people.
>
> (Reichberg et al., 2006, pp. 47–8)

The doctrine of 'just war' was further influenced by Christian theologians such as St. Augustine and St. Thomas Aquinas, the latter famously stated in *Summa Theologica* that the three criteria for just war are:

1. it should be waged by a sovereign authority (prohibition of waging a private war)
2. it must have a just cause (punishment of wrongdoers)
3. a just cause must be accompanied by the right intention.

Together with the rise of independent states in Europe, the doctrine began to evolve. In light of the growing number of sovereign states, wars started to be seen and defined as a state of legal affairs rather than a matter of subjective moral judgment. States no longer found themselves in a position to judge if another state's reason for resorting to force was just or not. This approach was supported by the rise of positivism, which strongly focused on the idea of sovereignty and by the Peace of Westphalia 1648, which established the European system of the balance of power. This system survived in Europe until the beginning of the twentieth century, effectively coming to an end with the outbreak of the First World War.

In the aftermath of the First World War efforts were made to rebuild international relations between states through the establishment and operation of an international institution which would play a central role in ensuring that such acts of aggression would not occur again. The League of Nations (LON) was created in 1919 with a view to achieving this aim. Under the 1919 Covenant of the League of Nations, member states were required to submit any inter-state disputes for arbitration or seek other forms of judicial settlement at the League's Council. However, the Covenant did not in fact revoke the right of states to resort to war, although it subjected this provision to some limitations. In 1928, another attempt at the legal regulation of the use of force was made, in the form of the General Treaty for Renunciation of War as an Instrument of National Policy, more commonly referred to as the Kellogg–Briand Pact. Parties to this treaty declared that they 'condemn recourse to war' and agreed to 'renounce it, as an instrument of national policy in their relations with one another' (Article 1).

The outbreak of the Second World War in 1939 once again marked the end of peaceful international relations. The tragic events of this international conflict led to the adoption of the Charter of the United Nations (UN Charter) in 1945 resulting in the development of a framework, aimed at regulating the use of force by members of the international community. That system remains in force.

1.1 The post-1945 legal framework

The current legal framework regulating the use of force in international law is enshrined in the UN Charter. The maintenance of international peace and security is the primary purpose of the UN (Article 1(1) UN Charter). This includes:

> prevention and removal of threats to the peace, [...] the suppression of acts of aggression or other breaches of the peace, [...] and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

Therefore, as a general rule of international law, the use of force is prohibited.

Box 1 The illegality of the use of force

Although states have resorted to the use of force in international relations on multiple occasions, there have been only two cases in which the International Court of Justice (ICJ) has found that there had been a violation of the prohibition of the use of force:

- *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v The United States of America*) ICJ Rep 1986
- *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda)* ICJ Rep 2005.

The UN Charter further provides that:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
>
> (Article 2(4) UN Charter)

As you may have noticed from the wording of Article 2(4), prohibited acts include both the *threat* of force and the *use* of it.

It is important to remember that the prohibition on the use of force *is not absolute*. As the wording of Article 2(4) suggests, the force is permissible in circumstances consistent with the purposes of the UN. Chapter VII of the UN Charter ('Action with Respect to Threats to the Peace, Breaches of the Peace, and Acts of Aggression'), outlines when a state can resort to the use of military force against other states. Force may be used against another state when:

- such an act is authorised by the UN Security Council as part of collective security mechanism
- a state is acting in self-defence.

You will now consider these situations in more detail.

1.2 The use of force authorised by the UN Security Council

The UN Security Council plays a major role in the global collective security system by deciding whether force may be used against other states. Should a situation that threatens international peace and security occur, it is within the Security Council's mandate to 'determine the existence of any threat to the peace, [...] or act of aggression' as well as to 'make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42' (Article 39 UN Charter). In such a situation, a state (or group of states) does not act unilaterally (as in the case of self-defence), but rather states act collectively by resorting to force acting under the authority of the international organisations (e.g. the UN Security Council).

Box 2 The use of force in Libya

UN Security Council Resolution 1973 of 17 March 2011 is an example of the authorisation of the use of force by the UN Security Council. On the 17 February 2011, soon after the outbreak of protests in Egypt and Tunisia, which marked the beginning of 'The Arab Spring', Libyans in Benghazi joined in peaceful protests against the oppressive rule of Colonel Muammar Gaddafi. They demanded that he step down after 42 years of ruling Libya and called for an open, democratic and inclusive Libya. They demanded the end of an era of oppression and gross human rights violations in the country, such as those committed in 1996 in the Abu Salim prison. The response of Gaddafi to this protest with armed violence against civilian protesters ignited a civil war between the government forces in support of Gaddafi and the opposition armed forces formed by the rebels.

On 17 March 2011, the UN Security Council, acting under Chapter VII of the UN Charter, adopted Resolution 1973 authorising member states 'to take all necessary measures […] to protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya, including Benghazi, while excluding a foreign occupation force of any form on any part of Libyan territory.'

Figure 1 Protesting in Libya, 2011

1.3 The use of force in self-defence

States may legitimately resort to the use of armed force in self-defence (Article 51 UN Charter). But what is the meaning of 'self-defence'?

