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Human Rights and International Humanitarian Law

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Abstract

It is recognized today that human rights law is not generally displaced in times of armed conflict by international humanitarian law (IHL). Yet in large part this new insight remains to be particularized as to its actual consequences. In particular, IHL is still predominantly under the influence of the concept of military necessity.

1 Introduction

It is common knowledge that international humanitarian law (IHL) and human rights law are two distinct disciplines. IHL has a tradition which goes back at least to the 19th century when Henri Dunant began his action in favour of victims of war.[1] It has continually grown and become increasingly enriched, reaching eventually a remarkably high level under the two Additional Protocols of 1977. Antonio Cassese has played an active role in the development of both of these branches of international law, not only as a scholar, but also as an eminent practitioner to whom the international community has entrusted some of the highest functions it has created in recent decades: he was the President of the European Committee for the Prevention of Torture (1989–1993) and later the President of the International Criminal Tribunal for the former Yugoslavia (1993–1997); he served as Chairman of the International Commission of Inquiry on Darfur (2004–2005) and was recently (2009) appointed President of the Special Tribunal for Lebanon. In the discharge of all of these responsibilities, his task has invariably been to assess and put into practice the interplay of IHL and international human rights law. He more than anyone else has been in a position to gain

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[1] See, for instance, E. David, *Principes de droit des conflits armés* (2002), at 48ff.

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a deep understanding of the necessity never to lose sight of the basic premises of the entire system of modern international law, namely human life and human dignity. The following observations seek to add a modest complement to the rich intellectual oeuvre through which Antonio Cassese has been able to provide guidance to the community of international lawyers, and thereby to exercise a determinative impact on the framing of international policies which directly affect the individual human being.

Which purposes does IHL pursue? IHL is designed to ensure a minimal protection even during the most profound catastrophe of human society, namely war. During armed conflict, the combatants have a licence to kill combatant elements of the adversarial camp. Somebody said – obviously with a good degree of sarcasm – with regard to the outbreak of a war: the hunting season will open. Accordingly, life, the most precious asset human beings have (or, in other words, which constitutes the dearest gift which a divine entity has given us), finds itself structurally threatened during an armed conflict. Notwithstanding this distressing point of departure, IHL seeks to salvage what realistically can be protected notwithstanding the clash of arms.

On the other hand, human rights are an emanation of the period subsequent to World War II. They emerged from the atrocities committed during that war, especially by German armed forces, but also by the victorious allied powers. According to their original concept, human rights should provide protection against state interference, but, as everyone knows, their scope has over the years greatly extended beyond the boundaries of purely 'negative' freedom to impose on states many commitments to provide protection also against interference by private persons and generally to ensure their effectiveness ('positive' rights).[2]

The right to life is located at the summit of the hierarchy of rights in all human rights conventions, be it at the universal or regional level. Essentially, these conventions have been elaborated for times of peace. If a national emergency breaks out, governments may formally take note of that situation, which permits them to take measures which derogate from the obligations they have accepted. However, pursuant to Article 4(2) of the International Covenant on Civil and Political Rights (Covenant or ICCPR), no derogation from the right to life is permissible. Did the authors of the Covenant wish totally to prohibit the killing of human beings during armed conflict? This certainly was not their intention. They simply believed that during armed conflict the Covenant was inapplicable. In fact, according to many voices heard and expressed during the last century there is a clear distinction between the law of war and the law of peace: they do not touch one another, they do not overlap, either one or the other applies, there is no mixture between the two.[3] In recent times, Israel manifested its adherence to the separation doctrine with regard to the occupation of the Palestinian territory.[4]

[2] See, for instance, C. Tomuschat, *Human Rights. Between Idealism and Realism* (2nd edn, 2008), at 52ff.

[3] F. Berber, *Lehrbuch des Völkerrechts*, ii: *Kriegsrecht* (2nd edn, 1969), at 64; A. Verdross, *Völkerrecht* (1937), at 293.

