

Human Rights and Armed Conflict: the European Experience

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1. Introduction

For millennia Europe has been afflicted by every type of armed conflict known to humanity. Yet the sustained reflection about the ethical and legal implications to which this gave rise eventually laid the foundations both for what became international humanitarian law (IHL – the law of war) and international human rights law (IHRL). International armed conflict is currently no longer a pressing problem in Europe. Three core objectives of this paper are: to consider why this is the case; to explore the lessons which might be learned by the rest of the world; and to reflect upon the emerging, yet still problematic, relationship between IHL and IHRL with respect to European states.

2. Armed conflict in Europe: a very brief history

From pre-historic time to the 1st century BCE the dominant form of organised armed conflict in Europe was inter-tribal warfare. This continued to be the case from the 1st-5th centuries CE, coupled with conflict associated with the rise, fall, and internal instability of, the Roman Empire. Tribal conflict again dominated the scene in the so-called ‘Dark Ages’ from the 5th-9th centuries CE. However, from the 9th-17th centuries tribal warfare was increasingly replaced by conflict arising out of the rise and fall of feudalism, particularly that associated with the formation and disintegration of states and empires, dynastic struggles, and the religious wars of the 16th and 17th centuries. From the 17th-19th centuries, the process of state formation, increasingly conducted in terms of ethnic nationalism, continued to result in a series of wars which climaxed in the First World War. In this period two new elements were added; ideological wars in Europe itself and colonial wars, both between European states and indigenous peoples and between competing European powers. The nationalist and ideological issues left unresolved by the First World War led to the

Second World War and, in its turn, the Cold War. However, since the end of the Cold War the European 'core' appears to have completed the process of state formation (at least for the foreseeable future) and has secured an unprecedented period of international peace. On the 'periphery', however, wars of the post-Soviet succession – nationalist conflicts stemming from the process of state formation arising from the disintegration of the Soviet Union – have continued in the Balkans (1991-1999), Chechnya (1994-96 and 1999-2000), South Ossetia (1991-92), Transnistria (1990-92), Abkhazia (1992-93), and in the Russo-Georgian war of 2008. It is less clear that these conflicts have reached a stable end-state.

3. The European debate about the ethics of war: three positions

In the European debate about the ethics of armed conflict, broadly speaking three positions emerged. At one end of the continuum 'realists', such as the seminal 19th century Prussian theorist von Clausewitz, argued that war is essentially 'a continuation of politics by other means'; in other words, merely an instrument for the pursuit of the interests of those who resort to it. According to this view armed conflict is neither moral nor immoral but simply a brute fact of human, and more recently international, relations. Indeed, for realists the 'ethics of war' is an oxymoron, a combination of two fundamentally incompatible dimensions of the human experience, and the attempt to combine them risks undermining the effectiveness of arms as a lever of public policy. At the other end of the continuum, the pacifist tradition maintains that war is always fundamentally immoral and can never be justified because there can never be an adequate moral reason for taking human life. Although this view has been expressed in secular terms, pacifist interpretations of the Christian faith – particularly in Britain by the Protestant non-conformist movement known as the Society of Friends or Quakers – have had a particularly high profile and long lineage.

However, neither of these viewpoints commands much support in Europe today. Most Europeans effectively subscribe to some variant of the 'Just War' doctrine which holds that embarking upon, conducting, and ending war raise profound and difficult moral and legal issues. This view also consists of three elements: 'jus ad bellum', the conviction that resort to arms can only be justified when it amounts to the 'lesser' in a range of other 'evils', such as self defence or ending or preventing something worse, for example genocide or slavery; 'jus in bello', the attempt to ensure that war is waged in a

manner which causes minimum human suffering; and 'jus post bellum', the view that armed conflict should also end in a morally and legally defensible manner.

4. History of the European debate about the ethics and legality of war

It is also possible to distinguish three phases in the European debate about the ethics and legality of war: the pre-modern, the early modern, and the late-modern or contemporary. In the pre-modern era, the realist position, to which most rulers and states subscribed, meant that the actual conduct of war was almost always brutal and indiscriminate. The religious conviction shared by many adherents to the Christian, Islamic, Jewish, and other faiths – that God does not approve of the deliberate infliction of suffering upon the innocent – simultaneously fuelled concern about limiting suffering in war, particularly for non-combatants and prisoners. However, it should also not be forgotten that Christianity, Islam and Judaism have produced 'holy war' traditions advocating, in some circumstances, taking up arms as a religious obligation particularly when the very existence of the faith is itself deemed to be under grave threat.