Self-defence is a lawful reaction to the 'armed attack' against the territorial integrity of a state, which also diminishes its political independence (acts forbidden in Article 2(4) UN Charter). By executing the right to use force in self-defence, states are conducting a unilateral act.

The traditional meaning of the right to self-defence originates from the *Caroline* case (29 Brit & For St Papers) (Box 3); these principles were accepted by the British Government at the time and formed a part of customary international law.

Figure 2 The destruction of the *Caroline*

Box 3 The *Caroline* case (1837)

This case sets out a customary international law definition of the right to self-defence. It originates from a dispute between the British Government and the US Secretary of State regarding the destruction of an American vessel in an American port by British subjects. The reason behind this act was the use of the vessel to transport munitions and groups of Americans, who were conducting attacks on the Canadian territory. The US Government declared that the attack on the vessel constituted an attack against the American territory.

The British Government responded by claiming the right to self-defence. The subsequent diplomatic correspondence between the parties contained an outline of the key elements for legitimate self-defence. The US Secretary of State, Daniel Webster, emphasised that for the self-defence to be lawful in international law, the British Government must prove the:

> necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment for deliberation

and that assuming such a necessity existed at the time:

> the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.
>
> (Webster and Fox, 1857)

The customary nature of the right to use force in self-defence was further confirmed by the International Court of Justice (ICJ) in the Nicaragua Case (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America* ICJ Rep 1986). This is one of the key judgments in international law and you will consider it in greater detail in Activity 1.

Activity 1

This activity is primarily designed to build your research skills in international law and to strengthen your ability to critically analyse international documents. It is also designed to allow you to practise the skill of comparative analysis. When consulting the texts for this activity, you should focus on selecting relevant parts of the decisions, which comment on the issues that the questions are asking you to consider.

Find and read:

- the ICJ decision in the Nicaragua Case (paras 191–95, Merits)
- the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (ICJ Rep 1996, paras 34–47).

Then compare and contrast these paragraphs with:

- the dissenting opinion of Judge Higgins in the ICJ Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (ICJ Rep 2004), focus on paragraphs 33–4.

a. When can states exercise the right to use force in self-defence?

b. What are the criteria with which a state must comply when engaging in the lawful act of use of force in self-defence?

c. Do you agree with the opinion expressed by Judge Higgins?

Comment

All of the above texts comment generally on the application of the ‘right to self-defence’ in international law and comment on the meaning of an ‘armed attack’ (see for example para.195 of the Nicaragua Case).

It is a good idea, if you can find the time, to read the other parts of this decision, as it provides a useful context to your studies.

1.3.1 Criteria for self-defence

In order to lawfully exercise the right to self-defence, a state must be able to demonstrate that it has been a victim of an armed attack. The burden of proof in such a case lies with the state seeking to justify the use of force in self-defence. Nevertheless, not all attacks will constitute an armed attack for the purposes of Article 51: only the most grave forms of attack will qualify (Nicaragua Case, para.191).

Furthermore, the ICJ held in the Nicaragua Case (Merits) that 'self-defence would warrant only measures which are proportional to the armed attack and necessary to respond to it' (para. 176). This statement sets out two important principles in international law concerning the use of force: the principle of proportionality and the principle of necessity. In this context, proportionality means that the response to an armed attack must be reflective of the scope, nature and gravity of the attack itself. On the other hand, the principle of necessity guards against the use of measures which are excessive and not necessary in response to an armed attack.

The meaning of 'armed attack' causes significant controversy in international law. In the Nicaragua Case and in *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion ICJ Rep 2004, the ICJ rejected the idea that an armed attack may include 'not only acts by armed bands where such acts occur on a significant scale but also assistance to rebels in the form of the provision of weapons or logistical or other support'(Nicaragua Case, para.195). In other words, it is necessary to show that an armed attack is attributable to a state.

In the Nicaragua Case, Judge Higgins strongly opposed this view and argued that the act involving the use of force from actors other than a state, such as groups of insurgents or terrorist groups, may give rise to the exercise of the right of self-defence by the attacked state. This statement highlights a very contentious issue in modern international relations, namely the use of force in self-defence against non-state actors.

1.4 Self-defence against non-state actors

The law on the use of force is traditionally designed to regulate the legality of armed force between states. This reflected the reality of the aftermath of the Second World War and the efforts of the international community to prevent such conflict from recurring in future. However, over the past few decades, states have increasingly been subjected to attacks by non-state entities. This raises questions about the adequacy of the traditional legal framework on the use of force in modern armed conflicts. The key questions are:

> When (if at all) may a state lawfully use force against non-state actors?
>
> May states exercise pre-emptive self-defence in anticipation of attack?

These questions attracted great international attention in the aftermath of the terrorist attacks on the World Trade Centre on 11 September 2001 (the '9/11' attacks) carried out by members of the al-Qaeda network.

