



HUMAN RIGHTS IN TIMES OF ARMED CONFLICTS

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Abstract

The present contribution deals with the issue of human rights in armed conflicts versus the concept of war. This distinction was made in Article 2, and the same in all four Geneva Convention of 1949. In this article, the distinction is made between the universal system of human rights and the International Humanitarian Law of Armed Conflicts (IHLAC). The difference of application between these two sets of law relies on the fact, that the universal agreements of human rights always apply, both in armed conflict and peace when the IHLAC applies only in times of armed conflicts. There is a difference between them in the regulation. Human rights regulate the relationship between the state and persons under its jurisdiction, regardless of their nationality and the IHLAC applies to states and individuals or armed groups distinguishing between a civilian or a veteran. About the compliance control, it is a different system too, for the IHLAC, it is the ICRC and criminal tribunals, and for human rights, there are different committees of tribunals like the International Court of Justice (ICJ). The exam of the jurisprudence of the ECtHR shows, that it does not make a distinction between a state of war and peace, which is called the humanization of the law of armed conflicts. Also, the very important question of the fragmentation of international law is examined, based on the jurisprudence of the ICJ.

Keywords: *International humanitarian law, the law of armed conflict, extraterritorial application of human rights, lex specialis, humanization of the law of war.*

1 WAR AND ARMED CONFLICT

The concept of armed conflict is broader than the concept of war. It includes all kinds of armed struggle between states – even when war is not officially declared, as well as various types of specific armed conflicts, i.e., those involving parties not recognized as subjects of international law. An example of an armed conflict was the fighting fought by the Tamil Tigers organization to

create an independent Tamil state in the northern part of Sri Lanka – Ilam. Although the militants of this organization were able to control part of the territory of Sri Lanka, the state they created was not recognized as a subject of international law, nor was the armed formation of the Tamil Tigers, which was also recognized by the US and the EU as a terrorist organization. Any armed conflict has the potential to turn into war.

This distinction can be seen in Article 2 common to all four Geneva Conventions of 1949: "This Convention shall apply in the event of a declaration of war or the emergence of any other

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armed conflict (conflit armé) between two or more than two High Contracting Parties, even if one of them does not recognize a state of war".

The basic declarations and agreements on human rights after World War II, which constitute the universal system of human rights, are the Universal Declaration of Human Rights of 1948 (UNGA, Universal Declaration of Human Rights (1948) resolution 217 A (III), A/RES/3/217 A, 1948), International Covenants on Human Rights of 1966,¹ and regional agreement and as the European Convention for the Protection of Human Rights and Fundamental Freedoms of November 4th, 1950. (Council of Europe, 1977), the Convention on Slavery of 25 September 1926, the International Convention on the Elimination of All Forms of Racial Discrimination of December 18th, 1965, the Convention against Torture and Other Cruel, Inhuman or Cruel Treatment or Punishment of December 10th, 1984, as well as agreements on women, children, refugees, statelessness, forced labor, association and finally the numerous conventions of the International Labor Organization. Only the Convention against Torture states that its provisions apply in all circumstances, including in times of armed conflict.

The Covenant on Civil and Political Rights, in Article 4, allows states to abrogate almost all human rights contained therein in "times of public danger threatening the life of the nation." Human rights that a state may not suspend under any circumstances are the right to life, the prohibition of slavery and servitude, the prohibition of deprivation of liberty solely on the ground of inability to fulfill contractual obligations, the principle of *lex retro non agit*, the right to have legal personality and freedom of thought, conscience, and religion. The most important is the right to life, which, according to the Covenant, can be deprived of an individual at any time and under any circumstances only based on a final judgment by a competent court and only for the most serious crimes.

The European Convention for the Protection of Human Rights and Fundamental Freedoms

resolves this problem differently. According to Art. 15 of the Convention, states parties to the Convention may "in case of war or other public danger threatening the life of the nation" abrogate all human rights contained therein except the prohibition of torture, the prohibition of slavery and servitude, the principle of *lex retro non agit* and the right to life, but the prohibition of suspension of the right to life does not extend to cases in which death is the result of lawful acts of war, and it shall be deemed permissible to deprive a person of life in defense of some person against unlawful violence, to effect a lawful arrest or to prevent the escape of a person lawfully deprived of his liberty, or in an action lawfully taken to suppress a riot or insurrection.

