

Cross-border conflict and international law

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International law should not be thought of as just another branch of treaty obligations. Rather it is a complete but parallel legal system, where states are the classical primary actor. International obligations ought to be implemented by states at the domestic level or individuals may not be able to benefit from them. As such, the laws of the states where a conflict is having an impact need to be understood in the light of this other, separate international legal system.

This legal system has several sources, including both treaties that bind all parties, and custom based on state practice that is legally obligated, which binds all states apart from persistent objectors to the rule. Some rules, known as *ius cogens*, are so important, though, that no state can opt out. International law is traditionally seen as the law governing the behaviour of states – among themselves and in relation to persons under their jurisdiction, and accommodating state sovereignty. The state is the paradigmatic actor in international law and part of the definition of the state involves its territory based on recognised, if sometimes disputed, borders. The ideas of self-defence and territorial integrity are dependent, in part, on clearly defined borders.

The cross-border impact of a conflict raises questions going to the essence of modern international law, especially pertaining to the international law of armed conflict (ILAC), international human rights law (IHRL), international criminal law (ICL), the law relating to the protection of internally and internationally displaced persons, as well as the emerging field of transitional justice. Moreover, it is in relation to these branches of international law that the classical model is challenged and where other actors – individuals, non-state actors and international organisations – interact with the state.

Modern international law derives from the United Nations Charter, Article 2.4 of which provides that all members should refrain from the threat or use of force against any other state;

thus, no state should act in such a way within its territory that it directly impacts on the territorial integrity or political independence of another member state, a concept more fully elaborated by the UN General Assembly in its 1970 Declaration on Friendly Relations.

The unilateral use of force by one state against another is no longer permissible in international law. If force is used or threatened, however, states have an inherent right to self-defence under Article 51. Equally, Article 2.7 provides that the UN shall not intervene in matters that are essentially within the domestic jurisdiction of a member state. Nevertheless, under Chapter VII of the Charter, the Security Council shall take measures, including where necessary the use of force, to maintain international peace and security. This Security Council duty might be exercised in line with the developing ideas relating to the ‘responsibility to protect’.

While armed conflicts still take place between states, what is more usual – and needs further analysis – is the situation where an internal armed conflict spills over into another state, either directly or indirectly, such as where civilian populations fleeing fighting cross a border seeking refuge, sometimes including persons who have committed war crimes or crimes against humanity.

International law of armed conflict or international humanitarian law

The law relating to going to war (*ius ad bellum*) is different from the law that applies during an armed conflict (*ius in bello*).

Whether the conflict is lawful in international law is irrelevant to the question as to whether the laws of war (*ius in bello*) apply: once there is an armed conflict, then the laws of war apply.

The laws of war are usually described in terms of Geneva Law, which relates to the protection of non-combatants, and Hague Law, which governs the means and methods of warfare.

The scope of law that applies depends on the nature of the conflict. ILAC only applies in full to so-called 'international armed conflicts', that is, wars between two states. Internal armed conflicts or civil wars have a more limited set of rules that apply to non-international armed conflicts (NIACs): Common Article 3 of the four Geneva Conventions (1949), and Protocol 2 to the Geneva Conventions of 1977, where the state has ratified that Protocol.

Hague Law would not, on its face, apply to a NIAC. However, international law is not limited to what is laid down in treaties, but also includes customary international law. In relation to NIACs, much of the law relating to international armed conflicts is said to be binding customary international law.

Adding to this complexity, what is apparently a NIAC may actually be international in character because of the involvement of neighbouring states: there is undoubtedly an internal element to the war in the Democratic Republic of Congo (DRC), but is the involvement of troops from neighbouring states sufficient to render it, in whole or in part, international in character? This question was explored by the International Court of Justice in *DRC v Congo*.

It is unclear at what point the involvement of another state turns a civil war into an international conflict. Does assistance to a rebel movement more readily effect that change than assistance to another government? Where an NIAC spills over into a neighbouring state, such as the Lord's Resistance Army conflict in northern Uganda and now DRC and other states in the region, does that render activities of the rebel movement in that neighbouring state 'international'?

Finally, the law of armed conflict applies to 'parties to the conflict' – are international peacekeepers parties to the conflict and bound by ILAC? This series of so far unanswered questions indicates the problems with respect to the cross-border impact of armed conflict, peacekeeping and peacebuilding.

International human rights law

One of the novelties of modern international law is that states have granted separate rights to individuals who live within their jurisdiction. Recognising that individuals have rights means that states are bound to comply with the international obligations deriving from such rights.

IHRL grants civil and political rights (such as the right to life, to humane treatment or to fair trial), and economic social and cultural rights (such as the right to health, to education or to housing) to individuals. IHRL treaties include the International Covenant on Civil and Political Rights (ICCPR), the International

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Covenant on Economic, Social and Cultural Rights and the African Charter on Human and Peoples' Rights.

