



Distortion of International Humanitarian Law rules by International courts/tribunals and its consequences

Von [Veranda Idrizi](#) [1] am Mo, 09.05.2022 - 10:45

When we talk about the issue of distortion of IHL by International Courts, we must start by firstly mentioning the most basics of International Humanitarian Law, that is: protecting people who are not, or no longer, participating in hostilities, and the aim to protect human dignity and to limit suffering during times of war. With that said, there is raised the issue that, should give us, the iron confidence that the international courts are taking into consideration applying these rules, and protecting the reputation of International Humanitarian Law itself, by giving fair rulings, and creating the example, that people involved in such matter, must, and will follow its principals.

The enforcement of international law by domestic courts is essential. The tremendous powers allocated to the State, especially in times of war, have the potential to bear catastrophic consequences for the lives and security of many innocent people if not judicially supervised.

However, it is a well-known fact that, domestic courts cannot be the only institutions responsible for providing the necessary checks and balances on the State's exercise of its powers during armed conflicts. These institutions face particular problems of their own security issue within their state, and yet in most of the cases, the domestic courts of democratic States are in a good institutional position to enforce international humanitarian law, because the national investigation and judicial authorities are available and functioning, and more importantly national courts are expected to conform to the rule of law requirements and thus enjoy an important degree of independence.

In addition, the issue is at the two main courts, currently the two permanent international courts that have jurisdiction over cases related to armed conflicts: the International Criminal Court (ICC), which is competent to determine individual criminal responsibility for war crimes, and the International Court of Justice (ICJ), which has competence to determine State responsibility for International Humanitarian Law violations in disputes between States, and to render advisory opinions on such issues.

There is no doubt that, the international courts and tribunals have played a big role and contributed vastly on the development of the Law of Armed Conflict, also the application of International Humanitarian Law to concrete facts by international tribunals and courts has contributed to the development and clarification of this body of law. This is said, knowing that International Humanitarian Law and International Criminal Law are distinct, but related fields. However, using a law in the courtroom that was created instead, to be applied on the battlefield poses significant challenges. In the process of such use, the law may have been distorted to fit facts that it was not envisioned to cover. Its use is as a means to punish unwanted behavior during armed conflicts and to combat impunity risks contorting the balance on which international humanitarian law is based: military, necessity and humanity.

In many cases, the ICC shows a tendency to classify situations as non-international armed conflicts without considering whether the situation concerned may instead (or at the same time) qualify as an international armed conflict. Non-international armed conflict is often, mistakenly, treated as a residual regime. Incorrect conflict classification may affect International Humanitarian Law's scope of application, and negatively impact on an accused's fair trial rights under international criminal law. The importance in ICC to properly classify situations is not merely a matter of correct labeling and upholding the integrity of International Humanitarian Law. Correctly classifying conflict situations during international criminal trials is also important for ICC itself, namely, to guarantee fair trial rights.

The real problem, however, while addressing this issue, lies where the jurisdictional and evidential limitations of a court dictate over-expansive interpretations of otherwise well-established and unimpeachable norms. This can possibly lead to the criminalization of previously lawful military



operations, or worse, a reduction of the existing spectrum of protections afforded to the most vulnerable people during armed conflicts. The re-interpretation of The Law of Armed Conflict by these two main courts is creating a wide gap between applying the rules that must be leading to a fair trial, and actually accomplishing the purpose that The International Criminal Court and The International Court of Justice have: determining individual criminal responsibility for war crimes and the State's responsibility for International Humanitarian Law violations. The consequences of this "re-interpretation" could be far-reaching from a legal and practical point of view.

Besides that, nevertheless a very damaging consequence, is the fact that the whole reputation of The International Humanitarian Law, and its respected structure, may and will be damaged surely, if these also respected institutions continue to make mistakes, and to deflect the very main purpose of International Humanitarian Law. Within the scope of direct, as mentioned, the duties that international courts and tribunals fulfill, regarding the issues that IHL includes, have room for improvement. This responsibility, carried by the courts, must by all means, be clarified. For all the issues concerning the distortion of International Humanitarian Law, each carries a great impact on the future, for the individuals, and the states that they take part in.

Lastly, international criminal tribunals must not only remain mindful of the importance of IHL law enforcement, but also of the reality of future armed conflicts. In these conflicts both the fighting participants and protected persons will bear the brunt of reinterpretation of the legal framework regulating such conflicts.

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