CONSEQUENCES OF THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW IN THE STRUGGLE AGAINST TERRORISM*

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Summary: Terrorism is a very ancient and multifaceted phenomenon. The International Community has been challenged by terrorism since the WW I and in particular since 1960s and 1970s. However, September 11, 2001 made a turning point in the struggle against terrorism, called also wrongly war on terror. This article discusses three points: I. Applicability and application of IHL in the struggle against terrorism; II. Full application of IHL in the struggle against terrorism, based on the assumption that Humanitarian law prohibits acts of terrorism, primarily protects victims and also takes into account military necessity; and III. Joint application of IHL and IHRL in the struggle against terrorism.

Résumé: Le terrorisme est un phénomène ancien qui présente de multiples facettes. La Communauté internationale a été confrontée au terrorisme depuis la Première Guerre Mondiale et plus particulièrement dans les années 60-70. Mais le 11 septembre 2001 a marqué un tournant dans la lutte contre le terrorisme, qualifiée à tort de guerre contre le terrorisme. Le présent article développe trois points : l'applicabilité et l'application du droit humanitaire dans la lutte contre le terrorisme qui doivent être fermement réaffirmées ; la pleine application du droit humanitaire dans cette lutte, étant entendu que le droit humanitaire interdit les actes de terrorisme et protège à titre principal les victimes, tout en tenant compte de la nécessité militaire ; enfin l'application conjointe du droit humanitaire et des droits de l'homme dans la lutte contre le terrorisme, la nécessité humanitaire ne devant pas céder le pas devant la nécessité militaire et la raison d'Etat.

Resumé: Terorismus je dávný jev, který má různé aspekty. Mezinárodní společenství bylo konfrontováno s terorismem od 1. světové války a zvláště v 60. a 70. letech. Avšak 11. září 2001 znamenal obrat v boji proti terorismu, označovanému mylně jako válka proti terorismu. Tento článek rozvíjí tři aspekty: aplikovatelnost a aplikaci humanitárního práva v boji proti terorismu, jež musí být potvrzené; plné použití humanitárního práva v tomto boji s tím, že humanitární právo zakazuje akty terorismu a chrání oběti, přičemž však bere v úvahu vojenskou nezbytnost; a konečně souběžnou aplikaci humanitárního práva a lidských práv v boji proti terorismu, když humanitární imperativ nesmí ustoupit před vojenskou nezbytností a zájmem státu.

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Introduction

Terrorism is a very ancient and multifaceted phenomenon. World War I began with the assassination of Archduke Franz-Ferdinand in Sarajevo on 28 June 1914, well known in the Czech Republic and evoked by Jaroslav Hašek in his book The Good Soldier Švejk (*Dobrý voják Švejk*).[1] Just before World War II., in 1937, two Conventions were adopted on the prevention and repression of terrorism and on the establishment of an International Criminal Court. These conventions never entered in force but they still constitute important precedents. The League of Nations was very much concerned with the issue of terrorism after the murder of King Alexander of Yugoslavia in Marseille on 9 October 1934.[2]

In France we were confronted with individual terrorism as early as at the end of the nineteenth century and at the beginning of the twentieth century. In a later period, Algerians were classified by the French authorities as terrorists during the Liberation War. In Germany (Rote Armee Fraktion – RAF) and in Italy (Brigate Rosse) there were terrorist acts during the decades of the 1960s and 1970s and Turkey was also confronted with terrorist groups.

During the same period the international community was also concerned about terrorist acts committed in airplanes or in airports disrupting and endangering air traffic. The response was the adoption of several conventions for the punishment of terrorists. Many of these were based on the principle *aut judicare, aut dedere* (or *aut dedere, aut persequi* or *aut dedere, aut punire)*. This principle is an application of universal jurisdiction, but facts demonstrate that such a universal jurisdiction is not

[1] See T. Takács, «Le terrorisme international peut-il déclencher une guerre mondiale? (L'assassinat de François-Ferdinand à Sarajevo)», pp. 125-135, in Kovács (ed), *Terrorisme et droit international Terrorism and International Law*, European Integration Studies, Miskolc, volume 1, number 1 (2002), 156 p.

[2] P. Kovács, «Le grand précédent : la société des Nations et son action après l'attentat contre Alexandre, roi de Yougoslavie», pp. 135-144, in Kovács (ed), *Terrorisme et droit international Terrorism and International Law*, European Integration Studies, Miskolc, volume 1, number 1 (2002), 156 p.

sufficient to eradicate the phenomenon of terrorism because there are always new forms of terrorism.[3]

On the other hand, the United Nations discussed the issue of terrorism but no agreement was reached, not even on the definition of terrorism, because of the divisions existing at that time worldwide between East and West and between North and South.[4]

In the recent times, the main event which occurred was the attack on the twin towers of the World Trade Center in New York on 11 September 2001. The American Government believes that there is a "war on terror" but seems to be denying that IHL (International Humanitarian Law) is applicable.

