## Nicaragua v. United States of America, 1986 I.C.J. 14 (1986)

### Does this case have any legal effect on the US?

#### Why?

### What actions by the US lead to this case?

### Did the court find that the contras were a US force?

### What did it find about the relationship between the contras and the US?

### What is the international law claim? Look at 113, p. 262

### What does the court have to determine?

### What is the general defense of the US?

### What is the US position on the relationship between the UN Charter and CIL?

### How does the court find that the US theory of collective self-defense undermines it argument about the role of the chapter and CIL?

### What are examples of key international law concepts, some of which are also part of treaties, that are omitted from the UN Charter?

#### Where does the inherent right of self-defense come from, if not CIL?

### 181 – How has the Charter affected CIL?

### 183 – Does the court have jurisdiction over breaches of the UN Charter?

### How does the Charter affect its review of the US’s actions?

### Do all states, at all times, have to respect at rule of CIL for it to be CIL?

### Would there be any CIL if this were the test?

### 188 – what does the court say both parties agree on as a treaty (UN Charter) obligation?

### 190 – What did the US say about non-aggression in its counter memorial?

### Is there an exception for self-defense under the principle of non-aggression?

### What is collective self-defense?

### What is necessary for collective self-defense to be an exception?

### What is the principle of non-intervention?

### How is related to the whole notion of CIL?

### Even if the state asks for help, can a third party state mount an armed attack as part of collective self-defense for political, i.e., non-military actions?

### Did the court find that the US used force against Nicaragua?

### What does the court say the US can do to help the contras without breaching CIL?

### What must the court find before it decides if the US actions were a legitimate exercise of collective self-defense?

### Does supplying arms to rebels in another state constitute an armed attack under CIL?

### Was El Salvador under armed attack from Nicaragua when it asked for help from the US?

### Even if the US is justified in its attack on Nicaragua, what must it do before the attack?

### Has it done this?

### Why?

### Without satisfying this condition precedent, can the US’s actions be lawful under CIL as modified by the Charter?

### Did the court find that the US violated CIL?

### What two orders it make?

### Who would have to enforce these if the US does not comply?

## Putting the pieces together

### How does a civil war undermine sovereignty and justify UN intervention?

### Why is this an issue in Syria, and how did it play out in Libya?

### What about Venezuela?

### How would you apply this in Somalia and other failed states?

### Will war crimes such as genocide allow a military attack on a nation?

### Is this also an issue in Syria?

### What about Rwanda?

### Cambodia under Pol Pot?

## Review the Right to Wage War, p. 275

# \*Chapter 10 – International Humanitarian Law

## Why have limits on what you can do in war at all?

### Chivalry – only applied to other knights, everyone else was screwed.

### Why is this about shifting alliances in the modern world?

## Nomenclature

### Jus ad bellum – law about preventing and starting wars

### Jus in bello – law of what you do during wars, also international humanitarian law (IHL) or law of armed conflict (LOAC).

### Where can we find IHL?

### International human rights law (HRL) – applies out of the war zone.

#### Traditionally, the view of the United States is that, during armed conflicts, the more general HRL gives way to the more specific IHL and its jus in bello principles.

## Review the Cardinal Principles, . 277

### How has warfare changed from the warfare that these principles contemplate?

## Review Common Article 2

### Does this require formal war?

## Common Article 3

### What is a non-international conflict?

### What is this especially important today?

## Notes and Questions

### 1. The Either/Or of the Geneva Conventions.

#### Under the 1949 Geneva Conventions, every armed conflict is either international (Common Article 2) or non-international (Common Article 3).

#### Are the protections offered by the two articles different in any important ways?

#### Are you persuaded that changing the threshold requirement for their application from a state of “war” to “armed conflict” was wise?

### 2. Defining Armed Conflict.

#### What should be the criteria for deciding the existence of an “armed conflict’?

#### Who decides, then?

#### What did the International Criminal Tribunal for the former Yugoslavia find as a definition of armed conflict?

### 3. International v. non-international armed conflict

#### Before 9/11, the Taliban were the de facto government of parts of Afghanistan, in armed conflict with the Northern Alliance, an indigenous group of war lords. Was that conflict of a non-international character?

#### Did its character change when the United States deployed forces in Afghanistan against the Taliban and Al Qaeda after 9/11?

#### With reference to the Geneva Conventions, what is the legal and practical significance of the distinction?

### 4. Conflicts Involving Non-State Actors.

#### Common Article 3 clearly applies to armed conflicts involving a state and non-state parties. But which non-state parties? Does it apply when a state is fighting a non-state entity outside the state’s territory?

#### Is this definition broad enough to reach transnational terrorist groups, like Al Qaeda, that conduct terrorist attacks in a number of different countries?

#### Does it apply to members of less well-organized splinter groups or even lone-wolf terrorists who purport to act on behalf of such organizations?

#### Pirates?

### Case Study: Counterterrorism and IHL

#### In November 2002, the United States targeted and killed Abu Ali al-Harethi and five other men by firing a missile from a Predator drone in a remote part of Yemen. Al-Harethi was an Al Qaeda operative suspected of playing a key operational role in the October 2000 terrorist attack on the U.S.S. Cole which killed 17 U.S. sailors.

