PRIMER: KEY CONCEPTS

INTRODUCTION

Meant as a primer for those with relatively little background in international law concerning armed conflict, this section delineates key legal concepts and fields. We first outline the international-legal concept of armed conflict, including its general scope and sources. (Sections 4 and 5 provide more detailed discussion of the variants of that concept.) We then briefly address the relationship of the primary field of international law applicable in relation to armed conflict—variously termed international humanitarian law (IHL), the law of armed conflict (LOAC), and the *jus in bello*—to certain other fields that may be relevant. Finally, we sketch the relationship between IHL and legal frameworks governing acts of terrorism.

THE CONCEPT OF ARMED CONFLICT IN INTERNATIONAL LAW

IHL is a branch of public international law that applies in relation to a situation of armed conflict or a state of war in the legal sense. Certain IHL treaties include provisions that contracting parties are required to undertake in “all circumstances”—not only in “time of war” but also in “time of peace” and “peacetime.” The latter set includes such obligations as training armed forces in the law of war and reviewing the legality of new weapons. Yet the bulk of the provisions govern behavior in relation to an existing armed conflict.

Scope

One way to conceive of the international-legal fabric of armed conflict is to see it as being formed by spinning four fibers into a continuous strand and stitching those threads together. The resulting fabric covers the armed conflict, setting the

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16. The general obligation is contained in Common Article 1 GCs I–IV.
17. Articles 44(2) and 47 GC I, 48 GC II, 127 GC III, and 144(1) GC IV.
18. Articles 23(1), 26(2), 44(1)–(2) and (4), and 47 GC I, 44 and 48 GC II, 127 GC III, 14 and 144 GC IV, and 66(7) and 83(1) AP I.
19. Articles 2(1) GCs I–IV, 6(1), 18(7), and 60(2) AP I.
20. Articles 47 GC I, 48 GC II, 127 GC III, 144 GC IV, and 83 AP I. Article 19 of AP II provides that “[i]t shall be disseminated as widely as possible.”
21. Article 36 AP I.

boundaries of the legal parameters. First, the **material scope** of application of IHL (also known as the scope of application *ratione materiae*) indicates what situations amount to an armed conflict under IHL. Second, the **personal scope** of application of IHL (also known as the scope of application *ratione personae*) designates who or what is bound by IHL, including what constitutes a party to the armed conflict under IHL, and who is protected under IHL. Third, the **geographic scope** of application of IHL (also known as the scope of application *ratione loci*) delimits where under IHL the armed conflict takes place and where else (if anywhere) IHL is applicable. And fourth, the **temporal scope** of application of IHL (also known as the scope of application *ratione temporis*) marks when IHL is applicable, including when the conflict begins and ends and when various rules and provisions of IHL are applicable or cease to be applicable. (Some of those rules might continue to apply even after the end the armed conflict.\(^{22}\))

IHL generally recognizes two categories of armed conflict: international armed conflict (IAC) and non-international armed conflict (NIAC). The contours of each category are addressed in more detail in, respectively, Section 4 (concerning IAC) and Section 5 (regarding NIAC).

IHL applies to all parties to an armed conflict. Those parties might include, for example, a state, a national liberation movement, dissident armed forces, or a non-state organized armed group.\(^{23}\) In certain respects, IHL may also bind individuals.\(^{24}\) Further, IHL—in the form of the law of neutrality—applies, where relevant, not only in relation to the parties but also to neutral states or states not party to the armed conflict.\(^{25}\)

**Sources**

There are two main sources of IHL: treaties and customary law.\(^{26}\) General principles may also be relevant. In general terms, treaties are international agreements between two or more states.\(^{27}\) The Statute of the International Court of Justice (ICJ) defines customary law as "international custom, as evidence of a general practice accepted as law."\(^{28}\)

As outlined in more detail in Sections 4 and 5, there is considerable fragmentation in the contemporary *lex scripta* (written or codified law) concerning the end of armed conflict under IHL. That fragmentation arises in part because:

- Various IHL treaties lay down different formulations—and certain IHL instruments contain different formulations *within* a single instrument—concerning relevant duties, rights, authorities, and protections that arise

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22. See, e.g., *infra* Section 5 (Articles 2 and 25 AP II).
23. See *infra* Sections 4 and 5.
25. *Id.* at 49.
before, at the moment of, or after the termination of the armed conflict;

- Not all states have contracted into the same sets of IHL treaties; and

- Not all end-of-armed-conflict IHL treaty provisions apply, at least as a matter of treaty law, to all IACs and NIACs, or even to all IACs or to all NIACs.

