COUNCIL OF EUROPE CONSEIL DE L'EUROPE

DH-SYSC-II(2018)15

18/07/2018

STEERING COMMITTEE FOR HUMAN RIGHTS
(CDDH)

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COMMITTEE OF EXPERTS ON THE SYSTEM OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS
(DH-SYSC)

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DRAFTING GROUP ON THE PLACE OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN THE EUROPEAN AND INTERNATIONAL LEGAL ORDER (DH-SYSC-II)

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Draft chapter of Theme 1, subtheme iv):

Interaction between international humanitarian law and the European Convention on Human Rights

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SYSC II

Theme 1 subtheme iv – the relationship of the Convention and international humanitarian law (IHL)

The Rapporteurs would like to acknowledge the contributions of Anatoly Kovler, Sébastien Touzé and Illaria Viarengo and Federica Favuzza which assisted in the preparation of this report.

1. Introduction

One of the areas in which the interaction of different bodies of international law that has been most discussed in recent years is that between international human rights law and international humanitarian law (IHL). And it is no surprise that the caselaw of the Strasbourg Court features prominently in those discussions. However before reviewing the evolving caselaw of the Court, and considering challenges and possible solutions that may arise from it, it may be useful to frame that discussion with a few introductory words on the nature and application of IHL and the situations in which its interaction with the ECHR might arise.

International Humanitarian Law or the law of armed conflict will govern the activities of those engaged in armed conflict. As such it is a specialised body of law designed to be applied in situations where the usual processes of social ordering have broken down or are under threat. It has its own particular characteristics, but its primary aim is to ensure that considerations of humanity continue to be weighed against the requirements of military necessity in conflict situations.

The content of IHL differentiates to some extent between: (a) situations of international armed conflict (IAC) (i.e conflict between two or more States); (b) situations of non-international conflict (NIAC) (conflict between one or more States on the one part and one or more non-State armed groups on the other part, or conflict between two or more non-State armed groups); and (c) situations of belligerent occupation (i.e. where the armed forces of one State occupy territory belonging to another State).

In relation to the law of international armed conflict many of the primary rules of international law are now codified in the four Geneva Conventions of 1949 and in Additional Protocol 1 of 1977, which have been widely taken up by States. In addition there are a large number of other treaties that make up the corpus of IHL and may apply in a given situation, and customary international law is still a significant source of the law applicable to IAC. Of particular note for present purposes are the provisions of the Third Geneva Convention on Prisoners of War, the Fourth Geneva Convention on the Protection of Civilians (including in situations of belligerent occupation), and Protocol I which developed the law further on both subjects.

By contrast, in relation to non-international armed conflict much of the law remains uncodified, although there are important provisions in conventional law notably Common Article 3 of the Geneva Conventions and Protocol II of 1977. It is therefore often necessary to turn to customary international law to determine the content of the law in a situation of non-international armed conflict. The law is based on the same fundamental principles of necessity, humanity, precaution and proportionality as underlie the law on IAC, but is adapted in particular for its application in conflict involving non-State armed groups.

Recent years have seen a great deal of practice in the development and application of customary international law to situations of NIAC.

In respect of the latter point, the development of international criminal law in the last two decades has been particularly significant, following the establishment of a number of international criminal courts and tribunals, including the negotiation of the Rome Statute of the International Criminal Court. These courts and tribunals have produced an extensive jurisprudence in relation to the prosecution of breaches IHL that can result in individual criminal liability. In that context there has been an observable, and perhaps understandable, trend towards applying standards first developed in relation to IAC in the context of NIAC.

As noted above, IHL has developed as a body of legal standards applicable to the very specific context of conflict, to ensure respect for basic standards of humanity often in a context where ordering principles of society have broken down or are under threat deliberately through organised violence. Given that goal, and the fact that both IHL and international human rights law developed in the Post WW II period in reaction to the horrors that occurred during the immediately preceding period, it is notable that for a long time the two bodies of law developed in parallel but largely separately.

