Rhodes, Catherine. "A Model of Coherent International Regulation." *International Governance of Biotechnology: Needs, Problems and Potential*. London: Bloomsbury Academic, 2010. 60–70. Science Ethics and Society. *Bloomsbury Collections*. Web. 26 Apr. 2023. <<http://dx.doi.org/10.5040/9781849661812.ch-005>>.

Downloaded from Bloomsbury Collections, www.bloomsburycollections.com, 26 April 2023, 12:57 UTC.

Copyright © Catherine Rhodes 2010. You may share this work for non-commercial purposes only, provided you give attribution to the copyright holder and the publisher, and provide a link to the Creative Commons licence.

5. A Model of Coherent International Regulation

In order to assess the coherence of the international regulatory response to the applications and impacts of modern biotechnology, a model of coherent international regulation is needed. The model presented here consists of sixteen key characteristics indicative of coherence. For illustrative purposes it is applied to the Geneva Conventions and Protocols, which provide a clear example of a coherent regulatory set. (The model is more widely applicable and this is demonstrated in Table 5.2 at the end of the chapter.) This chapter is the first of two that lay the basis for the technical analysis in the third section of the book.

The Geneva Conventions and Protocols

The Geneva Conventions and Protocols are a key part of international humanitarian law (IHL), that is the law that applies to armed conflict. They are designed to protect those who do not participate in the fighting and those who are no longer able to fight. They consist of seven separate texts:

- Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
- Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
- Convention (III) Relative to the Treatment of Prisoners of War
- Convention (IV) Relative to the Protection of Civilian Persons in Time of War
- Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts
- Additional Protocol II Relating to the Protection of Victims of Non-international Armed Conflicts
- Additional Protocol III Relating to the Adoption of an Additional Distinctive Emblem

Additional Protocol I provides additional details for the areas covered by the Conventions and follows a similar structure. Additional Protocol II only provides additional details on Article 3 of the Conventions, and has less in common in terms of content and structure. Additional Protocol III is even more specific, adding a red diamond to the traditionally recognised emblems of the red cross and red crescent. Because it is so specific it receives limited attention in the following analysis.

Characteristics of Coherent Regulatory Sets

The model presented in this chapter suggests that coherent sets of international regulation are expected to display sixteen key characteristics. The key characteristics of coherent international regulation are:

- Common (primary) purpose
- Common principles
- Common historical development
- Common identity (external awareness of connections)
- Self-referencing (internal awareness of connections)
- Shared definitions
- Unifying provisions
- Complementary provisions
- Common structure
- Common administration and review procedures
- Common enforcement and dispute settlement mechanisms
- Same strength of force
- Single international organisation with responsibility for oversight, coordination, implementation, monitoring and development
- Self-contained
- Clear issue focus
- Comprehensive coverage of issue

Common (primary) purpose:

Coherent sets of regulation will have a shared purpose. While the detailed objectives of the regulations may vary, their main objective will be common.

Common principles:

Coherent sets of regulation should be based on a core set of common principles. The provisions contained within regulations are unlikely to be complementary if they are based on divergent principles.

Common historical development:

Coherent sets of regulation will have a shared history. This does not require that all the regulations were adopted at the same time, but that their principles and provisions have a common developmental history.

Common identity (external awareness of connections):

Coherent sets of regulation will have a common identity. They will often be referred to as a complete regulatory set. This identity may be established in the regulations themselves or by the international organisation that oversees them. It will be evidenced in how the regulations are referred to by the public, the media, governments and other groups and organisations.

Self-referencing (internal awareness of connections):

Coherent sets of regulation will self-reference. That is, one regulation will refer to others where this is necessary, for example to avoid duplication or

to make it clear to the reader that a particular issue is covered elsewhere in the regulatory set.

Shared definitions:

It is expected that coherent sets of regulation will have shared definitions, particularly for key terms. Definitions used should not be contradictory.

Unifying provisions:

Since they share a common purpose, coherent sets of regulation will have some provisions that are the same in each text, which reinforce their common identity.

