Relationship between International Human Rights Law, Humanitarian Law and International Criminal Law

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International Human Rights (IHRL)/ International Humanitarian Law (IHL)/ International Criminal Law (ICL)

- Are branches of public international law.
- IHL is one of the oldest branches of IL.
- IHL - regulates the conduct of the parties to an armed conflict (conduct of hostilities) and the protection of categories of persons/ civilians and civilian objects.
- IHRL – provides for certain rights which accrue to individuals and groups vis-à-vis their government.
- ICL – blend of several legal disciplines, which differ as to their nature, values, goals, contents, methods, subjects and techniques (Bassiouni) – providing for individual criminal responsibility for serious crimes of international concern.

Main International Instruments

- ICCPR/ICESCR (1966)
- CERD (1965)
- CAT (1984)
- CEDAW (1979)
- CRC (1989)
- CMW (1990)
- CEED (2006)
- CRPD (2006)

- Geneva Conventions (GCs) of 1949
- Additional Protocols (AP I and AP II) of 1977

- Statutes of ad hoc tribunals and other international ized courts.
- ICC Statute (1998)

The Separate Development of IHRL and IHL

- The Universal Declaration of Human Rights of 1948 completely bypasses the question of respect for human rights in armed conflicts, while at the same time human rights were scarcely mentioned during the drafting of the 1949 Geneva Conventions.
- UN Human Rights Conference of Tehran in 1968 marked the beginning of a growing use by UN organs or agents of international humanitarian law rules and principles in their examination of the human rights situation in certain countries or in their thematic studies.
- UN Reports make use of both IHRL and IHL norms/standards.

Additional Protocol II – Acknowledgement of Applicability of IHRL

- The preamble to AP II to the 1949 GCs points to the close relationship between international humanitarian law and human rights:
- "*Recalling*… that **international instruments relating to human rights offer a basic protection to the human person**"; and
- "*Emphasizing* the **need to ensure** a **better protection for the victims of …armed conflicts**".

Overlapping???

- Certain recent treaties include provisions from both bodies of law. Examples *par exellence* are:
- The Convention on the Rights of the Child (Art. 38);
- Its Optional Protocol on the Participation of Children in Armed Conflict (increasing the age of compulsory recruitment into the armed forces to 18 years);
- The Rome Statute of the International Criminal Court.

CRC: Article 38

- 1. States Parties undertake to *respect and to ensure respect for rules of international humanitarian law* applicable to them in armed conflicts which are relevant to the child.
- 2. States Parties shall *take all **feasible measures*** to ensure that *persons* who have not attained the age of *fifteen years* do *not take a direct part in hostilities*.
- 3. States Parties shall *refrain from recruiting* any person who has not attained the age of *fifteen years into their armed forces*. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, States Parties shall endeavour to give priority to those who are oldest.
- 4. In accordance with their obligations under international humanitarian law to protect the civilian population in armed conflicts, *States Parties shall take all **feasible measures** to ensure protection and care of children who are affected by an armed conflict*.

Dual Nature of the Genocide Convention

- Article 1 reads:
- "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish."

IHRL and IHL: Certain Differences (1)

IHRL

- The concept of derogation, is recognized and incorporated in many IHRL instruments.
- IHRL instruments are comparatively simpler than IHL ones.
- IHRL instruments list a number of rights that can be claimed by individual persons against their own governmental authorities.

IHL

- No derogations allowed for under IHL.
- The similar concept represented under IHL by principle of military necessity, is in-built in relevant norms.
- IHL instruments list rules of behavior of parties to a conflict in relation to the conduct of hostilities and in relation to the treatment of specific categories of persons

Differences between IHRL and IHL (2)

IHRL

- IHRL instruments are agreed upon and offer protection also at a regional level through regional human rights treaty arrangements.
- IHRL monitoring mechanisms: Public monitoring (evaluation of State reports, special rapporteurs etc.)
- Plurality of monitoring and enforcement mechanisms

IHL

- IHL operates at a global level.
- ICRC: Confidential methods of monitoring take place of pride.
- AP I, Art. 90 establishes the International Fact-Finding Commission, which came into existence in 1991 (and has not yet been made use of).