In our short presentation, we will discuss three points. The first is the question of whether IHL applies to such cases (I). This raises very difficult issues. If the answer is affirmative, the consequences are quite clear and it would not in principle create difficulties: on the one hand, IHL rules, comprising both treaty and customary rules apply (II), but on the other hand, IHL application does not prevent IHRL (International human rights law (III) from being applied in the meantime.

I. Applicability and application of IHL in the struggle against terrorism

As was already mentioned, the US Government refuses to accept the applicability of IHL to what it nevertheless calls a "war against terrorism". In fact it would be more appropriate to use the more precise term of "struggle against terrorism".[5] In any case, there are two issues which need to be resolved. The first one consists of determining whether the armed conflict is an international armed conflict (IAC) or a non-international armed conflict (NIAC). In a sense, the definition of an international armed conflict was enlarged and made broader with the First Protocol to the Geneva Conventions in 1977 because Wars of Liberation were included and qualified as international armed conflicts (Article 1, Paragraph 4, Protocol I). This was a great success for the Third World countries and it was also important because IHL had originally been created to be applied to international armed conflicts, meaning conflicts between states. But major progress was already achieved in 1949 with Article 3, common to the four Geneva Conventions, which constitutes a "mini Convention"

[3] P. Tavernier, «Compétence universelle et terrorisme», pp. 237-256, in Société française pour le droit international, Journée franco-allemande, *Les nouvelles menaces contre la paix et la sécurité internationales. New Threats to International Peace and Security,* Pedone : Paris, 2004, 297 p.

[4] P. Tavernier, «L'évolution de l'attitude des Nations Unies vis-à-vis du terrorisme», pp. 17-21, in H. Labayle (ed), *Terrorisme et opinion publique, Cahiers du CESDSI,* n° 9, Grenoble, 1989, 56 p. The definition of terrorism also raises difficulties in relation to humanitarian law : see Marco Sassóli and Lindy Rouillard, «La définition du terrorisme et le droit international humanitaire», *Revue québecoise de droit international (Hors-série)*, 2007, pp. 29-48.

[5] Alain Pellet published two short articles in the newspaper *Le Monde* on 21 September and 15 November 2001 and criticized the American point of view and the use of the word "war" in that situation. These articles were also published with the title "La terreur, la guerre, l'ONU –Que faire des Nations Unies ?", pp. 13-18, in Kovács (ed), *Terrorisme et droit international Terrorism and International Law*, European Integration Studies, Miskolc, volume 1, number 1 (2002), 156 p.

or a "small Convention inside the Conventions" and provides for some particularly important rules, minimum rules, applying to non-international armed conflicts. We can take the view that the common Article 3 condemns terrorism implicitly as it prohibits the taking of hostages (Article 3, Paragraph 1 b) and even "violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture" (Article 3, Paragraph 1 b), which encompasses many terrorist activities. Protocol II 1977 is quite clear and Article 4 (fundamental guarantees) explicitly mentions a prohibition of "acts of terrorism" (Paragraph 2 d) and adds "threats to commit any of the foregoing acts" (Paragraph 2 h). Article 13 on "Protection of the civilian population" provides that "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (Article 13, Paragraph 2 *in fine*). The prohibition provided for in Protocol II is absolute, without reciprocity and without any exemption.[6] In a sense, the provisions of IHL are more extensive than the provisions of IHRL (Article 4, ICPRC and Article 15 ECHR).

Though absolute, the prohibition is also limited. It only applies if civilians do not "take a direct part in hostilities" (Article 13, Paragraph 3: "Civilians shall enjoy the protection afforded by this Part, unless and for such time as they take a direct part in hostilities"). This limitation is temporary, but the interpretation of that clause is quite difficult and raises many problems. On 26 February 2009, the Assembly of the ICRC issued an "Interpretive Guidance on the notion of direct participation in hostilities under humanitarian law", after a long expert process conducted from 2003 to 2008.[7] This document clarifies the issues encountered and seems to be relevant as far as terrorism and terrorists are concerned.

The second limitation is included in Article 1, Paragraph 2 of the 1977 Second Protocol: "This Protocol shall not apply to situations of *internal disturbances* and *tensions*, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts". Such a rule raises controversial questions of interpretation.[8] What exactly constitutes the threshold for an armed conflict? It is a tricky task to answer such a question when terrorists and terrorism are involved. We have already mentioned the case of the Algerian Liberation War (1955-1962). At the beginning, the French Government took the view that the Algerian combatants were terrorists and that operations conducted against them were "police" operations and

[6] Y. Sandoz *et al.*, *Commentaire des Protocoles additionnels du 8 juin 1977 aux conventions de Genève du 12 août 1949,* Genève, CICR-Martinus Nijhoff Publishers, 1986, especially p. 1473 § 4777.

