

Application of International Humanitarian Law and International Human Rights Law in Armed Conflict

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The issue of possible overlapping between International Humanitarian Law (IHL) and International Human Rights Law (IHRL) is not new and many academic publications have already been made on that topic.

The solutions which were primarily proposed were relatively simple at the theoretical level. While the IHL applied during the time of war, IHRL applies during the peace time.

First, the distinction between war time and peace time is, nowadays, more and more vague. Second, huge debates in the UN Security Council take place often with countries pushing to promote IHRL in the SC agenda and others being very reluctant about it. Is IHRL helping in peace keeping or peace building and being closely connected to peace and security? At least, it should be recognized that 173 countries all over the world ratified the International Covenant on civil and political rights while 6 have signed it and only 18 have not taken action. It means that at the international level, the Covenant has almost a universal recognition.

This obligation to respect human rights is even more enforced through regional instances, more specifically the Inter-American Court of Human Rights or the European Court of Human Rights (ECtHR). For example, concerning the obligation to respect Human Rights in war time was part of several of its decisions.

- 1) While, we should insist on the universal implementation of IHRL, still, as it is main topic of the conference, what happens when there IHRL contradicts implementation of IHL?

First, we should note that, in many cases, IHRL is complementary to IHL. For example, when there is no provision of IHL on issues related to trials, (right to fair trial for example when it is possible) there is no reason not to apply IHRL.

Still, the essence of IHL is to protect combatants, civil population or prisoners while IHRL law protects more individuals. It means that contradictions could happen on the basis of those different goals. In addition, IHL organizes relations among States during a conflict or between States and Movements of Liberation or groups of population while IHRL organizes relations between States and individuals.

It should be noted, in that context that the two bodies of international law may be conflicting according to the means which should be used by one or the other. The success of IHL in its protection's role depends on discretion and neutrality which would build trust among the

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various actors while IHRL is dealing with accountability and or responsibility. IHRL needs transparency which is not the situation for IHL.

Nevertheless, the Martens Clause which was mentioned in The Hague Convention of 1899 stipulates that even during the time war, protecting Human Rights and notably the protecting ones continue to apply. Jus gentium is still applicable. SC Res 25 Mai 1993: (S/RES/827) which established the ITFY also recalled that rule as well as in the Rome Statute.

At the meantime, as a matter of principle, protection deriving from IHL whenever applicable during the war time or during an internal conflict should always prevail against any other law. Is it the case with the current application of IHRL?

Despite those rules stated above, they may still exist contradictions to apply IHRL during an armed conflict. The ultimate goal of an armed conflict is indeed to win a war and necessary military actions should be undertaken and IHRL should not be an obstacle per se to that goal. It should be applied as much as it could be in a balanced way while IHL is always applicable since it is a protection's mechanism during the armed conflict.

However, we should also be realistic: nowadays, IHL is more a body of law to protect civilians or non -combatants rather than to regulate the military actions among belligerents.

In the context of this conference we could already underline that, as far as the ECHR is concerned, in some of the judgements of the European Court of Human Rights (ECtHR) related to Irak in which those discussions concerning the implementation of IRHL during a conflict occurred, the issue of attribution versus jurisdiction was also examined.

First, we should make a clear distinction, between attribution for which a State is designated for having committing an act of aggression or another act which would have consequences against that State at the international level and penal jurisdiction or even penal responsibility which belongs to the competence of criminal courts and eventually international criminal tribunals or by even concerning human rights by the UN Committee at the international level and at the regional level by the ECtHR or the

What is clear now is that as soon as a troop of a country party to the ECHR is even outside the territory of the Council of Europe, ECHR would apply. So, the concept of extraterritoriality is enforced. But is it extraterritoriality or application of jurisdiction on "offences committed by nationals of a country party to the Convention? In this regard, article one of the ECHR states clearly that the Convention applies on the territory of the State which is party to the Convention.

Of course, as far as the penal responsibility of individuals, even if they have committed offences outside of the jurisdiction of the State Party is a long-standing concept. If we look into the framework of international criminal law, we could even say that, it has been a concept which existed before the establishment of jurisdiction based on territoriality of the commission of the offences. Actually, rulers had jurisdiction on their subjects and not according to any territory since borders in Europe were not well defined.

But concerning the application of the ECHR, that type of jurisdiction is different since it is not connected to the commission of international crimes and not of implementation of the ECHR. Still, I suspect that there might be a certain confusion between criminal liability and jurisdiction of the ECtHR outside of the territory of the State which has ratified the ECHR. The concept of

extra-territoriality jurisdiction used by the Court to establish its jurisdiction is of course one of international law but even more of IHL for seeking, inter alia, protection of prisoners, civil population which is under the jurisdiction of military forces of a State occupying a territory. That is that concept which was used by the ECtHR to establish its jurisdiction in cases in which a State which is part of the Convention could be declared responsible of conducts of its forces in a territory under its occupation. Still, here, we should distinguish between jurisdiction and responsibility of the States and persons for the acts committed.

While jurisdiction could be admitted, conflicting rules between IHL and IHRL especially violations of ones (IHRL) when there are no violations of others shall be looked into very carefully.

Never, application of IHRL may constitute an impediment to the implementation of IHL which is considered as having a higher statute in the hierarchy of the international norms.

Actually, under such a situation, the ECtHR considers that IHL applies despite ECHR (Hassan/UK) (see also Varnava/Turkey). The court said and should always say that, during an armed conflict IHRL shall be interpreted in taking full consideration of IHL and could even not be applied in case of contradiction.

In that legal context, the State could refer to article 15 of the Convention which creates a derogation to the application of the Convention. But even without referring to article 15, the ECtHR stated that article 5 of the Convention related to the Right to liberty and security is not applicable under certain circumstances especially emergency conditions connected to a war situation. For example, IHL does not oblige military authorities to notify all the rights foreseen in article 5 when a person is arrested as it is under normal circumstances², (inter alia arrest with a lawful order of a court reasonable suspicion to have committed an offence, right to know the reasons of the arrest, right to be brought before a judge). Of course, there is an immense difference between rights of a war prisoner and a person who is suspected of having committed a crime).

² Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- a. the lawful detention of a person after conviction by a competent court;
- b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

2. Everyone who is arrested shall be informed promptly, in a language which he or she understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.

And the ECtHR decided in Hassan/UK as well as in a Varnava/Turkey even if the Convention continues to apply in war time, when a member of military forces is captured according to the IHL rules, article 5 para 1 does not apply. Whatever the Court says (the implementation of the Convention should be judged according to IHL principle), it means that IHL is a derogation to the implementation of the Convention.

What could be the conclusion of that debate:

Human Rights are more and more part of International law, indeed. But when IHL protects even more life of civilians and prisoners during the war time, it should be clear to everybody that IHL should prevail.

As Albert Camus said in his speech at the Nobel Academy before receiving the Nobel Prize of Literature. “Obviously, each generation believes that it should rebuild the World. But for our generation, the task is perhaps even bigger. It is simply to maintain the World as it is”

Thank you for your attention.