

4 The Legal Framework for Security

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Introduction

The linkage between peace and security is mediated in international law via the United Nations Charter. Historically, international human rights law (IHRL) has been perceived as an inhibitor of conflict (Sriram and Martin-Ortega, 2009: p. 4; Hathaway, 2007: p. 589), while international humanitarian law (IHL) has been used to frame the conduct of conflicts. This dichotomy has been challenged in the past few decades, and it is now widely acknowledged that IHRL also applies in conflicts. As a result, the two legal regimes must be studied together to understand how a government can best engage with the legal framework for security.

From the need to ensure that the relevant legal regime applies to the armed forces depending on their deployment, to classic violations of IHL, the law is everywhere when seeking to achieve security. As a result, the adoption of a legal framework pertaining to security and defence is critical to defining what security might look like. When we reflect on how law contributes to the definition of security, the issue of compliance is raised: abiding by international law, but also domestic laws and regional law, implies that nation states are contributing to the existing regulatory narrative of security. Individuals, institutions and states will choose to comply with the law because they perceive a direct benefit in doing so or because they fear consequences if they do not, i.e., the risk of prosecution. As discussed in Chapter 3, compliance with the law is an indicator of the perceived legitimacy of the judicial system and the overall quality of governance.

In reality, the issues pertaining to human rights and IHL are far more complex due to differences on the ground: in a security and defence environment that is uncertain and complex, each State will have a different experience of the enforcement of human rights and IHL, but compliance is assessed using the same benchmarking instruments and reasoning for all States. Yet, there are major differences in terms of security and defence challenges: some authorities

have questioned the applicability of IHRL to occupied territories, while others struggle with the legal regime applicable to armed forces deployed during police operations. While the legal framework often appears to be inflexible, there are options for State authorities to adapt the law to local and regional conditions, making security achievable in theory and in practice. This chapter explores the regulatory framework for security, highlighting pertinent issues within constitutional, human rights and international humanitarian law.

Governance and the Rule of Law: The Role of Constitutions

Any attempt at defining security from a legal perspective should begin with the national constitution: it is in this document, the *Grundnorm* (Kelsen, 2005: p. 8), that one will find all relevant information pertaining to how a nation perceives security and defence. The preamble of the constitution as well as the first few articles are crucial in that regard: those sections of the constitution indicate what a nation holds as their core values, including views on the preferred form of government and rule of law. This will, in turn, impact the articulation, compliance and enforcement of human rights.

Example 4.1: The German Constitution, the soldier as citizen and human rights

The post-WWII German constitution ensures the armed forces' independence vis-à-vis civilian authorities without turning the forces into an elite, a ruling class, a cast-away or a totalitarian instrument to avoid a historical repetition (Abenheim and Halladay, 2012: p. 308). Central to this legal construct is the concept of *Innere Führung*: a soldier is a citizen in uniform. The purpose of the *Innere Führung* is to place the soldier back at the heart of the civil-military relationship (Kutz, 2003: p. 118). To apply this concept in practice requires proper training: soldiers must be morally armed to understand why they are fighting and what they are fighting for, which demands improved communications between the civilian power and the armed forces. The concept also ensures that the soldier is a responsible citizen in uniform, dedicated to protecting state institutions. Finally, the human rights of German soldiers are protected by an independent Parliamentary Ombudsman to whom all soldiers have access (Nolte and Krieger, 2003: p. 365). The concept of *Innere Führung* is interesting for both the way in which it frames relations between civilian and the military authorities but also in terms of the institutional mechanisms that guarantee the human rights of military personnel in peacetime. The German constitution combines democracy and human rights in a unique fashion, based on lessons learned from history.

The German example demonstrates the importance of having strong core values in a constitution, with clear guidelines and constitutionalism to support a concept such as the *Innere*

Führung. It is how a constitution effectively contributes to maintaining peace and security via human rights, as per the UN Charter. The inclusion of a strong and legitimate constitutional philosophy is key for ensuring compliance of citizens with IHRL. Yet, war remains a reality in the human realm, and human rights do not solely apply in peacetime.

