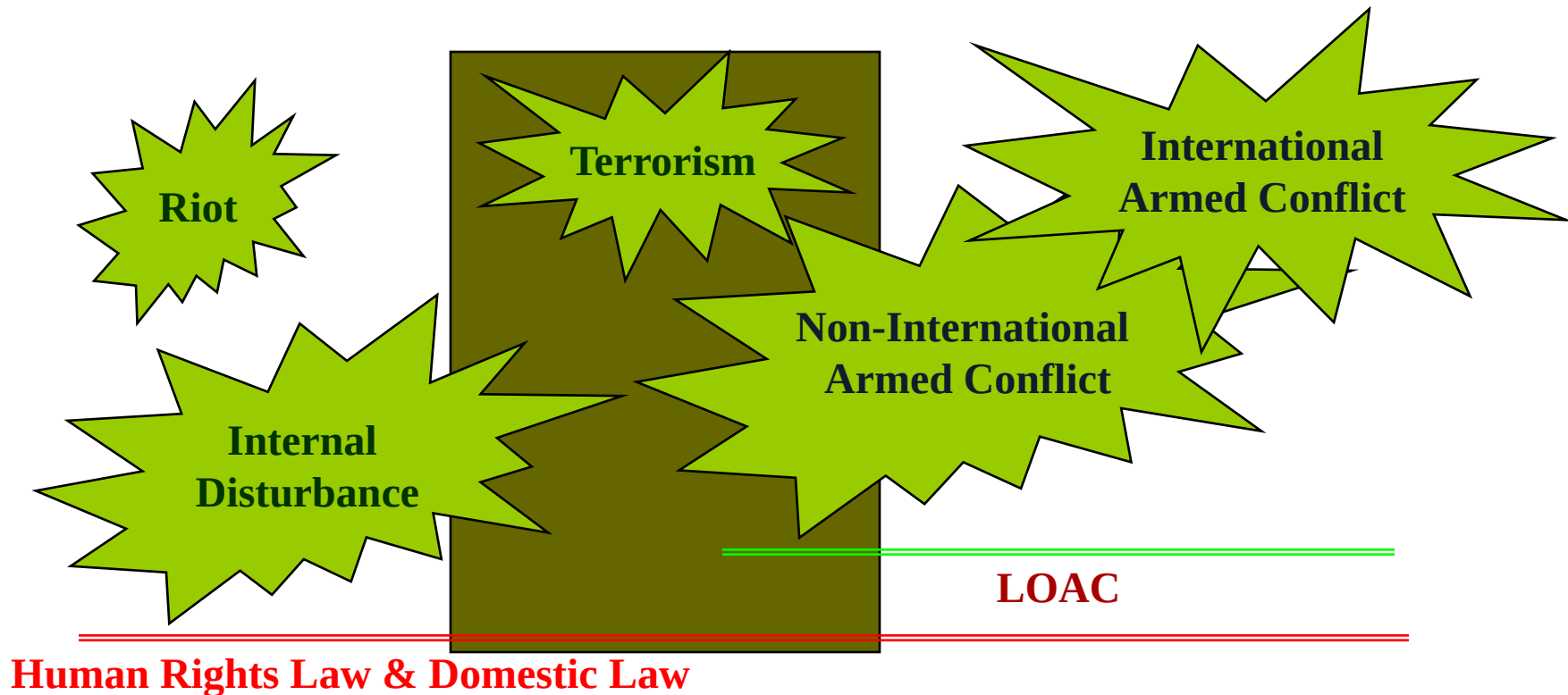


IHL, HUMAN RIGHTS LAW AND NON-INTERNATIONAL ARMED CONFLICTS



THE CONCEPT OF 'ARMED CONFLICT'

What Law Applies?



International Armed Conflict

- ❑ Between two or more States (no threshold of application)
- ❑ Includes all cases of occupation
- ❑ National liberation wars
- ❑ Internal conflict with external intervention

GCs and AP I apply

Non-international Armed Conflict

- Non-international armed conflicts under AP II
 - forces of a State against organised armed groups...
 - Under responsible command
 - Exercise armed control over a part of the territory
 - Carry out sustained or concerted military operations
 - Able to implement Additional Protocol - II

Internal disturbances and Tensions

" ... shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."

IHL is not applicable

Internal disturbances and Tensions

- ❑ internal disturbances: ... without reaching the threshold of an armed conflict, the State uses force to maintain law and order.
- ❑ internal tensions: ... without reaching the threshold of internal disturbances, the State uses force as a preventive measure to maintain law and order.

IHL is not applicable

Internationalized Armed Conflicts

- ❑ What is the effect on the characterization (and applicable law) of the intervention of a third State in an internal armed conflict?
- ❑ Which degree of intervention is required for the responsibility of the intervening State to be engaged?
- ❑ Which degree of intervention is required for the third State to become a party to the conflict?