IHRL and IHL: Similarities (1)

IHRL

- Principle of humanity (aimed at protecting human life and dignity).
- Elementary considerations of humanity (Corfu Channel, 1949) – No armed conflict.
- Prohibition of adverse discrimination.
- Protection of vulnerable categories of persons (women, children, migrant workers, persons with disabilities, etc.).

IHL

- Principle of humanity (aimed at protecting human life and dignity) (Martens Clause, AP I, Art. 1(2)).
- Elementary considerations of humanity (Nicaragua Case, 1986) – Common Article 3 of the 1949 GCs as encapsulation of this concept.
- Protection of vulnerable categories of persons (civilians, wounded and sick, persons *hors de combat*, POWs).

IHRL and IHL: Similarities (2)

IHRL	IHL
• Prohibits torture or cruel treatment (CAT).	• ---Common Art. 3 to the 1949 GCs
• Prescribes basic rights for persons subject to a criminal justice process (Art. 14, ICCPR).	• --- Common Art. 3 to the 1949 GCs
• Regulates aspects of the right to food and health.	• ---Humanitarian assistance/relief
• Breaches give rise to State responsibility and individual criminal responsibility.	• State responsibility and the duty to investigate and prosecute or extradite.

Applicability of IHRL and IHL

- According to a classic public IL separation between the law of peace and the law of war IHRL applies in times of peace and IHL in times of armed conflict.
- Gaps remain regarding the protection of individuals in four circumstances. This is considered also as the grey area between IHRL and IHL! There are four scenarios:

  1) Where the **threshold of applicability of IHL is not reached**;

  2) Where the **State** in question **is not a party to the relevant treaty or instrument**;

  3) Where **derogation from the specified standards is invoked**; and

  4) Where the **actor is not a government**, but some other group (non-State actors – organized armed groups).

Relationship between IHRL and IHL

- Three views exist as to the relationship between IHRL and IHL:
- (1) They are two mutually exclusive branches of international law;
- (2) IHL is part of IHRL;
- (3) Complementarity/convergence theory.
- Oftentimes HR scholars, e.g. Tomuchat, are proponent of the idea that IHL is part of IHRL (p. 242)
- What do International Courts and Tribunals (ICTs) and other (quasi-judicial) bodies in the fields of IHRL and IHL have to say about this relationship?

Int'l Courts on the IHRL-IHL Relationship

- **International Court of Justice**
- *Nuclear Weapons* Advisory Opinion (July 1996), para. 25:
- "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."
- *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* Advisory Opinion (July 2004), para. 106 :
- "As regards the **relationship between international humanitarian law and human rights law**, there are thus **three possible situations**: **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**."

ICTY on the IHRL-IHL Relationship

- **International Criminal Tribunal for former Yugoslavia**
- *Prosecutor v. Kunarac*, Judgment of 22 February 2001, para. 467:
- "Because of the paucity of precedent in the field of international humanitarian law, **the Tribunal has**, on many occasions, had **recourse to instruments and practices developed in the field of human rights law**. **Because of their resemblance, in terms of goals, values and terminology**, such recourse is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law. **With regard to certain of its aspects, international humanitarian law can be said to have fused with human rights law**."

The Inter-American Commission of Human Rights

- *Coard et al.v. United States,* Case No. 10.951, 29 September 1999, para. 39:
- "First, while international humanitarian law pertains primarily in times of war and the international law of human rights applies most fully in times of peace, the potential application of one does not necessarily exclude or displace the other. There is an **integral linkage between the law of human rights and humanitarian law** because they **share a "common nucleus of non-derogable rights and a common purpose of protecting human life and dignity**," and there may be a **substantial overlap** in the application of these bodies of law."

ICC Statute – Article 21

- The Court shall apply [In the second place], where appropriate, **applicable treaties** and the **principles and rules of international law**, **including the established principles of the international law of armed conflict;**
- The **application and interpretation of law** pursuant to this article **must be consistent with internationally recognized human rights**, and be **without any adverse distinction** founded on grounds such as gender as defined in article 7, paragraph 3, age, race, colour, language, religion or belief, political or other opinion, national, ethnic or social origin, wealth, birth or other status.

