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PROTECTION OF CIVIL LIBERTY IN THE REALM OF HOSTILITY: A COHESIVE APPROACH

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ABSTRACT

The creation and evolution of International Human Rights Law is an evident result of the inhumane maltreatments that took place during the Second World War. Since then, the applicability of International Human Rights Law for the protection of civil liberty during an armed conflict has been an exhaustive debate. Many scholars argue that since International Humanitarian Law is specifically enacted to address and rectify the situations in armed conflicts and the main objective of the treatyification of International Human Rights Law is to regulate and preserve the State–Individual relationship in their respective jurisdictions, International Human Rights Law should not continue to apply in the realm of hostilities. This paper mainly focuses on the negative and problematic impact of this conservative ideology on the Rights of Civilians during a combat. For this purpose, the research mainly addresses the following questions: (a) the current international legal framework applicable during warfare; (b) the compromised status of the civilians during an armed conflict; (c) the legal lacunas of International Humanitarian Law concerning civil liberty; (d) the importance of the materiality of International Human Rights Law for the protection of civilians. A desk review of UN sources on armed conflicts, documents on the ICRC’s database, and other scholastic electronic resources was used to achieve this purpose. In conclusion, the research paper anticipates to contribute to the contemporary debates regarding the well-

versed incorporation of International Human Rights Law into International Humanitarian law for the protection of civil liberty in the course of an armed conflict and vice versa.

Keywords: International Human Rights Law , International Humanitarian Law, Civil Liberty, Armed Conflicts, Cohesive Approach

INTRODUCTION

Human rights are a significant, contested concept in the field of Public International Law. The establishment of the United Nations Organization after the Second World War can be considered as the origin of the modern human rights law. As a form of international law, International Human Rights Law (IHRL) governs the direct legal obligations of States towards citizens and other individuals within their respective jurisdictions and can occur both at the domestic and international level. It is codified in a large number of universal or regional instruments, concerning different degrees of the whole subject.

International Humanitarian Law (IHL) – which is also a branch of public international law – is the legal framework applicable to situations of international and non-international armed conflicts and occupations, that aims to minimize the effects of hostility for the sake of humanity, through treaty law; specifically, through Geneva Conventions and Additional Protocols and Hague Conventions, and Customary International

Law. It is synonymous with *jus in bello*, and seeks to protect and assist victims of all types of armed conflicts. (ICRC, 2009) Therefore, IHL regulates the conduct of belligerent parties during an armed conflict and seeks humane treatments of the 'protected persons'- which includes civilians, prisoners, the wounded, and the sick. Also, regardless of the cause of conflict, it binds all parties to an armed conflict individually, including members of State and Non-State Armed Groups.

Human rights apply to all human beings irrespective of their geographical locations while concerning the day-to-day aspects of human lives. Fundamentally, they concern the rights that individuals and groups can claim against governments. They have a considerably larger impact on civil liberty than the IHL, which applies only at specific hostile locations, which fulfils the conditions of the universally binding legal instruments. On the other hand, IHRL only binds governments vis-à-vis their relations with individuals within their jurisdiction and control. (ICRC, 2008) Furthermore, IHRL has embodied in-laws either established by treaties, derived from State practices, or in resolutions issued by international organizations such as the United Nations or International Committee of the Red Cross (ICRC). Additionally, the International Court of Justice (ICJ) has confirmed on several occasions that, IHRL too applies in situations of hostility, irrespective of their character. (ICRC, 2012)

However, since the IHRL operates in a State-centric approach, there are situations that IHRL could not cover as the violator is not a State or an Agent of State. Contrarily, even though the individuals are not bound specifically, IHRL treaties provide duty on States to hold individuals liable for crimes they commit contrary to IHRL. (Sayed, 2017) Also, it has been argued that, since the main objective of the treatification of IHRL is to regulate and

preserve the State-Individual relationship in their respective jurisdictions, it should not continue to apply in the realm of hostilities.(UNHR, 2020) Hence, this paper addresses the problematic aspects and legal lacunas in the current international legal frameworks for the protection of the Rights of Civilians during a belligerent situation and hopes to contribute to the ongoing debates regarding the cohesive approach of IHRL and IHL, for the protection of civil liberty during an armed conflict.