IHRL Goes to War

For decades, the norm was to apply international IHRL during peacetime with IHL regulating conflict. Yet, it became clear that IHRL does apply in conflict as well, leading to the creation of the principle of *lex specialis*. While applying IHRL during peacetime is rather straightforward, it has been difficult to assess how it could apply in war: would a citizen be allowed to publish a pamphlet undermining the war effort during conflict in the name of freedom of expression? Would the protection of the right to life extend to civilians, making it necessary to delimit war differently? Such questions have hardly been addressed in practice. Scholars and practitioners have engaged with the theory, producing relevant guidelines for admissible killings (Sassòli and Olson, 2008); analysing the application of the *lex specialis* to different types of modern conflicts (Sassòli, 2011); while others have disagreed with the idea of applying IHRL in war (Oberleitner, 2015). As academic debates flourished, States and citizens were confronted with real life issues, such as the issue of claims for compensation for property forcibly abandoned.

Example 4.2: The Reality of Applying IHRL in Occupied Territories

In 2008, Russia invaded Georgia, leading to the occupation of 20% of the territory. Abkhazia and South Ossetia are now referred to as occupied territories under Georgian law. Russia attacked Ukraine in 2014, seeking to control Crimea, and parts of Donetsk and Luhansk. The Parliament of Ukraine adopted laws referring to the temporarily occupied territories. Specific human rights issues soon emerged in both situations, regarding, for example, compensation for property. The European Court of Human Rights (ECtHR) addressed the issue in *Broniowski v Poland* (Application no. 31443/96) in 2004: the case addresses compensation claims for property forcibly abandoned between 1944 and 1953 in the eastern provinces of pre-war Poland, as a result of boundary changes. The Broniowski family had to leave what is now part of Ukraine, leaving behind their property. Poland compensated those who had been ‘repatriated’ after agreements were reached with Lithuania, Ukraine, and Belarus. Broniowski inherited the property contract from his mother in 1989. He then claimed that the compensation his family had been entitled to had not been satisfied. The ECtHR held the same view, engaging in an important discussion about class action and the type of remedy to compensate loss of property. The ECtHR went on to build case law on the issue, looking at the Cyprus-Turkey dispute and the Nagorno-Karabakh dispute, focusing on compensation. The Court thereby established the right to compensation, and went on to discuss the creation of a property mechanism (see *Sargsyan*

v Azerbaijan, Application no.40167/06, 16 June 2016, para. 238; *Chiragov v Armenia*, Application no. 13216/05, 16 June 2015, para.199). Such case law could be of assistance for Russian, Ukrainian, and Georgian authorities in the future, but also for Armenia and Azerbaijan, as they constitute an opportunity for compliance with the right to remedy while protecting internally displaced people's rights. The question remains whether the Court only sought to make a practical contribution to the law or to create positive obligation for States. The latter suggestion would entail the duty for States to put a remedy mechanism in place to foster compliance.

In countries that have parts of their territories occupied or have disputed borders, the issue of land law and property law is a pressing one to ensure compliance with the right to property, the right to remedy, the protection of private and family life and the principle of non-discrimination.

