Chapter XIV

Protection of Children in International Humanitarian Law and Human Rights Law

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To kill the big rats, you have to kill the little rats
Radio Mille Collines, Rwanda, April 1994

1. Introduction

Children are the most vulnerable part of the population. This is true both in time of war and in time of peace. In time of armed conflict children are exposed to death, destruction, evacuation, separation from home and parents, starvation, physical and psychological trauma. Being a vulnerable group, they need special measures of protection in war, in addition to the measures for adult civilians. As most wars today are not between armies defending territorial borders, but intra-state conflicts, children among other civilians suffer disproportionately. In time of peace children also face enormous risks and become frequent victims of terrorism, organized crime, human trafficking, sexual abuse, prostitution, pornography etc. They have to endure also the harsh consequences of poverty, infectious diseases, environmental pollution, earthquakes, tsunami, floods and similar disasters.

The international humanitarian law (IHL) has gradually developed specific measures of protection of children in time of armed conflict. In parallel, the human rights law (HRL) has built up on the rights of the child, applicable in all time. The landmark 1989 Convention of the Rights of the Child (CRC)\(^1\) was negotiated, signed and ratified in a record-breaking time. Regional human rights law regimes have also continuously elaborated a child-rights approach. In another advancement, the United Nations principal organs – General Assembly, Security Council, Secretary-General (and his Special Representative for Children) – adopted and enforced various measures, among them the reduction and elimination

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of recruitment and use of child soldiers. Most recently the recruitment of child soldiers and other crimes against children have gradually been criminalized in international law and prosecuted in international criminal tribunals.\(^2\)

This chapter will present and compare the child-related developments in the codification and implementation of IHL and HRL. It will show similarities and controversies in the advancement of the child agenda in the two branches of international law, and demonstrate opportunities for mutual interplay. IHL and HRL historically originated through different concerns, forums and conventions, but have one major commonality – they both deal with the protection of victims. Still they are different: IHL applies in time of armed conflict; HRL applies in all times. IHL is a contract between states and regulates how to fight wars; HRL is a contract between states and citizens how to live in peace. IHL protects the civilians (children included) of the enemy state; HRL protects a state’s own nationals. Finally, IHL requires individual responsibility of perpetrators, HRL demands states’ responsibility for violations against individuals. In IHL states (prosecutors) sue individuals; in HRL individuals sue states.

The two branches, however, are not entirely separate circles. The boundary between “armed conflict” and “peace” became slimmer today in the age of terrorism, domestication of armed conflict, and increased role of non-state actors. Some human rights are restricted during armed conflict. And some crimes against humanity are no longer necessarily connected to an armed conflict, and can be prosecuted without the need to establish their nexus to war.

The chapter will explore the connections between IHL and HRL with regard to children and present both the positive developments towards complementarity and the still existing gaps. The codification of the protection of children is particularly illustrative of a convergence between IHL and HRL. HRL continuously evolved to be regarded as an instrument for universal protection of children both in time of war and peacetime. The law on the rights of the child, such as the 1989 Convention (Articles 38 and 39), or the African Charter on the Rights and Welfare of the Child (Article 22)\(^3\) encompass obligations to respect the rules of IHL. As a result, these texts can be regarded as instruments of both IHL and HRL. The codification of IHL and HRL however was not followed by parallel implementation. The enforcement mechanisms available within IHL appear stronger than those within HRL, because IHL has a longer history and its violations by their very nature were taken more seriously and prosecuted. And on the opposite, although “softer” in

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