That separation has traditionally been explained by the specificity of the field of application of IHL. IHL applies in situations of armed conflict, governing primarily the conduct of hostilities and the protection of persons hors de combat. By contrast human rights law will apply in principle in times both of peace and conflict. In its first statement on the relationship between these two bodies of law the International Court of Justice said:

> *"The Court observes that the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable* lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus 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 be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself*." (*Legality of the Threat or Use of Nuclear Weapons* (1996), at para 25)

In a similar vein in its Advisory Opinion on *The Construction of a Wall in the Occupied Palestinian Territory* the ICJ held:

> *"the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. 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. In order to answer the questions put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as* lex specialis*, international humanitarian law. "* (I.C.J. Reports 2004, p. 178, para. 106).

The use of the term *lex specialis* in both of these Advisory Opinions may suggest the displacement of a general obligation by a more specific one, in line with the maxim *lex specialis derogat legi generali*. However in its subsequent decision in *DRC v Uganda*, the ICJ cited the above description of the relationship between the two bodies of law from *The Wall* Advisory Opinion, but without the final sentence referencing the *lex specialis* principle. It went on to find that activities of the Ugandan forces in occupation of DRC territory breached both obligations of both IHL and human rights law that were incumbent upon both Uganda and DRC (including Art 6 and 7 of the ICCPR and Art 4 and 5 of the African Charter). In that context therefore the ICJ seems to have found that both bodies of law could apply to the same situation though its pronouncements on the interaction between them remain broadly stated.

To the extent that both bodies of law may overlap, the key issues are likely to include:

- how the right to life in Article 2 applies in the conduct of hostilities (including for example its interaction with the law on targeting);
- how Article 5 applies to the detention of prisoners of war or internment;
- how Article 1 of Protocol 1 applies to persons displaced from their property by conflict;
- how far a Contracting Party to the ECHR which is in belligerent occupation of territory has to apply the ECHR to persons within such territory.

2. The approach of the European Court of Human Rights to situations of armed conflict

Whilst there have been a considerable number of applications to the Strasbourg Court arising from situations of conflict, there are in fact relatively few in which the Court has had to consider the application of IHL and its relationship to the ECHR. Two factors may be deduced in the explanation of this. Firstly there may well be a reluctance on the part of States to characterise particularly a situation of internal disturbance as one of non-international armed conflict. As a result a State may not seek to defend its actions before the Strasbourg Court by reference to IHL, but rather seek to rely the right ultimately to use forcible means to enforce law and order. The second, according some authors and members of the Court, is that in recent years there has been an evolution in the Court's approach to these questions to a more open attitude to IHL. A number of stages to that evolution have been identified.

(a) Cases in which military action is adjudicated without reference to IHL

At the starting point of this evolution, authors have identified an initial reticence on the part of the Court to consider the provisions of IHL. Often cited in this respect are cases involving the response of the Turkish military to disturbances in South Eastern Turkey by Kurdish groups. In response to the situation the Turkish Government had sought to derogate from some of its obligations under Article 15, but did not seek to defend itself on applications before the Court by reference to IHL, and perhaps unsurprisingly the Court was able to decide the various applications by refefrence to the ECHR alone and without reference to IHL. Similarly in the case of *Isayeva v Russia* (concerning deaths and injuries to IDPs as a result of the military led response to Chechen separatist violence around Grozny) the Court determined the case on the basis of the ECHR alone, despite the Claimants submissions that the military action contravened IHL, and the Court's own reference to the situation as one of conflict.

(b) Cases in which secondary reference is made to IHL

In some cases, the ECtHR has acknowledged provisions of IHL as part of the legal context in which the ECHR applies. In *Loizidou v Turkey* for example, in establishing Turkey's responsibility under the Convention for the denial to the applicant of enjoyment of her property in northern Cyprus, the Court based its findings on the effective control exercised by Turkish military forces over that region. Subsequently in *Varnava v Turkey* (concerning missing persons following Turkey's military operations in northern Cyprus in 1974), the Court considered the application of Article against the context of IHL I the following terms:

