

International Humanitarian Law and International Human Rights Law

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IT USED TO BE A SIMPLE THING TO FIGHT A BATTLE...IN A PERFECT WORLD, A GENERAL WOULD GET UP AND SAY "FOLLOW ME, MEN," AND EVERYBODY WOULD SAY "AYE, SIR" AND WOULD RUN OFF. BUT THAT'S NOT THE WORLD ANYMORE...[NOW] YOU HAVE TO HAVE A LAWYER OR A DOZEN.¹

GENERAL JAMES L. JONES, US MARINE CORPS, WHILE SUPREME ALLIED COMMANDER, EUROPE.

What are "the laws of armed conflict" (or LOAC the term used by the military) and International Humanitarian Law (IHL as referred to by civilians)? What LOAC/IHL applies to particular armed conflicts? What is the legal status of participants in an armed conflict?

LOAC/IHL is a relatively recent concept developed in the last hundred years or so. Rules of war are not the same as laws of war. Rules for the battlefield have been around for thousands of years dating back to the Roman, Egyptian and Persian empires.

Simply put, LOAC/IHL protects persons and property affected by war or armed conflict. There are two fundamental issues, namely:

1. The status of the conflict (i.e. whether international armed conflict or non-international armed conflict), and
2. The status of the individuals

involved in the armed conflict.

Civilians not participating in the hostilities, the wounded and the sick, medical and religious personnel and prisoners of war are protected categories of persons under LOAC/IHL. Hospitals, schools, mosques, synagogues and churches are protected property.

Persons and property can lose their protection. Examples of the loss of protection are the civilian who directly participates in the hostilities and the minaret of a mosque being used by a forward air controller to call in fast air to bomb a military target.

LOAC/IHL applies during times of war, or more specifically, the 1949 Geneva Conventions provide that IHL "shall apply in all cases of declared war or any other armed conflict which may arise... (underlining added)"²

As the law in effect during armed

conflict (known as *jus in bello* or law in war) IHL is distinct from the legal regime enshrined in Article 2(4) of the UN Charter governing the resort to force (the *jus ad bellum* or the law to war).

The two primary sources of LOAC/IHL are custom and treaties. Among the earliest of *jus in bello* treaties was the 1785 Treaty of Amity and Commerce, between Prussia and the United States. Among other things, it contained provisions relating to treatment of prisoners of war and noncombatant immunity in the event the parties warred against each other.

The principles of distinction, proportionality and necessity, all part of customary international law or *jus cogens*, apply to the use of armed force.

Distinction:

Parties to an armed conflict must distinguish between the civilian

Hague Conventions armed conflict rules of war IHL Geneva Conventions 1949 LOAC custom Jus ad bellum

population and combatant and between civilian objects and military objective. Any intended target must be a military target.

Proportionality:

Attacks are prohibited if they cause incidental loss of civilian life, injury to civilians, or damage to civilian objects that is excessive in relation to the anticipated concrete and direct military advantage of the attack.

Necessity:

The use of military force is justified only to the extent it is necessary to achieve a military goal. This force used must not exceed the level required to stop the threatening activity.

Other fundamental IHL principles include the duty to take precautions to spare the civilian population before and during an attack; the prohibition against infliction of unnecessary suffering or destruction, or of superfluous injury; and the prohibition against engaging in indiscriminate attacks.

The main treaty sources applicable in international armed conflict are the *Hague Conventions* of 1899 and 1907 and the four *Geneva Conventions* of 1949 and their Additional Protocol I of 1977. The main treaty sources applicable in

non-international armed conflict are article 3 common to the *Geneva Conventions* and *Additional Protocol II* of 1977.

IHL is further supplemented by such treaties as:

- the 1925 *Geneva Protocol on Gas Warfare*,
- the 1954 *Hague Convention on the Protection of Cultural Property in Armed Conflict*, and its 1999 Protocol,
- the 1980 *Convention on Conventional Weapons* and its Protocols,
- the 2000 *Optional Protocol to the Convention on the Rights of the Child on the Involvement*

of Children in Armed Conflict,

- the 1993 *Chemical Weapons Convention*,
- the 1997 *Ottawa Convention on Anti-Personnel Mines*, and
- the 2008 *Cluster Munitions Convention*.