In the early modern era, from the 17th to 19th centuries, the European debate about the legitimacy of war became increasingly secularized and conducted in terms of rights. For the realists the preeminent 'right' was the right of nations and states to go to war in pursuit of interests including those associated with territory, dynastic succession, power and prestige, and the expansion and control of empire. However, the rights of individuals to be protected from avoidable suffering caused by armed conflict was also taking a more prominent place in the just war tradition and was given added impetus by the increasingly destructive capacity of modern industrialised warfare. Mid-19th century Europe, therefore, became a key site for the identification of more detailed, and more universally accepted, international standards of 'just war'. These were initially expressed in the establishment of the Red Cross (1863) and the First Geneva Convention (1864), each of which sought to provide for the needs of battlefield casualties, and later in the second Geneva Convention (1906) which concerned wounded, sick and shipwrecked members of armed forces at sea. In the 20th century the First and Second World Wars, which began as European nationalist and ideological wars, inspired two further Geneva Conventions (1929 and 1949), concerning respectively the treatment of prisoners of war, and civilians in time of war. All four Geneva Conventions were revised in

1949 and have also since been augmented by additional protocols. In the 20th century, the League of Nations (1919-1939) and the United Nations (1945-) also became the first universal inter-state organisations committed to the realisation of the just war doctrine.

Since the 20th century the 'European' debate has increasingly been subsumed in the wider international debate which has also produced more specific and detailed standards increasingly conceived in terms of rights. A debate about the relationship between international humanitarian law and international human rights law has also begun to emerge. However, while formal standards in both these branches of international law have become increasingly clear, interpretation and application are still often highly contentious.

5. Establishment and consolidation of international peace in Europe: the common European institutional model

One particularly striking feature of the European experience of war since the Second World War, and particularly since the end of the Cold War, has been the decline in both the incidence and the risk of international armed conflict in Europe itself. The most plausible explanation is the convergence in the structure and operation of European national public institutions around a common model characterized by democracy, human rights, the rule of law, welfarism, and the democratically-regulated market. Broadly this has happened in three phases: first the consolidation of European democracy in the aftermath of the Second World War in the late 1940s, the ending of the southern European dictatorships in Portugal, Spain and Greece in the 1970s, and, finally, the conclusion of the Cold War in 1989. But, while this trend is strong in the European core it remains weak on the periphery, ie in Russia, Belarus, and in the Caucasus. The convergence in the structure and operation of national public institutions has been promoted not only by the internal dynamics of national liberal democracy, capitalism and welfarism but also by the institutionalization and expansion of pan-European institutions, in particular the Council of Europe which began in 1949 with 10 members and now has 47, and the European Union which began, under a different name, in 1951 with 6 members and now has 27.

5. 1. The Council of Europe and the European Convention on Human Rights

While the Council of Europe is particularly well-known for the European Convention (and the European Court) of Human Rights, its principal objectives in 1949 were to prevent war between member

states by collectively seeking to inhibit the slide towards authoritarianism and to make western Europe more ideologically cohesive should the Cold War turn 'hot'. In other words, the western European model was not only promoted as a vehicle for encouraging interdependence between member states; it was also self-consciously asserted against its communist counterpart in the east. The Council of Europe's core values were, and remain, democracy, human rights and rule of law. It has never had an economic or formal security dimension. In 1950 the European Convention on Human Rights, the Council's most celebrated achievement, shared and refined the pursuit of these goals by providing both a more formal statement of standards, and also a process to provide early warning of the drift towards authoritarianism in any member state – complaints about violation brought by states against each other to the judicial organs at Strasbourg, the European Court of Human Rights and its now defunct companion, the European Commission of Human Rights.