> *"… Article 2 must be interpreted in so far as possible in light of the general principles of international law, including the rules of international humanitarian law which play an indispensable and universally accepted role in mitigating the savagery and inhumanity of armed conflict (see Loizidou, cited above, § 43). The Court therefore concurs with the reasoning of the Chamber in holding that in a zone of international conflict Contracting States are under obligation to protect the lives of those not, or no longer, engaged in hostilities. This would also extend to the provision of medical assistance to the wounded; where combatants have died, or succumbed to wounds, the need for accountability would necessitate proper disposal of remains and require the authorities to collect and provide information about the identity and fate of those concerned, or permit bodies such as the ICRC to do so.*
>
> *186. In the present case, the respondent Government have not put forward any materials or concrete information that would show that any of the missing men were found dead or were killed in the conflict zone under their control. Nor is there any other convincing explanation as to what might have happened to them that might counter the applicants' claims that the men disappeared in areas under the respondent Government's exclusive control. In the light of the findings in the fourth inter-State case, which have not been controverted, these disappearances occurred in life-threatening circumstances where the conduct of military operations was accompanied by widespread arrests and killings. Article 2 therefore imposes a continuing obligation on the respondent Government to account for the whereabouts and fate of the missing men in the present case; if warranted, consequent measures for redress could then be effectively adopted*."

(c) Cases relating to criminal responsibility under IHL (an indirect application of IHL?)

On a number of occasions the Court has been called on to consider the questions of IHL in the context of challenges to criminal proceedings concerning historic allegations of war crimes and/or crimes against humanity, and in particular the compatibility of those proceedings with Article 7 of the Convention. These cases all raise complex questions of fact and law, and some turn on questions of how international crimes have been received into and prosecuted in the relevant national legal system. It is difficult to draw from them more general conclusions on the relationship of IHL and the ECHR.

(d) Cases which examine IHL, but exclude it

In the case of *Sargsyan v Azerbaijan* (concerning a claim by an IDP claiming that his inability to return to his home in a village (Gulastan) at the frontline of the Nagorno-Karabakh conflict, was an interference with his right to property (Art1 Protocol1) and his home(Art 8)).

The Court considered whether there was a basis in IHL for the Government's denial of access to his home, in the following passage:

> *230. The Government argued in particular that the refusal to grant any civilian access to Gulistan was justified by the security situation pertaining in and around the village. While referring briefly to their obligations under international humanitarian law, the Government relied mainly on interests of defence and national security and on their obligation under Article 2 of the Convention to protect life against dangers emanating from landmines or military activity.*
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> *231. The Government have not submitted any detailed argument in respect of their claim that their refusal to grant civilians access to Gulistan was grounded in international humanitarian law. The Court observes that international humanitarian law contains rules on forced displacement in occupied territory but does not explicitly address the question of displaced persons' access to home or other property. Article 49 of the Fourth Geneva Convention (see paragraph 95 above) prohibits individual or mass forcible transfers or deportations in or from occupied territory, allowing for the evacuation of a given area only if the security of the population or imperative military reasons so require; in that case, displaced persons have a right to return as soon as hostilities in the area have ceased. However, these rules are not applicable in the present context as they only apply in occupied territory, while Gulistan is situated on the respondent Government's own internationally recognised territory.*
>
> *232. What is rather of relevance in the present case, is the right of displaced persons to return voluntarily and in safety to their homes or places of habitual residence as soon as the reasons for their displacement cease to exist, which is regarded as a rule of customary international humanitarian law applying to all territory whether "occupied" or "own" (Rule 132 of the ICRC Study on Customary International Humanitarian Law – see paragraph 95 above). However, it may be open to debate whether the reasons for the applicant's displacement have ceased to exist. In sum, the Court observes that international humanitarian law does not appear to provide a conclusive answer to the question whether the Government are justified in refusing the applicant access to Gulistan.*

The Court went on to find that whilst the applicant's home was in an area of military activity the respondent Government had not done sufficient to take alternative measures to restore his property rights or to provide him with compensation for his loss.