The debate as to whether IHRL applies in conflict becomes moot in a situation where a conflict has become a 'grey zone': this happens when a conflict is punctuated by long stretches of calm during which there are no attacks, but a military presence is felt or seen. Such complex situations raise questions as to when IHL applies, as it is clear that IHRL remains applicable whether the conflict is 'hot' or 'cold'. Some conflicts span generations and involve elements of IHRL, but also refugee and citizenship laws, mixing domestic, regional, and international laws. Issues such as citizenship law, disappearances, displaced people, and access to justice all fall under a variety of legal systems. It is agreed that IHL should apply when there are sporadic outbursts of violence and a level of protracted violence. There is no indication as to what the threshold could be as the law is not interested in the length of an armed conflict but rather in its conduct and consequences. Hence why IHL will only apply once there has been an outbreak of violence, and IHRL will be applicable before, during and after this outbreak. The International Criminal Tribunal for the Former Yugoslavia theorised this approach in the Tadic case (Case No. IT-94-1-AR72, Appeals Chamber, 2 October 1995, para.70): it stated that there is an armed conflict 'whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State', thereby triggering the enforcement of humanitarian principles. The Rome Statute of the International Criminal Court (ICC) has also addressed the concept of protracted conflict, raising questions pertaining to the creation of a sub-category of conflict, and with the possibility of creating further 'enabling arrangements of IHL' (Lewis, 2020: 1113). The risk is developing an

exceptional legal regime with regard to operational needs at the expense of protection of civilians. Complying with international law is complex when the issue of temporality is raised. The concomitant application of IHRL and IHL in conflict has been criticised; some practitioners and scholars would prefer coming back to a strict separation between legal regimes according to conflict types. However, in the modern era the hybrid nature of conflict makes it impossible to disassociate applicable legal regimes.

Rules of Engagement (ROE)

ROE are often mistakenly assumed to be law as such: although they must be consistent with both national and international law applicable to the mission, they do not in themselves generally have the force of law and a soldier cannot be prosecuted in court for violating a ROE. Yet, they are seen as legally binding as they effectively constitute military orders (Cooper, 2014: 208). While this relationship of ROE to law may seem counterintuitive, for practical purposes it should be remembered that, while ROE ‘may ... impose greater limitations on the actions of a soldier than national or international law would actually permit’ (Rowe, 2007: 329), they can never permit actions which are actually prohibited by rules of national or international law.¹ Control over forces is absolutely vital in any mission, across the full spectrum of military deployments – from non-combatant evacuation operations through peacekeeping operations to full-scale combat operations against hostile forces; it is the exercise of such control that distinguishes professionalised, properly commanded and controlled armed forces from disorderly violent mobs. Consider the typical circumstances of an infantry recruit: they are likely to be little more than 18 years old on average, with relatively little formal education, and equipped with weapons that give the effective power of life or death over other human beings. When confronted with an actually or potentially hostile environment, the chances are that the soldier will also be very scared. The question to be answered is: ‘Do I shoot or not shoot?’ The stakes are high here, both in politico-military and in legal terms: the risks of unintended de-escalation or, substantially worse, escalation, are significant. Moreover, the consequences of non-compliance are potentially drastic for the soldier as they will likely face disciplinary and/or criminal investigations. ROE, then, are an essential mechanism for the authority to undertake specific actions, serving at the political-strategic level to set the operational parameters of a given mission and at the military-tactical level to control the soldiers’ authorisation to use force, whether lethal or non-lethal. The form which ROE take

will vary from one country to another, as will their substantive content based on the context of the operation. Although typically (and ideally) promulgated in advance of an operation, ROE must retain enough systemic flexibility to be changed quickly, following justified requests from commanders as the conditions of an operation and its strategic/tactical context change. Often imagined to be a set of pithy absolute rules with legal authority printed on a card issued to all soldiers, it is important to understand that this is not the case. This description relates to what is really a short, basic summary of the most important rules, in simple language which the average soldier can easily understand, remember and apply in combat. Referred to as ‘soldier’s cards’, these small laminated documents are small enough to fit into a uniform breast or hip pocket.

The full ROE are generally more expansive and also cover many situations apart from those involving the use of force, for example, use of specific weapons or weapons systems (including riot control equipment), detention or seizure of persons or equipment, ‘buzzing’ or sonic booms by aircraft, boarding of merchant vessels at sea. ROE have been well described as ‘distill[ing] law, strategy and policy into tactical instructions for [military personnel] regarding when and against whom they can use force ... [they are] the most specific and direct manifestation of both law and policy on the ground. In effect, ROE tell [military personnel] how they can accomplish their mission – who they can kill and what they can destroy in the process of mission fulfilment’ (Blank, 2011: pp. 1-2).

