Problems of Correlation between IHL and IHRL in the Context of territorial disputes

Martirosyan Lilit G.
Russian-Armenian University
Faculty of International and European Law, PhD student (Yerevan, RA)
lil.martirosyan23@gmail.com

UDC 341/341.3
Keywords: international law. Human rights, International law of armed conflicts, International Court of Justice, correlation

Մարդու իրավունքների և Միջազգային մարդասիրական իրավունքի հարաբերակցության հիմնախնդիրները տարածքային վեճերի համատեքստում

Մարտիրոսյան Լիլիթ Գ.
Հայ-Ռուսական (Սլավոնական)համալսարանի ասպիրանտ,
Միջազգային և Եվրոպական իրավունքի ամբիոն (Երևան, ՀՀ)
lil.martirosyan23@gmail.com

Ամփոփագիր. Ժամանակակից միջազգային իրավունքում բոլոր վեճերը պետք է լուծվեն խաղաղ ճանապարհով: Թեև 21-րդ դարում ուժի կիրառումն անընդունելի և արգելված է, այնուամենայնիվ, շատ հաճախ տարածքային վեճերը վերածվում են զինված բախումների:
Մարդու իրավունքների միջազգային իրավունքը հաճախ կենտրոնացել է այն հարցի վրա, թե արդյոք մարդու իրավունքների օրենքը շարունակում է կիրառվել զինված հակամարտությունների ժամանակ, և եթե այո, ապա ինչպես կարող են այս երկու իրավունքի մարմինները լրացնել միմյանց: Ընթացիկ հոդվածը ներկայացնում է ՄԻՀ-ի և ՄԻՄԻ-ի միջև փոխհարաբերությունների հիմնական խնդրահարույց կողմերի վերլուծությունը: Այս հարցը մեծ մասամբ քննարկվել է մասնագետների շրջանում, և այս թեմայի շուրջ քննարկումները դեռևս հանգուցալուծման չեն եկել: Արդարադատության միջազգային դատարանը մի քանի անգամ վերլուծել է փոխհարաբերությունները
Այս հոդվածում բարձրացված խնդիրները կարելի է բաժանել հետևյալ հարցերի համաձայն.
1. ՄԻԴ-ի դիրքորոշումը ՄԻՀ-ի և ՄԻՄԻ-ի միջև հարաբերությունների վերաբերյալ
2. Զինված հակամարտությունների ժամանակ ՄԻՄԻ-ի կիրառման շրջանակը
3. ILHR-ի և IHL-ի կիրառումը, այսպես կոչված, ահաբեկչության դեմ պատերազմի ժամանակ
Այս կետերից յուրաքանչյուրն ունի իր խնդիրներն ու հարցերը, որոնց պետք է պատասխանել:
Հանգուցաբառեր՝ միջազգային իրավունք. մարդու իրավունքներ, Զինված ընդհարումների միջազգային իրավունք, Արդարադատության միջազգային դատարան, հարաբերակցություն

Проблемы соотношения МГП и МППЧ в контексте территориальных споров

Мартиросян Лилит Г.
Российско-Армянский Университет,
Кафедра Международного и Европейского права, аспирант (Ереван, РА)

Аннотация. В современном международном праве все споры должны разрешаться мирным путем. Хотя применение силы недопустимо и запрещено в 21 веке, однако очень часто территориальные споры перерастают в вооруженные конфликты.
Международное право прав человека часто сосредоточено на вопросе о том, продолжает ли право прав человека применяться во время вооруженного конфликта, и если да, то на том, как эти два свода норм могут дополнять друг друга. В данной статье анализируются основные проблемные аспекты взаимоотношений между МГП и МППЧ. Этот вопрос широко обсуждается специалистами, и дискуссии на эту тему еще не завершились. Международный Суд неоднократно анализировал взаимосвязь.
Проблемы, поднятые в этой статье, можно разделить на следующий набор вопросов:
1. Позиция Международного суда относительно взаимоотношений между МГП и МППЧ
2. Сфера применения МЛПЧ во время вооруженного конфликта.
3. Применение МЛПЧ и МГП во время так называемой войны с терроризмом.
В каждом из этих пунктов есть свои проблемы и вопросы, на которые необходимо ответить.
Ключевые слова: международное право, права человека, Международное право вооруженных конфликтов, Международный Суд Правосудия, корреляция