In principle, customary IHL could help resolve that fragmentation and fill in the corresponding gaps in the *lex scripta*. Therefore, for at least three reasons, discerning the scope of applicable customary IHL may be especially important concerning the end of a particular armed conflict and the end of applicability of IHL in relation to that conflict.

First, in principle, customary IHL could bind parties to rules and principles even if those protections had not been codified in treaties. This type of customary-IHL formation might be most salient with respect to the end of armed conflict in terms of formulations, standards, and concepts that states have not (yet) inked in international agreements but that have emerged in other contexts, especially international tribunals.

Second, in principle, customary IHL could fill gaps in the *lex scripta* between contracting parties to treaties that contain certain end-of-armed-conflict provisions and states that have not contracted into those treaties. In this way, customary IHL has the potential to help address the lack of universal ratification of key IHL treaties, especially Additional Protocol I to the Geneva Conventions of 1949 (AP I) and Additional Protocol II to those Conventions (AP II).

Third, in principle, customary IHL can help fill gaps in the *lex scripta* between end-of-armed-conflict-related provisions concerning IAC and those concerning NIAC. In that respect, customary IHL might be particularly salient considering the much denser and more extensive cluster of such provisions laid down in treaties regulating IAC compared to the sparser set of such provisions established in treaties regulating NIAC.

As illustrated in Sections 4 and 5, however, it is far from clear whether customary IHL does in practice help resolve these forms of fragmentation and fill in the corresponding gaps in the *lex scripta* with respect to the end of armed conflict. As we shall show, the fact that some treaties contain different tests—at times, even within the same instrument—concerning the end of conflict poses a significant challenge for clear and decisive customary norms to emerge.

**Relationships between Fields of International Law concerning Armed Conflict**

**Jus ad Bellum**

Today, the applicability of IHL to an armed conflict is generally not predicated on the lawfulness of the resort to the use of force in international relations, which is governed by a different field of public international law: the *jus ad bellum* (or, as some commentators term it, the *jus contra bellum*). Nonetheless, at least one possible intersection between IHL and the *jus ad bellum* may be relevant to the

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end of armed conflict. That intersection concerns whether rounds of hostilities between the belligerent parties fall within the ambit of the same war. If not—that is, if one war between the belligerent parties has terminated and another war between them has begun—the new war must be analyzed on its own merits with respect to the assessment of aggression (or armed attack) and self-defense under the *jus ad bellum*.

**International Human Rights Law**

While IHL traces its roots to the regulation of interstate wars, international human rights law (IHRL), in its contemporary form, arose out of an attempt to regulate, as a matter of international law and policy, the relationship between the state—through its governmental authority—and its population. Unlike the relatively narrow war-related field of IHL, IHRL spans an ever-growing range of dealings an individual, community, or nation may have with the state.

In recent decades, the connection between IHL and IHRL has been the subject of a growing interest by states, adjudicatory bodies, and international institutions. The precise links between these two branches of public international law have also merited extensive academic commentary. The debate over this relationship largely centers on three issues. The first issue is whether IHRL applies extraterritorially such that states bring all, some, or none of their IHRL obligations with them when they engage in armed conflicts (as defined in IHL) outside of their territories. The second issue is whether non-state actors (especially organized armed groups) have *de jure* IHRL obligations (or, at least, *de facto* IHRL-related responsibilities). And the third issue is what is the apposite interpretive procedure or principle to use when ascertaining the content of a particular right or obligation under the relevant framework(s). This last point is especially pertinent where the two bodies of law—IHL and IHRL—are thought to apply simultaneously.