Complementary provisions:

Coherent sets of regulation will also contain complementary provisions. Of course, not all of the provisions of the regulations will be the same, otherwise it would not be necessary to have separate texts. However, it is expected that the provisions will be complementary in the sense that they work towards the same overall objectives and there should not be any contradictory provisions within a coherent set of regulation.

Common structure:

Coherent sets of regulation should have a common structure. This may be to the extent that related provisions are contained in the same articles in the different regulatory texts or just that related provisions appear in a similar order in each text.

Common administration and review procedures:

Coherent sets of regulation should have common administration and review procedures. This may include matters such as how often the regulations are to be reviewed, how they are monitored, procedures for withdrawal, etc.

Common enforcement and dispute settlement mechanisms:

Coherent sets of regulation will have common enforcement and dispute settlement mechanisms. This includes, for example, the implementing measures required by states and any enforcement roles assigned to the international organisation associated with the regulations.

Same strength of force:

This term has various elements including, for example, the number of states parties to the regulations. It is expected that in a coherent regulatory set, each regulation will have roughly the same number of states parties. (This will only apply to treaties which require states to ratify or accede to them and not to regulations based on voluntary

arrangements.) Another element relates to enforcement procedures. As stated above, it is expected that coherent regulatory sets will have the same enforcement procedures.

Single international organisation with responsibility for oversight, coordination, implementation, monitoring and development:

The particular roles and functions assigned to an international organisation will vary depending on what is required by the regulations. It is expected that coherent sets of regulation will have only a single international organisation, which will generally perform the same functions for each of the regulations.

Self-contained:

This term means that the regulations will be able to cover the particular matter with which they are concerned without requiring reference to regulations external to their set. All international regulation is based on certain basic rules and norms of international law, for example state sovereignty, and therefore reference to these is excluded from the analysis relating to this characteristic.

Clear issue focus:

This links quite closely to common purpose. It should be clear from the text of each regulation that they focus on the particular issue that forms their common objective. This issue should be their primary focus.

Comprehensive coverage of issue:

A coherent set of regulation should provide comprehensive coverage of the issue on which it focuses. This does not mean that the coverage of the regulations will be perfect; there are always likely to be flaws and areas which require updating. However, there should be no major gaps in the coverage or imbalances that leave one area poorly covered.

Application of the Model to the Geneva Conventions and Protocols

Common (Primary) Purpose

The Geneva Conventions and Protocols all share the common primary purpose of protecting the victims of armed conflict. The following is a statement from the website of the International Committee of the Red Cross (ICRC): ‘The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They protect people who do not take part in the fighting (civilians, medics, aid workers) and those who can no longer fight (wounded, sick and shipwrecked troops, prisoners of war)’ (ICRC, 3 June 2004).

Common Principles

The Geneva Conventions and Protocols are based on humanitarian principles to be applied during armed conflict. The key principle is to protect those who do not take part in the fighting and those who are no longer able to fight. The people protected must be treated humanely without any adverse distinction. The use of non-discriminatory means and methods of warfare is forbidden. These principles are applied across the regulations, for example the following is found in Article 12 of Convention I:

Members of the armed forces and other persons mentioned in the following Article, who are wounded or sick, shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the Party to the conflict in whose power they may be, without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar criteria.

And similar provisions are located in Article 12 of Convention II, Articles 13 and 14 of Convention III, Article 27 of Convention IV, Article 10 of Protocol I and Articles 4, 5 and 7 of Protocol II.

Common Historical Development

Regulation of warfare has a long history. The first moves towards modern international regulation came in the nineteenth century. The ICRC was established in 1863 and the first Geneva Convention – for the Amelioration of the Condition of the Wounded in Armies in the Field – was adopted by sixteen states in 1864 at a conference convened by the ICRC. Several international treaties that aimed to regulate armed conflict were agreed prior to the Second World War. These were further developed after the War. Laws regulating armed conflict are referred to as international humanitarian law (IHL) or the laws of war. They apply during armed conflict, rather than in times of peace. The four Geneva Conventions, adopted in 1949, form a core part of IHL, protecting the victims of armed conflict. Two Additional Protocols were adopted in 1977 in response to the need to update and strengthen the Conventions and a third Additional Protocol was adopted in 2005 to add an additional protected emblem – the red diamond – that avoids the religious connotations that some groups associate with the red cross and the red crescent.