[7] That document is published in the *International Review of the Red Cross*, volume 90, number 872, December 2008. That issue is dedicated to direct participation in hostilities.

[8] See, A. Balguy-Gallois, *Droit international et protection de l'individu dans les situations de troubles intérieurs et de tensions internes,* thèse Université de Paris I (2003). The French National Advisory Commission on Human Rights adopted on 22 September 2005 an Opinion on respecting the fundamental rights of human beings in situations of internal disturbances and tensions [Commission nationale consultative des droits de l'Homme (CNCDH) : Avis sur le respect des droits fondamentaux de la personne humaine en situation de troubles intérieurs et tensions internes au regard du droit international] ; original French text and a shorter english text are available on the website of the Commission (www.cncdh.fr).

not "war" or "military" operations. The foregoing example is one of many examples. Ultimately, if the question of the applicability of IHL in the struggle against terrorism is resolved, we can affirm that all the rules of humanitarian law apply.

II. Full application of IHL in the struggle against terrorism

The full application of IHL in the struggle against terrorism means that all rules, whether treaty rules or customary rules, may be applied and are useful in such circumstances.

A. First of all, humanitarian law prohibits acts of terrorism.

Rule 2 of the ICRC Study (2005) on Customary International Humanitarian Law clearly stipulates that: "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (Rule 2). And the commentary immediately adds: "State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts".[9] That rule is contained in Article 52, Paragraph 2 of Additional Protocol I for International Armed Conflicts and also in Article 33 of the 4th Geneva Convention. As already mentioned, the same rule is applicable to non-international armed conflicts: Article 13, Paragraph 2 of Additional Protocol II and Article 4, Paragraph 2d of the same Protocol.

Furthermore, it is interesting to note that acts of terrorism are specified as war crimes in the Statute of International Criminal Tribunal for Rwanda and Special Court for Sierra Leone. The question of terrorism as a war crime was discussed before the International Criminal Tribunal for the former Yugoslavia and the indictments issued in some cases included charges of terrorising the civilian population in violation of the laws and customs of war: see *Dukic* Case, *Karadzic* and *Mladic* Case. Moreover in the *Galic* Case (5 December 2003) the Trial Chamber found the accused guilty of "acts of violence the primary purpose of which is to spread terror among the civilian population as set forth in Article 51 of the Additional Protocol as a violation of the laws or customs of war under Article 3 of the Statute of the Tribunal".[10]The Chamber takes the view that the "purpose" is sufficient even if such acts did not actually spread terror. This case-law could be useful for the ICC (International Criminal Court).

B. IHL primarily protects victims

The main aim of IHL has always been to protect the victims in armed conflicts and to provide them with assistance. This has been the case ever since Henry Dunant

[9] J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, volume I: rules, Cambridge-Geneva: ICRC-Cambridge University Press, 2005, LIII-621 p.

[10] ICTY, *Prosecutor v. Stanislav Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, § 769; see also §§ 97-98, 135-137. H. Ascensio and R. Maison, L'activité des juridictions pénales internationales (2003-2004), *Annuaire français de droit international*, 2004, pp. 416-468, especially pp. 448-449.

founded the Red-Cross movement after the battle of Solferino, 150 years ago. IHL protects the victims of terrorism, but in certain circumstances it also protects the terrorists themselves when they are "hors de combat". This problem was discussed particularly in relation to the issue of Guantanamo prisoners. The US Government took the position that terrorists, or presumed/supposed terrorists, are unlawful combatants. But such a category of so-called "unlawful combatants" does not exist in IHL.[11] The distinction between combatants and non- combatants is the main distinction in humanitarian law and there is no place for a third category. Rule 1 of the ICRC *Study* makes a clear distinction between civilians and combatants. Article 5 of the 3rd Geneva Convention of 1949 provides that: "Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention *until such time as their status has been determined by a competent tribunal*". That clause was clarified by Article 45 Protocol I (1977).

The same question was raised regarding places of detention in Afghanistan, particularly in Bagram. Though IHL primarily protects victims, it nevertheless takes into account military necessities.

C. IHL takes into account military necessity

There are many situations where military necessity can be invoked. For example, Rule 38 of the ICRC *Study* provides that each party to the conflict must respect cultural property "unless imperatively required by military necessity". A similar exception concerns the destruction or seizure of the property of an adversary (Rule 50) or the destruction of any part of the natural environment (Rule 43).

