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Introduction

International Humanitarian Law (IHL), compiled in the Geneva Conventions, Additional Protocols and other Treaties and regulations, has created a specific set of rules with the aim to protect individuals by controlling the manner in which armed conflicts are waged (Tomuschat, 2010). Yet, the two institutions established by the Geneva Conventions to enforce IHL are the International Committee of the Red Cross and the International Fact-Finding Commission, non-judicial bodies. As such, they do not fully deal with the consequences of breaches of IHL, as they cannot provide compensation for the victims or punishment for those responsible (Steiger, 2015).

These roles are, in turn, filled by other international judicial institutions like the International Criminal Court (ICC), the International Court of Justice (ICJ) or human rights bodies like the European Court of Human Rights (ECtHR) (Clapham, 2017). The Rome Statute provisions envision a prosecution by the ICC for war crimes and the crime of aggression, thus serving as an enforcement body of the IHL. Even then, the ICC acts in a fairly limited scope, by only focusing on individual actors. This can be seen in the actions of the ICC regarding situations in Ukraine and Gaza. Only Putin as the President, the Minister of Defence, the Chief of General Staff of the Russian army and the Commissioner for children's rights were included in the arrest warrants sent by the ICC regarding the situation in Ukraine. Similarly, for Gaza the arrest warrants only cover the Prime Minister and the Minister of Defence. While such enforcement is very important in battling impunity, it neglects areas like state responsibility or, in the most part, victim compensation.

Nevertheless, the role played by the human rights bodies is much more widespread. In particular, ECtHR approaches IHL violations in a more holistic way, rather than individuals, cases can only be brought up against States. Thus, if the Court finds violations of the ECHR, it can order individual reparations for the victims which fall under the responsibility of the violating State. The downside of this system falls on the jurisdiction of the ECtHR, which can only deal with the violations of the Contracting Parties. Nonetheless, the impact that the ECtHR has had on IHL and vice versa cannot be overlooked. Therefore, this paper will analyse how the European human rights system deals with the enforcement of IHL.

1. Theories on the relationship between IHL and human rights

The discourse around the relationship between the two bodies of law is well-established and long-standing (Tomuschat, 2010). While both of these are part of the broader frame of international public law, each one functions as a distinct body of law with different areas of focus. IHL is a much older body of law that famously began developing after Henri Dunant

witnessed the battle of Solferino (Tomuschat, 2010). It provides the principal body of law that is applied in the context of an armed conflict. On the other hand, the human rights system focuses on protecting individuals' rights and liberties and aims at securing dignified lives for everyone.

Amongst their differences is the context in which these two systems were developed. As the European Convention on Human Rights (ECHR) was written as a response to the atrocities of the Second World War, the creators were aware of the realities of an armed struggle. This is reiterated in Article 15 of the ECHR, which allowed for a temporary derogation from some rights in case of a national emergency (ECHR, 1953). At the same time, Art.15 implements strict cumulative criteria that must be fulfilled before any derogation is allowed, as well as a list of non-derogable rights even in a time of conflict. While the underlying objective of both IHL and human rights might be similar, that is the protection of human dignity, the context in which they operate and the procedures that they use often result in a conflict between the two. After all, IHL inherently deals with the realities of death and conflict, aiming to minimize suffering by regulating conduct during armed hostilities. Yet, it is important to highlight that the sole existence of a conflict does not automatically exclude the application of the human rights system (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004; Democratic Republic of Congo v. Uganda, 2005), as in general, human rights apply unceasingly.

This means that the two can apply concurrently during an armed conflict when a State Party to a human rights Treaty has not derogated from its obligations. In such cases, the interplay between human rights and IHL will influence areas like detention and protection of human life.

At the beginning of the inquiry into this relationship, the International Committee of the Red Cross recognised three main schools of thought explaining the relationship between the two bodies of law (Clapham, 2017). On the opposite sides were the separatist and integrationist ideas. Scholars who favoured the former understood that the two systems are entirely separate and were against any intermixing, fearing that it could only lead to confusion and contradictions (Fortin, 2022). The latter idea understood humanitarian law as a part of the broader human rights system (Fortin, 2022). From today's point of view, it is clear that neither idea was correct. The jurisprudence of the ICJ and ECtHR has proved that though the two are separate bodies, they can be used to complement each other. That is why, since the beginning of the discussion, most authors favoured the complementarian idea, which understood that the two bodies of law must be used together to grant the highest possible level of protection for individuals (Fortin, 2022).