[4] See Israeli Report to the Human Rights Committee, UN Doc CCPR/C/ISR/2001/2, 4 Dec. 2001, at para. 8, and Response of the Human Rights Committee, Concluding observations of 4/5 Aug. 2003, UN Doc CCPR/CO/78/ISR, 21 Aug. 2003. Its position received support from Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', 99 *AJIL* (2005) 119, at 139.

This doctrine has been called into doubt,[5] and an intellectual necessity to do this can clearly be perceived. IHL originated at a time when the concept of human rights did not yet exist. There can be no doubt that the right to life has always provided the background of IHL, but it must be acknowledged that IHL comes from an epoch when military thinking still largely dominated its architecture. To be sure, human life was protected, but only within the limits of military necessity, a concept which is susceptible of making a mockery of the entire carefully constructed edifice of IHL.[6] Therefore, in our time, one cannot place full trust in traditional IHL without raising some questions.

2 IHL and Human Rights Law – The Jurisprudence of the International Court of Justice

Before the International Court of Justice (ICJ), the issue assumed major importance when the Court had to deliver its advisory opinion on nuclear arms in 1996.[7] Some governments maintained that nuclear arms had to be considered unlawful because they do not allow for attacking a military target with the requisite precision. It was contended that on account of their general indiscriminate effect, they encroach upon the right to life. Other governments objected, invoking the traditional doctrine pursuant to which all the problems emerging during an armed conflict are governed by IHL.

Confronted with these two opposite opinions, the Court had to respond. In the first place, it observed 'that the protection of the International Covenant on Civil and Political rights does not cease in times of war', embracing however at the same time, in a somewhat contradictory fashion, the theory of *lex specialis* by stating that:

> whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can *only*[8] be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[9]

There is a definite lack of clarity regarding the connotation which the Court attached to those words. On the one hand, it can be maintained that the Court endorsed the thesis of the complete separation of the two disciplines. On the other hand, however, it is also legitimate to argue that the Court rather wanted to highlight the notion that Article 6 ICCPR has to be read and understood in conjunction with the rules of

5 See, in particular, Roberts, 'Transformative Military Occupation: Applying the Laws of War and Human Rights', in M. Schmitt and J. Pejic (eds), *International Law and Armed Conflict: Exploring the Faultlines. Essays in Honour of Yoram Dinstein* (2007), at 438, in particular 452–458.

6 A vivid reflection of that excessive extension is the adage coined by some older German writers: '*Kriegsräson geht vor Kriegsmanier*', see E. Castrén, *The Present Law of War and Neutrality* (1954), at 65. See also the discussion by Berber, *supra* note 3, at 77–79; L. Oppenheim and H. Lauterpacht, *International Law*, ii: *Disputes, War and Neutrality* (7th edn, 1952), at 231 (with references).

7 *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Rep 226.

8 Emphasis added.

9 *Ibid.*, at 240, para. 25.

IHL. This second reading seems to be all the more reasonable since the former reading would have amounted to a complete abandonment of the introductory sentence about the continuity of human rights in wartime.

Eight years later, in 2004, the Court had to re-examine the relationship between human rights and IHL when it was called upon to assess the lawfulness of the construction of a wall in the occupied Palestinian territory.[10] In that connection, it became necessary to pronounce on the obligation of the Israeli authorities to respect, over and beyond IHL, the rules of human rights law, in particular the provisions of the Covenant. The difficulty of interpretation resulting from Article 2(1) of the Covenant is well-known. That provision enunciates two criteria, the presence of a person in the territory of the state concerned and its jurisdiction with respect to that person. But this is not the topic we are discussing. We are interested in the co-existence of the rules enunciated by the Covenant and IHL.

This time, the language of the Court was much more differentiated, without, however, entirely clarifying the *problématique*. The Court distinguishes three modes of co-existence. In the first place, it reiterates with resolute firmness that the protection of the conventions on human rights does not cease in case of armed conflict. And then it continues as follows:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.[11]

In the judgment of 2005 in the dispute between the Democratic Republic of the Congo and Uganda, it reconfirmed that holding.[12]

Just recently, in the order issued on 15 October 2008 in respect of the dispute between Georgia and Russia, the Court assumes without any hesitation that the International Convention on the Elimination of All Forms of Racial Discrimination applies in any event during an armed conflict:

> The acts alleged by Georgia appear to be capable of contravening rights, provided for by CERD, even if certain of these alleged acts might also be covered by other rules of international law, including humanitarian law.[13]

This time, the division into three classes no longer appears. However, this new version of the proposition should not be overrated, since the Court was faced with a request to issue a provisional measure. The urgency of the matter prevailed over any other consideration.