But one of the most interesting provisions is contained in Rule 129 B concerning the forced displacement of civilians for reasons related to an armed conflict. This clause specifies that "Parties to a non-international armed conflict may not order the displacement of the civilian population, in whole or in part, for reasons related to the conflict, unless the security of the civilians involved imperative military reasons so demand". In a so-called revolutionary war, and also in the struggle against terrorism, states often resort to such a military method to isolate civilians from terrorists. That was the case during the colonial war in Algeria (1955-1962) with the so-called "regroupement des villages" (regrouping of villages). The same process was conducted during the Vietnam war and also in Turkey in the Kurdish region. But military necessity cannot be an excuse for an "ethnic cleansing" policy, as it was in the context of the war in the former Yugoslavia.

We can therefore affirm that IHL establishes a fair balance between the protection of victims and military necessities.

[11] See P. Weckel, «Les „combattants irréguliers» en situation d'occupation militaire», pp. 215-232, in Christian Tomuschat, Evelyne Lagrange and Stefan Oeter (eds), *The Right to Life,* Brill, 2010.

Another point must be underlined, one concerning the interrelationships between IHL and IHRL.

III. Joint application of IHL and IHRL in the struggle against terrorism

It is often said that IHL is applicable in wartime or during an armed conflict and IHRL applies in peacetime. Moreover, IHL was developed and codified before IHRL. Humanitarian treaties and conventions were drafted and signed in Geneva and in The Hague at the end of the nineteenth century and at the beginning of the twentieth century. It is interesting to note that Turkey, as an Islamic power, took an active part in the Hague Conferences. In contrast, IHRL is more recent and was developed after World War II. In 1945 people believed that IHL and IHRL were two separate bodies of rules. But it became more and more evident that there are many links and interrelationships. The case-law of the International Criminal Tribunals (for the former Yugoslavia and for Rwanda) is quite interesting in that respect and the reasoning of the two tribunals is often based on IHL and IHRL.

The same is true for the struggle against terrorism. In general, the fact that IHL applies does not exclude the application of IHRL. In most cases, humanitarian rules and human rights law are very similar, but there are some differences. Sometimes human rights law provides more extensive protection, while in other situations it is humanitarian law that affords greater protection.

There are interesting developments concerning these issues in the ICRC *Study*, especially in Chapter 32 "Fundamental guarantees". The authors of the *Study* recall that "While it is the majority view that international human rights law only binds governments and not armed opposition groups, it is accepted that international humanitarian law binds both".[12] In a sense, we can conclude that IHL is more effective because it applies to both governments and non-state parties. But often the rules of human rights law are more precise and more developed through the case-law of international courts. That's why a joint application of IHL and IHRL is useful. Moreover, and significantly, recent United Nations' documents frequently combine Human Rights Law and Humanitarian Law. For example, in the Annual Report of the Special Representative of the Secretary-General for Children and Armed Conflict, published in July 2009, there is a chapter on "Terrorism and counter-terrorism and its impact on children" where both IHRL and IHL are mentioned: "Terrorist attacks disproportionately target civilians in hitherto sacrosanct locations, such as places of worship, schools and hospitals, market and other public spaces. Such indiscriminate attacks, when deliberately targeting civilians, are *grave abuses of human rights*. And when such attacks take place in the context of an armed conflict, they constitute *war crimes*".[13]

[12] Jean-Marie Henckaerts and Louise Doswald-Beck, *op. cit.*, p. 299.

[13] A/HRC/12/49, 30 July 2009, Annual report of the Special Representative of the Secretary-General for Children and Armed Conflict, Rhadhika Coomaraswamy, p. 12, § 41 et s.

Concerning the application of IHRL by non-state parties, I am more inclined to concur with the views of the minority, as expressed by Christian Tomuschat.[14] In my opinion, most of the fundamental guarantees are rules of *jus cogens* and must be applied by both governments and non-state actors.[15]

In short, we can say that governments and non-state actors must comply with IHL and IHRL rules. The struggle against terrorism does not provide an excuse for de-emphasizing "humanitarian necessity" to the benefit of "military necessity". "Kriegsraison" and "Raison d'Etat" must not supersede humanitarian requirements and obligations. We must be very cautious and vigilant in that respect.

[14] CH. Tomuschat, "The applicability of Human Rights Law to insurgent movements" in H. Fischer *et al*, *Crisis management and humanitarian protection,* Berliner Wissenschafts-Verlag, Berlin, 2004.

[15] See Yves Sandoz *et al.*, *op. cit.,* p. 1364, § 4429-4430. See also another viewpoint expressed by Sergio Jaramillo Caro, the Colombian Deputy-Minister of Defence, in an interview conducted by Toni Pfanner and Nils Melzer, *International Review of the Red Cross,* volume 90, number 872, December 2008, pp. 823-833.