Armed Conflicts Definition

'an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'

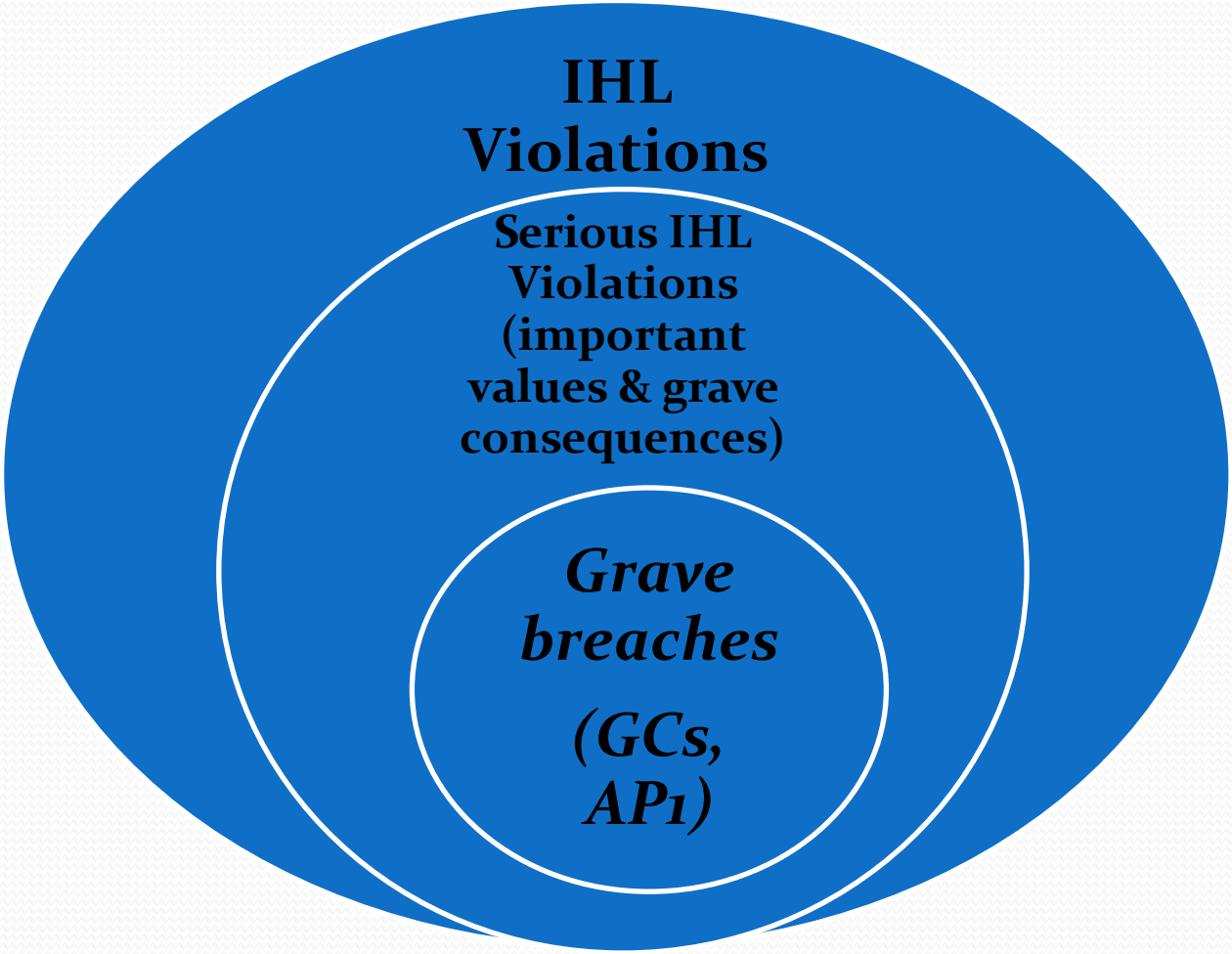
(Tadic Interlocutory Decision, par. 70).