Soon after the 9/11 attacks, the UN Security Council issued Resolution 1373 of 28 September 2001. The language of this resolution may suggest an almost unlimited mandate to use force against terrorist groups. It reads:

> *Acting* under Chapter VII of the Charter of the United Nations, [...]
>
> 2. *Decides also* that all states shall:

> (b) Take the necessary steps to prevent the commission of terrorist acts [...].

In addition, the UN Security Council established a Counter-Terrorism Committee, mandated with the implementation of the resolution.

Although there were instances of the use of force against non-state actors prior to 2001, the 9/11 attacks urged discussion about the right to pre-emptive self-defence in international law. Following the attacks, the Bush Administration in the USA adopted a security strategy, based on the right to pre-emptive self-defence. The doctrine of pre-emptive self-defence assumes the right to use force without international authorisation in order to prevent the development of a possible future attack by another state. The USA's *National Security Strategy* (US Government, 2002) used the term of pre-emptive self-defence, particularly with reference to terrorist attacks:

> The war against terrorists of global reach is a global enterprise of uncertain duration.
>
> [...]
>
> And, as a matter of common sense and self-defence, America will act against such emerging threats before they are fully formed.

The idea of pre-emptive self-defence is extremely controversial, as it goes against the core principles of international law regulating the use of force. The UN Charter allows for the use of force only in extreme circumstances, as a means of last resort, once all peaceful means have been exhausted. Furthermore, the use of force against another state in circumstances where there is a lack of an armed attack in the first place questions the necessity and proportionality of an attack carried out by a state which acts on the basis of 'pre-emptive self-defence'.

The ICJ has not yet commented on the existence of a right to use force against non-state actors, nor the right to pre-emptive self-defence.

2 The law of armed conflict

In Section 1 we looked at the rules governing the resort to force by states in international relations (*jus ad bellum* – law on on the use of force).This section looks at a specific branch of international law, which aims to regulate the conduct of states and individuals during armed conflict: international humanitarian law (IHL) (*jus in bello* – law of war).

The study of IHL will enable you to understand how international law responds to situations where the force has been used (or where states are engaged in war) as well as what practical ramifications the rules of IHL have for the protection of all actors involved in warfare.

Activity 2

Consider the following questions:

a. Is anything allowed in war?
b. Why does international law seek to regulate the conduct of warfare?
c. What actors are involved in armed conflict and what type of protection, in your opinion, should be afforded to them?
d. Can you think of any challenges to the regulation of the conduct in war in the contemporary world?

Comment

In considering these issues, you may find it helpful to watch the following short film from the International Committee of the Red Cross: *International Humanitarian Law: A Universal Code*. It is approximately 13 minutes long.

Video content is not available in this format.

2.1 Overview of international humanitarian law

> If international law is, in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law.
>
> (Lauterpacht, 1952)

International humanitarian law (IHL) acts as *lex specialis* (law governing a specific subject) in international law. It sets out the rules applicable to a very specific situation in international relations: the state of armed conflict.

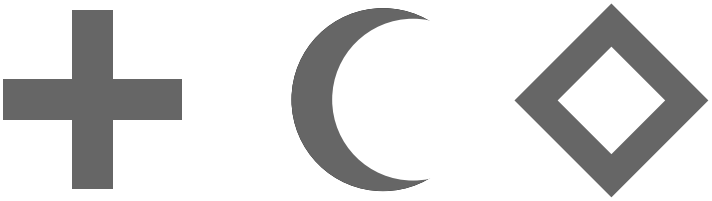
The main aim of IHL is to limit the detrimental effects of warfare by providing protection to those who do not take part or no longer take an active part in hostilities. It also defines rules of conduct for those engaged in armed conflict and provides restrictions regarding the methods and means of warfare that can be employed.

Historical development of IHL

Although the customary principles regarding the conduct of hostilities have been formed over centuries, the origins of contemporary IHL go back to the nineteenth century and the battle of Solferino (1859). Henri Dunant, a Swiss businessman who witnessed the grave suffering resulting from this battle, was appalled by the extent of human suffering and the lack of assistance to the sick and wounded. Dunant organised local residents to provide help to the victims of the battle. The humanitarian treatment of those no longer participating in hostilities later became the core principle enshrined in the first Geneva Convention in 1864.

Upon his return to Geneva, Dunant wrote a book, *A Memory of Solferino*, which eventually led to the establishment of the International Committee of the Red Cross (ICRC) in 1863 – an organisation that promotes and guards the principles of IHL to this day.

The ICRC has three emblems (Figure 3); their purpose is to make combatants aware that people, buildings and vehicles bearing the symbols are protected under the 1949 Geneva Conventions and should not be the object of attack.



(a) (b) (c)

Figure 3 The three emblems of the ICRC: (a) red cross; (b) red crescent; (c) red crystal

The Law of The Hague and the Law of Geneva

Traditionally, the law of armed conflict is divided into two branches: the Law of Geneva and the Law of the Hague (Figure 4).