Nicaragua v. USA (ICJ, 1986)

- ❑ It should be established in principle that it had an *effective control* on the military or paramilitary operations when the violations did occur.
- ❑ "had specifically ordered or imposed" the commission of the acts.

Tadic Case (ICTY, 1999)

Distinction between:

- ❑ isolated individual or group which is not military organized
- ❑ armed forces, militias or paramilitary units

Characterization of conflicts

Three situations:

- provide financial support, military equipment, or training (intervention)
- play a role on the organization, coordination or planning of military operations (overall control)
- give specific instructions or directives (effective control)

WHAT IS AN INTERNAL ARMED CONFLICT ?

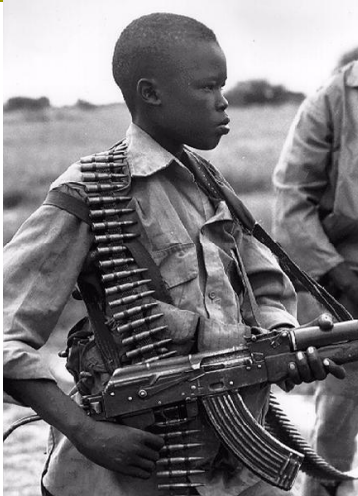
❑ *FOR GC COMMON ARTICLE 3:*

- ❑ **Protracted armed conflict occurring in the territory of a State between government troops and organised armed groups**

❑ *FOR ADDITIONAL PROTOCOL II:*

- **Which takes place in the territory of a State**
- **Between armed forces and organised armed groups**
- **Which are under responsible command**
- **Which exercise control over a part of the territory**
- **So as to enable them to carry out concerted military operations**

Features of Non-International Armed Conflicts



- Non state actors / organisations
- No longer a monopoly on violence
- A lack of respect for IHL rules¹²

Features of NIAC (cont'd)...



- Civilians = targets
- Increased suffering for civilians
- Lack of accountability

The Legal Situation during NIAC

□ *FOR THE STATE AUTHORITIES*

- National security, police and prison laws
- Human rights laws & mechanisms
- National IHL legislation
- Criminal prosecutions

□ *FOR NON-STATE ACTORS*

- Threat of prosecution
- Voluntary adherence
- Dissemination of IHL
- Special agreements between parties

IHL Applicable to NIAC

- ❑ **Common Article 3 of 1949 Geneva Conventions**
- ❑ **Additional Protocol II of 1977**
- ❑ **Conventions on means & methods of warfare**
- ❑ **Protocol on Involvement of Children in Armed Conflict**
- ❑ **Laws and Customs of War Applicable to NIAC
(Accepted by Nations / Determined by Tribunals)**

Key Features of GC Common Article 3

- ❑ Minimum Humanitarian Guarantees**
- ❑ Humane treatment - certain categories of persons - Prohibition of certain acts**
- ❑ Care of Wounded and Sick**
- ❑ Right of Humanitarian Initiative**
- ❑ Special Agreements Between Parties to the Conflict**
- ❑ Status of Parties Unaffected**

Key Features – Additional Protocol II

- Definition of a Non-international Armed Conflict
- **Fundamental Guarantees of Humane Treatment**
- **Judicial Guarantees for Detainees**
 - **Protection of Wounded, Sick and Shipwrecked**
 - **Protection of Civilian Population and Objects**
- Regulation of Means and Methods of Warfare
- **Work of Humanitarian Organizations**
- Dissemination of the protocol
- **Certain Internal Conflicts to be treated - As International Armed Conflicts**

International Human Rights Law

- ❑ What is Human Rights Law?
 - A separate body of international law from IHL
 - Protects individuals and groups against violations of their, civil, political, economic, social and cultural rights
 - Deals with the protection of those rights
 - Primarily concerned with how a government treats its own citizens
 - Often politicized

Principal Human Rights Treaties

- Charter of the United Nations (1945)
- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1966)
- International Covenant on Economic, Social and Cultural Rights (1966)
- International Convention on the Elimination of All Forms of Racial Discrimination (1965)
- Convention on the Elimination of All Forms of Discrimination against Women (1979)
- Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984)
- Convention on the Rights of the Child (1989)
- UN Convention on Migrant Workers

SIMILARITIES & DIFFERENCES

(IHL & Human Rights Law)

IHL and Human Rights Law

- ❑ **Share a common purpose – protecting human dignity**
- ❑ **Guarantee respect for life – physical and mental well being**
- ❑ **Both technically apply in armed conflict but they are designed to apply to different kinds of situations:**
 - **Human rights law is designed to govern in peacetime**
 - **IHL only applies in situations of armed conflict**
- ❑ **Protections under IHL can NEVER be derogated from and apply equally to all parties to the conflict, if protected persons**
- ❑ **Human rights can be derogated from in certain circumstances**
- ❑ **IHL offers more protection in armed conflict than general non-derogable human rights**

