

HOSTILITIES UNDER INTERNATIONAL LAW

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The interrelation between International humanitarian law (IHL) and Human rights law has been questioned during the present era, particularly by authors and scholars who would like to strengthen the role of human rights law as a regulatory framework for the conduct of hostilities.¹ The practical difficulties of ensuring respect for IHL through the existing channels of enforcement have helped some authors to advocate and propose the direct application of Human rights law to the conduct of hostilities, and the enforcement of IHL through the international human rights machinery.² Although this approach cannot be underestimated, its potential is far more limited than it may appear in reality.

Human Rights Law and International Humanitarian Law

The enforcement of IHL through human rights bodies is already limited by the fact that a still substantial number of States are not party to any majority human rights treaties or have not accepted the jurisdiction of any human rights body. Even if one is prepared to regard human rights law as binding upon non-State actors, the jurisdiction of international human rights bodies could hardly be construed to extend beyond the conduct of States. While the provisions of human rights law on the use of lethal force against individuals, and on humane treatment, may arguably be interpreted to accommodate certain military operations, the large amount of devastation entailed by the conduct of hostilities in major armed conflicts simply exceeds the regulatory capacities of human rights law. It is therefore hard to see how human rights law could be used to regulate the destruction of private and public property in major military operations, to determine the possibility of damage to the environment and agricultural areas, and to provide special protection for cultural and religious sites, as well as for installations containing dangerous forces.

¹ Abresch, W. 'Human Rights Law of Internal Armed Conflict', p.741.

² Hampson, F.J. 'Using International Human Rights Machinery', p.119.

Furthermore, in small-scale operations, human rights law is not necessarily more protective than IHL. For instance, human rights law allows the use of reasonable force against anyone where this is necessary for a reasonable purpose. Similarly under IHL, an occupying power is prohibited from destroying civilian property, even against compensation, except where ‘imperatively demanded by the necessities of war’. Conversely, under human rights law, the destruction of property may be allowed for a whole series of public purposes, as long as adequate compensation is paid.³ When dealing with cases involving the conduct of hostilities, the Inter-American Commission on Human Rights has interpreted the content of human rights law by express reference to the rules and principles of IHL. The European Court of Human Rights, however, has dealt with such cases exclusively based on human rights law. It shall therefore be examined whether and, if so, to what extent the human rights standards developed by the European Court for the conduct of hostilities differ from those governing the conduct of hostilities under IHL.⁴ To add further, the complexity of this problem expands and becomes more serious when States claim to be engaged in counter-terrorism or openly resort to the method of hostilities, thereby arguing that the targeted individuals are legitimate military objectives in an armed conflict.

Incidence of hostilities and areas of concern

In practice, it is not always clear whether the threshold requirements of ‘armed conflict’ and of ‘hostilities’ are fulfilled. For instance, as the Israeli Supreme Court rightly observed, the Israeli State policy of hostilities clearly is related to a situation of armed conflict between Israel and Palestinian armed groups. Contrary to what the Court appears to assume, however, it does not necessarily follow that every hostility carried out as part of this policy is also governed by the normative paradigm of hostilities. Particularly where the targeted victim does not qualify as a legitimate military objective or where such qualification is doubtful, the lawfulness of the operation depends on compliance with the law enforcement paradigm. It was indeed unfortunate that the Israeli Supreme Court missed this opportunity to clarify the delicate interrelation between the normative paradigms of law enforcement and of hostilities.⁵

³ Melzer, N. ‘Targeted Killing in International Law’ pp.383-384.

⁴ Ibid, p384.

⁵ Ibid, p.396.