Interestingly, the relationship between international human rights and IHL seems to be evolving again, as a result of the growing number of court cases and human rights violations which result in further interpretative work of various human rights bodies.

2. Conflictual Jurisdictions

In its judgments, the International Court of Justice confirmed that the context of an armed conflict does not automatically release States from their obligations stemming from the human rights protection system (Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, 2004; Democratic Republic of Congo v. Uganda, 2005). Despite this, the practice of invoking IHL before human rights bodies remains in its developmental stages. Its applications before human rights institutions, like the ECtHR, is far from prevalent, largely due to the limited overlap between the bodies with the Court's jurisdiction.

For IHL to be relevant and applicable, two conditions need to be met; first, the existence of an armed conflict, and secondly, the establishment of extraterritorial jurisdiction, which would allow the ECtHR to rule on the case. As this is a regional body that deals with the promotion of human rights on the European continent, it has limited opportunities to deal with the situations of armed conflict occurring beyond European territories. However, the participation of European countries in the NATO/UN armed interventions in the Middle East has created an opportunity for the Court to broaden the strict territorial approach, as demonstrated with the adoption of the Bankovic case.

European Court of Human Rights' jurisdiction

Judges are affronted with the fact that — committed by the authorities of a European State — the possible violations might have taken place in the context of an armed conflict outside of the European continent. However, the general rule of the jurisdiction of the ECHR is based on territoriality.

To clarify this, in the Bankovic case, the Court recognised that in exceptional circumstances, a Contracting State can be held responsible for actions performed abroad or actions that produced effects abroad. The two main sources of extraterritorial jurisdiction found in the ECtHR jurisprudence are connected to effective control over a foreign territory or over an individual. More specifically, the ECtHR has recognised that these exceptional circumstances include cases of foreign diplomats that exert sufficient influence and authority to control others (Al-Skeini and Others v. the United Kingdom, 2011) and situations where agents of a Contracting Party exercise authority over an individual outside of their sovereign territory (Al-

Skeini and Others v. the United Kingdom, 2011).

Furthermore, the State's responsibility for an individual does not depend on exercising control over the territory where the individual is located. Instead, the obligation and responsibility arise from the State's actions or authority that affect the individual, regardless of the individual's geographic location. The concept of effective control over a territory is applicable to cases of legal or illegal military action (Al-Skeini and Others v. the United Kingdom, 2011). It implies that when a Contracting Party establishes a dominant position of a local authority, with the support of its military or by subordinating the local administration, it is required to secure the rights and freedoms from the Convention on this territory (Al-Skeini and Others v. the United Kingdom, 2011). To assess the existence of effective control over an area, the Court can use the strength of the military presence in that area and the overall subordination of the local population (Al-Skeini and Others v. the United Kingdom, 2011). Additionally, a Contracting State can be invited by another to assume de facto authority over parts of its territory, thereby acting as the public authority of that region. This arrangement would place responsibility on the Contracting State for its actions in the governed area (Al-Skeini and Others v. the United Kingdom, 2011). In such cases the responsibility of human rights violations is attributed to the State that exercises the factual control over the territory, rather than to the official sovereign of the territory.

Application of IHL

The system of IHL was introduced to regulate the matters of war, hence its application in the context of an armed conflict. However, the exact circumstances under which IHL applies remain less well-defined. To mend this gap, a series of considerations dictate under what situations IHL applies, including International Armed Conflicts (IAC) and Non-International Armed Conflicts (NIACs).

Firstly, IHL covers all situations of IAC (Article 2 of the IV Geneva Convention, 1949). This encompasses all hostilities between two or more States that are parties to the Geneva Conventions (Article 2 of the IV Geneva Convention, 1949). It is not important how the conflict is perceived subjectively by the participants (Article 2 of the IV Geneva Convention, 1949). Furthermore, in cases of occupation, IHL applies even if the occupying forces meet no armed resistance.