LITERATURE REVIEW

My research paper is mainly focused on the relationship between IHL and IHRL during an armed conflict. Consequently, I felt that it is essential to review the chronicle literature of the relationship between these two laws in the realm of hostility.

Since the times of pre-historical era, war has been regulated by certain rules and rituals. However, the modern warfare backdates to the emanation of centralized States with standing armies. In the international legal order, which has developed since then, the law of war (the *ius in bello*) has occupied a paramount place. (Rosas, 1987) Therefore, IHL include a considerable portion of international law which is inspired by a feeling for humanity and is centred on the protection of the individuals in time of war. (Pictet, 1985) The codification of the four Geneva Conventions in 1949, and later codifying its Additional Protocols in 1979, manifested a milestone in the domain of IHL. During the 1949 and the Geneva Diplomatic Conference on Humanitarian Law of 1974-1977, International Human Rights Law was invoked as evidence of the amalgamation of intra-State structures of incumbency in international law and the preponderance of individual protection vis-à-vis one's own

State. (Hill-Cawthorne, 2015) Another aspiration of IHRL was the formulation of the Universal Declaration of Human Rights (UDHR) in 1948. Although it was not considered as a law-making instrument in the field of international law, its principles are considered as an integral part of the International Customary Law. (Malekian, 2011)

Whereas warfare is a phenomenon in constant change, the integration of these two laws is required to adjust constantly to avoid gaps in the protection they provide in a belligerent situation. (ICRC, 2009) The discussion on their interaction is certainly part of a broader legal debate on the fragmentation and unity of international law. Henceforth, recent legal debates have dedicated on developing mechanisms to assure maximum protection for the individual. (ICRC, 2012) Considering their complementarity nature and mutually reinforcing manner, it is explicated that both IHL and IHRL inform each other in a number of ways. In this respect, the cohesive approach of these two laws provides extensive protections and guarantees for the rights of persons not actively or no longer participating in hostilities, including civilians.

METHODOLOGY

The working method chosen was a Desk Review, which is more of a qualitative approach in order to reach an understanding of the compromised situation of the civilians during an armed conflict. A survey of international legal and non-legal documents through the years concerning IHRL and IHL helped in understanding the conceptualization contours and development of the contemporary legal framework applicable during a hostile situation. This paper is fundamentally based on UN sources on armed conflicts, documents on the ICRC's

database, and other scholastic electronic resources.

DISCUSSION

The current international legal framework applicable during an armed conflict

Although one can trace back to a long history in customary rules on the laws of war, the project of codifying those rules in multilateral treaties did not begin until the mid-nineteenth century. Back then, international law was presumed to regulate the corresponding relations between States, and the international treaties which were signed between States generally dealt only with questions relevant to that reciprocal correlations. (Rosas, 1987) Therefore, intra-State issues were usually to be excluded, as they were seen as affiliating to the realm of the domestic law of a State, as opposed to international law. However, that era witnesses the emergence in customary international law of the doctrines of insurgency and belligerency, which addressed different standards in civil wars. The effectiveness of these doctrines, however, remained constrained by the inter-State focus of international law. (Rosas, 1987) In particular, they tended to be relevant mainly to those internal conflicts that affected the interests of Third World States, being invoked by such States to regulate their relations with the parties to the conflict. It was, therefore, only in 1949 that non-international armed conflicts explicitly became subject to treaty-based regulation under the Geneva Convention. Simultaneously, the distinction between international and non-international conflicts was codified.