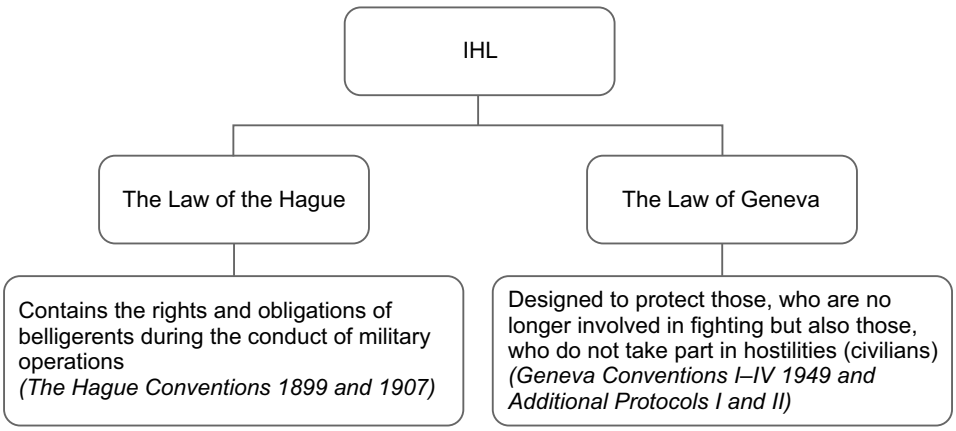


Figure 4 The two legal arms of IHL

In this course, we will focus on the four Geneva Conventions of 1949 and the three Additional Protocols of the Geneva Conventions (AP I and II 1977, AP III 2005), which create the core of the legal framework of protection for victims of armed conflict. Aim to familiarise yourself with the relevant provisions of the Geneva Conventions related to the various issues discussed in this section.

Types of armed conflict

Although generally only states can become a party to treaties, the rules of IHL must be respected by all parties to an armed conflict, irrespective of whether they are a state or non-state entity (e.g. a group of guerrilla fighters). However, the application of the correct legal framework depends primarily on the type of armed conflict. IHL distinguishes between two main types of conflict:

- international
- non-international (internal).

International armed conflict (IAC) involves fighting between armed forces of at least two states. The law applicable to international armed conflicts is enshrined in the Geneva Conventions I–IV and AP I.

In recent years non-international armed conflicts (NIAC) have become much more common. Such conflicts, civil wars, involve fighting between the regular armed forces of the state, on the one hand, and identifiable armed groups on the other; or else, fighting between two or more armed groups but with no state involvement.

Box 4 Armed conflict(s) in Libya

Between February and October 2011, Libya was engaged in an armed conflict. When the Libyan Revolution broke out, Libya was in a state of an internal armed conflict: the fighting between pro-Gaddafi militias and the rebel armed groups (called thuwar) constituted NIAC.

Libya was also engaged in an IAC with the states participating militarily in the implementation of the measures authorised by UN Security Council Resolution 1973; this included the establishment of a no-fly zone over Libya.

Not all fighting within one country will be a civil war. There is a difference between internal disturbances, such as riots or protest against the state authorities, and NIAC. NIAC

requires reaching of a certain threshold of intensity of general violence and it must extend over a certain period of time. The legal framework applicable to NIAC is much more limited than the framework applicable to IAC. It comprises Article 3 common to all four Geneva Conventions (Common Article 3) and the AP II.

Box 5 Common Article 3 of the Geneva Conventions

Common Article 3 is often called 'a treaty in miniature' due to the number of rules it contains. It reads as follows:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
>
> 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.
>
>   To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:
>
>   b. violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
>
>   c. taking of hostages;
>
>   d. outrages upon personal dignity, in particular humiliating and degrading treatment;
>
>   e. the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> 6. The wounded and sick shall be collected and cared for.
>
>   An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
>
>   The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
>
>   The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.

The conduct of the protagonists in both NIAC and IAC is additionally regulated by the rules of customary international humanitarian law (CIHL). CIHL is of particular importance in modern armed conflicts. Generally, customary rules of IHL complement the rules enshrined in treaty law. As a result of the changing nature of warfare, treaty law is sometimes unable to adequately respond to the challenges posed by contemporary armed conflicts. As its rules derive from general state practice, CIHL fills in these gaps

and so it strengthens the protection available to victims. Furthermore, customary rules are binding on all states, irrespective of whether the state ratified a treaty.

Customary international humanitarian law and the ICRC

In 2005, the ICRC conducted a study on customary international humanitarian law. The study showed that rules regulating internal armed conflicts are much more extensive under CIHL than under treaty law. This is of particular significance, as the majority of modern armed conflicts are of a non-international character. Furthermore, as the treaty law regulating NIAC is rather limited, development of customary rules enhances protection of victims, but also those taking active part in hostilities.

2.2 The main principles of IHL

IHL is based on three main principles:

1. proportionality
2. necessity
3. distinction.

You became familiar with the first two principles in Section 1. The third main principle of IHL relates to the distinction between civilian objects and military objectives. IHL requires all parties to a conflict to balance military necessity with humanitarian principles, aimed at limiting suffering in warfare. The application of the principle of distinction means that only military objectives can be subjected to an armed attack. This rule is codified in Articles 48 and 52(2) of AP II, to which no reservations have been made. It is a very important principle as it has implications for the applicable system of protection explained in Table 1.