The issue can also be further elaborated with the help of few cases. In the case of Abu Musab al-Zarqawi (United States/Iraq, 2006)⁶ - the leader of the terrorist group al-Qaida in Iraq was killed in an airstrike by US forces. Al-Zarqawi was killed along with seven other alleged militants when US warplanes dropped two 500-pounds bombs on an 'isolated safe house' outside the town of Baqubah, north of Baghdad. At the time of the attack, the house in question was surrounded by US and Iraqi forces, but according to US Defense Secretary, it was deemed impossible in the prevailing circumstances to try to capture al-Zarqawi without running the risk of letting him escape. In another case, of Qaeda Senyan al-Harithi (United States/Yemen, 2002),⁷ in the early morning of 3 November 2002, six suspected al-Qaida members were killed on a desert road in Yemen when a missile fired from an unmanned aerial vehicle operated by the CIA struck the car they were travelling in. Among those killed was Ali Qaed Senyan al-Harithi, suspected of masterminding the attack on the warships in October 2000. It appears that the attack was carried out with the agreement of the Yemeni Government. Although the United States had its involvement in this attack, it never publicly acknowledged responsibility for the attack.

Nils Melzer elaborately describes the conditions and modalities imposed by the normative paradigm of hostilities, which give rise to four main areas of concern. "Firstly, in order to avoid States circumventing the strict standards imposed by the law enforcement paradigm on the use of lethal force, there must be absolute clarity as to when a particular operation of targeted killing can legitimately be conducted under the paradigm of hostilities. The second area of concern pertains to the operational compliance of targeted killings with the fundamental logic and premises underlying the conduct of hostilities. The third area of concern pertains to the proportionality of incidental death, injury and destruction inflicted on protected persons and objects. The fourth area of concern pertains to the standards of precaution that must be expected from States resorting to targeted killing as a method of conducting hostilities."⁸

⁶ See The Short, Violent Life of Abu Musab al-Zarqawi, <https://www.theatlantic.com/magazine/archive/2006/07/the-short-violent-life-of-abu-musab-al-zarqawi/304983/> (accessed on 26 July 2018); see Peter Chambers, Abu Musab Al Zarqawi: The Making and Unmaking of an American Monster (in Baghdad) *Alternatives: Global, Local, Political* Vol. 37, No. 1 (February 2012), pp. 30-51.

⁷ *Supra* note 5 p.439.

⁸ *Ibid*, p. 428.

Application of harmonious approach

Some rights may be absolutely a subject matter of human rights law and some that of the international humanitarian law. Scholars always recommend the application of both these branches of international law. However, the IHL represents that the specific law should prevail over the general law. The Inter American Commission of Human Rights in the Conrad case followed this approach.⁹ Further, the International Commission of Inquiry on Darfur to the United Nations Secretary-General has observed that both these branches of International Law aim to protect human life and dignity, prohibit discrimination and provide protection against torture or other cruel, inhuman and degrading treatment. They both seek to guarantee safeguards for persons subject to criminal justice proceedings, and to ensure basic rights to health, food and housing. They also include the provisions for the protection of women, children and displaced persons. The difference lies in that whilst human rights law protects the individual at all times, international humanitarian law is the *lex specialis*, which applies only in situations of, armed conflict.¹⁰ The Human Rights Committee however adopts a harmonious and complementary approach.¹¹ As per this approach international human rights law and international humanitarian law are two branches of law that have a common goal of protecting persons, they should be harmonized and interpreted in such a way that they complement and supplement each other. In some cases, international humanitarian law will specify the extent rules and their interpretation, and in other cases, the international human rights law, depending on the circumstances of each case.

Almost in every society, hostilities carried out either within or outside the ambit of legal order possess criminal tendencies. The risk lies much less in the methods adopted rather than in the myths and misconceptions, which entangle it. The direct application of human rights law and international humanitarian law to the conduct of hostilities does not support the rules and principles of law enforcement into the conduct of hostilities but instead, factual occurrence of

⁹ See http://en.wikipedia.org/wiki/Black_v._United_States

¹⁰ See [Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General](#) (25 January 2005), at § 143
http://www.un.org/News/dh/sudan/com_inq_darfur.pdf (accessed on 24 July, 2018).

¹¹ See UN Human Rights Committee, *General Comment No. 31*, CCPR/C/21/Rev.1/Add.13 (26 May 2004), at p.11.

hostilities requires a construction of human rights law and international humanitarian law depending on the circumstances of each individual case.