ROE represent an intersection of three perspectives in the control of armed forces: policy, military operations, and law. At the policy level, they ‘provide for the conduct of operations in compliance with national policy’ in the strategic sense and ensure political accountability of the military command echelons to their civilian superiors in government. At the military level, they ‘assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives’. At the legal level, they ‘provide for the judicious use of force in compliance with international [and national] law’ (Mandsager, 2009: pp. 1-2). Overall, their utility and effect may be summarised in the word: ‘control’. Properly drafted and implemented ROE help to ensure that the application of force – which may result in people being wounded or killed and property being damaged or destroyed – is controlled such that it aligns with policy objectives and is subject to civilian political oversight, achieves the

mission's legitimate military objectives while preventing unintended escalation or de-escalation, and is consistent with legal rules at the international and domestic levels (thereby helping to avoid legal liabilities, although the classified nature of ROE still may lead to problems of perception). A now-classic example of the use of ROE in a specific operation is provided by a famous episode of Operation Corporate, the British military campaign to retake the Falkland Islands from Argentine occupation in 1982.

Example 4.3: ROE Adaptability

On 29 April 1982 the British submarine *HMS Conqueror*, deployed 35 miles outside the southern limit of the Total Exclusion Zone (TEZ) declared by the UK around the Argentine-occupied Falkland Islands, sighted the Argentine light cruiser *ARA General Belgrano*, the largest warship in the Argentine Navy, assuming her to be returning from patrol to Ushuaia. The ROE originally promulgated for the British Task Force authorised attack on Argentine forces only within the TEZ, as a way of limiting the conflict; but, aware now from British intelligence intercepts of an order to Argentine naval units to seek out and attack the Task Force, and realising the threat posed by *Belgrano* with her 15 6-inch guns, Prime Minister Margaret Thatcher's War Cabinet quickly authorised a change to the ROE so that Argentine forces could be attacked wherever they were encountered. On 2 May, acting under the amended ROE, *Conqueror* torpedoed and sank *Belgrano* with the loss of 323 lives. As a direct result, all Argentine naval units were ordered back to their bases, from which they were not allowed to emerge subsequently; this effectively ceded command of the sea in the operational theatre to the UK, granting the Task Force an enormous strategic advantage which strongly influenced the outcome of the campaign, as it ensured that Argentine carrier-based aircraft no longer had the range to interdict the seas around the Falklands when the British were landing troops to retake the islands. The change to the ROE had implemented the British strategic policy objective of securing command of the sea and protecting the Task Force as it approached the Falklands, and the tactical military objective of destroying a major enemy naval unit, while complying with the law of armed conflict, according to which *Belgrano* was a legitimate military target, lawfully subject to attack.

ROE are flexible: standing ROE can be 'pulled off the shelf' for any relevant operation, while mission-specific, bespoke ROE are tailored to the needs of a particular operation. They can be used in the full spectrum of military deployments, from civil disturbances through peace support and humanitarian assistance operations to full-scale armed conflicts. They can prohibit a particular activity or permit it, with or without restrictions. Whilst ideally issued in advance of a deployment, they can be changed as circumstances warrant. In the contemporary operational context, ROE are more critical than ever as a tool for the oversight of armed forces within a politico-legal framework. In a world with increasingly destructive firepower,

instantaneous worldwide communications and the pluralisation of information sources and media platforms, the careful control of troops on operations is essential to strategic communications and public opinion. Failures in communication, intelligence and understanding or application of promulgated ROE can be catastrophic not only to a particular operation – and any civilians unfortunate enough to be caught up in it – but also to broader perceptions of a mission as a whole, as happened when a 2009 US airstrike, called in by a German commander on two fuel tankers captured by Taliban insurgents near Kunduz, Afghanistan, killed 70-140 civilians (Marchant, 2020: pp. 73-76). Future areas of practice to look out for will include ROE for military operations in cyberspace and outer space.