The inter-state applications process was intended to be the main method by which national Convention compliance was ensured. But there have been less than two dozen of these in the Convention's entire history. Instead individual applications, which did not reach significant proportions until the mid-1980s and did not become mandatory until the late 1990s, now average over 40,000 per year. Over 95% of these are rejected as inadmissible and of the 5% or so which cross this threshold almost 95% result in a finding of violation by the European Court of Human Rights. Enforcement of the Court's judgments by the Committee of Ministers is a political process, which includes negotiation with respondent states about how the violation might be corrected.

The main achievements of the European Convention on Human Rights include its successful institutionalization and bureaucratization in Strasbourg, expansion to include every state in Europe except Belarus, popularity with applicants, and the promotion of convergence in the 'deep structure' of national public institutions through domestication of its standards. But any contribution the Council of Europe and/or the Convention may have made to preserving international peace in Europe cannot now be determined separately from the role played by the European Union. Moreover, in spite of the eulogies heaped upon it by human rights activists and scholars, the Convention suffers from some serious, and indeed potentially fatal, flaws. These include: the failure of the inter-state complaints process; the powerlessness of both inter-state and individual applications to tackle effectively large-scale systematic Convention violations, such as those which have occurred in Turkey and Chechnya; case overload,

ineffectively addressed by the 11th Protocol of 1998 and the now apparently permanently stalled 14th Protocol of 2004; and the resilience of some national constitutional and legal systems to correct the systemic source of violations the European Court of Human Rights has repeatedly condemned. The Convention's prospects are, therefore, uncertain and critically depend, in the short term, upon the urgent implementation of an effective solution to the backload of applications, and, in the longer term, the clarification of growing uncertainty about its relationship with the developing human rights mission of the EU.

5. 2. The European Union

The series of institutions which have become the European Union began with French disappointment that, as a result of British objections, the Council of Europe's goals did not include a commitment to economic integration. The European Coal and Steel Community was founded in 1951 with the modest, but imaginative, objective of integrating French and German coal and steel production in order to prevent any further Franco-German wars. In 1957 the goals of this organisation were expanded to include the integration of the economies of any western European capitalist liberal democracy which wished to join. The war prevention role was, therefore, bolstered by the quest for enhanced and geographically extended economic prosperity. The European Union took little interest in human rights until the early 21st century on the grounds that they had little to do with economic integration and that, in any case, were the responsibility of the Council of Europe to which all EU states also belong. But, in the past few years, EU interest in human rights has greatly increased. This stems from developing awareness that the deepening and widening integration programme had run ahead of European public opinion thereby undermining its legitimacy, the fact that some national constitutional courts threatened rebellion against the direct effect of EU law in national legal systems unless national constitutional rights were guaranteed by EU equivalents, the contrast between the EU's concern to ensure human rights compliance with non-member trading partners and the lack of its own human rights policy, and the realisation that effective economic integration requires a certain level of political and legal integration which, in the contemporary world, inescapably involves human rights. In addition to its continued commitment to ensuring compliance with human rights standards in its external relations, the EU's current human rights activities include those of the Fundamental Rights Agency of 2007, the developing human rights jurisprudence of the European Court of Justice, and the Charter of Fundamental Rights 2001, the status of

which remains in doubt following the defeat, in key referenda in 2005 and 2008, of the European Constitution with which it was formally linked.

6. International humanitarian law and international human rights law in armed conflicts involving European states

All European states are party to the core instruments of international humanitarian law (IHL). In addition to the duty to protect and to provide medical attention for enemy personnel in international wars, the main focus of this legal regime is to protect civilians from avoidable suffering caused by armed conflict, mainly by distinguishing between legitimate military targets, including enemy combatants, and legitimate military means, methods and weapons. Even legitimate military targets may not lawfully be attacked if doing so would create an excessive risk of civilian casualties or damage. Methods, means and weapons which cause unnecessary, or indiscriminate, suffering are also prohibited. Civilians may only be interned if absolutely necessary for the security of an occupying power, and must be granted POW-type status, and there is an absolute prohibition on deportations and upon reprisals and collective punishment. The first three provisions of all four Geneva Conventions are the same, the most important, for present purposes, being Common Article 3. This prescribes minimum standards of protection – within a party's territory during armed conflicts not of an international character – for non-combatants and enemy personnel no longer actively engaged in hostilities due to wounds, detention, having laid down arms, or any other cause. The main requirements are that, in all circumstances, such persons shall be treated humanely, and should not be subject to outrages upon their personal dignity, in particular humiliating or degrading treatment. These standards should also apply to those not formally classed as prisoners of war, and any sentences must be passed by regularly constituted courts providing fair trial guarantees.