The UN General Assembly adopted dozens of resolutions bearing the same title: "Respect for Human Rights in Armed Conflict", the most important of which are: resolution 2444(XXIII) of December 19th, 1968, which speaks of the need to apply "humanitarian principles" in all armed conflicts and to ensure better application in such conflicts of "existing humanitarian conventions and standards". Another resolution, 2677(XXV) of 28 XII 1970, is already more precise and speaks of "the desire to ensure full respect for human rights in armed conflict" and of "the enduring value of existing humanitarian principles applicable in armed conflict", mentioning in this context the Fourth Hague Convention of 1907 on the Laws and Customs of War on Land, the Geneva Protocol of 1925 concerning the prohibition of the use of asphyxiating, poisonous or similar gases, and bacteriological agents in war, and the four Geneva Conventions of 1949 on the Protection of Victims of War. And finally, Resolution 3318(XXIX) of December 14th, 1974, which already explicitly calls the above-mentioned six agreements "instruments of international law relating to the observance of human rights in armed conflict".

The development of the International Humanitarian Law of Armed Conflict (IHLAC) took place much earlier, with the adoption of (ICRC, n.d.):

1. the Geneva Convention of 22 August 1864,
2. the Geneva Convention of 6 July 1906,

¹ (UNGA, 1966) together with (UNHR, 1976) and (UN, International Covenant on Economic, Social

and Cultural Rights (ICESCR), 16.12.1966, JoL of 1977, No. 38, item 167, 1967)

3. the Geneva Convention for the Amelioration of the Sick and Wounded in Active Armies of 27 July 1929, and
4. the Convention concerning the Treatment of Prisoners of War signed in Geneva on 27 July 1929.

The Geneva Conventions of 1949 on the Protection of Victims of War are also a kind of codification of the International Humanitarian Law of Armed Conflict (IHLAC) :

- The first and second conventions concern the adiverment of the fate of the wounded and sick in land and sea war (I, II GC)
- The Third Convention develops the provisions of the IHLAC concerning prisoners of war (III GC)
- The Fourth Convention concerns the protection of civilians and contains to a large extent completely new provisions (IV GC)

The purpose of these Conventions is to protect the victims of armed conflicts, all four conventions are called in doctrine "Geneva Law".

In 1977, two additional protocols to these conventions were signed, aimed at supplementing and extending the scope of protection of war victims, which also introduced changes to The Hague Law:

- the first of these protocols concerns international conflicts (I AP),
- the second concerns conflicts of a non-international nature (non-international armed conflicts) (II AP).
- the third refers to the adoption of an additional distinguishing mark (red crystal) (III AP).

Human rights regulate the relationship between the state and persons under its jurisdiction, while the IHLAC (International Humanitarian Law of Armed Conflicts) applies to both states and individuals or armed groups. The difference between the two is that human rights apply to any person under the jurisdiction of a particular state, regardless of their nationality², while in the case of

the IHLAC citizenship is relevant to the scope of protection³, as does the qualification of a person as a civilian or veteran⁴. Humanitarian law is constructed based on formulating the obligations of individual parties to a conflict, while human rights formulate the rights and freedoms of individuals. The IHLAC is only valid in times of armed conflicts⁵, while human rights are to be always applied, both in armed conflict and in peace.

Both branches of law have a different system of compliance control because, in the case of the IHLAC, the International Committee of the Red Cross and criminal tribunals play a great role, and in the case of human rights, various types of committees and tribunals relating to the responsibility of the state are important, not individuals, such as the International Court of Justice.

Despite some differences, some issues are regulated by both regimes, as confirmed by the International Court of Justice (hereinafter: ICJ) in its advisory opinion on the legal consequences of the construction of a wall in the occupied Palestinian territory of 9 July 2004.⁶ It concerns the rights to life or freedom from torture, which are protected by human rights as non-individual (not subject to suspension)rights, in any situation. At the same time, the question of who and in what situation can be deprived of life or injured is regulated by the IHLAC.

International humanitarian law does not invoke human rights from international agreements. The Fourth Hague Convention of 1907 and The Additional Protocol I of 1977 merely state that, in cases where these agreements are not subject to international agreements, 'civil persons and combatants shall remain under the protection and authorities of the principles of international law arising from established customs, from human principles. This is the so-called "Martens clause", from the name of the Russian diplomat who

² See, for example, Article 2(1) of the ICCPR

³ See Article 4 of the Geneva Convention (GC) relative to the Protection of Civilian Persons in Time of War - IV GC, 12.08.1949, JoL 1956, no. 38, item 171, annex.

⁴ See, for example, Article 48 of the Protocol Additional to the Geneva Conventions (AP) of 12 August 1949, relating to the Protection of Victims of International

Armed Conflicts, 8.06.1977, JoL 1992, No. 41, item 175, annex.

⁵ See Articles 2 and 3 of the GC and Article 1 of AP I and AP II.

⁶ See: the ICJ Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory of 9 July 2004, ICJ Reports 2004, p. 136, § 106.

formulated it in 1899. Only additional Protocol II of 1977 refers to human rights, which states that "international instruments concerning human rights give basic protection to the human individual."