Enforcement of IHL & IHRL

□ Human Rights:

- Injured party institutes legal proceedings – against government officials & agencies
- Reports of international committees
- Serious violations can be prosecuted (as Crimes Against Humanity)

□ IHL:

- Protection by the ICRC or protecting powers
- Enforced by domestic courts or an international tribunal/court by prosecution (as War Crimes)
- All individuals (government officials and/or private citizens) may be held responsible for violations

States of Emergency

International Covenant of Civil & Political Rights (ICCPR) – Article 4.1:

In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social

Non-derogable Human Rights...

ICCPR:

The right not to be arbitrarily deprived of life (Art.6)

Prohibition against torture and other cruel, inhuman or degrading treatment or punishment (Art.7)

Prohibition of slavery and servitude (Art.8.1-2)

Prohibition against detention for debt (Art.11)

Prohibition against retroactive criminal laws (Art.15)

Recognition of legal personality (Art.16)

Freedom of thought, conscience and religion (Art.18)

The Minimum Standards (under *both* IHL and IHRL)

POW, internees or detainees may be questioned. They may be willing to freely give important information or may be induced to do so through skilful interrogation, however, they are under no obligation to do provide information. It is prohibited to use any of the following techniques in order to obtain information:

- a. *torture;*
- b. *degrading treatment such as leaving POW naked;*
- c. *inhumane interrogation methods;*
- d. *threats of violence or death;*
- e. *threats to other persons;*
- f. *refusal to treat wounds or provide medical attention;*
- g. *administering chemicals, drugs or other substances.*

IHL – Minimum Standards/Guarantees

GC Common Article 3 (NIAC) – Humane Treatment

GC III Art. 13 (IAC) – Humane Treatment (POW)

GC III Art. 17 (IAC) – No Torture, Coercion, Threats or Insults when questioning POW

GC IV Art. 27 (IAC) – Humane Treatment (Civilians), including against threats, acts of violence, insults & public curiosity or prejudice (special protection for women)

AP I Art. 75 (IAC) – Minimum Standards of (Humane) Treatment & Fundamental Judicial Guarantees

AP II Arts. 4 - 6 (NIAC) – Minimum Standards of (Humane) Treatment & Fundamental Judicial Guarantees

IRAQ – ABU GHRAIB





IRAQ – ABU GHRAIB



IRAQ – ABU GHRAIB



IRAQ – ABU GHRAIB

International Refugee Law and its Relationship with IHL

History, Concept and Development of Refugee Law

- ❑ Refugee is an Age-old concept
- ❑ This concept was emerged and developed during 20th Century
- ❑ A refugee is generally defined as any person who is obliged to flee his habitual place of residence and seek refuge elsewhere
- ❑ Refugee first attracted International attention after First World War
- ❑ Catalyst was the Second World War

Refugee Definition

❑ Who is a Refugee?

- Article 1 of the 1951 Refugee Convention deals with the Status of Refugees:

- ❑ *A refugee is a person who, owing to a well-founded fear of persecution for reasons of **race, religion, nationality, membership of a social group or political opinion**, is outside the country of his origin and is unable or unwilling to avail himself of the protection of that country; or who, not having a nationality and **being outside the country of his former habitual residence** as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*

- ❑ Not everyone crossing an international border qualifies for refugee status.

Relationship between IHL and IRL

- ❑ The international legal framework applicable in armed conflict is primarily composed of three interrelated and mutually reinforcing sets of rules:
 - **International Humanitarian Law;**
 - **International Human Rights Law, and;**
 - **International Refugee Law.**

Relationship between IHL and IRL

- ❑ International refugee law (IRL) deals with the protection of persons who have fled their country due to persecution or other serious violations of human rights or armed conflict (Refugees).
- ❑ While international humanitarian law regulates the protection of persons and the conduct of hostilities in armed conflict (persons affected by armed conflict),
- ❑ International human rights law imposes standards that governments must abide by in their treatment of persons both in peacetime and war (all human beings).