With respect to international law concerning the end of armed conflict, IHRL may be relevant in at least two major respects. First, where IHL is considered to supersede or replace an IHRL-based right or obligation, it is important to ascertain the temporal scope of application of IHL because, as noted above, IHL tolerates certain measures—including lethal targeting in direct attack against military objectives—that would usually contravene IHRL.

The second respect in which IHRL may be relevant here concerns situations where an armed conflict transforms from being international in character to non-international in character (thus, the “old” IAC ends and a “new” NIAC begins) and where the originally intervening foreign state remains to fight a non-state organized armed group (or groups) alongside the host state as part of the “new” NIAC. (Many

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commentators consider the U.S. position in relation to Afghanistan, in the October 2001–present period, to constitute such an example. In such scenarios, discerning the existence, content, and extent of applicable IHRL obligations of the foreign state may be particularly salient. That is because, once the conflict transforms from an IAC into a NIAC, in general the relatively-thicker set of IHL-of-IAC provisions terminate as the less-dense set of IHL-of-NIAC provisions are triggered. Thus, upon the end of the “old” IAC and the beginning of the “new” NIAC, it may be important to determine whether and to what extent IHRL may complement the relatively fewer IHL-of-NIAC provisions.

International Criminal Law

Though international criminal law is not an altogether new branch of international law, its post-WWII evolution is often considered one of the great developments of modern international law. In general, ICL imposes individual responsibility—not state responsibility—for international crimes, such as war crimes, crimes against humanity, and genocide. The sources of ICL may be found in treaties, customary international law, and general principles, as well as the relevant jurisprudence of courts. In practical terms, ICL may be applied by domestic courts (some reaching, under universal-jurisdiction principles, beyond their nationals or borders); by dedicated international tribunals (such as the International Criminal Court (ICC)); or by a range of hybrid courts that merge domestic and international components.

ICL may implicate the end of armed conflict primarily in terms of the temporal jurisdiction concerning war crimes. A war crime may be committed only where there is a sufficient connection with an armed conflict. Thus, to establish whether a war crime may have been committed, it is necessary to ascertain the temporal scope of the armed conflict.

**Relationship between IHL and Legal Frameworks Governing Acts of Terrorism**

Terrorist acts and other forms of involvement by terrorists in armed conflict may


34. See, e.g., Alexander Schwarz, *War Crimes*, in MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW ¶ 1 (2014) (defining a war crime **stricto sensu** as “any act, or omission, committed in an armed conflict that constitutes a serious violation of the laws and customs of international humanitarian law and [that] has been criminalized by international treaty or customary law” and explaining that “[t]his definition requires at least two conditions qualifying a conduct to a war crime. First, a violation of international humanitarian law, and second, the criminalization of the conduct under treaty or customary international law. The applicability of the rules of international humanitarian law implies that a war crime must be satisfactorily connected to an armed conflict. The second condition requires that customary or international treaty law must provide legal norms entailing individual criminal responsibility for the perpetration of such a violation”) (internal cross-references and citation omitted).
arise in relation to either category of armed conflict—IAC or NIAC. (Certain anti-terrorism treaties exclude from their scope of application the conduct of armed forces in an armed conflict.\textsuperscript{35}) Of course, terrorist acts may also be conducted outside of the context of an armed conflict; those acts of terrorism are subject to applicable domestic law-enforcement regimes and IHRL, but not (also) IHL.\textsuperscript{36}

The only terrorist acts that IHL applies to are those that have a sufficient connection with an armed conflict. In other words, “not all acts of terrorism in a territory affected by armed conflict will comprise part of that conflict.”\textsuperscript{37} Instead, “[i]t remains necessary to distinguish ordinary criminal acts of terrorism committed by other individuals or organisations from violence committed by the parties to the conflict or which has a ‘nexus’ to the conflict.”\textsuperscript{38} The response to the former—an “ordinary” criminal act of terrorism—is not governed by IHL. Rather, it is subject to the application of domestic law-enforcement measures compatible with other relevant fields of international law, such as IHRL.\textsuperscript{39}

So long as they are conducted with a sufficient nexus to an armed conflict, many terrorist acts—such as attacks directed against civilians who have not forfeited protection under IHL—\textsuperscript{40} would also constitute a violation of IHL.\textsuperscript{41} Yet a number of the acts that may be penalized in domestic law as terrorism offenses are not prohibited under IHL. (Nor, however, are those acts necessarily authorized