2 HUMANIZING THE LAWS OF WAR

The European Court of Human Rights (ECtHR), based in Strasbourg, France, plays an important role in the humanization of human rights. It adjudicates on human rights issues enshrined in the Convention and its Additional Protocols, examining complaints from citizens of the 47 Member States of the Council of Europe that have ratified the Convention.

The case-law of the ECtHR has a major impact on changes in the rules of conduct of hostilities since victims of violations can apply directly to the Court and demand compensation from the state, based on the European Convention on Human Rights. However, this could not be done based on the Convention and international humanitarian law.

An analysis of the judgments already issued by the ECtHR indicates that the effects of the humanization of the law of war are mostly positive. Positive, because it will clarify terms that are not defined by International Humanitarian Law (IHL), such as "taking direct part in hostilities". All such actions of the ECtHR apply not only to international conflicts but also to non-international conflicts. It is in internal conflicts that IHL is most often neglected. For example, the Statute of the International Criminal Court recognizes as a war crime only non-discriminatory attacks committed in an international conflict. On the other hand, in Article 3 of the GC or the entire II AP, which refer to internal conflicts, there are no regulations concerning the need to take precautions when carrying out attacks, the obligation to apply the principle of proportionality, or the prohibition of non-discriminatory attacks. The case-law of the ECtHR may contribute to the gradation of the use of force in a situation of armed conflict and may reduce the number of victims in the conflict.

The Court applies these principles to both international and non-international conflicts and to situations that are no conflicts. In principle, it makes no distinction between a state of war and peace. This makes it possible to eliminate grey areas, i.e., situations such as riots, riots, or

isolated acts of violence, in which the principles of international humanitarian law and the related protection of civilians could not be applied. Under the ECtHR, according to the case-law of the ECtHR, civilians must always be protected.

The Court also points to the need to conduct an effective investigation into the circumstances of the deaths of people who died because of the use of force by the government. Therefore, the state authorities can't invoke a situation of armed conflict to avoid the need to clarify the circumstances of a person's death. The ECtHR also forces us to assess the legality of the use of force from the point of view of acceptable purposes, which in an ideal world should translate into the elimination of armed conflicts of an international nature, since the usefulness of military action carried out following human rights standards will be negligible.

What are the dangers of this humanization of the law of armed conflicts by the ECtHR? The ECtHR applies to states, but not to opposition armed groups, while the IHL applies to all parties to the conflict. This means that government forces, forced by the ECtHR to provide a higher standard of protection for all populations, will be more limited than their opponents in their ability to conduct military action (some compare such a situation to a fight with one hand tied to the back). Therefore, the asymmetry of conflicts will increase, which will work in favor of armed groups opposing the state, which the state will not be able to fight, which will mean an extension of the conflict. The costs will be borne by both combatants (their lives will be exposed to greater risk) and civilians (the inability to provide them with protection against these armed groups). That is why m.in the United States and Israel continue to oppose the use of human rights in armed conflicts, m.in because such action undermines the decision of States to create a specific legal regime applicable in armed conflicts.

3 CONCLUSIONS

- Human rights are vested in the human individual in all times, both in peacetime and in armed conflicts, international and non-international.
- The scope of human rights, how individuals may enforce their human rights, and how

violations of human rights may be prosecuted and punished are set forth in the international agreements that make up human rights system in times of peace and in times of armed conflict in the international agreements that make up international humanitarian law.

- It is no longer possible or advisable to combine human rights law and international humanitarian law, which in contemporary domestic and public international law and in legal scholarship today exist as two separate systems, just as it is neither possible nor advisable to subordinate one to the other. On the contrary, it is indispensable that, in the process of developing these two separate systems of law, legislators should constantly bear in mind the interdependence that exists between them.

The relationship between the IHLAC (International Humanitarian Law of Armed Conflicts) and human

rights is an example of the fragmentation of international law. (UN, 2006) This issue has been the subject of several advisory opinions and judgments of the International Court of Justice. In its advisory opinion on the legality of the threat or use of nuclear weapons of 8 July 1996, the ICJ stated that the assessment of the arbitrariness of the deprivation of life in a time of war must be considered from the point of view of 'lex specialis, namely, the law applicable in armed conflicts, which is designed to regulate military action' (ICJ, 1996) On the other hand, in the judgment of 19 December 2005 r. on armed activities in the Congo (DRC v. Uganda), the ICJ stressed the need to take into account both branches of international law. (ICJ, 2005) Similarly, in the judgment of 9 July 2004, the International Court of Justice on the legal consequences of building a wall in the Occupied Palestinian Territories. (ICJ, 2004)

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