Chapter 18

The Effective Convergence between IHL and International Human Rights Law in Guaranteeing the Right to Life in Situations of “Volatile Occupation”

1. Introduction

One of the most intractable questions for the parallel application of international human rights law (IHRL) and IHL in occupied territories is the extent to which the standards fleshed out in the jurisprudence of the monitoring bodies of human rights treaties concerning the right to life can be applied to conduct of hostilities that break out in occupied territories. This has been the subject of much of academic debate in relation to so-called targeted killing. Targeted killing is a commonly used concept that often refers to lethal force used against an individual person. The experts who gathered to discuss a multitude of implications of this issue at the University Centre of International Humanitarian Law (UCIHL), Geneva, in 2005 provided the following cogent definition:

A targeted killing is a lethal attack on a person that is not undertaken on the basis that the person concerned is a “combatant”, but rather where a state considers a particular individual to pose a serious threat as a result of his or her activities and decides to kill that person, even at a time when the individual is not engaging in hostile activities.¹

This pattern is often relied upon against an alleged, suspected, or actual terrorist, or against any other unprivileged belligerent in occupied territories. The modality of targeted killing often takes the form of aerial killing (at times by

way of drones). If this form of deploying lethal force is considered outside the framework of the rules of conduct of warfare under international humanitarian law (IHL), this amounts to an extra-judicial killing, which is clearly unlawful. The issue of aerial targeted killing is so intimately connected to issues of volatile occupied territories riddled with eruptions of fighting caused by resistance or other armed opposition groups, or by unprivileged belligerents such as terrorists. The intertwined nature of the regime of occupation and aerial killing is such that the combined syndrome provides a crucial touchstone for assessing the parallel application of international humanitarian law (IHL) and international human rights law (IHRL) with respect to the right to life.

Before undertaking detailed examinations, the fundamental assumptions of this chapter need to be highlighted. It is proposed that in occupied territories, the human rights standards applicable in respect of law enforcement operations should be the default rules, unless and to the extent that these are modified by the IHL rules on conduct of hostilities. The International Court of Justice, the European Court of Human Rights and many monitoring bodies of IHRL have recognised the parallel application of IHL and IHRL in military occupations. Even in case occupying powers are confronted with demonstrators or riots in occupied territories, it is the measure of arrest and trial that should be preferred. Indeed, the existence of Article 68 GCIV suggests that the process of arrest, capture, prosecution and punishment pursuant to the law enforcement model should be chosen to deal with issues of maintenance of public order and security within the meaning of Article 43 of the 1907 Hague Regulations and Article 64 GCIV. On the other hand, where the armed forces of the occupied State or members of independent groups fulfilling the conditions for prisoners of war under Article 4A(2) GCIII are conducting combat operations in the occupied territory, it is generally the IHL rules on conduct of hostilities rather than the IHRL rules on law enforcement that govern the occupying power’s response. However, a fundamental problem is that the IHL treaties that deal

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2 See CUDIH, ibid., at 19, 22–23.
4 ECtHR, Loizidou v. Turkey, Preliminary Objections, Judgment of 23 March 1995, paras. 63–64.
5 HRC, General Comment 31, para. 10; and its Concluding Observations on the Second Periodic Report on Israel, 21 August 2003, para. 11.
6 CUDIH, supra n. 1, at 26 (all experts agreed on this issue); and Doswald-Beck (2006) supra n. 1, at 890.
7 CUDIH, ibid., at 22–23.
8 Ibid., at 24.