There are lots of different points of view about the co-application between IHL and IHRL. Some scientists think that there is no interrelation between this two laws and each of them has its own field of

application. There is a widely held view that IHL is a low of wartime and the IHRL is a law of peacetime. While IHL regulates the conduct of hostilities and the protection of persons in situations of armed conflicts, International Human Rights law protects the individual from abuse or arbitrary exercise of power by State authorities. And scientists who support this position insist that there is no correlation between the discussed laws. Each of them has its own scope and time of application. The others admit that we are dealing with two independent bodies of law but they also point, that in lot of situations IHL and IHRL can be co-applicated. And here we have a problem, that is-how especially IHL and IHRL can be co-applicated? Which is the scope of interrelation between them? We can find the answers in decisions of ICJ, specifically, in *The Nuclear Weapon case, The Wall case and DRC v Uganda Case.*

1. In *The Nuclear Weapon case*, while giving an advisory opinion in 1996 a problem of applicable law had risen. In par. 25 Court stated*: "the protection of the International Covenant of Civil and Political Rights does not cease in times of war.... 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* [**3**].

From the wording of text emanate that ICJ, when giving an advisory opinion, observed IHL as *lex specialis* when it comes to right to life during armed conflicts.

2. *In The Wall case* ICJ proposed that there are three options when considering the parallel application of the two fields. The Court stated: "*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. 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."* [**1**].

As we can see The Court again mentioned the maxim *Lex specialis* but for this time didn't mean it for only right to life. The statement considered application of all rules of IHL *as lex specialis* during armed conflicts.

3. *In DRC v UGANDA case ICJ* stated the same as it did in The Wall case, but completely abandoned the theory of *lex specialis* [**2**].

The position in this case is reasonable. Theory of *lex specialis* had risen lots of discussions and has lots of problems. First of all many scientists denied the concept of prevailing branch of law in one system of law. As it is widely known, international law is a horizontal system. International Humanitarian Law and International Human Rights Law are two equal bodies of law. They think that even ICJ can't state that IHL is *lex specialis* against IHRL.

And another question that we see is which maxim of law The Court meant by *saying Lex specialis? Lex specialis derogate Legi generali or lex specialis complemente legi generali*? In the first version we understand that specific law perevails over general law. In the second one - the specific law compliments the general one. Following the examination of the two Advisory Opinions *(the Nuclear Weapon* and *The Wall*), it has been asserted that IHL is lex specialis Complementary and not derogatory of Human Rights Law. The propose of using the concept of *lex specialis* by the Court was harmonization of co-application of two fields of law. A theoretical model for the parallel application of IHL and IHRL must be more specific and concrete to ensure legal certainty, lot more legal certainty then the theory of *lex specialis* as to prohibit the potential manipulation of law.

So, we understood that the applicability of Human Rights law does not cease in times of armed conflicts. But we can't say that IHL and IHRL have the same scope of application. The most serious difficulty that must be controlled lies in the question of whether there are not after all limitations to the scope of applicability of human rights law and whether it applies to all the situations of armed conflicts. This question revolves largely around the issue of extraterritorial applicability of human rights obligations. The problem of extraterritorial obligations is primarily of relevance to international armed conflict since it is in such situations that state is likely to be operating outside its borders and the questions are raised as to whether human rights obligations can extend to actions of state forces outside the states recognized borders even after excepting that human rights law has not disappeared with the outbreak of conflict. While the personal, material and territorial applicability of IHL essentially depends on the existence of a nexus with an armed conflict, the applicability of human rights protections depends on whether the individual concerned is within the jurisdiction of the state involved [**4**]. For example, during an international armed conflict, IHL applies not only in the territories of the belligerent States, but essentially wherever their armed forces meet, including the territory of third State, international airspace, and even cyberspace. According to the prevailing interpretation human rights law applies, when individuals find themselves within territory controlled by a State, including occupied territories

(territorial jurisdiction), or where a State exercise effective control, most commonly physical custody, over individuals outside its territorial jurisdiction (personal jurisdiction). The International Court of Justice, The Human Rights Committee and states are of the opinion that Human Rights law applies extraterritorially, within its jurisdiction, including times of occupation.