Table 1 The system of protection of civilians and combatants under IHL

CIVILIANS	COMBATANTS
do not take part in hostilities	do take part in hostilities
do not have a right to take part in hostilities (have the right to be respected)	have the right to take part in hostilities and have the obligation to observe of IHL
may be punished for participation in hostilities	may not be punished for the mere participation in hostilities (but will be pu committing violations under IHL)
generally: are protected because they DO NOT participate in hostilities	are protected WHEN they no longer participate in hostilities
• protected as civilians in the hands of the enemy • protected against attacks and effects of hostilities	• protected if they have fallen into the power of the enemy • if wounded, sick or shipwrecked • protected against some means and methods of warfare, even whe

Activity 3

Read the following articles of Geneva Convention III 1949, which sets out the rules regulating the treatment of prisoners of war: 2–5, 12–18, 22–23, 25–30, 33–34, 41, 49–50, 52, 71, 78.

Bearing in mind what you've learned so far about IHL, try to apply your knowledge in a practical case scenario by role playing in an online game, where you will become a commander of a prisoner of war camp. Your role will be to run the camp according to the principles of IHL. You will receive feedback on the decisions you have made as you progress through the stages of the game. The game is called 'Prisoners of war'.

Comment

This activity is designed not only to test your understanding of the rules of IHL, but also your ability to apply it to particular situations. Importantly, the exercise highlights one of the main challenges to the operation of the rules of IHL, namely their implementation during armed conflict by the actors involved. You should get a taste of the complexity of the decisions which are made in wartime.

2.3 Protection of civilians

The general framework of protection available to civilians is contained in Geneva Convention IV and AP I and II.

Article 27 Geneva Convention IV affords general protection to all civilians, without adverse distinction based on age, state of health, sex, race, religion or political opinion. The prohibition of discrimination is inherent to all of the Law of Geneva and therefore applies also in conflicts of a non-international character.

Common Article 3(1) of the Geneva Conventions prohibits discrimination on various grounds (see Box 5).

However, it is essential to distinguish between the prohibition of *discrimination* and the principle of *differentiation*. IHL explicitly prohibits any form of discrimination in the application of its rules to protected persons. Nevertheless, IHL simultaneously recognises the specific needs and vulnerabilities of certain groups during war and grants them further, additional, protection and rights. Therefore, under the Law of Geneva framework, persons may be entitled to both a general protection, applicable equally to all combatants, civilians and persons classified as *hors de combat*, as well as a special protection as a party particularly vulnerable to armed conflict and certain types of violence.

Ethnic cleansing in Srebrenica

During the war in the former Yugoslavia, in July 1995, over 8000 civilian men of Bosnian Muslim origin, were killed by the Army of Rebuplika Srpska under the command of General Ratko Mladič (see Figure 5). The massacre was part of a policy of so-called ethnic cleansing – a deliberate strategy aimed at the creation of ethnically clean areas. This intentional mass killing not only constituted a grave violation of the rules of IHL regarding the protection of civilians, but also amounted to genocide.

Figure 5 Preparation for burial of some of the Srebrenica victims

For the timeline of catastrophe in Srebrenica, see: Timeline: Siege of Srebrenica (BBC, 2012).

Special protection under IHL

Two groups afforded special protection are women and children.

The specific needs of women may vary according to the situation in which they find themselves during armed conflict. Although the majority of women experience armed conflict as civilians, mostly due to their traditional gender roles within the society as wives, mothers and carers, an increasing number of women take an active part in warfare, both in regular forces and guerrilla, resistance or insurgent groups. Irrespective of the roles they play, IHL attempts to provide particular protections, aimed at achieving special respect for women. Within the IHL framework, particular rules have been adopted in relation to pregnant women and mothers of young children.

Box 6 Protection for women under the Law of Geneva

The Law of Geneva provides special protection for women:

- Mothers:
  - (Articles 14, 16, 17, 21, 22, 23 GC IV)
- Detainees and Prisoners of War (POWs):
  - Articles 14(2), 25, 97, 108 GC III
  - Articles 76, 85, 89, 91, 97, 124, 132 GC IV
  - Articles 76(2) GC AP I
  - Articles 5(2)(a), 6(4) GC AP II.
- Specific provisions regarding protection from wartime sexual violence:
  - Articles 27 GC IV
  - Articles 76 (1) GC AP I
  - Articles 4 (2) GC AP II
  - Common Article 3(1)(c) GC.