\textsuperscript{35} E.g., Article 19(2) International Convention for the Suppression of Terrorist Bombings, 2149 U.N.T.S. 256 (providing that “[t]he activities of armed forces during an armed conflict, as those terms are understood under international humanitarian law, which are governed by that law, are not governed by this Convention, and the activities undertaken by military forces of a State in the exercise of their official duties, inasmuch as they are governed by other rules of international law, are not governed by this Convention”: Article 26(5) Convention on the Prevention of Terrorism, Council of Europe, Treaty Series No. 196, 2005.

\textsuperscript{36} Those acts may (also) fall within the scope of an international anti-terrorism convention.


\textsuperscript{38} Id. See also Boškoski, Trial Judgement, supra note 4, at ¶ 190 (considering “that while isolated acts of terrorism may not reach the threshold of armed conflict, when there is protracted violence of this [terrorist] type, especially where they require the engagement of the armed forces in hostilities, such acts are relevant to assessing the level of intensity with regard to the existence of an armed conflict”).

\textsuperscript{39} See Saul, Terrorism and IHL, supra note 37, at 214.

\textsuperscript{40} See id. at pp. 225–26.

\textsuperscript{41} For example, pursuant to Article 51(2) of AP I, “[a]cts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited,” and, according to Article 4(2) (d) of AP II,

[w]ithout prejudice to the generality of the foregoing, the following acts against [all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted] are and shall remain prohibited at any time and in any place whatsoever: […] acts of terrorism.

See Prosecutor v. Stanislav Galić, Judgement, ICTY Appeals Chamber, IT-98–29-A, Nov. 30, 2006, ¶ 90 (finding that “the prohibition of terror against the civilian population as enshrined in Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II clearly belonged to customary international law from at least the time of its inclusion in those treaties”). See also Hans Gasser, Acts of terror, “terrorism” and international humanitarian law, 84 INT’L REV. RED CROSS 547, 554–62 (2002); Yoram Dinstein, Non-International Armed Conflicts in International Law 34 (2014) [hereinafter, “Dinstein, NIACs in International Law”].
under IHL.\textsuperscript{42}) For instance, IHL does not expressly prohibit the provision of financial resources to non-state organized armed groups, even where the latter are committing acts of terrorism. Nonetheless, domestic laws, certain non-IHL treaties, and United Nations Security Council decisions penalize various forms of financial and other support to terrorist acts. And international-legal rules on aiding and abetting the commission of certain crimes or internationally wrongful acts may penalize various forms of support to terrorist groups.\textsuperscript{43} Moreover, so long as they comport with law-of-armed-conflict rules governing the conduct of hostilities, attacks carried out by a non-state organized armed group against government armed forces are not prohibited in IHL. Yet, in accordance with applicable IHRL, domestic legislation may penalize those attacks as violent crimes, treason, support for terrorism, and the like.\textsuperscript{44}

\textsuperscript{42} For instance, under Article 3(1) of AP II, “[n]othing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.”


\textsuperscript{44} See, e.g., R v. Mohammed Gul [2012] EWCA Crim 280 [60] (concluding that “[t]hose who attacked the military forces of a government or the Coalition forces in Afghanistan or Iraq with the requisite intention set out in the Act are terrorists. There is nothing in international law which either compels or persuades us to read down the clear terms of the 2000 Act to exempt such persons from the definition in the Act”); see also U.S. Dep’t of Def., Law of War Manual § 17.4.1.1 (Dec. 2016) [hereinafter, “Law of War Manual”] (stating that “[a]n important consequence of the fact that States may exercise sovereignty over persons belonging to a non-State armed group is that a State may prosecute individuals for participating in hostilities against it. Such conduct frequently constitutes crimes under ordinary criminal law (e.g., murder, assault, illegal destruction of property). [¶] Although, during international armed conflict, lawful combatants are afforded certain immunities from the enemy State’s jurisdiction, persons belonging to non-State armed groups lack any legal privilege or immunity from prosecution by a State that is engaged in hostilities against that group”).