International human rights law (IHRL), on the other hand, covers a much wider range of civil, political, social, economic, cultural and other rights, summarised at the global level by the Universal Declaration of Human Rights 1948, the International Covenant on Civil and Political Rights 1966, and the International Covenant on Economic, Social and Cultural Rights 1966 – collectively known as the International Bill of Rights. As already indicated, the European Convention on Human Rights also binds every state in Europe except Belarus and the Charter of Fundamental Rights – which has a much

wider thematic reach, a more limited geographical application, and is not yet legally binding – applies to the 27 member states of the European Union.

For European states, therefore, the main differences between IHL and IHRL are as follows. First, IHL only applies to armed conflicts, while IHRL, particularly the ECHR, *prima facie* applies to armed conflicts, peacetime, and everything in between. Second, IHL provides minimum, non-derogable, treaty-based standards which are generally not judicially well-developed, whereas the ECHR, although also an international treaty, provides much more detailed, formally limited, derogable, and much more judicially-developed standards. Third, the principle of proportionality under IHL requires a balance to be struck between military necessity and the minimization of suffering, while under the ECHR it involves striking a balance between, on the one hand, conflicts between rights and, on the other, conflicts between rights and collective goods with procedural and evidential priority accorded the former. Fourth, IHL is generally only enforceable by the United Nations Security Council, international courts (increasingly the International Criminal Court), and some national courts with universal jurisdiction for relevant offences, but usually not at the instigation of victims. The ECHR, on the other hand, is now effectively enforceable only at the victim's instigation by domestic courts and, subject to a highly exclusionary admissibility test, by the European Court of Human Rights. Fifth, breach of IHL is a crime and could result in the offender being severely punished, whereas violation of the ECHR merely requires the respondent state to correct it at source and, at the discretion of the European Court of Human Rights, to compensate the victim. Sixth, unless otherwise provided, IHL is inherently applicable beyond the territory of states, while for IHRL it is the other way around. However, in spite of these differences, the same principle holds for Europe as, in the Wall Case, the ICJ declared to be true universally: '(t)he relationship between international humanitarian law and international human rights law is ... not one of exclusion but of coordination' (422). Therefore, in certain circumstances, the relevant standards of each will apply to European states simultaneously unless, in the case of the ECHR, there has been an effective derogation subject to the principles of strict necessity and proportionality. What, then, are these circumstances and what are the legal consequences when they obtain?

For every European state except Belarus, the key issue concerns the appropriate interpretation of the Convention as a whole in the context of the type of armed conflict in question. IHL does not apply to internal disturbances and terrorism of the nationalist and ideological

kinds which occurred in Northern Ireland and other European states particularly in the 1970s and 1980s. In any European civil war, both sides would be bound by Common Article 3 of the Geneva Conventions, but only the state would be bound by the ECHR. Armed conflicts between Council of Europe states – such as that which broke out between Russia and Georgia in the summer of 2008 – raise the prospect of the application of both IHL and the ECHR. However, the key issue in determining whether or not the ECHR would apply to armed conflicts between a Council of Europe state and any other state (extra-territoriality), concerns the interpretation of Article 1 which provides that ‘(t)he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms’ the Convention specifies. But what activities lie ‘within the jurisdiction’ of a member state? Regrettably, the jurisprudence of the European Court of Human Rights fails to provide a wholly consistent answer. Two types of extension have been recognised, the personal and the territorial. An example of the former can be found in *Öcalan v Turkey* where the Court held that the arrest of the leader of the Kurdish Workers’ Party by Turkish forces on an aircraft in the international zone of Nairobi airport nevertheless fell ‘within the jurisdiction’ of Turkey because the arrest was intended to, and did, bring the applicant back to Turkey to stand trial for terrorist offences. In *Banković v Belgium and 16 other states* the Court considered the limits of the territorial interpretation in the context of NATO’s war against Yugoslavia stemming from the Kosovan intervention. An application complaining of breaches of Articles 2, 10 and 13 of the Convention was made by the next of kin of those killed and injured by air strikes on Radio Televizije Srbije in Belgrade on 23 April 1999. The Grand Chamber of the European Court of Human Rights held that the respondent states were not in breach of the Convention because the deceased and injured had not been ‘within their jurisdiction’ at the material time. It was emphasised that the normal understanding of ‘jurisdiction’ in international law is territorial and that, in the Convention context, exceptions could only be justified where ‘the respondent State, through the effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the government of that territory, exercises all or some of the public powers normally to be exercised by that government’ (para. 71). Therefore, because aerial bombardment did not constitute sufficient control of territory, it did not bring those killed or injured by it ‘within the jurisdiction’ of the states concerned. The argument that jurisdiction and responsibility are proportionate to the degree of intervention was also rejected on the grounds that this would be