The Use of Force by States

An essential component of the legal control of State armed forces is ensuring that they are used in compliance with the international law governing the resort to force in international relations (*jus ad bellum*). The increasing awareness of potential legal liabilities on the part of the military chain of command is well illustrated by the disclosure that the British Chief of Defence Staff personally sought assurances from Prime Minister Tony Blair that the proposed Coalition invasion of Iraq in 2003 was lawful (Boyce, 2011: pp. 2-3). With the incorporation since then of a defined crime of aggression within the ICC Statute, potentially rendering senior political and military leaders liable for the unlawful use of force, military and civilian defence personnel need *a fortiori* to be cognisant of the legal framework in this field. The contemporary *jus ad bellum* is largely regulated by Chapter VII of the United Nations Charter, according to which the threat or use of force is generally prohibited, if it is ‘against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations’ (UN, 1945: Art.2(4)). The Charter only allows for two possible exceptions, which are relatively clear, but with a partial overlap with customary international law rules established long before 1945, and highly subjective in interpretation; and there are additionally certain other claimed justifications that are controversial or are supported by some States but not by others.

The most straightforward justification for the use of force is if it is undertaken as part of a collective security operation mandated by the UN Security Council (UNSC). The UNSC has the exclusive right to determine ‘the existence of any threat to the peace, breach of the peace,

or act of aggression' (Article 39 UN Charter). If provisional measures and/or sanctions are deemed inadequate, they may then proceed to 'take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security' (Article 42 UN Charter). Although it was originally envisaged that such action would be undertaken by the UN's own military forces, which would effectively be 'loaned' by Member States to the Organisation under the special agreements foreseen in Article 43 and would then be controlled directly by the UNSC, no such agreements have ever been made. As a result, in a line of precedents stretching back to the authorisation given for the use of force in Korea in 1950 (UNSCRs 83 & 84), the original coalition of the willing, the UNSC has evolved a practice of inviting States to contribute to missions wherein the use of force is effectively mandated as a collective security enforcement measure. The verbal cue for such action is for the enabling resolution to contain the formula 'all necessary means' or 'such measures as may be necessary'. Examples of such 'pure' use of force measures authorised by the UN since the Korean War are few and far between, but include the 1st Gulf War (UNSCR 678), anti-piracy operations off the coast of Somalia (UNSCRs 1816 & 1851), and enforcement of a 'no-fly zone' over Libya (UNSCR 1973). It is also sometimes the case that such wording finds its way into elements of peacekeeping mandates, as in the 2013 creation of a Force Intervention Brigade within MONUSCO, with the authority to undertake targeted offensive action to neutralise designated non-State actors (UNSCR 2098). It should be noted that peacekeeping missions, although involving the deployment of military forces, are not uses of force as such and do not fall under the Charter regime of Chapter VII.

By far the most important exception to the modern prohibition of the use of force by States, both in theory and in practice, is the right of self-defence. Acknowledged in Article 51 of the Charter, self-defence had existed as a right under customary international law – the law of nations developed over centuries of State practice and *opinio juris*² – long before the advent of the contemporary collective security architecture. It may be exercised by a State acting individually, or collectively as part of an alliance or in response to a request for assistance by a State that has been attacked: the best-known example of the former is Article 5 of the 1949 North Atlantic Treaty, while the latter is the basis for British military action against so-called Islamic State in Iraq and Syria since 2014. As the oldest justification for the State use of force and incontrovertibly established in classical jurisprudence (Grotius, 1625: Chapter I, §§II-XVI), nobody denies in principle that a State ultimately always has the right to defend itself; indeed,

it is invariably the preferred justification cited by States when resorting unilaterally to force. The difficulties in adjudicating such claims lie in the fact that the criteria for the legality of self-defence differ between the Charter provisions and those of customary law, while perceptions of the applicability of those criteria in any given case are highly subjective, to say the least.