Hence, to ascertain the international legal framework applicable during an armed conflict, firstly, it is vital to recognize how the term "armed conflict" is defined in IHL and the characteristics of armed conflicts and other situations of

violence. The States parties to the 1949 Geneva Conventions have entrusted the International Committee of the Red Cross (ICRC), through the Statutes of International Red Cross and Red Crescent Movement, in Article 5, para. 2 (g),

“to work for the understanding and dissemination of knowledge of IHL applicable in armed conflicts and prepare any development thereof”.

In contemplation of fulfilling its humanitarian mandate in a delineated locale of violence, the ICRC assesses whether or not it is an armed conflict. (ICRC, 2009) This mandate allows the ICRC to refer to the applicable rules in its dialogue with those involved in the belligerent situation. Although the ICRC’s legal classification of a hostile situation does not bind States per se, their specific mandate under the four Geneva Conventions, their Additional Protocols and the Statutes of the International Red Cross and Red Crescent Movement and its remarkable role in the expansion and development of IHL give a particular *bona fide* to its classifications, which States must consider in good faith. (ICRC, 2009)

Therefore, as per the ICRC classification, IHL distinguishes two main types of armed conflicts, which are,

1. International Armed Conflicts that occur between two or more State parties

2. Non-International Armed Conflicts that occur either between State(s) armed forces and organized armed group(s) or between two or more organized armed group(s)

Rightfully, there is no further classification of armed conflicts. Thus, the applicable law for these two categories of armed conflicts includes the IHL, IHRL, and domestic laws of the States involved as well. Nevertheless, scholars find another category of armed conflicts; designated as other situations of violence, which include less intense violent

situations, that normally occur between Police/ Security or a country and organized or non-organized Military, Paramilitary groups, or between individual groups. IHL does not apply to these kinds of situations. Accordingly, only IHRL and national laws would apply. (ICRC, 2009) However, it must be kept in mind that, there is no agreed central authority that classifies armed conflicts and thus, mostly the States involved and the international community would classify belligerent situations into the above-mentioned types of armed conflicts.

Furthermore, it is noteworthy that, rather than using the specific term 'war', the Geneva Conventions use the generic term 'armed conflict' to highlight that the determination of whether an armed conflict exists within the meaning of the Articles of Geneva Conventions depends on the prevailing circumstances, not the subjective views of the parties to the conflict. (Cameron & Ferrarro, 2016)

1) International Armed Conflict

According to the general postulation made by the International Criminal Tribunal for the former Yugoslavia (ICTY), an international armed conflict can be defined as

“an armed conflict exists whenever there is a resort to armed force between States”.

As per the Common Article 2 to the Geneva Conventions of 1949, which declares that;

“[T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no other armed resistance”

an international armed conflict occurs when one or more High Contracting Parties; i.e., States, have recourse to armed force against another High Contracting Party, regardless of the reasons or intensity of the confrontation. (Rosas, 1987) The possibility of applying IHL in this scenario solely depends on the factual situation on the ground. (Clapham, 2010)

Along with the Geneva Convention, Additional Protocol I extend the definition of an International Armed Conflicts to include armed conflicts in which people fight against colonial domination, alien occupation, or racist regimes in order to claim their right to self – determination, i.e., national liberation movements. In contrast to the non-international armed conflicts, there is no minimum threshold of armed violence. (ICRC, 2009) Whenever there is resort to hostile armed force between two States, there occurs an international armed conflict. (Rosas, 1987) For an international armed conflict to exist, the use of force must be by the State. The acts of exclusively private personage do not constitute an international armed conflict unless they act on behalf of a State, including on occasions when States use proxy forces.

2) Non-International Armed Conflict

According to the judgments and decisions of the ICTY, a Non-International Armed Conflict can be determined as

“[s]ituations of which there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State”.

