

African Commission on Human and Peoples' Rights, Human Rights in Conflict Situations in Africa

INTRODUCTORY TEXT: *Based on the African Commission on Human and Peoples' Rights' resolution and analysis on the co-applicability of IHL and IHRL during armed conflict, this case deals with the interplay between the two legal regimes in the context of the African human rights system.*

Case prepared by Mr. Marishet Mohammed Hamza, LL.M student at the Geneva Academy of International Human Rights Law and Human Rights, under the supervision of Professor Marco Sassòli and Mr. Pavle Kilibarda, researcher and teaching assistant, both at the University of Geneva.

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more humanity in armed conflicts. **Similarly, in some of the texts used in the case studies, the facts may not always be proven;** nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

A. AfComHPR, Resolution on Human Rights in Conflict Situations

[**Source:** African Commission on Human and Peoples' Rights, 'Resolution on Human Rights in Conflict Situations', ACHPR/Res.332(EXT.OS/XIX)2016, 25 February 2016, available at: <https://www.achpr.org/sessions/resolutions?id=248>]

[1] The African Commission on Human and Peoples' Rights (the Commission) [...]

[2] Recalling its mandate to "promote human and peoples' rights and ensure their protection in Africa" [...]

[3] Considering that [...] Article 3 (f) of the Protocol Establishing the Peace and Security Council (PSC Protocol) has as its objective protecting 'human rights' and 'respect for the sanctity of human life and international humanitarian law';

[...]

[4] Deeply concerned by the on-going conflict situations affecting various parts of Africa, as well as the consistent reports of violence being faced by civilian populations and the attendant widespread violations of human and peoples' rights and humanitarian law;

[...]

The Commission decides to:

[5] Conduct a study on human rights in conflict situations in Africa, with a view to developing a comprehensive strategy and framework on the same;

[...]

B. AfComHPR, Addressing Human Rights Issues in Conflict Situations

[**Source:** African Commission on Human and Peoples' Rights, 'Addressing Human Rights Issues in Conflict Situations: Towards a more Systematic and Effective Role for the African Commission on Human and Peoples' Rights', 25 October 2019, available at: <https://www.achpr.org/legalinstruments/detail?id=62>]

[...]

Foreword

[...]

[1] The adoption by the African Commission of Resolution 332 on human rights in conflict situations has thus been a long time coming. As the study it requested and the interest around it attests, it is one of the Commission's most consequential initiatives. As robustly and comprehensively articulated, this study certainly presents not only the Commission's authoritative view on human rights in conflict situations but also how the Commission on its own or in concert with other relevant actors engages to address the challenges of human and peoples' rights in conflict situations in a systematic, proactive and institutionalised form (as opposed to the ad hoc and mostly reactive approach dominant thus far). [...] The Study presents by far the most comprehensive analysis in the African human rights system of the problematic of human rights in conflict situations and as such it represents a landmark work for the AU human rights and peace and security system. [...]

[...]

Part 1, Introduction

[...]

Part 2, Relationship between conflict and human rights: the context, applicable law, and salient issues in conflict situation in Africa

The context covered under Resolution 332

[...]

13. The human rights issues that are covered under Resolution 332 are thus those arising in conflict situations. The phrase conflict situations in this context covers not only armed conflicts, both international and non-international, to which International Humanitarian Law (IHL) applies, but also other instances of crisis situations manifesting violent actions of various gravity short of armed conflict. [...]

[...]

Determination of applicable law

46. The conflict situations covered under Resolution 332 and the protection issues that they give rise to necessarily evoke normative discussion on the applicable law. The issue here is whether and how international humanitarian law (IHL) applies in relation to the human rights standards of the African Charter (IHRL) in these conflict situations.

47. The main distinction between IHRL and IHL is that IHRL protects the individual from abusive or arbitrary exercise of power by State authorities, whereas IHL primarily regulates the conduct of parties to an armed conflict by regulating methods of warfare and the protection of those not participating in the conflict, without creating rights that protected persons enforce through individual complaints, except through IHRL treaties, such as the African Charter. Therefore, the application of IHL and hence its relationship to human rights law arises *only* in cases of armed conflicts. Secondly, the definition of armed conflict under IHL is much narrower than the broad definition of conflict adopted above, which encompasses conflict situations falling short of armed conflicts. IHL thus does not apply in crisis situations where the violence is below the threshold for armed conflict under the definitions of IHL. It is thus necessary for purposes of determining the application of IHL to have regard to the definition of armed conflict in the context of IHL.

[...]

51. Accordingly, for an armed conflict of a non-international character to come into existence [...], it is a pre-requisite that the criteria of intensity and organisation are fulfilled. However, with the change in the nature of

conflicts including in terms of the unconventional means and methods of violence, the use of new technology and the levels of organisation and control of territory, the lines that international norms neatly draw have become blurred and it has become difficult to determine which legal regime should apply. [...]

[...]

53. A further point to note in terms of the applicable law is that the traditional distinction that reserves the application of IHL to war times and IHRL to peace no longer holds. Traditionally, *jus in bello* (or IHL), is the law that governs the way in which warfare is conducted, in order to limit the suffering which is caused by the armed conflict. "The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force." On the other hand, *jus ad bellum* is the law on the use of force, and is the concern of IHRL. IHRL is thus concerned with the legitimacy and lawfulness of use of force, including that it should only be used as a last resort. Thus, while it may be argued that the use of force in certain circumstances in NIAC is legal from the perspective of IHL, from the perspective of IHRL standards the same use of force could be a breach of IHRL if the use of force was not applied as a last resort.