Secondly, IHL also applies to cases of NIACs. These include conflicts between a State and an Organized Armed Group (OAG) or between two OAGs. However, only specific conflict situations qualify as a NIAC. Protests, looting or some cases of terrorism can result in a conflict between a group and the state or between two groups, but they will hardly amount

In order to separate the more severe conflicts from others, the International Criminal Tribunal for the former Yugoslavia introduced in the Tadic case a set of criteria that a situation must fulfil before being qualified as a NIAC. Firstly, the OAG participating in the conflict must be relatively well-organized (Prosecutor v. Tadic, 1995). This is assessed on a case-to-case basis and can be established based on things like permanent headquarters, a charter, a structure of command and the ability to launch coordinated attacks. Secondly, the conflict must reach sufficient intensity (Prosecutor v. Tadic, 1995). This can be assessed by the number of victims, especially civilians, the kind of weapons used and the duration of the fighting. In such cases, the applicable law will be the Common Article 3 and the CIHL.

Furthermore, Additional Protocol II provides rules specifically for a conflict between a Contracting Party and an OAG, that controls part of the State's territory. It is perceived as a supplement to the protection granted by the Common Article 3. It is, however, essential to remember that it does not include the wars of independence, which are seen as IACs.

3. Case law analysis

Al-Jedda v. the United Kingdom – Interpreting IHL obligations

The case of Al-Jedda v. the United Kingdom dealt with the detention of a dual national of Iraq and the UK. Hilal Abdul-Razzaq Ali Al-Jedda was detained in 2004 after traveling to Baghdad from the UK and held in detention without criminal charges. Al-Jedda was suspected by the British government of involvement with a terrorist organisation. More specifically, he was accused of participating in the recruitment of terrorists and smuggling weapons. Following his release, he brought a case against the UK for the violation of Article 5 of the ECHR for his detention.

In the case at hand, the government of the United Kingdom has tried to diminish its responsibility by arguing that the State was obligated to detain the individual under a United Nations Security Council Resolution (Al-Jedda v. the United Kingdom, 2011). This obligation vis-à-vis the United Nations Charter clashed with their obligations towards the ECHR, and, as a result of the primacy clause from the Charter of United Nations found in Article 103 (UN Charter, 1945), the ECHR obligations were disapplied (Al-Jedda v. the United Kingdom, 2011). The Court failed, however, to find any evidence supporting the existence of this obligation in the Resolution nor any subsequent communications from the Security Council (Al-Jedda v. the United Kingdom, 2011). Furthermore, judges then examined whether any humanitarian provisions would result in an obligation for the United Kingdom government to detain the individual. The two instruments that the ECtHR primarily focused on were the Hague Regulations of 1907 and the Fourth Geneva Convention, as these instruments contain the

rules and obligations of an occupying power. After analysing the relevant IHL dealing with detention, the Court found that no obligation can be derived from it that would disapply the requirements contained in Article 5 of the ECHR (*Al-Jedda v. the United Kingdom*, 2011). Therefore, it was concluded that the requirements stemming from the European Convention were continuously binding for the UK (*Al-Jedda v. the United Kingdom*, 2011).

Since the ECHR rules on detention were applicable in the case, the Court found that the prolonged detention indeed violated Article 5 of the ECHR, since the UK's government did not intend to bring criminal charges against the detainee (*Al-Jedda v. the United Kingdom*, 2011).

Hassan v. the United Kingdom – Enforcing human rights protection during an armed conflict

The judgment of the European Court of Human Rights in the *Hassan v. the United Kingdom* case gives another important insight into the relationship between human rights and IHL. The case concerned the legality of the detention of an Iraqi civilian by the armed forces of the United Kingdom. Although, the British Army came to his house looking to arrest his brother, it was Tarek Hassan who was arrested in the end. He was detained only for a few days, but the circumstances of his release are not certain, and a few months after his initial arrest, his body was found. The applicant, Hassan's brother, alleged that the government of the United Kingdom violated its obligations vis-à-vis Articles 5, 3 and 2 of the ECHR for arbitrary detention and death. In the proceedings, the applicant argued that on top of arbitrary detention, the UK violated Hassan's right to life and the right to be free from torture, due to the uncertain circumstances of his release and the possible role that the UK played in his subsequent mistreatment and death. It was argued that the government had either directly participated in the death of Hassan or knowingly or negligently released him into a dangerous environment. Furthermore, the UK had, in the eyes of the applicant, failed to fulfil its obligation to investigate the death.