The Common Article 3 to the Geneva Conventions of 1949, declares non-international armed conflicts as;

“armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties”

However, a more restrictive definition of non-international armed conflicts can be found in the Additional Protocol II, which excludes internal disturbances and tensions from the definition of non-international armed conflicts. (ICRC, 2012) To regard a hostile situation as an armed conflict, the situation must reach a certain threshold of confrontation. Contrary to an international armed conflict, which takes place between the armed forces of States, in a non-international armed conflict, at least one of the two antagonistic sides is a non-state armed group. (Rosas, 1987) Furthermore, in the Prosecutor v. Fatmir Limaj, ICTY has declared two criteria that have to be applied, to distinguish an armed conflict from less serious forms of violence, which are,

1. The intensity of the conflict
2. The organization of the parties.

The level of intensity of the violence is determined by taking into consideration certain indicators such as the duration and gravity of the armed conflicts, the type of government forces involved, the number of fighters and troops involved in the opposing side of government forces, the types of weapons used, the number of casualties and the extent of the damage caused by the fighting. (ICRC, 2009) The level of organization of the armed group is evaluated by looking at indicators such as the existence of a chain of command, the capacity to communicate and enforce orders, the capacity to plan and launch coordinated military operations, and the capacity to recruit, train, and equip new fighters. (MERI, 2016)

The compromised status of the civilians during an armed conflict

Before moving on to an in-depth analysis about the topic, it is essential to comprehend who is a civilian during an armed conflict. According to the Geneva Conventions and their Additional

Protocols, the definition of ‘a civilian’ varies according to the classification of armed conflicts.

- Therefore, for the purposes of the principle of distinction in international armed conflict, all persons who are neither members of the armed forces of a party to the conflict nor participants in a levée en masse are civilians and, henceforth, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities. (ICRC, 2009)

Membership in improperly organized militia and volunteer brotherhoods, including organized confrontation movements, belonging to a party to the conflict must be determined based on the same indicators and criteria which are applicable to organized armed groups in non-international armed conflicts.

- In contrast, for the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the hostile situation are civilians and, thus, entitled to protection against direct attacks by conflicting parties, obviously, unless they intentionally take a direct part in hostilities. (UNHR, 2020)

In non-international armed conflict, organized armed groups consists of the armed forces of a non-state party to the conflict and include only the individuals whose continuous function it is to take a direct part in hostilities, i.e., continuous combat function. (ICRC, 2012)

- Since the private contractors and employees play a major role in modern warfare, it is crucial to rightfully determine whether they qualify as civilians withing the meaning of IHL. Generally, it depends on the same criteria as are applicable to any other civilian. The geographic and organizational proximity of such persons to the armed forces and the belligerent situation, requisite that this determination must be made with a high threshold of care. (UNHR, 2020)

Those who qualify as civilians are entitled to protection against direct attack unless and for such time when they directly participate in hostilities, even though their pursuits and geographical location may expose them to an increased risk of collateral injury and death. Nevertheless, this does not exclude the possibility that, for purposes other than the conduct of hostilities, domestic law that particular State might regulate the status of such private contractors and employees differently from IHL. (MERI, 2016)

The fundamental objective of IHL is to protect the rights of the civilians during an armed conflict and to regulate the comportment of belligerent parties based on a balance between military necessity and humanity. (UNHR, 2020) Therefore, IHL aims to differentiate between the armed forces of a party, who consists of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military operations, through the principle of distinction. (ICRC, 2009)

In the recent decades, the notable shifting of the conduct of hostilities into civilian community cores has led to an escalated adulterating of civilians with armed forces. In modern armed conflicts, military personnel have extended their traditional military functions to civilians, as strategic plans, by incorporating them into military as private contractors, civilian intelligence personnel, and other civilian government employees. Therefore, these civilians have amalgamated their positions into hostile activities, complicating the applicability of the principle of distinction. (UNHR, 2020) In addition, modern military operations exhibit complicated and complex interdependence between human and technical resources, which obviously

includes civilians in the arena as well. (ICRC, 2012) Undercover military operations which include daylight activities as civilians and night time activities as warriors, cause erroneous and arbitrary targeting on civilian population, where the hostile parties cannot properly identify their adversaries. Consequently, there is an increased risk for civilians to be unprecedented, fallacious and imprecise military targets.