Common Identity (External Awareness of Connections)

The Geneva Conventions and Protocols, while consisting of seven separate documents with different titles, have the common identity of ‘the Geneva Conventions’ or the ‘Geneva Conventions and Protocols’. This can be seen in the way they are referred to by the ICRC, in news stories and other publications and in policy debates. For example a search on ‘Geneva Conventions’ on the BBC News website on 23 March 2010 brought up over

400 stories; a search on 'Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field' brought up two results (BBC News Online Search Facility).

Self-referencing (Internal Awareness of Connections)

References are made between the Conventions and Protocols where necessary to clarify coverage of certain issues. Table 5.1 lists where some of these references are located.

Table 5.1 References between the Conventions and Protocols

Convention/Protocol	Refers to	In article
Convention I	Convention III	16
Convention I	Convention II	20
Convention I	Convention III	28
Convention I	Convention III	30
Convention I	Convention III	49
Convention II	Convention I	4
Convention II	Convention I	23
Convention II	Convention III	50
Convention III	Convention I	33
Convention IV	Conventions I, II and III	4
Convention IV	Convention I	18
Convention IV	Convention I	20, 21, 22
Protocol I	Conventions I, II, III and IV	1, 2, 3
Protocol I	Convention I	9
Protocol I	Convention I	12
Protocol I	Convention I	18
Protocol I	Convention II	22, 23
Protocol I	Convention III	41, 42, 44, 45
Protocol I	Conventions I and II	44
Protocol I	Convention IV	45
Protocol I	Convention IV	49
Protocol I	Convention IV	58
Protocol I	Convention IV	68, 69, 70
Protocol I	Convention IV	72, 73
Protocol II	Conventions I, II, III and IV and Protocol I	1

Shared Definitions

Certain key terms are given the same basic definition in the Conventions. The most prominent example of this is the definition of the term 'grave breach'. In all the Conventions this includes 'wilful killing, torture, or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health' (Article 50 of Convention I, Article 51 of Convention II, Article 130 of Convention III and Article 147 of Convention IV). And Protocol I states that 'Acts described as grave breaches in the Conventions are grave breaches of this Protocol' (Article 85).

Unifying Provisions

The Conventions and Protocols have some common provisions that connect them further. The most prominent example is 'Common Article 3' on non-international armed conflict, which is exactly the same in all four Conventions. Other examples include a statement on the use of emblem: 'with the exception of the cases mentioned in the following paragraphs of the present Article, the emblem of the red cross on a white ground and the words "Red Cross" or "Geneva Cross" may not be employed, whether in time of peace or time of war' (Article 44 of Convention I, with similar wording in Article 44 of Convention II, Article 18 of Protocol I and Article 12 of Protocol II); and a statement on humanitarian organisations: 'The provisions of the present Convention constitute no obstacle to the humanitarian activities which the International Committee of the Red Cross or any other impartial humanitarian organisation may ... undertake for the protection of the wounded and sick, medical personnel and chaplains, and for their relief' (Article 9 of Convention I, with similar wording in Article 9 of Conventions II and III and Article 10 of Convention IV).

Complementary Provisions

The Conventions and Protocols form complements to one another, each extending protection to different subject matter for the same aims: armed forces on land; armed forces at sea; prisoners of war; citizens of occupied territories; and victims of non-international armed conflict. This can be seen in the sections on repression of grave breaches, which, after stating the common definition, have specific provisions for the particular area covered. For example:

- Article 130 of Convention III adds 'compelling a prisoner of war to serve in the forces of the hostile Power, or wilfully depriving a prisoner of war of the rights of fair and regular trial'; and
- Article 147 of Convention IV adds 'unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or wilfully depriving a protected person of the rights of fair and regular trial ... taking of hostages, and extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly'.