Like in the previous cases (*Al-Jedda*, 2011; *Al-Skeini*, 2011), the government of the UKs first argument was focused on the lack of jurisdiction of the ECtHR (*Hassan v. the United Kingdom*, 2014). Moreover, in the case at hand, they contended that in the time of an active armed conflict, IHL displaces the applicability of the rules prescribed by human rights (*Hassan v. the United Kingdom*, 2014) or at least is able to modify their interpretation due to the *lex specialis* principle (*Hassan v. the United Kingdom*, 2014).

This principle applies in cases in which there is a conflict between two bodies of law. It states that in such circumstances the more specific set of rules will prevail (*lex specialis* applies over *lex generalis*). In the context of the conflict between IHL and human rights it is,

however, generally accepted that the principle does not play a decisive role and the two apply concurrently (*Democratic Republic of Congo v. Uganda*, 2005). This was also the ECtHR's conclusion in the case at hand as the judges, recalled the two cases of the International Court of Justice, which dealt with the applicability of human rights within the context of an armed conflict and how they co-exist (*Hassan v. the United Kingdom*, 2014). The ECtHR recognised that during an armed conflict, some cases might be dealt only by IHL, some might only be dealt with by human rights and yet, some others might require the use of both bodies of law.

In light of this, the ECtHR accepted the argument of the UK that even in the absence of a formal derogation (as foreseen in Article 15 of the ECHR), the Court must consider IHL provisions when applying Article 5 of the ECHR (*Hassan v. the United Kingdom*, 2014). The Court, therefore, recognised the continuing applicability of the ECHR rules, while also acknowledging the special circumstances of an armed conflict. Subsequently, the Court went on to provide a more detailed analysis of the interplay between the two bodies of law regarding arbitrary detention. The judges stipulated that a detention measure can only conform with the ECHR obligations if it is lawful (*Hassan v. the United Kingdom*, 2014). The lawfulness required by the Court is twofold. Firstly, detention must be conducted according to the relevant IHL rules. Secondly, it also must not violate the fundamental purpose of Article 5 of the ECHR and, thus, be free from any arbitrariness (*Hassan v. the United Kingdom*, 2014).

In the case at hand, the Court found that the detention was conducted in accordance with the rules prescribed by the IHL and was not arbitrary. Therefore, it was concluded that no violation of Article 5 took place (*Hassan v. the United Kingdom*, 2014).

Conclusion

IHL and human rights are both part of International Law. While human rights apply continuously, IHL is only applicable during a time of armed conflict. There are, however, clear links between the two as both bodies of law aim to protect the rights of individuals. During a time of conflict, the two can apply concurrently. This article has explored the different perspective that explain the intricate relationship between human rights and IHL. On the opposing side were the more radical separatist and integrationist ideas, which either favoured a complete separation of the two or perceived one as a mere part of another. Between the two was the complementary idea which entailed that while the two bodies of law were separate, they were meant to work together to provide the highest level of protection for individuals.

In recent years, the European Court of Human Rights has showcased its jurisprudence and its importance to the development of IHL. The 2003 invasion of Iraq resulted in several European States assuming the administration over parts of Iraq's territory. In line with the ECtHR interpretation of extraterritoriality, the military intervention and the subsequent control over the local administration ensued the extension of the ECtHR's jurisdiction over these territories. This created an environment where the European human rights protection system met with humanitarian law. The increasing role of ECtHR in IHL jurisprudence is a direct result of that operation. This article has examined two legal case studies (Hassan case and the Al-Jedda case) that exemplify these developments. The judges, having analysed the relevant provisions of the IHL and the previous judgments of the ICJ found that, in the absence of a legal derogation, no other circumstances can prevent the applicability of human rights during an armed conflict. Furthermore, the Court has found that the IHL and human rights can complement each other when granting protection to individual actors, as showcased by the case of legality of detention under both IHL and the ECHR.

In conclusion, the analysis of these aforementioned cases showcases how human rights bodies, like the European Court of Human Rights, play an important role in the interpretation and enforcement of IHL. Simultaneously, the proceedings also provided an insight into the relationship between the two bodies of law and how they complement each other during an armed conflict. Indeed, the relationship between the two is expected to continue to develop, with some scholars predicting that future jurisprudence will integrate IHL and human rights (Fortin, 2022). Yet, it remains uncertain when and to what extent such developments could take place, as well as which potential future conflicts could give rise to future jurisprudence that will shape the evolving relationship between human rights and IHL.

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