Furthermore, civilians; including women, men and children altogether, continue to suffer heavily from the armed conflict. Their liberty is at stake in during an armed conflict due to various reasons. Crossfire from ground engagements, suicide attacks and non-suicide IED attacks and airstrikes has resulted in uncountable casualties in the pathway of warfare. (UNHR, 2020) Additionally, they are exposed to extreme harm due to recruitment and use by parties to the conflict into fighting, abductions, sexual exploitation and violence including bacha bazi.

Moreover, women, especially in the realms of religious warfare, become victims of extreme human rights violations such as lashing or executing, due to exacting punishment according to terrorists' justice systems for committing adultery or having immoral relationships. (Clapham, 2010) Commonly, most of these civilians are affected by the broader effects of civil right violations, which negatively impacts their day-to-day activities, including freedom of speech and movement, access to healthcare, education and justice. They have also become the victims of poverty, forced displacement, loss of livelihoods and limited access to basic services. Besides, every year, incidents of hundreds of injured civilians are reported in post-war territories, becoming victims of explosive remnants of war. (UNHR, 2020)

Conclusively, it can be deduced that attacks deliberately targeting civilians and

civilian objects or carrying out attacks from and in civilian locations, including residential homes, public markets, and religious places, which exposes civilians to risks of attack by adversaries are serious violations of IHL that may amount to war crimes. Furthermore, when committed as part of a widespread or systematic attack directed against any civilian population, those acts can be constituted as crimes against humanity. (UNHR, 2020)

The legal lacunas of International Humanitarian Law concerning civil liberty

From the end of the Second World War to the contemporary belligerent situations in Syria, the Central African Republic, Yemen, Libya, and South Sudan, IHL has significantly been developed through substantive instruments. It would not be exaggerating to state that IHL is the most powerful tool the international law has at its disposal to safeguard the protection and dignity of the civilians at stake, in times of war. (Clapham, 2010) While pursuing to preserve a standard measure of humanity amidst conflict, IHL seeks to balance between military necessity and humanity, implementing a yardstick that even war has its own limits. (ICRC, 2009) Generally, IHL governs the conduct of hostilities by the parties to a conflict and protects persons in the adversary's hands. Furthermore,

- Through the Principle of Distinction, IHL requires the opposing parties of a conflict to distinguish between combatants and civilians, and to withhold from attacking civilians;
- It requires the parties to a conflict to care for the wounded and sick and to protect medical personnel;
- IHL forbids or restricts the use of weaponry which particularly amounts to cruel and inhumane attacks or that do not distinguish between combatants and civilians;

- It requires the parties to a conflict to ensure that the dignity of prisoners of war and civilian internees is preserved, in particular by allowing visits by ICRC delegates.

Nonetheless, continuous failure of strict adherence with these international instruments has exacted a heavy price on civilians. (MERI, 2016) Civilians are continuously suffering by remaining the primary victims of violations of IHL. (ICRC, 2012) Collectively, they have been the victims of forced displacements, deliberate attacks, destruction of infrastructure vital to the, and individually, they have largely been the victims of violations of law such as murder, cruel and inhumane torture, rape, and other forms of sexual violence. Therefore, it is evident that, since the nature and scope of IHL is largely systematic, we are able to find certain incidents concerning civilians, which cannot solely be covered by IHL itself. (Callamard, 2019)

While IHL, through treaty and customary rules, potentially affords a significant level of protection, especially to civilians, its remit is limited to acts directly associated with armed conflict. IHL only partially addresses the range of harmful actions that adversary parties may perpetrate against or inflict upon a civilian population. (UNHR, 2020) The scope of IHL extends throughout the territory in which hostilities take place (*ratione loci*) and must involve a person protected by the instruments (*ratione personae*) According to ICTY, *Prosecutor v Kunarac, Kovac and Vukovic*,

“As indicated by the Trial Chamber, the requirement that the acts of the accused must be closely related to the armed conflict would not be negated if the crimes were temporally and geographically remote from the actual fighting. It would be sufficient, for instance, for the purpose of this requirement, that the alleged crimes were closely related to hostilities

occurring in other parts of the territories controlled by the parties to the conflict.”