Common Structure

The articles in the Conventions and Protocols flow in a similar way from general points, through specific provisions, to administrative detail. Such a structure is common to many treaties but is present at a more detailed level in the Conventions and Protocols, where similar provisions can be found in similar positions in the documents. For example, the provision that people protected by the Conventions cannot renounce their rights under the Conventions is found in Article 7 of Conventions I, II and III and Article 8 of Convention IV. The provisions which outline which violations constitute 'grave breaches' are found towards the end of the Conventions and Protocol I, before the final provisions.

Common Administration and Review Procedures

The Conventions do not specify any particular review or amendment procedures. There are very similar provisions in the Conventions and Protocols for some administrative matters such as authentic texts, ratification, accession and denunciation procedures. The ICRC, as guardian and promoter of IHL, is responsible for its development.

Common Enforcement and Dispute Settlement Mechanisms

The Conventions and Protocols all use the same methods of enforcement and implementation, primarily through action by contracting states, such as education and the implementation of legislation to prevent and punish grave breaches and to protect the emblems of the red cross, red crescent and red diamond. For example: 'The high contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the Convention as widely as possible' (Article 47 of Convention I, Article 48 of Convention II, Article 127 of Convention III and Article 144 of Convention IV, with similar wording in Article 83 of Protocol I).

Dispute settlement provisions can be found in Article 11 of Conventions I, II and III and Article 12 of Convention IV. The Articles begin: 'In cases where they deem it advisable in the interest of protected persons, particularly in cases of disagreement between the Parties to the conflict as to the application or interpretation of the provisions of the present Convention, the Protecting Powers shall lend their good offices with a view to settling the disagreement.'

There is also a provision for enquiry into alleged violations: 'At the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention.' This provision can be found in Article 52 of Convention I, Article 53 of Convention II, Article 132 of Convention III and Article 149 of Convention IV. There is a similar provision in Articles 8 and 9 of Protocol I.

Same Strength of Force

The Conventions and Protocols are all legally binding treaties and compliance is mandatory for all contracting parties. Some provisions are also part of customary international law. There is some variation in the number of states parties. There are 194 states parties to the four Conventions, 169 to Protocol I, 165 to Protocol II and 52 to Protocol III (ICRC, 16 March 2010).

Single International Organisation

From the outset of their development the Geneva Conventions and Protocols have been overseen by the ICRC. It is responsible for their development and promotion and for many aspects of their monitoring and implementation. It provides a large, easily accessible information source on its website, which is open to the public, and provides technical guidance to states on implementation through an Advisory Service: 'As the promoter and guardian of international humanitarian law, the ICRC must encourage respect for the law. It does so by spreading knowledge of the humanitarian rules and by reminding parties to conflicts of their obligations' (ICRC Advisory Service, July 2004).

Self-contained

While resting, as all international regulations do, on basic customs, principles and rules of international law – for example that states have the right to make treaties – the Geneva Conventions and Protocols cover the area of protection of people during armed conflict without relying on other regulations to complete this coverage. They also form part of a wider set of international rules (IHL), but can function independently of it.

Clear Issue Focus

The Conventions and Protocols all clearly and primarily focus on the issue of regulating armed conflict to protect those who are not fighting or are no longer able to fight.

Comprehensive Coverage of Issue

While requirements for coverage will vary over time, the Conventions and Protocols do give reasonably comprehensive coverage to the protection of the victims of armed conflict. There have been recent criticisms of the scope of the Conventions and Protocols, as they do not cover the issue of the legality of humanitarian interventions, and their applicability to conflicts that form part of the 'War on Terror' has been challenged. The ICRC feels that the issue of humanitarian intervention should not be dealt with under IHL, but instead under international law on the use of force. In regard to the War on Terror, the Conventions and Protocols do apply to those parts

that constitute international or non-international armed conflicts. The ICRC does not support the concept of there being a category of individuals – ‘illegal combatants’ – the treatment of whom IHL does not apply to (ICRC, 21 July 2005).