[10] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Rep 136.

[11] *Ibid.*, at 178, para. 106.

[12] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, 19 Dec. 2005, 45 ILM (2006) 271, at 317 para. 216.

[13] *Application of the International Convention on the Elimination of All Forms of Racial Discrimination*, Order, 15 Oct. 2008, at para. 112, available at: www.icj-cij.org/docket/files/140/14801.pdf.

3 The Jurisprudence of Human Rights Courts

One should welcome the stand taken by the Court in the leading case of the *Wall*. However, one could say, 'Your Excellencies, we are still confused, but on a higher level.'[14] In fact, in an actual case, it will always be necessary to know in what sector the relevant occurrences are located. To give a clear example: the general guarantees which surround the arrest of a person in accordance with Article 9 ICCPR cannot find application to prisoners of war. During armed conflict, any judicial control mechanism is necessarily defective, and masses of persons, captured as prisoners of war, can hardly be brought before a judge according to the perfectionist model encapsulated in Article 9 ICCPR. But most cases will be located in a twilight zone where no straightforward answers can be given.

In the jurisprudence of the regional institutions for the protection of human rights the applicability of human rights has already been discussed intensely.

In the first place, the institutions of the Pact of San José, i.e. the American Convention on Human Rights, were faced with the issue. In the case of *Las Palmeras*,[15] a Columbian case, the Inter-American Commission decided that it was necessary to assess the facts also under the auspices of IHL. In issue was the attack by the armed forces of the state against a school. A child, their teacher, and several workers in the surrounding area died when the armed forces used weapons against the school building and executed extrajudicially some of the persons they had arrested since they suspected that the school was a hiding place for *guerrilleros*. For its part, the Court did not approve the stand taken by the Commission. It said in a few words that its mandate was confined to applying the American Convention, and that accordingly it did not have the authorization to go beyond the limits drawn by that Convention.[16] It did not even mention the notion that the law of the Convention could be inapplicable.

This is certainly not a convincing judgment since it leaves open the question pursuant to which criteria the substantive determination should be made whether a person has lost his/her life in an arbitrary manner (American Convention, Article 4(1)).[17] Especially in armed conflict, this question raises serious difficulties.

At the European Court of Human Rights in Strasbourg, the judges had many times to deal with occurrences in the internal armed conflict in Chechnya. The judgment in *Isayeva v. Russia* of 24 February 2005[18] contains all the elements that have guided the Court in all of its later decisions. The Russian forces attacked a village where guerrilla fighters had also taken refuge. The inhabitants tried to flee from the village but were

[14] See also Dennis, *supra* note 4, at 133: 'the Court did not offer specific guidance on how to subdivide the rights into these categories'.

[15] Preliminary Objections, Judgment, Series C No. 67, 4 Feb. 2000.

[16] *Ibid*., at para. 33.

[17] 'Every person has the right to have his life respected . . . No one shall be arbitrarily deprived of his life.'

[18] App. No. 57950/00, 24 Feb. 2005, available at: http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId =43014001&skin=hudoc-en&action=request.

attacked during their flight by the Russian air force. Many people died. The authors of the application, relatives of the victims of those attacks, invoked a violation of the right to life. Without the least hesitation, the Court examined the facts under Article 2 ECHR without asking whether such occurrences came *ratione materiae* within the scope of the ECHR or whether, according to the principle of subsidiarity, the law of peace had to yield to the law of armed conflict. On the other hand, its assessment was founded on criteria which essentially belong to IHL, in that it reviewed in great detail the strategy which the Russian forces should have adopted. Its conclusion was: yes, the right to life of the victims had been violated.

