



Human rights in armed conflict and the jurisdiction of the ECtHR

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The recent armed conflict between Georgia and the Russian Federation has brought to prominence the applicability of human rights law to situations of armed conflict and the jurisdiction of the ECtHR over events occurring during hostilities.

The relationship between international human rights law and international humanitarian law (IHL) has long been controversial. IHL applies in situations of armed conflict. Although originally only applicable in situations of international armed conflict (wars between states), it has been gradually extended to cover internal armed conflicts (civil wars), although the rules applying in such situations are more rudimentary than the very detailed provisions applicable in international armed conflicts. As for

international human rights law, a more recently developed body of rules, it is clear that it applies in peacetime, but does it apply in times of war?

One answer was given by the International Court of Justice in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*. Faced with an argument that deaths resulting from the use of nuclear weapons would breach individuals' right to life, the Court concluded that:

"Whether a particular loss of life, through use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the [International] Covenant [of Civil and Political Rights], can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

In other words, a killing in wartime

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would only breach international human rights law if it breached IHL.

This answer, however, gives rise to further questions. International human rights courts are not courts of general jurisdiction. They are only empowered to determine cases by reference to their constitutive treaties. For example, Art. 34 of the ECHR provides that:

“The Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto...”

The Inter-American Commission on Human Rights established a practice of finding violations not only of the Inter-American Convention on Human Rights

but also of IHL conventions. However, in the *Las Palmeras* case,² the Inter-American Court of Human Rights held this practice outside of its jurisdiction. In that case, the Inter-American Commission had found that Colombia had violated the right to life enshrined in Art. 4 of the American Convention on Human Rights and in Common Art. 3 of the Geneva Conventions. The Inter-American Court, however, stated that whilst it was competent to interpret the Geneva Conventions whenever necessary to interpret a rule of the American Convention, it was not competent to apply those Conventions. IHL could only be applied indirectly.

The ECtHR has also been faced with numerous applications arising out of events in armed conflicts: from south-east Turkey and Chechnya in particular. However, in contrast to the American

Court of Human Rights, it has not applied IHL, even indirectly, to determine whether the ECHR has been breached. In *Ergi v Turkey*,³ the Court determined that the applicant's sister's death in cross-fire between Turkish security forces and PKK guerrillas was an unlawful killing by sole reference to Art. 2 of the ECHR. Similarly, in *Isayeva, Yusupova & Bazayeva v Russia*⁴ the ECtHR held deaths caused by the bombing of a civilian convoy by Russian military planes violations of the ECHR without referring to IHL, despite being invited to by Rights International, an NGO which intervened in the case.⁵

It is difficult to know the precise reasons why the ECtHR has taken this route. It may be that it has simply responded to the parties' pleadings. Applicants may not wish to rely on less favourable rules of IHL, as opposed

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to the ECHR. Respondent states are frequently unwilling to admit they are in situations of armed conflict, preferring to argue that they are simply undertaking “police actions” against “terrorists”. As already mentioned, the ECtHR may also consider that it is not entitled to make reference to IHL, although this has not stopped it referring to other human rights norms and decisions of human rights monitoring bodies elsewhere (see, for example, *Kalashnikov v Russia*,⁶ where the ECtHR relied on the views of the European Committee on the Prevention of Torture in deciding that the conditions of the applicant’s detention violated Art. 3).⁷

However, it is difficult to say that the ECtHR’s stance has disadvantaged applicants. Although IHL and international human rights law duplicate each other on some issues (such as with regard to torture, which is equally prohibited by both), IHL is generally more permissive. To take a particular pertinent example, whereas Art. 2 restricts killings by the State to situations of absolute necessity, IHL assesses the

issue by reference to the concept of proportionality. An attack giving rise to civilian casualties is unlawful in IHL only when it is directed against the civilian population and civilian objects, or causes damage to civilians which was disproportionate to the direct military advantage gained, or is indiscriminate because it uses indiscriminate methods or means of war or causes indiscriminate damage to the civilian population.

Consequently, the ECtHR has been willing to determine the legality of Contracting Parties’ conduct during armed conflicts, and to do so by reference to the ECHR rather than IHL (whether directly or indirectly). However, the ECtHR might nevertheless be prevented from adjudicating on such issues when the conflict is international in character and military activities take place outside a party’s territory. Art. 1 of the ECHR provides that: “The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms” defined in the ECHR. The extent of the parties’ obligations is therefore confined to persons within their “jurisdiction”. In *Bankovic v Belgium*,⁸ the ECtHR held that persons within the premises of Serbian television in Belgrade, who had

been killed or injured in the bombing of the building by NATO military planes during the 1999 Kosovo campaign, had not been within the jurisdiction of the respondent States. IHL, by contrast, has no such territorial limitations.

There are, however, two exceptions to this rule. First, even outside its territory, persons within a Contracting Party’s authority and control are within its jurisdiction for the purposes of the ECHR, as in *Issa v Turkey*,⁹ where the ECtHR held admissible a complaint about the killing of seven Kurdish men by Turkish forces operating in northern Iraq.¹⁰ Second, it is clear that when one Contracting Party occupies territory belonging to another, the population continues to benefit from the ECHR, as, in the Court’s view, otherwise there would be a vacuum in the system of human rights protection provided by the ECHR.¹¹

Applying these conclusions to the recent Georgia-Russian conflict, it would appear that the ECHR applies to the acts of both sides, regardless of whether the locus of their activities was in their own or the other’s territory.

1 (1996) ICJ Rep. 66, at para. 25.

2 Preliminary objections, judgment of 4 February 2000, Series C no. 66.

3 (No. 23818/94) 28/7/98, Reports 1998-IV.

4 (Nos. 57947/00, 57948/00 & 57949/00) 24/2/05.

5 Some of the wording used in the judgment mirrored IHL concepts. However, there was no

acknowledgement of this ‘borrowing’.

6 (No. 47095/99) 15/7/02, Reports 2002-VI.

7 The difference in treatment may arise from the fact that the ECPT is also a part of the Council of Europe’s systems for the protection of human rights.

8 (No. 52207/99) dec. 12/12/01.

9 (No. 31821/96) dec. 30/5/00.

10 Indeed, it may be that the benefits of the ECHR extend to everyone in territory under military occupation by a Contracting Party, but see the contrary view taken by the House of Lords in *Al-Skeini v Secretary of State for Defence* [2007] UKHL 26.

11 This has been the view of the ECtHR in a number of cases concerning the activities of Turkey in northern Cyprus: see, in particular, *Loizidou v Turkey* (No. 15318/89) 18/12/96, Reports 1996-VI; and *Cyprus v Turkey* (No. 25781/94) 10/5/01, Reports 2001-IV.