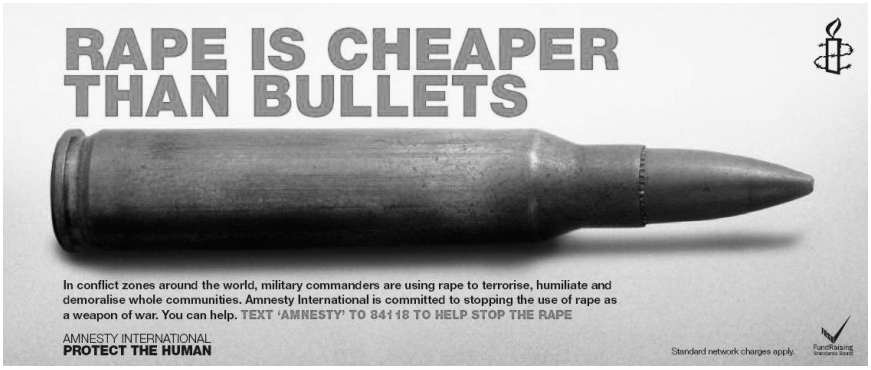


Figure 6 'Rape is cheaper than bullets', a poster advertising campaign launched by Amnesty International to stop the use of sexual violence as a weapon of war

Activity 4

Read paragraphs 333–58 from the Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General (UN, 2005). (UN, 2005).

Can you identify which rules of IHL have been violated in the situations described in the report?

The report states that rapes have also been committed by the Janjaweed. Are irregular armed groups bound by the rules of IHL regarding protection of women in armed conflict?

Do the instances of rape and other forms of sexual violence raise any questions about the adequacy of IHL in the protection of women in armed conflict? Is the law sufficient? Or is there perhaps more of a need to nurture respect for the existing law?

Comment

Rape and other forms of sexual violence have been used as a weapon of war for millennia. The aim of using sexual violence in conflict is to victimise women and also to assert domination over the enemy. Furthermore, it is a psychological wartime tactic, which purports to attack and weaken the entire community to which the victim belongs. From a socio-cultural perspective, sexual violence is used to assert specific political goals by means of humiliation, degradation and the terrorisation of a particular social group.

The report describes several situations involving the use of rape and other forms of sexual violence during the civil war in Darfur. The use of sexual violence in armed conflict (both internal and international) is explicitly prohibited by IHL and this rule is binding on *all* parties to armed conflict. In the context of an NIAC, Common Article 3 of the Geneva Conventions prohibits 'violence to life and person, in particular [...] cruel treatment and torture' and 'outrages upon personal dignity, in particular humiliating and degrading treatment'. Although Sudan is not a party to GC AP II, the customary rules of IHL, including the prohibition of the use of sexual violence, are applicable and fully binding on those involved in armed conflict.

All parties are bound by the core principles of IHL, especially the principle of distinction (see para. 339 of the report) and the principle of differentiation. Furthermore, international law prohibits and criminalizes sexual violence, in particular rape as a war

crime and/or a crime against humanity. The use of sexual violence as a weapon of war has been condemned on an international level (UN Security Council Resolutions 1325 of 31 October 2000 and 1820 of 19 June 2008) and numerous calls have been made to stop this practice.

3 Humanitarian intervention and the responsibility to protect

By now you should have a good understanding of law regulating the resort to force by states as well as the rules of IHL, which regulate conduct in armed conflict. In this section, we will look at a topic that remains hugely controversial in international relations as well as in international law: humanitarian intervention. Throughout the study of this section, you will have an opportunity to use the knowledge gained in Section 1 to critically approach the topic of humanitarian intervention and to evaluate its validity from a legal perspective.

3.1 What is humanitarian intervention?

The term humanitarian intervention is defined by Holzgrefe as:

> The threat or use of force across state borders by a state (or a group of states) aimed at preventing or ending widespread and grave violations of the fundamental human rights of individuals other than its own citizens, without the permission of the state within whose territory force is applied.
>
> (Holzgrefe, 2003, p. 18)

This definition alone indicates some of the key problematic issues surrounding humanitarian intervention. Firstly, it involves the use of force (or a threat thereof) against another state without its consent. This action itself indicates an attack on state sovereignty, which is additionally strengthened by the second element of this definition: implication of a failure of the state in question to secure the human rights of its citizens.

Furthermore, there are several misconceptions about the meaning of humanitarian intervention, some of which can be clarified as follows:

1. Humanitarian intervention does not have the same meaning as humanitarian assistance. There is a clear distinction between those two categories, based on the question of consent. In situations where humanitarian assistance is needed, the host state must consent to it. During IAC, the parties to an armed conflict are in principle obliged under the rules of IHL to permit relief operations for the benefit of civilians, without distinction based on whether they belong to an enemy state or not. The consent of the state should not be a relevant issue. However, in cases where no armed conflict is taking place, the consent of the host state becomes crucial. International law is clear in posing no objections to the provision of humanitarian assistance. As confirmed by the ICJ in the Nicaragua Case:

   > There can be no doubt that the provision of strictly humanitarian aid to persons or forces in another country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law
   >
   > (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* ICJ Rep 1986, 242)

2. The use of force by a state in order to rescue its own nationals abroad does not amount to humanitarian intervention. The famous case illustrating such an act was the rescue by Israel of hostages held captive at Entebbe airport in Uganda, after the hijacking of an Air France aeroplane. Protection of citizens abroad was also used as a justification for the invasion of Grenada by the US in 1984.
3. An intervention based on the invitation by another state does not constitute humanitarian intervention.
4. Peacekeeping operations (PKO) are not humanitarian interventions. PKO are deployed by the UN on the basis of mandates from the UN Security Council. Their main aim is to maintain international peace and security usually in the aftermath of armed conflict, but some operations are deployed in order to prevent the outbreak of conflict.