Does IHL end, or even lessen, the frequency of battlefield crimes? Was Thucydides correct in noting, "The strong do what they can and the weak suffer what they must"? Can we expect laws to deter violations of IHL?

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What then is International Human Rights Law (IHRL)? IHRL is even more recent than IHL and begins with the Charter of the United Nations (Articles 1, 30, 55 and 56). IHRL seeks to guarantee the fundamental rights of persons vis-à-vis their own governments and to protect them against actors in the international community that might violate those rights.⁴

In Australia, the only common

law country not to have a comprehensive national human rights enactment, the IHRL instruments to which Australia is a signatory and the decisions of the United Nations Human Rights Committee have greater significance as human rights reference points in domestic law than they may have in other western countries.

Australia is a party to:

- the *International Covenant on Civil and Political Rights* (ICCPR),
- the *International Covenant on Economic, Social and Cultural Rights* (ICESCR),
- the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD),
- the *Convention on the Elimination of all Forms of Discrimination Against Women* (CEDAW),

- the *Convention on the Rights of the Child* (CRC),
- the *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT) and
- the *Convention on the Rights of Persons with Disabilities* (CRPD).

Although Australia is signatory to various IHRL treaties, conventions and covenants, they do not form part of Australian law unless incorporated into domestic law by statute. This is the rule in *Walker v Baird*.⁵ This rule means that entry into a treaty by the executive arm of government does not create rights or obligations for private citizens unless the treaty is enacted into domestic law.

One example is the *Crimes (Torture) Act 1988* (Cth) which, in a limited way, implements some of the provisions in the CAT. State and Territory legislation is also relevant. In 2004, the Australian Capital Territory enacted the *Human Rights Act 2004* and in 2006, Victoria enacted the *Charter of Human Rights and Responsibilities Act 2006*. Tasmania and Western Australia had shown signs of implementing similar legislation but none has been forthcoming.

IHRL applies in time of peace and, most contend, in armed conflict as well. The American (and Israeli⁶) positions are that IHRL does not, or should not, apply in *jus in bello*. Many disagree,⁷ particularly Europeans, the International Committee of the Red Cross,⁸ the International Court of Justice,⁹ and



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human rights activists.

Consider the British experience of the *Human Rights Act* introduced by Tony Blair's government in 1998. The Blair government simply adopted the European Convention as part of domestic law, making its provisions directly enforceable in British courts. Judges were to interpret statutes 'as far as possible' to conform to the act's liberty guarantees.¹⁰ British judges could not strike down any law passed by parliament. All they could do, if the law was blatantly in contravention, was to signal to the legislature that it should be looked at again, by issuing a declaration of incompatibility.¹¹

IHL and IHRL can operate together although there are clearly areas where the two laws conflict. A simple example of this is the IHRL right to life and the IHL sanction of taking a life provided that life is of a lawful combatant who is not *hors de combat*. IHL prohibits the taking of a civilian life provided that civilian is not taking a direct and active part in hostilities.

There are significant differences between IHL and IHRL. IHRL is premised on the principle that citizens hold individual *rights* that their state is bound to respect; IHL imposes *obligations* on the individual. IHRL largely consists of

general principles whereas IHL is a series of *specific* provisions.

One aspect that emerges, whether IHL or IHRL, battlefield violations will never be entirely eliminated. Armed conflict is, simply put, the business of killing people and smashing things. The passions of war and the adrenaline rush of combat combined with more sophisticated and powerful weapons in the hands of young men and women are a mix which assures occasional breaches of both laws. As former General (and Secretary of State) Colin Powell wrote,

"The kill-or-be-killed nature of combat tends to dull fine perceptions of right and wrong."¹² ●

Endnotes

1. Lyric Wallwork, "A Marine's toughest mission," Parade Magazine, Jan. 19, 2003
2. 1949 Geneva Conventions, common article 2.
3. Gary Solis, *The Law of Armed Conflict*. (Cambridge University Press, New York, 2010), 9.
4. Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law: Beyond the*

Nuremberg Legacy, 2nd ed. (Oxford: Oxford University Press, 2001), 10.