According to ICTR, *Prosecutor v Musema*,

“The alleged crimes ... must be closely related to the hostilities or committed in conjunction with the armed conflict.”

Secondly, even though the main purpose of IHL can be identified as to regulate armed conflicts and restrict or minimize their negative impacts on victims and those who have laid down their weapons, it could be contended that IHL does not cover “all” violations of international law which could be occurred in those situations, such as violations of freedom of expression or gender discrimination. (UNHR, 2020) Those civilians could have been used as human shields and in real-life situations, evidence can be found that people detained in relation to armed conflicts are monotonously deprived of their basic human rights, even by States. Thus, it is apparent that IHL does not regulate and hasn't meant to regulate the everyday life of the civilian population in situations of armed conflict.

IHL may not apply in situations where its conditions of applicability are unfulfilled, i.e., where violence is insufficiently intense or the particular party is insufficiently organized. (Hill-Cawthorne, 2015) Consequently, it is uncertain whether IHL would be applicable in a low-intensity military confrontation, such as border incidents between two or more adjoining States or incidental armed skirmishes. It must be noted that international law does not provide guidance on the precise meaning of “use of force” or “armed conflict” in the context of the Charter of the United Nations and of the Geneva Conventions. (Sayed, 2017) In the *Haradinaj* case, the Trial Chamber stated that,

“the criterion of protracted armed violence is to be interpreted as referring

more to the intensity of the armed violence than to its duration.”

In addition, armed groups involved must have a minimum degree of organization. There, the Trial Chamber summarized the indicative factors which were taken into account when evaluating the two criteria. (Callamard, 2019)

For assessing the intensity these indicators include “the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces engaging in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. Even the involvement of the United Nations Security Council may also be a reflection of the intensity of a conflict.” (ICRC, 2012)

For assessing the minimum degree of organization, indicators such as “the organizational hierarchy of the conflicting party, the delineation of roles and responsibilities, the obedience for the hierarchy of command” were taken into account.

Conclusively, it can be proposed that, due to the nature of IHL and its vast scope of application which is specially systemized to be applicable in the ‘direct’ conflicting situation, it might not be able to cover all the violations committed by hostile parties during the warfare, makes it likely to put the civil liberty in the arena of conflict at stake. (UNHR, 2020) Thus, it is of both theoretical and practical importance, that to find a substantial mechanism to cover up those above-mentioned lacunas of IHL, which endangers the protection of civilians.

The importance of the materiality of International Human Rights Law for the protection of civilians

International Human Rights Law imposes prima facie obligations on States. Theoretically, however, human rights obligations are infinite with regard to their addressees. (Hill-Cawthorne, 2015) They are embedded in human dignity, which indwells all individuals regardless of who is in a position to affect these devoirs. This comprehension is embodied in the Universal Declaration of Human Rights (UDHR), the keystone IHRL, which speaks of the claim of "everyone" to the rights embedded in it and does not denote the addressees of the contemporaneous obligations.'

The IHRL is reflected, inter alia, in the Universal Declaration of Human Rights, as well as in a number of international human rights treaties and in customary international law. The nine core human rights treaties can be inscribed as follows.

1. The International Covenant on Economic, Social and Cultural Rights and its Optional Protocol.
2. The International Covenant on Civil and Political Rights and its two Optional Protocols.
3. The International Convention on the Elimination of All Forms of Racial Discrimination.
4. The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol.
5. The International Convention for the Protection of All Persons from Enforced Disappearance
6. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol.
7. The Convention on the Rights of the Child and its two Optional Protocols