Later cases confirm this approach. In the recent case of *Khatsiyeva*,[19] the Russian air force killed by missiles shot from helicopters three young men who were working in a field. The military commanders believed that they were members of an illegal fighting group. For the Court, there can be no doubt that the Russian side failed to take the requisite precautions. Therefore, it concluded that a violation of Article 2 ECHR had taken place. The decision in *Mezhidow* of 25 September 2008,[20] where a village had been hit by artillery shelling, is very similar. Five members of a family died. The Court notes that, given the circumstances, the use of force was not absolutely necessary and therefore not fully proportionate to pursuing the objectives indicated in Article 6(2) ECHR.[21]

Could the Court maintain this jurisprudence also in the circumstances of an international armed conflict with its vast dimensions? Serious doubts arise in that connection, but I am perfectly in agreement with the Court that non-international conflict is the area where the right to life can have an impact on the traditional doctrine and should re-orient the interpretation of the traditional law. It should be reiterated that IHL is deeply rooted in the past and that some of its elements may appear 'rough and tough', requiring a profound overhaul.

4 Consequences to be Drawn from the Construction of IHL in the Light of Human Rights

A *Collateral Damage*

The first question is radical. Is it not convenient to abandon altogether the concept of collateral damage, damage that can be human lives? Does not the dignity of the human person require abstaining from balancing human life against the so-called

[19] App. No. 5108/02, 17 Jan. 2008, available at: http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=43014001&skin=hudoc-en&action=request.

[20] App. No. 67326/01, 25 Sept. 2008, available at: http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=43014059&skin=hudoc-en&action=request.

[21] It should be added that national courts have affirmed the applicability of the ECHR to persons who were arrested by the armed forces of a state party even outside the national territory: *Al Skeini v. Secretary of State for Defence* [2007] UKHL 26; *Al-Jeddah v. Secretary of State for Defence* [2008] 1 AC 332 (HL).

'military necessity'? It is true that to balance these two elements may at first glance appear to be a scandalous operation. On the other hand, the distinction between military objectives and civilian objects constitutes the core of humanitarian law. If it is no longer permissible to attack the installations and military units of an adversary if there are civilians in the neighbourhood, a breakdown of the entire regime of distinctions between civilians and combatants is almost pre-programmed. The parties to an armed conflict are obligated to separate their military installations from 'densely populated areas' of their civilian population (Articles 57(7), 58(b) of Additional Protocol I). If, deliberately, they introduce such installations into civilian environs, they must assume full responsibility. They cannot, by such tactics, obtain military advantages. It would be highly inappropriate to favour a party which does not respect the applicable rules of belligerence in order to change the military balance in its favour. To abolish the right to attack military objectives if civilian victims must be expected would lead to that result. This again would mean that reciprocity, the principle which encourages the parties involved to respect the rules on the conduct of armed activities, could not be maintained. Accordingly, any such new rule would hardly be respected, with extremely serious consequences for the entire regime for the protection of civilians. However, in any case where civilians are to be expected as victims of an attack against a military objective, the scrutiny must be strict. The test of proportionality must be administered with the utmost care. In that regard, Article 57 of Additional Protocol I provides essential indicators. It cannot be in conformity with international law to destroy, by bombing from the air, entire families on account of the suspicion that someone in a specific house is somehow involved in Hamas activities.

B *The Notion of 'Combatant' or 'Fighter' in Non-International Armed Conflict*

Coming back to non-international armed conflict, the question who is a 'combatant' is particularly delicate.[22] Additional Protocol II of 1977 refers only implicitly, by contrast, to that concept by affording protection to 'persons who do not take a direct part or who have ceased to take part in hostilities' (Article 4(1)). Additionally, Article 13 sets out guarantees in favour of the 'civilian population'. Likewise, Common Article 3 of the four Geneva Conventions of 1949 speaks only of persons 'taking no active part in the hostilities' – which necessitates drawing a distinction between such persons and others who in fact play an active role in armed activities. It stands to reason that persons who are actively engaged in armed activities may be killed. But how do we characterize a fighter who has withdrawn to his home and has stayed there for days, maybe even weeks? Is he still a combatant?[23]

[22] Technically, in non-international conflict there are no combatants, but only fighters: see Bothe, 'Töten und getötet werden – Kombattanten, Kämpfer und Zivilisten im bewaffneten Konflikt', in K. Dicke *et al.* (eds), *Weltinnenrecht. Liber amicorum Jost Delbrück* (2005), at 67, 72.