5. [1892] AC 491
6. Françoise J. Hampson, "The Relationship Between International Humanitarian Law and Human Rights Law from the Perspective of A Human Rights Treaty Body," 871 *Int'l Rev. of the Red Cross* (Sep 2008), 549, 550.
7. Louise Doswald-Beck and Sylvain Vit , "International Humanitarian Law and Human Rights Law," 293 *Int'l Rev. of the Red Cross* (Apr 1993), 94
8. Henckaerts, Jean-Marie and Louise Doswald-Beck, eds., *Customary International Humanitarian Law*, Vol 1, Rules (Cambridge University Press, 2005), note 79 at 299-300. "Human rights law applies at all times..."
9. The Legality of the Threat or Use of Nuclear Weapons (Nuclear Weapons Advisory Opinion), (1996) at para 25.
10. Robertson, Geoffrey, *The Statute of Liberty: How Australians can take back their rights* (Vintage Books, 2009), 122
11. *ibid*, 123
12. Colin L. Powell, *A Soldier's Way: An Autobiography* (London: Hutchinson, 1995), 144.



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Take the first steps towards a solution

Melinda Schroeder
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Northern Territory Legal Aid Commission



What is the Legal Aid Helpline?

The Legal Aid Helpline operates from a dedicated call centre at the Northern Territory Legal Aid Commission's (NTLAC) Palmerston premises. The Territory wide service provides information, referral and appointments for legal advice and can be contacted between 8.00am and 4.30pm Monday to Friday. All people contacting the Commission for information or advice contact the Helpline as a first step towards a solution to their problem.

The service provides comprehensive information to callers, along with referrals to legal advice and other helpful services for a wide variety of issues. The Helpline staff are able to arrange appointments for legal advice where required, and also provide valuable information to the caller prior to that appointment. This information can assist callers to have a greater understanding of their issue prior to the advice appointment which can result in a better use of the time spent with the legal adviser.

Often people are unsure of whether they have a legal problem or not, or where they can go to get help with their specific problem. We encourage those people to call the Legal Aid Helpline. Our staff are experienced in identifying issues and the right people to help with

them. Helpline staff have a wide range of resources available to assist with information.

Background

The National Partnership Agreement on Legal Services between the States and Territories and the Commonwealth Governments was signed by the then Prime Minister of Australia and Chief Minister of the Northern Territory in 2010.

This agreement required legal aid commissions across Australia to reposition their services so that where possible, people are provided with legal help at an early stage and before problems escalate.

Early intervention and prevention legal advice, information and referral services are vital to helping people with legal problems early on.

As a result, the NTLAC put in a range of strategies to increase the focus on this area of service provision. One of these was the development of the Legal Aid Helpline.

Continuous Improvement

Helpline staff participate in regular professional development opportunities, service provider training and information sessions

to keep up to date with changes to systems and procedures. Since implementing new telephone technology and the service being resourced with full time staff, the call capture rate has increased to 100%. A significant increase in calls to the service is highlighted by the call rate from January 2011 – 2012 increasing 55% and from January 2012 - 2013 increasing 43%. From January 2011 to January 2013 this has been a 120% call increase.

How can legal practitioners use the Helpline?

Clients will often present to lawyers with a range of legal and other problems, but the lawyer is only engaged to advise and represent their client with a particular problem. Practitioners can refer clients with multiple legal and related needs to the Helpline for other matters while continuing to assist them with a particular matter.

More Details

Cards with the Legal Aid Helpline contact details are available for practitioners to provide to clients. To obtain copies of the cards please email Melinda Schroeder of the NTLAC at melinda.schroeder@ntlac.nt.gov.au.