(e) Cases in which IHL has been directly applied by the Court

The case in which the Court has considered the relationship between IHL and the convention in the greatest detail is the case of *Hassan v UK.* The case concerned the detention of the applicant's brother, Tarek Hassan, on suspicion of being a combatant or a civilian who constituted a threat to security on 22 or 23 April 2003. He was taken to Camp Bucca, a US-run detention facility in which the UK retained its own compounds. Following his interrogation by both British and US forces the Camp records showed that he was released on or around 2 May. However he did not contact his family on his release and in September 2003 he was found dead in the town of Samara. The applicant brought proceedings alleging that the UK had breached Article 2, 3 and 5 in respect of his brother. However as the claims under Articles 2 and 3 were not established on the facts, it was the claim under Article 5 that became central.

In responding, the UK argued first that the Convention did not apply extraterritorially during the active hostilities of an international armed conflict. However in the alternative it also argued that to the extent that the Convention did apply in such circumstances, it had to be applied to take account of IHL, which applied as the *lex specialis,* and might operate to modify or even displace a given provision of the Convention.

The Court did not accept the Respondent Government's arguments against the extraterritorial application of the Convention in these circumstances, on the basis that the applicant came within the physical control of UK forces on his detention, and remained under their authority and control even when he was subsequently transferred to US detention within Camp Bucca. The Court therefore emphasised that both IHL and the Convention were applicable in the circumstances.

The Court therefore had to face the difficulty that the legal bases for detention set out in Article 5(1) ECHR make no provision for some of the powers of detention that are permissible under the Third and Fourth Geneva Conventions (notably in relation to prisoners of war and the powers of internment necessary for reasons of security). The Court noted that this was the first occasion on which a State had requested it to disapply or to interpret Art 5 in the light of powers of detention permissible under IHL. The Court chose to seek an "accommodation" between these two apparently conflicting legal provisions through interpretive approach based on the rules of interpretation in Article 31 of the Vienna Convention on the Law of Treaties. In particular paragraph 3 which permits that for the purposes of interpretation account shall be taken of:

> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
> (c) any relevant rules of international law applicable in the relations between the parties.

The Court found that there was no subsequent agreement for the purposes of paragraph (a). In relation to paragraph (b), the Court looked at the practice of the Parties to the ECHR and found that their consistent practice of not using the derogation mechanism in Article 15 to modify their Convention obligations when undertaking military activity extra-territorially in an international armed conflict. In relation to (c) the Court underlined its previous caselaw requiring an interpretation of the Convention "in harmony with" other rules of international law, which applied also to IHL (*Varnava v Turkey* cited above).

"… 103. In the light of the above considerations, the Court accepts the Government's argument that the lack of a formal derogation under Article 15 does not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in this case.

104. Nonetheless, and consistently with the case-law of the International Court of Justice, the Court considers that, even in situations of international armed conflict, the safeguards under the Convention continue to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out in subparagraphs (a) to (f) of that provision should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court is mindful of the fact that internment in peacetime does not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15 (see paragraph 97 above).
It can only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security are accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

105. As with the grounds of permitted detention already set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law must be "lawful" to preclude a violation of Article 5 § 1. This means that the detention must comply with the rules of international humanitarian law and, most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which is to protect the individual from arbitrariness (see, for example, Kurt v. Turkey, 25 May 1998, § 122, Reports of Judgments and Decisions 1998-III; El-Masri, cited above, § 230; see also Saadi v. the United Kingdom [GC], no. 13229/03, §§ 67-74, ECHR 2008, and the cases cited therein).

106. As regards procedural safeguards, the Court considers that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which takes into account the context and the applicable rules of international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provide that internment "shall be subject to periodical review, if possible every six months, by a competent body". Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent "court" in the sense generally required by Article 5 § 4 (see, in the latter context, Reinprecht v. Austria, no. 67175/01, § 31, ECHR 2005-XII), nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the "competent body" should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. …"

Judge Spano, joined by three other judges, gave a partly dissenting opinion, differing from the Majority's approach of seeking to address the apparently conflicting legal provisions through a "harmonious" interpretation. In their view the only way for a State to reconcile its obligations under Article 5 of the ECHR with exercise IHL powers to detain/intern under the Third and Fourth Geneva Conventions, was to make a valid derogation under Article 15.