States are obliged to respect, protect, promote and fulfil the rights they have recognised, both in peacetime and situations of conflict. The right to life applies throughout a conflict, although it needs to be noted that the ICCPR prohibits 'arbitrary' killings and ILAC permits the killing of enemy combatants and even civilians where the attack was targeted at a military objective – the so-called 'collateral damage'.

Furthermore, under IHRL states are allowed to derogate from certain obligations under a treaty if certain conditions are fulfilled. Rights that cannot be derogated under any circumstance include the right to life, the right to humane treatment and the prohibition of slavery. Other rights, like the right to personal liberty or freedom of expression, can be derogated from. According to the ICCPR, for example, a state can derogate when there is 'a public emergency that threatens the life of the nation' and if certain requirements of proportionality, necessity and non-discrimination are present. During the Rwandan genocide many people fled into neighbouring states. Such massive movement of people across the borders might represent a threat to a neighbouring state like Uganda or Burundi, both of which have ratified the ICCPR. Therefore, were they to have a legitimate claim, they could derogate rights to personal liberty or freedom of expression.

Moreover, and not the same as a derogation, many rights have built-in 'clawback' clauses restricting the scope of certain rights in specific circumstances. So, under the ICCPR, states parties are allowed to limit their protection of the right to freedom of expression to uphold, for example, national security and public order.

As noted, IHRL applies both in peacetime and in conflict to persons who are within the jurisdiction of a particular state, not

just its territory. Thus, for example, a state party to the ICCPR could breach its treaty obligations when it acts outside its territory if the violation was within its extraterritorial jurisdiction.

How could such jurisdiction be established? The requirement is that of 'effective control.' In the 'war on terror', for instance, the United States and the United Kingdom are claimed to have been instrumental in the planning and implementation of extraordinary renditions, and would be responsible for breaching rights under the ICCPR if it is proven that they exercised 'effective control' over the disappearances, torture and lack of fair trial guarantees that took place in countries like Pakistan. The meaning of 'effective control' continues to be debated by states and relevant bodies.

The consequences of extraterritorial application of human rights treaties are important for the protection of the individual with respect to the cross-border effects of conflict since liability might arise for actions and omissions inside or beyond its borders. The question remains open whether an ICC indictment before the end of a conflict, as in the case of Hassan al-Bashir and his colleagues in Sudan or Joseph Kony in Uganda, inhibits or helps the resolution of the conflict.

International criminal law

Persons who violate ILAC and IHRL may be subject to prosecution as international criminals. The state where any crime takes place has jurisdiction to prosecute, subject only to the international law relating to immunities. However, some crimes are so heinous that international law allows for universal jurisdiction, permitting all states to prosecute such crimes. This is particularly so with respect to war crimes, crimes against humanity and genocide. Moreover, the past twenty years has seen a growing use of international and internationalised courts to carry out these prosecutions.

In terms of war crimes and the cross-border impact of conflict specifically, Geneva and Hague Law establish several crimes in relation to international armed conflicts, but in situations of civil war individual criminal responsibility for violations is not expressly established. Nevertheless, the International Criminal Tribunal for the former Yugoslavia (ICTY) has held that customary international law provides for such individual responsibility.

With respect to international armed conflicts, all four Geneva Conventions and Additional Protocol 1 create the crime of grave breaches. Grave breaches give rise to the only example of explicit mandatory universal jurisdiction in international criminal law. That is, states parties to the Conventions and Protocol have to seek out and prosecute violators found within their



The border between Sierra Leone and Liberia at Gendema in Sierra Leone.
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territory; other *soi-disant* international crimes only enable states to prosecute violators on their territory and the obligation is either to surrender to another state with a more pressing claim to jurisdiction or, failing that, to carry out the prosecution itself (*aut dedere, aut judicare*).

Crimes against humanity are not set out in any comprehensive, global treaty. But Article 7 of the Rome Statute of the International Criminal Court (ICC) regarding crimes against humanity is now generally accepted – despite some differences in the text between the statutes of the ICTY, the International Criminal Tribunal for Rwanda (ICTR) and the ICC. Further, custom provides for universal jurisdiction. Custom equally grants universal jurisdiction over genocide, while the 1948 Genocide Convention only grants jurisdictional competence to the territorial state and any international tribunal. Genocide is difficult to prove because it requires the perpetrator to intend to destroy a group, in whole or in part.

Most prosecutions of international crimes will continue to take place before domestic courts asserting either territorial or some form of extraterritorial jurisdiction. Nevertheless, the 1990s saw the establishment of the ICTY, ICTR and the ICC. At first blush, these three international tribunals look very similar, but they have different jurisdictional competences and the ICC, created by states by treaty, only has jurisdiction over Article 5 crimes – genocide, crimes against humanity, war crimes and the crime



of the normative framework applicable in transitional justice situations.