Conclusion

The model of coherent regulatory sets provided in this chapter enables the assessment of coherence of the international regulations relevant to the applications and impacts of biotechnology which follows. The Geneva Conventions and Protocols clearly form a coherent set of international regulation, displaying all of the expected characteristics of the model. Table 5.2 shows that this is not a unique case – other sets of international regulations also match the model closely.

Table 5.2 Applying the Model to Other Sets of Regulation

Characteristic	Regulatory set		
	Geneva Conventions and Protocols ^a	Dangerous Goods Regulations ^b	UN Drugs Conventions ^c
Common (primary) purpose	Yes	Yes	Yes
Common principles	Yes	Yes	Yes
Common historical development	Yes	Yes	Yes
Common identity	Yes	Yes	Yes
Self-referencing	Yes	Yes	Yes ^d
Shared definitions	Yes	Yes	Yes
Unifying provisions	Yes	Yes	Yes
Complementary provisions	Yes	Yes	Yes
Common structure	Yes	Yes	Yes
Common administration and review procedures	Yes	Yes	Yes
Common enforcement and dispute settlement mechanisms	Yes	There are none in the regulations	Yes
Same strength of force	Yes	Yes	Yes ^e

(Continued)

Table 5.2 (Continued)

Characteristic	Regulatory set		
	Geneva Conventions and Protocols ^a	Dangerous Goods Regulations ^b	UN Drugs Conventions ^c
Single international organisation	Yes	Yes ^f	Yes ^g
Self-contained	Yes	Yes	Yes
Clear issue focus	Yes	Yes	Yes
Comprehensive coverage of issue	Yes	Yes	Yes

^a Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (ICRC, 1949a); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (ICRC, 1949b); Convention (III) Relative to the Treatment of Prisoners of War (ICRC, 1949c); Convention (IV) Relative to the Protection of Civilian Persons in Time of War (ICRC, 1949d); Additional Protocol I Relating to the Protection of Victims of International Armed Conflicts (ICRC, 1977a); Additional Protocol II Relating to the Protection of Victims of Non-international Armed Conflicts (ICRC, 1977b); and Additional Protocol III Relating to the Adoption of an Additional Distinctive Emblem (2005).

^b The International Maritime Dangerous Goods Code; the Technical Instructions for the Safe Transport of Dangerous Goods by Air; the European Agreement Concerning the International Carriage of Dangerous Goods by Road; and the Regulations Concerning the International Carriage of Dangerous Goods by Rail. All are based on the UN Model Regulations for the Transport of Dangerous Goods.

^c The Single Convention on Narcotic Drugs; the Convention on Psychotropic Substances; and the Convention against Illicit Trade in Narcotic Drugs and Psychotropic Substances.

^d Due to the gaps of several years between each Convention's negotiation and adoption, the Single Convention on Narcotic Drugs does not refer to either of the later Conventions, and the Convention on Psychotropic Substances does not refer to the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances refers to both earlier Conventions.

^e There is a slight variation in the number of states parties (184 to the Single Convention on Narcotic Drugs and the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, and 183 to the Convention on Psychotropic Substances). The Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances strengthened the enforcement mechanisms available for use under the earlier Conventions.

^f The United Nations Committee of Experts on the Transport of Dangerous Goods provides model regulations on the transport of dangerous goods which are monitored and updated regularly. Once issued other international organisations (the International Maritime Organisation, the International Civil Aviation Organisation, the United Nations Economic Commission for Europe and the Intergovernmental Organisation for International Carriage by Rail) amend their regulations in line with the model. There is a single international organisation responsible for monitoring and review, but there are also intermediary organisations responsible for particular transport areas.

^g The International Narcotics Control Board is the main international organisation responsible for the monitoring and review of the UN Drugs Conventions, but the Commission on Narcotic Drugs has a role in policy-making and the UN Office on Drugs and Crime provides advice to states on compliance with the Conventions.