3. Challenges and possible solutions

The desirability of establishing clarity as to the applicable law is of course a constant in all situations, but it has an obvious and particular importance in conflict situations. This underlines the need for a reconciliation between the different bodies of law to the extent that they are both applicable.

Any reconciliation must take account of the nature of conflict. These are situations in which the costs of both action and inaction can have profound consequences on the lives of those affected (both combatants and non-combatants); and where decisions may have to be made very quickly and at times on the basis of limited information, sometimes at the level of the individual soldiers, in the context of ongoing violence whether actual or threatened. In that sense the IHL is undeniably a *lex specialis* that has been fashioned specifically to be applied in conflict situations in order to uphold its underlying core principles.

The majority judgment in *Hassan* suggests a possible approach to the reconciliation of the two bodies of law, in the context detention of prisoners of war and internment of individuals who constitute security threats in the context of an international armed conflict. The provisions of IHL in this respect are clear and well-established, enabling the Court to find that they were reconcilable with the fundamental purpose of Article 5(1) to protect the individual from arbitrary detention. It is imaginable that there are other areas of IHL in which the rules are similarly clearly established where a similar solution may be possible.

Adopting a similar solution in relation to NIACs may be possible in some respects, but there may be additional complexities. A first set of complexities arises from very different circumstances in which NIACs can occur. There may be threshold questions about the existence of NIAC, for example States may be disinclined to characterise a situation on its own territory as a NIAC. There may be other situations where the forces of one State are assisting another State in prosecuting a NIAC where the application of the ECHR at all may be disputable, where for example the assistance is limited and the territorial State is not itself a Contracting Party to the ECHR. There may be still other circumstances where there is an international coalition which is taking military action against a non-State actor in the territory of a State which unwilling or unable to take action against the non-State actor.

Another complexity may arise from determining the content of the rules relating to NIAC, which are still largely derived from customary international law. However what is essential, and this is the same whether or not the ECHR is applicable, is that States are clear about the legal framework in which they are operating and adopt clear standards and processes on crucial issues such as targeting and detention that respect core principles. Any possible “accommodation” or “harmonious” interpretation of IHL and human rights obligations will require this as a minimum.

It has been suggested that an alternative solution to the question of determining conflicts between (at least some) provisions of the two bodies of law is for a State to derogate from the ECHR in accordance with Article 15. For the minority in *Hassan* this is the only possible solution under the Convention. It is notable too that the Human Rights Committee in General Comment 35 seem to accept the possibility of States derogating from the right to liberty in conflict situations, including conflict situations outside their own territories in which they are engaged (see para 65).

As the majority in *Hassan* noted that States have not derogated in relation to situations of IAC in which they have engaged, and given the majority approach in that judgment the need to derogate would have to be weighed carefully. However it is conceivable that there may be cases where derogation may provide an appropriate route in relation to an extra-territorial conflict situation. There may be questions as to the applicability of Art 15, but to the extent that the Convention is applicable extra-territorially it would seem logical that Article 15 is also applicable. Any actual derogation would require justification in any event, but it would seem that the terms of Article 15 should be read sufficiently broadly to allow a derogation in principle when a State is acting extra-territorially.

A further set of questions might then arise as to the extent of possible derogations, again particularly in respect of extra-territorial application. For a start, there may be difficult issues in determining which ECHR obligations are applicable, arising from the notion of "dividing and tailoring" Convention rights in situations of extraterritorial application. Even where a derogation is permissible on the face of Article 15, it is not clear how far derogations may be permitted. Thus for example a derogation from Article 2 is permissible in respect of deaths resulting from lawful acts of war, but of course caselaw of the Court has expanded the scope of Article 2 into a number of positive obligations, and it is not necessary clear how far they would apply in conflict situations.

All of this suggests that the invocation of Article 15 may assist in answering some questions, but it is also likely to raise further questions, and careful assessments would have to be made of its overall contribution to creating greater legal certainty.