8. The International Convention on the Protection of All Migrant Workers and Members of Their Families

9. The Convention on the Rights of Persons with Disabilities and its Optional Protocol

The applicability of human rights law to armed conflict has been the subject of extensive discussion over the past few decades. Much of this debate centres upon the question of whether human rights law continues to apply once we enter the realm of armed conflict. (Hill-Cawthorne, 2015) Despite being stated of the applicability of human rights law during an armed conflict, by the International Court of Justice (ICJ), in its Nuclear Weapons Advisory Opinion, the use of the term *lex specialis* might have been deemed as a reinforcement for a claim that whereas human rights law then does not evanesce, it nevertheless is in effect ectopic by IHL. (Sayed, 2017)

In terms of human rights applying to individuals during the war,

- Some are governed exclusively by IHL such as the conduct of hostilities or the treatment of the wounded and sick
- Some exclusively by IHRL such as the freedom of the press, the right to assembly, vote, or strike
- Others are covered by both such as, the prohibition on torture

Evaluating which authority applies to an incident in an armed conflict, either IHRL or IHL can be pivotal because different doctrines and rules can apply. Since one body of law may contain more detailed provisions to protect individuals, in monitoring violations committed during armed conflict, it will be necessary to examine the provisions of both IHRL and IHL. IHRL, for instance, contains more detailed provisions in relation to understanding “fair trial” rights, which in turn inform IHL norms in this area. Concerning attacks on civilian buildings such as schools and hospitals, or attacks on

the medical staff or humanitarian relief personnel, IHL has specific provisions. (UNHR, 2020)

A pragmatic approach during monitoring, fact-finding, and investigations would be to assess the situation or incident with reference to provisions of both IHRL and IHL in order to decide the rules catering to the precise procedural and substantive guarantees. (Hill-Cawthorne, 2015) Since there are contrarities and gaps between the protections bestowed by the various human rights and humanitarian law instruments, along with national and local laws, the individual should be eligible to the most protective provisions of appropriate international, national, or local laws. Hence, if IHL provides better protection than IHRL, humanitarian law should be applied and vice versa. (Callamard, 2019)

Furthermore, when observing the human rights which will be applicable during both international and non-international armed conflicts, it is evident that in those situations, all human rights provisions shall apply in all international and non-international armed conflicts except those rights that have been lawfully suspended in a declared emergency, or if there is a more specific rule IHL that affords better protection. (Clapham, 2010)

The above-mentioned ‘state of emergency’ situation includes disturbances, riots, isolated and occasional acts of violence, and other public emergencies which threaten the life of the nation, in which mechanisms normally concordant with the constitution and laws are insufficient to implore the situation. (Sayed, 2017) For the purpose of excluding the below-mentioned human rights in a state of emergency, it must be officially declared. Therefore, in an officially declared state of emergency, all human rights must be applied with the following exceptions. (MERI, 2016)

Derogations from certain rights may be permissible to the extent strictly required by the exigencies of the situation, and only if not inconsistent with other requirements under international law.

1. No discrimination exclusively on the basis of race, color, sex, language, religion, or social origin.

2. No derogation is permissible with regard to rights stipulated in the International Covenant on Civil and

3. Political Rights as non-derogable or rights regarded as non-derogable by Human Rights Committee (HRC) jurisprudence

Nevertheless, it is notable that some basic human rights cannot be suspended even during armed conflict or other public emergencies; they are found in article 4 of the International Covenant on Civil and Political Rights or common article 3 of the Geneva Conventions or have been accepted as non-derogable by the Human Rights Committee. (Callamard, 2019)

Also, national laws may be relevant to certain human rights monitoring to the extent that they have provisions relating to human rights and/or humanitarian law, to reinforce the obligation of the State concerned, and to advocate for remedial action for violations, including holding perpetrators accountable. National laws may also criminalize actions that might amount to international crimes or other serious violations of human rights, accommodating such crimes to be prosecuted in national courts. (Sayed, 2017) Nonetheless, since national laws do not fall within the purview of this research, no further analysis will be conducted on that sphere.