The Charter states: ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security...’ (Article 51 UN Charter). The clarity and simplicity of this statement are deceptive: it neither defines what is meant by the phrase ‘armed attack’, nor stipulates any detailed conditions for the legality of an exercise of the right of self-defence. The International Court of Justice (ICJ) has addressed aspects of the right of self-defence in several high-profile cases over the decades, but the jurisprudence is fragmentary and, in some important respects, inconclusive: thus, there is little consensus in the international community about the application of the right in practice, and States are effectively left to make what argument they can for themselves. Whilst it is clear at least that in order for the right of self-defence to be engaged there needs to be an ‘armed attack’, which the ICJ has determined is constituted by ‘the most grave forms of the use of force’ (ICJ, 1986: p. 101), Article 51’s stipulation ‘if an armed attack occurs’ – meaning on a plain reading of the text that a State is obliged to wait *until an armed attack has occurred* – is inconsistent with both Article 2(4)’s prohibition of the *threat* or use of force and the longstanding customary law recognition of a pre-emptive aspect to the right of self-defence, such that a State may use force in self-defence by way of a ‘first strike’ if it believes an armed attack to be ‘imminent’ (Sofaer, 2003). Imminence in itself is a highly subjective perception, and each instance has to be judged on its own facts; it has been open to increasingly elastic interpretation in recent years, particularly in relation to countering threats from extraterritorial terrorist groups (Bethlehem, 2012; Wright, 2017). Customary law also requires that there be a *necessity* to use force in self-defence, and that any force so used be *proportionate* to the original threat or attack. The parameters of the self-defence concept continue to develop in connection with the potential for armed conflict to occur in cyberspace (Schmitt, 2017: pp. 244-251), and will doubtless do so further as the domain for likely conflict expands to outer space, although it is worth noting that there are no new laws in these areas: the existing rules are applied by analogy.

Example 4.4: Anticipatory Self-Defence

Probably the best-known example of anticipatory self-defence in the post-1945 era, although not claimed as such at the time, was Israel's pre-emptive airstrike against the Egyptian Air Force at the start of the Six-Day War (1967). The question is: how do we judge the legal validity of a 'first strike'? The geo-political context and security environment are everything in such cases. Israel's decision to strike its enemies first was made after a conjunction of strategic developments: namely, Egypt's expulsion of the UN peacekeeping force that had been present in the Sinai since 1956, her blockade of the Straits of Tiran to Israeli shipping, her sending of troops to take up offensive positions on the Israeli frontier, her signing of a military pact with Jordan, escalating incidences of violence along Israel's frontier with Syria, and increasingly bellicose statements by Egyptian President Gamal Abdel Nasser (e.g. 'our basic objective will be to destroy Israel') – all combined to make the Israeli Cabinet conclude that an armed attack was imminent (Shapira, 1971: pp. 66-68), an assessment with which most States at the time and subsequently concurred. This precedent in part inspired Pakistan to take similar action, much less successfully, against India in 1971 in connection with the latter's aid to insurgents in Bangladesh.