[23] No clear answers can be gleaned from Rule 1 of the codification exercise by J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, i: *Rules* (2005), at 3ff.

In Afghanistan the Americans hold that view, and they feel accordingly justified in attacking dwellings with warplanes even far away from any actual hostilities. Entire families have been destroyed. Frequently, the end result has been the death of a so-called 'terrorist' 'disposed of', but accompanied by the death of many other persons, civilians to all intents and purposes. Here, one sees very clearly the serious consequences of the distinction between the law of human rights and IHL:

- According to IHL, a person who belongs to the 'armed forces'[24] of the enemy can be targeted, also outside active hostilities;
- According to the law of human rights, whenever the state wishes to take the life of a human, it must take the utmost precautions, abiding by the narrow requirements of the relevant clauses in the provisions guaranteeing the right to life. The entire context, the specific situation, must be taken into account. Review of cases of self-defence is carried out according to strict rules. Shots to kill are permissible only in extreme circumstances.

I think that precisely the cases we are confronted with, cases of the use of force outside active hostilities, should all be reviewed on the basis of human rights – exclusively according to human rights. Cases of 'targeted killing' have not been mentioned, but I am profoundly convinced that such cases should also be assessed pursuant to the rules of human rights law. In circumstances where no fighting between opposite forces takes place, a licence to kill is unacceptable.[25] Nor can the law of war be light-handedly extended by including in the category of combatants or fighters all those who belong to the political groundwork of a movement engaged in actual hostilities. For instance, policies which seek to eradicate anyone who has discharged a political function for Hamas in the Gaza strip would therefore be clearly inconsistent with the requirements of IHL.[26] There is no justification for withdrawing attacks against the civilian population from the ambit of human rights by blurring the borderline between that population and those involved in armed activities.

6 Concluding Observations

My conclusions mean at the same time that to a great extent the gates of the mechanisms for the protection of human rights are flung open. The Strasbourg Court is right in subjecting the actions of the Russian forces in Chechnya to its review. We all know that IHL is affected by a great lack of remedies. There is the Fact-Finding Commission

[24] Art. 1(1) of Additional Protocol I speaks of 'dissident armed forces or other organized armed groups'.

[25] Bothe, *supra* note 22, at 72ff, 80, is of the view that a fighter remains a fighter and remains subject to attack even when he returns home. In our view, this interpretation does not take sufficiently into account the specificities of non-international conflict.

[26] Reference is made to a report by the *International Herald Tribune*, 17–18 Jan. 2009, at 8: '[t]he army attacked "both aspects of Hamas – its resistance or military wing and its dawa, or social wing" – a senior [Israeli] intelligence officer said. He argued that Hamas is all of a piece and that in a war its instruments of political and social control were as legitimate a target as its rocket caches.' This is a recipe for total war.

according to Article 90 of Additional Protocol I, but hitherto it has not been able to start its work. The intervention of the European Court of Human Rights is therefore highly welcome. But there is one big caveat: we do not know whether the Court can really bear the weight of mass phenomena as they may derive from a large-scale armed conflict. It has been reported that already 2,000 applications by Ossetians have been filed against Georgia.[27] Litigation resulting from international armed conflict has traditionally been handled at intergovernmental level in the relationship between states, and there are good grounds for maintaining that practice. However, as far as internal armed conflicts are concerned, that avenue is closed. Primarily, the mechanisms of the state concerned are called upon to take the requisite remedial action. However, where those mechanisms fail to operate in accordance with the human rights obligations of their country, the way to Strasbourg remains the only remedy which victims can activate.

[27] In fact, the *Annual Report 2008* of the European Court of Human Rights, at 128, lists 2,022 pending cases against Georgia whereas one year earlier the number was 286: see *Annual Report 2007*, at 135.

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