Armed Conflicts – Nexus with War Crimes

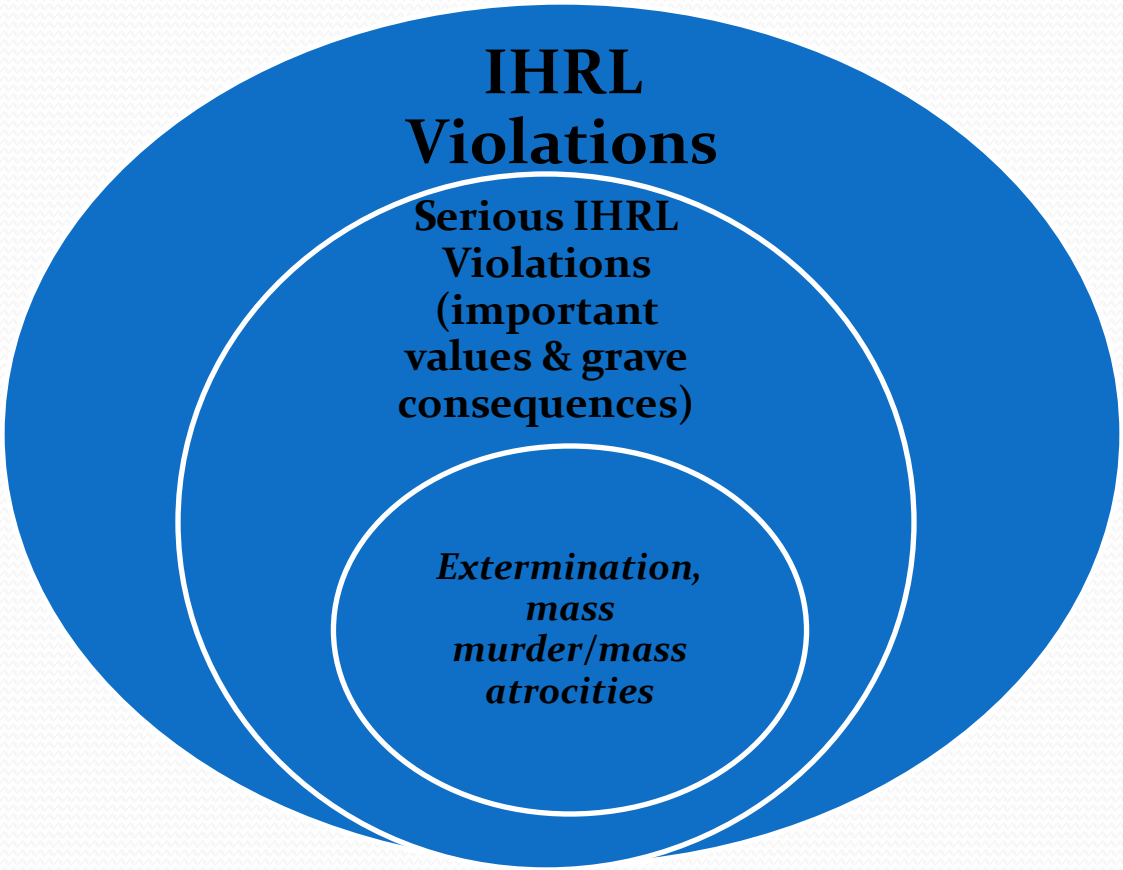
(i) perpetrated against persons protected by IHL;

(ii) occasioned by the armed conflict, which created the situation *and* provided an opportunity for the criminal offence. Thus, the offence must be committed to pursue the aims of the conflict or must be carried out at a minimum, in unison with the military campaign.

Violations of IHL vs. War Crimes



Violations of IHRL vs. Crimes Against Humanity



Conclusions

- Despite a certain divide in the onset of IHL and IHRL their complementarity has become widely accepted.
- Meron argues that a phenomenon of "humanization" of humanitarian law has occurred via a process driven to a large extent by the adoption of international human rights law principles and the commonly shared principle of humanity.
- ICTs have played an important role with regard to clarifying the relationship between IHRL and IHL and in interpreting and developing rules and principles of IHL and IHRL.

Additional Material

- R. Provost, *International Human Rights and Humanitarian Law*, Cambridge University Press, 2002;
- T. Meron, *Convergence of International Humanitarian Law and Human Rights Law*, AJIL, Vol. 94, No. 2, 2000, pp. 239-278;
- *ICRC Website: http://www.icrc.org/Web/Eng/siteengo.nsf/html/section_ihl_and_human_rights;*
- Gentian Zyberi, The Humanitarian Face of the International Court of Justice, Intersentia, 2008, pp. 271- 276 (http://igitur-archive.library.uu.nl/dissertations/2008-0402-200640/UUindex.html)