One of the main areas of difficulty with regard to joint applicability – that of extraterritorial applicability of human right obligations – is much less of an obstacle in the case of non-international armed conflicts, where the conflict is taking place within the territory of the state. The Fact that IHL treaty law dealing with non-international armed conflicts is comparatively sparse points towards use of Human rights law to assist in the regulation of conduct during such conflicts. The few existing treaty rule can be compared and likened to non-derogable human rights, and where IHL treaties are silent, human rights law might be offered as an answer. For example [**4**]. Unlike the IHL rules on international armed conflicts, the treaty rules for international conflicts make no mention of a legal status of combatants , persons who may participate in the hostilities and can be lawfully targeted. Whereas the targeting of civilians is prohibited, it is unclear how to classify members of armed groups and consequently determine when they can be targeted. In international armed conflicts the reasoning behind use of the relevant IHL rules as *lex specialis* when faced with a potential violation of the human rights law obligations to protect the right to life is fairly obvious. A combatant lawfully target another combatant, and this should not be regarded as an arbitrary or unlawful killing. While the dividing line between combatant and civilian might not always be one hundred per cent clear in international armed conflicts, it is a distinction that can be maintained at most times. Not so is the situation in non-international armed conflicts, in which this distinction is not as readily visible, neither on the ground nor in the law. The said can be a reason to say that human rights law standards should be the ones to prevail during non-international armed conflicts. So it is in the case of so-called "war against terrorism." There can be two possible situations: terrorism which became an international armed conflict and terrorism which became a non-international armed conflict. The scope and level of violence required in order for a conflict to be regarded as non-international conflict has never been clearly defied. If a State party claims that the so-called war against terrorism is a non-international armed conflict a problem of status of the participants is raising. State were and still are unwilling to grand a status of combatants to insurgents and other non-state actors who take part in non- international armed conflicts, as doing so would not only afford them an element of legitimacy, but would mean that that they enjoy the two privileges of combatants – Immunity from criminal liability for fighting and prisoner - of - war status. It therefore seems almost self-evident that in non-international armed conflicts, including the so called "war against terrorism", there are "combatants, who, as opposed to civilians, may legitimately be targeted by the other side, they can be attacked by the other party of the conflict. As opposed to international armed conflicts, in which combatants are required to have a 'fixed distinctive sign recognizable at a distance', in non-international armed conflicts, including the so-called war against terrorism, no such a demand exists. And can the opposing party to the conflict be required to fight against the participants to an armed or terrorist group only when they are actually fighting? The answer is 'no'. While he armed conflict continues members of the terrorist group who have taken an active part in hostilities may be targeted, and not only in case of having an active participation. One of the obvious difficulties in this approach is the sort of evidence required to establish an active role. In many cases such evidence will be based on intelligence information. But how can we be sure that the targeted persons are indeed real terrorists? There will always be a possibility that the targeted person is not a real terrorist and killing him was not proportional and gave no military advantage to the State party. In discussed situations applying Human rights standards can partially solve the problem. The alleged terrorist may be detained and given to a fair trial, as proposed by International Human rights law.

So, the position in the current article is, that not only IHRL does not cease its applicability during armed conflicts, it must also prevail during non-international armed conflicts, including so-called 'war against terrorism', because the uncertainty of the status of persons who have direct participation in hostilities gives a state party carte blanch every time they should decide over the lawfulness of targeting. The object of the attack has to be to prevent a concrete danger which could not reasonably be prevented by other means and that was highly likely to be realized if immediate action was not taken. A state cannot avoid its obligations to respect and ensure the right to life anytime that it is possible.

References:

1. *Advisory Opinion Concerning Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, International Court of Justice (ICJ), 9 July 2004
2. Armed Activities on the Territory of the Congo, Congo, the Democratic Republic of the v Uganda, Judgment, Merits, ICJ GL No 116, [2005] ICJ Rep 168, ICGJ 31 (ICJ 2005), 19th December 2005, International Court of Justice [ICJ]
3. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996
4. **Noam Lubell**, Challenges in applying human rights law to armed confl ict, Volume 87 Number 860 December 2005

Сдана/Հանձնվել է՝ 06.12.2021
Рецензирована/Գրախոսվել է՝ 10.12.2021
Принята/Ընդունվել է՝ 13.12.2021