Four *processes* are believed to constitute the core of transitional justice: 1) *justice* – aiming to prosecute and punish the perpetrators of mass atrocities; 2) *reparations* – seeking to adequately redress victims of atrocities for the harm suffered; 3) *truth* – aiming to investigate the atrocities so that society discovers and knows what happened during conflict; and 4) *institutional reform* – to ensure that such atrocities do not happen again.

While there are reasons to implement these processes within the boundaries of the state where conflict took place, considering the cross-border implication of conflict in a transitional justice setting challenges a solely state-centred approach. Indeed, the close interaction between states and other important international actors, and between people across borders, calls for a more comprehensive approach to truth, justice, reparations and institutional reform that is bound to transcend state boundaries.

For example, transitional justice processes should include, in a satisfactory manner, people in exile and refugees. Also, other states or non-state actors equally responsible for atrocities should recognise their mistakes and assume responsibility for what happened. International justice helps to achieve this aim, although in a limited way. Yet, truth remains a local business when the UN, other states and other actors could play an important role in truth-seeking and truth-telling, beyond providing economic or expert support.

Internationalising transitional justice mechanisms is not an easy task and is one that faces strong resistance by states who might see it as a threat to their sovereignty and their political interests. A palpable example of this is international criminal justice. While international tribunals (*ad hoc*, hybrid and the ICC) were created not as an expression of transitional justice mechanisms, they play, *de facto*, that role, since they are meant to help in the realisation of the justice dimension.

An important challenge to the domestic and international justice element of transitional justice is the perception that it can be an obstacle to peace, truth or reconciliation in the aftermath of conflict or repression. The ICC, for example, is considered by some states and critics to be an obstacle to peace in countries where it is currently conducting investigations, for instance in Uganda and Sudan.

Displacement

Conflicts inevitably give rise to displacement, sometimes across a border, sometimes internally within the state. In both cases,

of aggression – committed on the territory of a state party or by a national of a state party where no relevant state is willing or able to prosecute.

Undoubtedly, the three bodies, as well as the so-called ‘hybrid tribunals’ like the Special Court for Sierra Leone, have had and will continue to have a major influence on the development of ICL; but in terms of direct impact, national courts will remain the primary prosecutor. Understanding the jurisdictional competence of domestic courts will remain important to everyone analysing the cross-border impact of conflict.

Transitional justice

Armed conflicts constitute a potential threat to the international community since they have spillover effects. This threat makes it imperative to help states in such situations to undergo important political and social change, so that they can build systems where the rule of law, democracy, and human rights protection can flourish. In such contexts, peacebuilding measures are necessary to achieve a lasting transformation, to avoid a relapse into conflict and repression.

A key element of peacebuilding is transitional justice. This field, although not synonymous with international human rights law, has been strongly influenced by it, and in particular by the obligations deriving from this law that aim to prevent and fight impunity. ICL, ILAC and international refugee law are also part

the victims suffer in much the same way, but those who cross an international border have a separate regime to guarantee them protection, both in the state of refuge and from return to the country where the conflict is occurring.

The 1951 Convention Relating to the Status of Refugees defines a refugee in terms of someone who has crossed a border with a well-founded fear of persecution based on certain specific grounds. Such persons are owed protection by the receiving state and fall within the mandate of UN Refugee Agency (UNHCR). Moreover, even where the receiving state is not a party to the 1951 Convention, such as Thailand with respect to those crossing from Burma/Myanmar, it still has an obligation, either through custom or due to IHRL obligations, not to *refouler* (force back) someone to where their life or freedom would be threatened.

Nevertheless, it used to be that those fleeing international armed conflict were deemed not to be suffering “persecution” under the 1951 definition. However, the conflicts of the 1990s in the former Yugoslavia, where civilians were targeted on grounds of race, religion and ethnicity, caused a re-think on this interpretation and led to a broader understanding of refugee status.

Where a person does not cross an international border, as is the case for many affected by the Colombian conflict, they cannot be refugees, but IHRL and ILAC do offer protection. In 1998, the UN Secretary-General promulgated the Guiding Principles on Internal Displacement – they are not legally binding, but highlight how other binding parts of international law can protect internally displaced persons.

Conclusion

Important branches of public international law – ILAC, IHRL, ICL, refugee law and the emerging field of transitional justice – apply to conflicts that impact across borders. The application of international law in such situations has to address complex

issues, because of the lack of clarity of such laws or fields, but also due to the state-centred approach that still dominates in international discourse.

The interplay between these different branches of international law is also significant. Clearly, the paradigm of international law aims to provide some coherence to the treatment of the cross-border consequences of conflict. Nevertheless, international law is not constituted by a set of infallibly clear, consistent and compatible norms of law, adding challenges to the way these particular branches of law regulate and interact with one another in such situations.

But despite the problems of interpretation and application of these laws, significantly they have tried to put human beings at the heart of their concerns. So they offer important principles and rules – such as human dignity, *non-refoulement*, the prohibition of torture, accountability for past crimes, and the right to adequate reparation – that should be used to protect people affected by conflict, including where its impact crosses borders.

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