The other principal justification that is sometimes advanced for the unilateral use of force by States is broadly termed humanitarian intervention. Whilst armed intervention is generally prohibited in international law because of its incompatibility with the fundamental principle of State sovereignty (Article 2(7) UN Charter; UNGAR 2131), the suggested right of humanitarian intervention has its origins in the (largely undisputed) right of States to intervene in order to protect *their own nationals* in foreign territory, in situations where the host State is unwilling or unable to exercise such protection – for example, due to a civil war. However, since 1945 the notion of a State unilaterally – that is, without a mandate from the UN or another international organisation – intervening in foreign territory to protect *nationals of another State* from gross human rights violations, is much more controversial. The concept was first posited as a legal right in 1991 when the UK asserted it in the face of the UNSC's refusal to support a no-fly zone over northern Iraq for the protection of Iraqi Kurds against repression by Saddam Hussein's forces (UKHC, 2000: §§30-32), and then received a higher profile in connection with the Kosovo War in 1999 after Blair's famous speech to the Chicago Economic Club in which he posited a doctrine of the international community (Blair, 1999), whereby States could intervene unilaterally in order to put a stop to major humanitarian disasters like genocide or ethnic cleansing. The UK has since continued to invoke humanitarian intervention as justification for military action, most recently in connection with the 2018 airstrikes against chemical weapons facilities in Syria (UK Prime Minister, 2018), but it would be fair to say that

it has not attracted wider support in the international community as a whole; indeed, a substantial body of UN Member States have explicitly condemned it as contrary to the Charter and general international law (G77, 1999: §69).

An attempt has been made to put the concept of humanitarian intervention onto a more consensual, multilateral basis with the UN's adoption of the doctrine of Responsibility to Protect (R2P), originally recommended by the Canadian-established International Commission on Intervention and State Sovereignty. The R2P doctrine asserts that it is each State's primary responsibility to protect its own people – as a corollary of that sovereignty which is the foundation of the international legal order – but, if a State is unable or unwilling to do so, the international community may take diplomatic, humanitarian, *or other* steps to exercise such protection. Formally, the only legal authority for the use of force in such extreme cases remains a mandate adopted by the UNSC under Chapter VII of the Charter, so R2P does not in fact create a new, separate basis for the use of force by States. Despite its adoption by the UN (UNGAR 60/1: §§138-139), many States consider it too open to abuse for geo-political reasons, and the only case where it has arguably been used to date is that of Libya (UNSCR 1973); even then, it is notable that the doctrine was not mentioned by name in the resolution authorising the action or in the debates preceding its adoption. It remains doubtful, therefore, that R2P presently constitutes a *legal right*; it is more in the nature of a *political aspiration*.

International Humanitarian Law (IHL)

Since the adoption of the four Geneva Conventions in 1949, members of armed forces have been increasingly aware of the need for familiarity with the rules of IHL, a branch of international law which regulates the conduct of hostilities and provides for the protection of certain specific categories of persons. IHL, also known as the law of armed conflict (LOAC) and, historically, as the laws of war, is a body of law, with roots in the ancient world, which has been vastly expanded and updated since the 1860s. Much of this expansion occurred around the turn of the 20th Century and therefore was largely dictated, due to the structure of the world order at that time, by a select group of mostly European States, many of which possessed colonial empires; nevertheless, it bears emphasising that the traditions of honour and chivalry that underlie much of IHL are universal in nature. This has only been reinforced in modern times by the fact that every recognised State in the world is party to the Geneva Conventions.

IHL applies in all armed conflicts, whether declared or not, and applies equally to all parties to an armed conflict: it matters not who is the aggressor, and who the victim of aggression, and the application of IHL does not depend on reciprocity. A number of rules, e.g., those defining combatant status, and consequent prisoner of war (POW) status for captured personnel apply only in international armed conflicts, but a great many others are now considered to apply equally in non-international armed conflicts and thus bind non-State actors equally with States. (Henckaerts & Doswald-Beck, 2005). The treaties – now numbering in excess of 100 – range in their coverage from the very specific (e.g., prohibiting certain types of weapons) to the very general (e.g., the Additional Protocols to the Geneva Conventions); the oldest one dates from 1856, the newest from 2017. Although these instruments contain a multitude of detailed regulations, their essence may be distilled in the following fundamental principles:

- ***Military necessity*** – operations are permitted for legitimate military aims, i.e. whatever is necessary to defeat the enemy, provided they do not violate substantive rules of IHL;
- ***Humanity*** – the object of war being the defeat (but not the annihilation) of the enemy, operations must be conducted in such a way as to minimise unnecessary loss of life and destruction of property;
- ***Distinction*** – attacks are to be directed only at combatants and military objectives, civilians and civilian objects are not to be deliberately attacked but must be spared as much as possible, and
- ***Proportionality*** – deaths of civilians and destruction of civilian property incidental to attacks on lawful military objectives must not be excessive in relation to the military advantage anticipated from those attacks.