54. However, given the changes in the nature of conflicts [...] and the ensuing legal issues, the co-applicability of these two regimes of law has become a legal imperative currently supported by diverse sources of authority. The contemporary international law position thus does not uphold a watertight dichotomy between human rights law and IHL in armed conflicts. The evolving legal consensus has been that, even in times of armed conflict, human rights continue to apply but, unlike in situations other than those amounting to armed conflict, human rights law does not have exclusive application. Rather it applies alongside IHL. [...]

55. The African human rights system took the position that the rights and freedoms guaranteed in the Charter apply both in peace and war times. First, in legislative terms, unlike other human rights instruments that allow derogation in cases of a state of emergency, the African Charter does not make a similar provision. The African Commission adopted a more explicit position in its practice. According to the Commission, people must be protected from violation of their rights, including threats to their lives not only in times of peace but also in war situations. Similarly, based on Articles 60 and 61 of the African Charter, the African Commission upheld the applicability of IHL rules in various cases of conflict situations.

56. However, even with the co-applicability of IHRL and IHL, there are enormous challenges in actual implementation in the context of emerging situations, notably the war on terror or intra-state conflicts in the territories of several states that brings in, among others, the problem of IHRL's extra-territorial applicability. This is mainly because there are different rules and considerations, which regulate the extra-territorial application of IHL and IHRL. However, [...] there are ample precedents that provide evidence about the extra-territorial applicability of IHRL if it is established that the armed forces of a state exercise control over the territory of another state. [...] This means that, if a State exercises effective control over a territory, the

State should abide by its obligations under IHRL. Additionally, even in instances where there are doubts on the question of effective control where a State uses force, no legal vacuum arises and the applicability of IHL and/or IHRL should understandably be determined after due examination of the specific circumstances of the conflict situation.

57. For purposes of the African Charter and indeed this Study, what the co-applicability of the two regimes of law entails is not that the African Commission directly applies IHL. In conflict situations in which IHL applies, the African Commission resorts to the applicable IHL rules on the basis of Articles 60 and 61 of the African Charter. And instead of making a finding on the existence of violation of IHL, the Commission uses, [...] the IHL standards, rather than the normal human rights standards for assessing existence of violations, to determine violations of Charter rights.

58. In terms of the applicable law, the other issue that arises is the applicability of IHRL to non-state actors. IHL is applicable to armed non-State groups provided that these armed groups are party to an armed conflict and fulfill the legal definition with sufficient organisation and the requisite degree of intensity of the fight. However, the binding nature of IHRL on armed non-State groups in either wartime or peacetime is contentious, because they are not party to international treaties. There is an emerging view in international law that certain rules of IHRL apply to non-state actors where they exercise effective control over territory. [...] This illustrates the tacit recognition of the applicability of IHRL to non-State armed groups under certain circumstances.

[...]

Part 3, The African human rights system, and conflict situations

[...]

Part 4, Proposed approach to addressing human rights issues in conflict and crisis situations and recommendations

[...]

Annexure

[...]

Discussion

1. (Document A, para. [3] and Document B, paras 47, 53, 55 and 56) How did the Commission define the relationship between IHL and IHRL? Does the statement under para. 57 imply that in armed conflicts IHL is always the *lex specialis*? (See also Africa, The AfCHPR on the interplay between human rights and IHL)
2. (Document B, para. 57)? How is an 'analysis based on IHL standards' different from 'finding of the existence of a violation of IHL'? Can the African Commission determine if IHL has been violated?
3. (Document B, para. 55) In the Commission's view, do all the human rights guaranteed under the African Charter continue to apply during armed conflict situation? Can human rights provided under the Charter be derogated from in situations of armed conflict? If not, what are the implications for the relationship between IHL and IHRL? Would your answer be different for international (IACs) and non-international armed conflicts (NIACs)?
4. (Document B, para. 47) Does the Commission's statement (in the specific paragraph) envisage that IHRL treaties and enforcement mechanisms can be used for any IHL violations that arise during armed conflict? Or, only for human rights violations? (The African Charter on Human and Peoples' Rights, Arts 60 & 61)
5. (Document B, paras 53 and 58) Do you agree with the Commission's assertion that '*jus ad bellum* [...]' is the concern of IHRL?
 - a. What is the relationship between *jus ad bellum* and IHRL? Can violations of *jus ad bellum* lead to violations of IHRL? Does this not have implications for the relationship between *jus ad bellum* and *jus in bello*? Are human rights bodies, including the African Commission, competent to apply *jus ad bellum*? (See HRCtee General Comment No. 36 on the Right to Life, 30 October 2018, UN Doc. CCPR/C/GC/36, paras 69-70)
 - b. If IHRL takes *jus ad bellum* considerations into account and IHL does not, does this imply that IHRL prevails in an armed conflict whenever such a consideration arises? Or all on the contrary that IHL must prevail in an armed conflict as it is distinct from *jus ad bellum*? Or that both apply, and IHRL can be violated because of *jus ad bellum* considerations while IHL is not?
6. (Document B, para. 53) Do NIACs raise *jus ad bellum* issues? If so, what are the implications for the relationship between *jus ad bellum* and *jus in bello* in NIACs?
7. Concerning the 'use of force' in NIACs, does the Commission regard IHRL as the *lex specialis*? Can force in NIACs only be used as a measure of last resort under IHL?