Examples of past humanitarian interventions

Iraq (1991) – provision of humanitarian assistance to ethnic Kurds by the US-led coalition troops and maintenance of a no-fly zone to prevent attack by Iraqi air forces.

Somalia (1992) – The USA and the UN intervened to ensure the delivery of international humanitarian aid to the region.

Kosovo (1999) – The NATO bombing of Belgrade as a response to widespread attacks on the civilian population.

Sierra Leone (2000) – UK troops deployed to support UN peacekeeping forces to protect civilians from gross violations of their rights committed by rebel forces.

Darfur, Sudan (2004) – The African Union deployed peacekeeping troops to protect civilians in the region, especially those in refugee camps. However, the intervention failed to limit or eliminate the violence.

Figure 7 UN Peacekeeping forces

3.2 The dilemma of intervention

The key tension in the debate on humanitarian intervention relates to the intersection between the moral and legal aspects of intervention.

From the legal perspective, humanitarian intervention can be seen as violating one of the main principles enshrined in international law: the political and territorial independence of the state. It can therefore be argued that, apart from different phraseology, it simply constitutes an act of illegal use of force. On the other hand, it is difficult to object to the moral righteousness of intervening in order to protect individuals in another country from gross violations of their human rights. However, does the fact that something might be morally right make it a lawful act?

It is important to distinguish between the legitimacy and the legality of humanitarian intervention. The clash between the commitment of the international community to the legality of actions in the international arena and the ethical commitment to save lives creates one of the major dilemmas in contemporary international affairs. Questions have also been raised about the effectiveness of humanitarian intervention, especially its timescale.

Example: Genocide in Rwanda

The Rwandan genocide in 1994 is a good example of a failure of a humanitarian intervention, which was catastrophic for the victims. At the time when arguably it was most needed, the international community, with the knowledge of the unveiling tragedy in Rwanda, did not take any action to prevent mass killings of civilians and attempted genocide.

Activity 5

In this activity you will consider whether humanitarian intervention is a legal dilemma.

Read the views expressed by various academic commentators, below, and compile a list of your legal arguments in favour of, and against, humanitarian intervention.

> ‘Humanitarian war’ is a contradiction in terms. War and its consequences, bombing and maiming people can never be part of human rights and morality.
>
> (Douzinas, 2000, p. 141)

> I indicated that critics of humanitarian intervention are not pacifists. They object to *this kind of war*, a war to protect human rights. They do not object to wars, say, in defense of territory. This position is somewhat anomalous because it requires separate justifications for different kinds of wars. [...] Take the use of force in self-defense. What can possibly be its moral justification? Very plausibly, this: that the aggressor is assaulting the rights of persons in the State that is attacked. The government of the attacked State, then, has a right to muster the resources of the State to defend its citizens’ lives and property against the aggressor. The defense of States is justified *qua* defense of persons. There is no defense of the *State* as such that is not parasitic on the rights and interests of individuals. If this is correct,

any moral distinction between self-defense and humanitarian intervention, that is, any judgment that self-defense is justified while humanitarian intervention is not has to rely on something above and beyond the general rationale of defense of persons.

(Tesón, 2003, p. 99)

[…] the arguments in support of unilateral humanitarian intervention do not stand up to close scrutiny. [...] By virtue of the Charter of the United Nations, only the Security Council is empowered to take forcible action against a State which is in breach of its international undertakings to respect human rights.

(Dinstein, 2011, p. 74)

Intervention will be where and how US power chooses, the guiding consideration being: 'What is in it for us?' [...]. To be sure, the 'vision' is cloaked in appropriate rhetoric about 'democracy' and all good things, the standard accompaniment whatever is being implemented, and by whom, hence meaningless – carrying no information, in the technical sense.

The declared intent, the record of planning, and the actual policies implemented, with their persistent leading themes, will not be overlooked by someone seriously considering 'humanitarian intervention', which, in this world, means intervention authorized or directed by the United States.

(Chomsky, 1994)

The substantial denial of women's rights – whether civil, political, economic, social, or cultural – has never served as the sole or primary basis for military intervention.

[...]

These calls intensified when the Taliban began imposing a form of gender apartheid in Afghanistan. It took the attack of September 11th, however, for the United States to mobilise Operation Enduring Freedom in Afghanistan. Although the plight of women under the Taliban was not a prime motivator for the intervention, the rhetoric surrounding the intervention appropriated feminist concerns about the quality of women's lives under Taliban rule to garner the support of domestic and international constituencies for the Operation. Indeed, the propaganda value of violence against women has long been recognised. To date, preventing harm to women has served only as a convenient makeweight argument in the service of interventions initiated for other rationales.

(Van Schaack, 2011, p. 477–8, 488–9)

Comment

You could start your arguments from an analysis of the differences between the legal justification for the use of force in self-defence and humanitarian intervention. Look again at the rules of *jus ad bellum* – can they be applied to humanitarian intervention? Are there any irreconcilable differences between the two acts (self-defence and humanitarian intervention), which would determine their different legal regulation?