tantamount to arguing that anyone adversely affected by any act imputable to a member state anywhere in the world would be brought within its jurisdiction, which would rob the concept of jurisdiction of any meaning. The measure of effective control required is, therefore, that necessary for a state to have, in principle, sufficient capacity to ensure respect for all Convention rights.

Similarly, the Grand Chamber rejected as inadmissible, the complaint made in *Behrami v France* that France was in breach of the Convention with respect to deaths and injuries stemming from unexploded cluster bombs dropped by NATO during the Kosovan campaign, which had not been defused, or the relevant sites marked, by French troops operating as part of the UN's Mission in Kosovo (UNMIK). The decision was joined by that in *Saramati v France, Germany and Norway* where the detention of the applicant by KFOR troops in Kosovo was also rejected as inadmissible. It was held that the acts of UNMIK and KFOR acting lawfully under Chapter VII of the UN Charter were attributable to the UN and not to the states concerned, and, since the UN was not a party to the ECHR, it could not be held to have breached it. While many questions remain about the related concepts of jurisdiction and extraterritoriality in the Strasbourg jurisprudence, the central issues in the context of armed conflict between a member and non-member state ultimately boil down to interpreting how the Convention and the armed conflict in question are to be appropriately interpreted, and thereby to how their relationships with other legal regimes, particularly IHL, are to be determined.

7. Conclusion

The European experience of armed conflict is particularly important for the rest of the world because the two world wars of the 20th century began in Europe, and because both international humanitarian law and international human rights law derive largely from this, and previous European, experience. The end of the Cold War brought to fruition a post-Second World War process which appears largely to have solved the problem of international armed conflict, at least in the European core. Prima facie this is due to the universalization, in 'core' states, of the 'common institutional model' at national level, and the effective institutionalization of effective pan-European regimes – particularly the European Union – committed to the same values and goals.

The lessons the rest of the world can learn from this experience are easy to state but difficult to realise. First, it is clear that

economically interdependent welfare-capitalist democracies are unlikely to go to war with each other, although they are, equally clearly, still prepared to fight other kinds of state. The prospects for international peace elsewhere in the world would, therefore, be enhanced if states similar to those in the European core were more widely established. Second, since securing this result in Europe has been a long and arduous process taking many centuries, it is unlikely to be realised instantaneously elsewhere. Nevertheless, this desirable destination will never be reached at all unless the journey towards it begins. Third, while international peace appears to be secure for the foreseeable future in the European core this does not mean that Europe is, or will be, free from all forms of armed conflict. For one thing, some states on the periphery have institutionalized the common institutional model much less effectively and it would be premature to declare the wars of the post-Soviet succession over. And it cannot be forgotten that, as part of international coalitions, European states are, and for the foreseeable future are likely to remain, engaged in wars in other continents, not least in Afghanistan. Here the lessons are much less straightforward. But one thing is clear; the guidelines for the assessment of the legality and morality of these conflicts remain the contemporary just war doctrine, as enshrined in the UN Charter, customary international law, IHL, and more conditionally the ECHR, fundamentally expressed in terms of rights. While the relevant principles may be relatively easy to state, they are much more difficult to apply, as bitter debates over contemporary armed conflicts and their consequences amply demonstrate.

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