Special protections are stipulated for certain classes of object (e.g., hospitals, cultural property) and categories of persons (e.g., wounded and sick, POWs), and the civilian population generally should be spared as much as possible from the effects of military operations. To that end, military commanders are required to exercise precautions in attack, with particular regard to the aforementioned principles of distinction and proportionality (Schmitt, 2010).

In international armed conflicts, everyone has the legal status of being either a combatant or a civilian – the former being defined as members of regular State armed forces, or militia satisfying the criteria of:

- Being under responsible command;
- Having a fixed distinctive emblem;
- Carrying arms openly, and
- Conducting operations in accordance with LOAC (Hague Regulations, 1907: Article.1).

Military objectives are defined as, ‘objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage’ (Article 52 (2) Protocol I, 1977). These rules, despite appearing relatively clear-cut, are not easy to interpret in the heat of battle and do not in themselves take account of either civilians who directly participate in hostilities, or so-called ‘dual-use objects’. Moreover, whilst it is important to appreciate that proportionate loss of civilian life or destruction of civilian objects incidental to an attack on a lawful military objective - colloquially known as ‘collateral damage’ – is actually permitted under IHL, that is not how the media or the court of public opinion tends to see it. The rules can be remarkably difficult to apply, particularly in the urban environments (often with the civilian population still *in situ*) that form an increasing number of the world’s battlefields. Consequently, it is extremely important that soldiers are properly instructed in the rules of IHL and how to apply them, as mandated by the current treaty law, and that commanders take care to prevent and punish violations (Articles 82-87 Protocol I, 1977). Even such precautions, however, face difficulties in the context of modern ‘hybrid warfare’: the blend of political confrontation and militarised provocations (including in the cyber domain) while never quite crossing the line into open conflict, combined with plausible deniability and the manipulation of media and social media, makes for a fog of war that is even thicker than usual. In these circumstances the law, too, can be twisted and ‘reinterpreted’ – as in recent reinterpretations of the concept of imminence in the right of self-defence or the misrepresentation of civilian casualties (even humanitarian aid workers, as in Syria) on the battlefield as ‘terrorists’ – to the benefit of certain already-powerful actors, without having conformed to any conventional international law-making process.

Conclusion

The legal framework by which the governance of security is assured is of critical importance to practitioners in the field. Any State designing a security apparatus should therefore include reflections on constitutional law, IHRL and IHL, a wide-ranging body of law that governs the actions of the State and its security forces at all times. IHRL and IHL both apply across the spectrum of State security activity, from peacetime through internal security and counterinsurgency operations, to situations of non-international and international armed conflict.

Notes

1. For example, ROE prohibiting attacks if any collateral damage is anticipated are acceptable, since collateral damage as such is not illegal; but ROE authorising the killing of survivors from enemy warships sunk in maritime operations are unacceptable, since the deliberate killing of shipwrecked survivors constitutes wilful murder of persons protected by Geneva Convention II (1949), which is a grave breach of that Convention (i.e., a war crime).
2. Literally, ‘opinion of law’, i.e., the belief that a particular mode of conduct is required as a positive legal obligation.

Questions to Consider

1. Should IHL apply to armed forces in peacetime?
2. Should IHL be the primary legal regime during conflict or is IHRL equally relevant?
3. Can the established framework of the *jus ad bellum* survive the advent of new domains of warfare, such as outer space and cyberspace?
4. How can the application of IHL be operationalised in situations of ‘hybrid war’?

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Chapter 4: the legal framework for security

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