3.3 Beyond humanitarian intervention: some of the critical points

Apart from those issues regarding the legality of humanitarian intervention which you considered in the earlier part of this course, one more question arises: what happens in the aftermath of humanitarian intervention?

The matter of the 'continuity' of humanitarian intervention, or rather, the question of who bears the burden of responsibility for its effects, is significant in the context of the discussion regarding the dilemmas of intervention. The debate usually oscillates around the issues of territorial integrity and sovereignty of the state, where intervention is allegedly needed. Much less attention is paid to the long-term view of intervention as an act that impacts on the lives of individuals, and not always in a positive sense. Some of the aspects include:

- **Human rights obligations** – the premise of intervention is that the human rights of individuals are being violated in a grave manner and that the state does not fulfil its human rights obligations towards its citizens. Who, in that case, should be responsible for securing human rights? Can (or should) an intervening party play this role?
- **Security** – military intervention increases the risk of potential harm to individuals. Military operations carried out by the intervening state(s) on the ground increase the level of violence in the region and expose civilians to the high risk of suffering serious harm. Furthermore, violence may continue long after the intervention has finished and, as such, constitute a threat to the security of individuals. Who should be responsible for ensuring the long-term, post-intervention security? Is it at all possible?
- **Migration** – as a consequence of the use of force and the threat to security attached to it, many people become refugees or internally displaced persons. What about protection of such persons? Should the burden of protection rest on the intervening party? Do human rights obligations apply extraterritorially?
- **Liability for human rights violations committed during humanitarian intervention** – the impact of intervention may have tragic consequences resulting in further breaches of the human rights of individuals. Godec (2010, p. 235) refers to two examples of such harms: acts of sexual violence and post-conflict sex trafficking in Kosovo.

3.4 Responsibility to protect

As you have observed, the idea of humanitarian intervention has proved to be a highly controversial concept. It has been criticised both when it took place (e.g. Somalia, Bosnia, Kosovo) and when it failed to happen (e.g. Rwanda). In light of the problems surrounding humanitarian intervention a fundamental question has emerged: 'If humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica, to gross and systematic violation of human rights that offend every precept of our common humanity?' (Annan, 2000).

In 2001, the idea of the 'responsibility to protect' (R2P) was born and outlined in the Report of the International Commission on Intervention and State Sovereignty (the ICISS Report). . The main premise of R2P is that:

> Sovereign States have a responsibility to protect their own citizens from avoidable catastrophe – from mass murder and rape, from starvation – but when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.
>
> (ICISS, 2001, p. viii)

Unlike the traditional idea of 'humanitarian intervention', the concept of R2P is composed of three responsibilities:

- to prevent
- to react
- to rebuild.

This approach appears to be different from the traditional view of humanitarian intervention; it suggests a continuum of obligations for intervening states, especially in situations, where military intervention has taken place.

Furthermore, the 'right to intervene' is effectively replaced by the 'responsibility to act', in its preventive or reactive scope, in order to protect people from harm. This new approach also marks a shift in the traditional international practice, which largely focused on favouring the interests of the state, and promotes a human-rights-oriented approach to state sovereignty, where the welfare of individuals receives paramount attention.

R2P forms an example of a 'broader systemic shift in international law, namely, a growing tendency to recognize that the principle of state sovereignty finds its limits in the protection of "human security"' (Stahn, 2007). As Kofi Annan notes:

> State sovereignty, in its most basic sense, is being redefined—not least by the forces of globalisation and international co-operation. States are now widely understood to be instruments at the service of their peoples, and not vice versa. At the same time individual sovereignty—by which I mean the fundamental freedom of each individual, enshrined in the charter of the UN and subsequent international treaties—has been enhanced by a renewed and spreading consciousness of individual rights. When we read the charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them.
>
> (Annan, 1999)

Conclusion

In this free OpenLearn course you have learned about the international legal framework which regulates the use of force by states. You have also studied the basic rules of IHL, which regulates conduct during armed conflicts.

By now, you should have an understanding of what humanitarian intervention is and why it is a controversial concept. Hopefully, throughout the study of this course you have formed your own critical opinion about some of the core problematic areas in contemporary international relations, such as humanitarian intervention, R2P, the use of force by non-state actors and the continuing challenge of implementation of IHL in time of war.

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USA

Case of the steamer *Caroline* 29 Brit & For St Papers.

Other jurisdictions

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Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v Uganda) ICJ Rep 2005

Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory Advisory Opinion ICJ Rep 2004

Legality of the Threat or Use of Nuclear Weapons Advisory Opinion ICJ Rep 1996

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) ICJ Rep 1986.

Legislation:

Treaties and conventions

Geneva Convention 1864

Hague Conventions 1899 and 1907

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Further reading

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UN's response to terrorism: further information.

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Activity 2: International humanitarian law: a universal code © ICRC 2009 http://www.icrc.org/eng/resources/documents/audiovisuals/video/00981-humanitarian-law-universal-code-video-2009.htm.

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