#### What did the UN say about this killing?

#### What was the United States position?

#### Are these actions armed conflict?

#### Is there another body of law that could control?

#### Does it matter?

## Basic principles

### Distinction – who can you shoot and imprison?

### Proportionality - forbidding any use of force that causes incidental civilian casualties that are disproportionate to the military advantage from the operation

## Review the Geneva Conventions

## Notes and Questions

### 1. Architecture and Stature of the Geneva Conventions.

#### What is the legal status of the 1949 Geneva Convention?

#### What about battlefield tactics?

##### The regulation of battlefield tactics is left to other treaties, such as the 1907 Hague Regulation IV, and to customary law. Can you see the basic orientation of the conventions toward protection of the victims of war in the provisions of Geneva III and IV excerpted above?

### 2. Grave Breaches.

#### How do the conventions become domestic law?

#### Exactly what constitutes a “grave breach”? Is there a practical difference between a grave breach and a war crime?

#### What are the scope and content of each state’s obligation to seek redress for grave breaches? See id. art. 86

#### How are these applied to soldiers?

#### How can citizens be tried?

#### How are enemy soldiers tried?

### 3. Jus in Bello as Custom and the Protocols.

#### What are the limitations on the Geneva Conventions?

#### What difference does it make whether IHL is customary or enshrined in a treaty provision such as the Geneva Convention?

#### Can you figure out why the United States has recognized some of the provisions as customary law but not others?

#### Why not sign on lock, stock, and barrel?

### 4. Are the Geneva Conventions Obsolete?

#### What did White House Counsel Alberto Gonzales say?

## B. APPLYING IHL—TARGETING IN ARMED CONFLICT

### Public Committee Against Torture in Israel v. Israel, Supreme Court of Israel, sitting as the High Court of Justice, 46 I.L.M 375 (2006).

#### What is the factual background?

#### Is Israel at war?

#### Is it opposed by a state, i.e., is this an international conflict?

#### What is ‘‘the policy of targeted frustration’’ of terrorism?

#### Are the people they are killing part of the uniformed forces of a state?

#### What is a lawful combatant?

#### Does Israel consider the people it is targeting lawful combatants?

#### Can you kill lawful combatants?

#### What are the advantages of being a lawful, as opposed to unlawful, combatant?

#### What is a civilian?

#### Can you kill civilians?

#### Does IHL recognize the category of unlawful combatant?

#### Is that a satisfactory result in this case?

#### What is the Court’s three part test for when citizens are no longer protected under IHL?

#### How do you apply each part?

#### What is a hostile action?

#### What are some examples of direct versus indirect hostilities?

#### What if you are hostile one day, but not the next?

#### What did the U.N. Special Rapporteur tell us about the duration of participation?

#### What three part test must each action meet?

#### What about the problem of unlawful combatants who go back to safe havens where they do not engage in hostilities between attacks?

#### What about some who sees himself as defending his home against the occupying force?

#### Why did Schmitt argue that it was good to define direct hostilities very broadly?

#### Does the Court find that when the cannon roar, the law is silent?

#### Did it find that all targeted killings are legal or illegal?

#### How must the cases be resolved?

#### In practical terms, is this likely to restrain the attacks?

## Notes and Questions 309

### 2. Classifying the Conflict.

#### Go to Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions (Philip Alston), Addendum: Study on Targeted Killings, at 17-18, U.N. Doc. A/HRC/14/24/Add.6 (May 28, 2010).

### 4. Distinction.

#### Many feel that the principle of distinction is the most important jus in bello rule. An ICRC study begins its list of customary norms this way: “Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants.…Attacks must not be directed against civilians.”

#### If terrorist forces purposefully wore civilian clothing, with no insignias or other identifying features, how would U.S. commanders or pilots in the air know who their lawful targets were?

### 5. Military Necessity.  If distinction is the most humanitarian principle in IHL, military necessity is “the principle that justifies the use of all measures needed to defeat the enemy as quickly and efficiently as possible that are not prohibited by the law of war.” Department of Defense Law of War Manual, supra p. [123](http://e.pub/sgn4dun08yx3viej3iiu.vbk/OEBPS/xhtml/9781454881131_18_ch04.xhtml#page_123), at 52.

### How do you square this with:

#### 6. Unnecessary Suffering.  AP I art. 35 makes it clear that any weapons or “methods of warfare of a nature to cause superfluous injury or unnecessary suffering” are forbidden. How would you define the key terms “of a nature,” “superfluous injury,” and “unnecessary suffering”?

#### How is the principle of unnecessary suffering different from the principle of distinction?

#### Does the use of cluster munitions violate either principle? How about a Hellfire laser-guided missile launched from a drone?

### 7. Proportionality.

#### Review AP I arts. 51.5(b) and 57.2(b), supra. The focus is clearly on civilians, not combatants. Paragraph 2.4.1.2 of the Department of Defense Law of War Manual, supra, states that “incidental” harm to “the civilian population and civilian objects” from an attack must not be “excessive in relation to the military advantage anticipated to be gained.”

#### What is proportionality ‘‘stricto senso,’’ that is, the requirement that there be a proper proportionate relationship between the military objective and the civilian damage. P132 44

#### What is the proportionality test for injuring innocent civilians?

#### Is there a proportionality test for combatants, both lawful and unlawful?