Refugee and International Legal Mechanism

- ❑ Statute of office of the UNHCR, 1950
- ❑ Convention relating to the status of Refugees, 1951
- ❑ Protocol relating to the status of Refugees, 1967
- ❑ Convention relating to the status of stateless persons, 1954
- ❑ Declaration on Territorial Asylum, 1967

Refugee Protection and Regional Mechanism

- ❑ the 1966 Bangkok Principles on Status and Treatment of Refugees adopted at the Asian African Legal Consultative Committee (currently called AALCO) in 1966.
- ❑ the 1969 OAU Convention governing the Specific Aspects of Refugee Problems in Africa
- ❑ the 1984 Cartagena Declaration on Refugees for Latin America
- ❑ the 1976 Council of Europe's Recommendation 773 (1976) on the situation of de facto Refugees
- ❑ the 2004 EU's Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as Refugees or as persons who otherwise need international protection and content of the protection granted

Fundamental Principles of IRL

- ❑ Arts.2 -34 provides various Rights Obligations to the Refugees, such as:
 - Duty to adhere the local laws
 - Basic fundamental rights
 - Right to access to courts, Right of Association, employment, public education, housing etc

Fundamental principles

□ Article 9 : Provisional Measures

- Nothing in this Convention shall prevent a Contracting State, in time of war or other grave and exceptional circumstances, from taking provisionally measures which it considers to be essential to the national security in the case of a particular person, pending a determination by the Contracting State that that person is in fact a refugee and that the continuance of such measures is necessary in his case in interests of national security

Fundamental Principles of IRL

- ❑ **Article 33 - Prohibition of expulsion or return - "*refoulement*"**
- ❑ No Contracting State shall expel or return ("refouler ") a refugee in any manner whatsoever to the frontiers of territories where life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.
- ❑ This provision will not be applicable to a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country.

Right of Asylum

- ❑ asylum seekers are people who flee their home country and seek refugee status in another, possibly because of war or human rights abuses, then lodge an application for asylum with that government
- ❑ the right of asylum concerns individuals and is usually delivered in a case-to-case basis.

1967 Protocol Relating to the Status of Refugees

- Removed dateline which was mentioned in 1951 Convention
- The removed both the temporal and geographic restrictions

OAU Convention

- ❑ This Convention deals with Specific Aspects of Refugee Problems in Africa, 1969; Article 1(1)
- ❑ For the purpose of this Convention, the term “refugee” shall mean every person who, owing to well-founded fear of being persecuted for reasons of **race, religion, nationality, membership of a particular social group or political opinion**, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country, or who, not having a nationality and being outside the country of his former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it.
- ❑ 1(2) The term “refugee” shall also apply to every person who, owing to **external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality**, is compelled to leave his place of habitual residence in order to seek refuge in another place outside of his country of origin or nationality

Bangkok Principles

□ Article 1: Definition of the term refugee

A refugee is a person who, owing to persecution or well –founded fear of persecution for reasons of race, colour, religion, political belief or membership or membership of a particular social group

- (a) leaves the State of which he is a national, or the country of his nationality, or if he has not nationality, the State or Country of which he is a habitual resident; or
- (b) being outside such State or Country, is unable or unwilling to return to it or to avail himself of its protection.

Addendum

1. The refugee phenomenon continues to be a matter of global concern and needs the support of the international community as a whole for its solution and as such the **principle of burden sharing** be viewed in this context

Bangkok Principles (contd...)

- ❑ The Principle of international solidarity and **burden sharing** needs to be applied progressively to facilitate the process of **durable solutions** for refugees

India and Refugee problems

- ❑ India has received refugees not only from some of its neighbouring countries but distant countries like Afghanistan, Iran, Iraq, Somalia, Sudan and Uganda since independence.
- ❑ India is not party to 1951 Convention and 1967 Protocol.
- ❑ No uniform domestic mechanism to deal with ‘refugees’ influx .Refugee ‘status’ are considered on a case-by-case basis and UNHCR often plays a prominent role to the efforts of the Government.

Indian judiciary and Refugee issues

- ❑ Articles 22(1),22(2) and 25(1) of the Indian Constitution reflect that the rules of natural justice in common law systems are equally applicable in India, even to refugees - Chakma Refugee issues
- ❑ According to Supreme Court of India International conventional law must go through the process of transformation into municipal law before the international treaty becomes internal law.
- ❑ Courts may apply **international law only when there is no conflict between international law and domestic law**, and also if the provisions are not in in contravention of the spirit of national legislation.

Indian judiciary and Refugee issues

- ❑ Freedom of movement is granted to all the refugees and choose their own occupation in India.
- ❑ Since India has not yet incorporated the principle of *non-refoulement* in its legal statutes, the person concerned would have to face the prospect of being arrested and prosecuted as per the laws of the land.

IHL concerns with Refugee problems

- Article 73 of API : Refugees and Stateless persons
 - Persons who, before the beginning of hostilities, were considered as stateless persons or refugees under the relevant international instruments accepted by the Parties concerned or under the national legislation of the State of refugee or State of residence shall be protected persons within the meaning of Parts I and III of the fourth Convention, in all circumstances and without any adverse distinction.
- Article 74- Reunion of dispersed families
- **Additional Protocol II:**
 - Article 17 of AP II
 - 1. The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.
 - 2. Civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Thank you for your attention!!!!