Therefore, we can safely conclude that, since these two bodies of law mutually reinforce each other in a given belligerent situation, for the protection of civil liberty during an armed conflict, a cohesive approach of IHL and IHRL is essential. The reciprocal application of the two legal

regimes is known as a co-existing application or dual applicability. (Sayed, 2017) In the light of IHRL and IHL, it signifies that both legal regimes are applicable in times of warfare. Hence, the final question would be to ascertain which body of law would have pre-eminence over the other as a matter of *lex specialis*.

As per the above observations, due to the similar protections offered by both IHRL and IHL, their simultaneous application in armed conflicts does not, in general, raise substantive problems. Nevertheless, in certain exceptional cases, IHRL and IHL may offer somewhat conflicting solutions. (Callamard, 2019) International law has therefore foreseen a number of frameworks of legal interpretation that would help to determine how two apparently contradicting norms should be read contemporaneously and, if that proves implausible, which would have priority. (Clapham, 2010)

The *lex specialis derogat legi generali* principle denotes an extensively accepted maxim of legal interpretation and technique for the resolution of normative conflicts. It provides that, if a matter is being regulated by a general standard and at the same time by a more specific rule, then the latter should take precedence over the former. The correspondence between the general standard and the specific rule may, however, be formulated in two ways.

1. One is where the specific rule should be read and understood within the details or against the background of the general standard, usually as an elaboration, update or technical specification of the latter.

2. If construed in a narrower perspective, *lex specialis* is also understood to cover the case where two legal provisions that are both valid and applicable are in no express hierarchical relationship and provide inconsistent direction on how to handle the same set of facts. In such a case, the utilization of the

lex specialis principle is used to clear up conflicts of norms. (MERI, 2016)

In both cases, however, the rule with a more precisely demarcated purview of application has pre-eminence. Therefore, we can deduce that, as per the lex specialis principle, when two conflicting provisions apply to the same situation, the provision that gives the most detailed guidance should be given antecedence over the more general rule.

A standard that could be used to establish which body of law should be applied to a distinct situation is that of effective control: the more effective the control over persons or territory, the more human rights law would constitute the appropriate reference arrangement. In this respect, it has been argued that the IHRL standard surmises effective control over a territory and/or an individual, while the IHL standard posits an absence or breakdown of control by means of armed conflict. (Clapham, 2010)

As a way to inform the lex specialis principle in the context of armed conflict, it has been suggested that the stabler the situation, the more the human rights paradigm would be applicable; the less stability and effective control, the more the international humanitarian law paradigm would be applicable to supplement human rights law.⁹⁷ Thus we can conclude that, instead of focusing only on the existence of a conflict, the analysis should concentrate on stability and effective control.

CONCLUSION

IHRL is a system of international norms intended to protect and encourage the human rights of all persons. These rights, which are immanent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, or any other status, are ascribed, interdependent, and inseparable. They are

often declared and guaranteed by law, in the form of treaties, customary international law, general principles, and soft law.

IHL is a set of rules which aims, to limit the effects of armed conflict, for humanitarian reasons. It is implemented with the hope of protecting people—especially civilians - who are not or are no longer participating in the hostilities and restricts the means and methods of warfare. Its applicability is, therefore, limited *ratione materiae* to situations of armed conflict. IHL is part of *ius in bello* (the law on how force may be used), which has to be distinctively understood from *ius ad bellum* (the law on the legitimacy of the use of force).

For years, it was believed that the difference between IHRL and IHL was that the former applied in times of peace and the preceding in situations of armed conflict. Modern international law, however, recognizes that this distinction is erroneous. Indeed, it is widely accepted nowadays by the international community that since human rights obligations emanate from the recognition of intrinsic rights of all human beings and that these rights could be affected both in times of peace and in times of war, IHRL perseveres to apply in situations of armed conflict.

Equivalently, nothing in human rights treaties indicates that they would not be applicable in times of armed conflict. Therefore, these two regimes of law—IHRL and IHL—are considered to be complementary sources of obligations, which should cohesively be applied in situations of armed conflict.

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