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Review Article

Human Rights Law Applicable to Armed Forces: A Conceptual Overview

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Abstract

International human rights law is a system of international norms designed to protect and promote the human rights of all persons. The most important substantive difference is that the protection of international humanitarian law is largely based on distinctions-in particular between civilians and combatants-unknown in international human rights law. it should be borne in mind that the Charter of the United Nations recognizes the protection and promotion of human rights as one of the fundamental principles of the Organization. In more general terms, military forces acting under the authority of the United Nations are expected to apply the highest standards in relation to the protection of civilians and are also expected to investigate and to ensure accountability for violations of international human rights and humanitarian law.

Keywords: Armed Forces; Human Rights.

The detailed treatment of human rights is, generally, a post-World War II development. Although the term was little used in the context of the armed forces before the soldier was not wholly at the mercy of his military superiors acting to enforce military discipline Although the term 'human rights' of the soldier was not spoken ofthe armed forces would normally wish to treat its soldiers 'fairly' or with 'common humanity' if only to ensure recruitment of a sufficient number of soldiers or to retain those whom it had trained. Whilst these considerationsmight have been less pressing where the State conscripted thosewho would form its junior ranks, a certain degree of fair treatment of soldiers by those in authority over them was essential to ensure that the army acted with some measure of efficiency.It is, perhaps, not too great an exaggeration to conclude that as the fundamental purpose of an army is to fight during an armed conflict an individual's needs are treated as subservient to this purpose. Wherehe is a volunteer he could be expected to have joined the armed forces with the knowledge that his interests would have to be subsumed to the greater interests of those armed forces[1].

The armed forces possess another characteristic different in degree from all other forms of employment. The treatment of individuals on a basis of equality is, however, a fundamental principle of most, if not all legal systems. International humanitarian law requires protected personsunder the Geneva Conventions of 1949 to be treated without, for example,'any adverse distinction based, in particular, on race, religion or political opinion'.It is suggested that the principle adopted by the Court in these cases, namely, that a soldier does not waive his rights given by a human rights instrument, merely by voluntarily joining the armed forces with knowledge of this attitude, is correct. The alternative is to assert that the actof voluntary enlistment has a profound effect on those rights. To adopt this

approach would lead to the need for further inquiry, such as whether the soldier knew he was waiving a particular human right and whether he knew the extent and the consequences of such a waiver [2].

The very nature of human rightsis not a primary consideration for the armed forces of a State which has established them for at least one purpose, to fight a war on its behalf.The fighting of war necessarily involves loss of life, injury to individuals and the destruction of property. There is, it might be argued, little room to consider the human rights of those within the armed forces or those who come into contact with them during a war, whether of an international or of a non-international kind. To provide some amelioration ofthe condition of the victims of the war, to control the methods of war and to limit its consequences, particularly as they affect civilians or civilian objects, States have, over a period of time, agreed by treaty to a wide bodyof international humanitarian law [3].

International humanitarian law has been defined as'international rules, established by treaties or custom,which are specificallyintended to solve humanitarian problems directly arising from internationalor non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and meansof warfare of their choice or protect persons and property that are, or maybe, affected by conflict.A breach of international humanitarian law is designed to lead to thetrial and punishment of an individual perpetrator while a breach of ahuman rights treaty is intended to lead to the State being liable eitherto pay compensation to the victim (along with the prosecution of anindividual) or being called upon to change its practices.In an application made by an individual to humanrights body relianceupon international humanitarian law may also be seen where the armedconflict was of a non-international nature. The Inter-American Commissionon Human Rights has taken the view (in 1998) that'it is primarily in situations of internal armed conflict that humanrights and humanitarian law converge most precisely and reinforce one another . . . both common Article 3 of the Geneva Conventions 1949and the American Convention on Human Rights 1969 guarantee these rights; the right to life and physical integrity and prohibit extra-judicial executions, and the Commission should apply both bodies of law' [4].

International humanitarian law and human rights possess sufficient differences to lead to the conclusion that they do not represent the same forms of legal protection to individuals while deriving from separate sources.The armed forces of many States operate within this type of hierarchical structure with a broad distinction between commissioned officers, non commissioned officers (NCOs) and the lowest ranking soldier. Although both categories of officers are required to show qualities of leadership commissioned officers will, generally, have received a longer period ofeducation and will be expected to lead a greater number of men than NCOs. It is common for these officers to be recruited directly into thearmed forces without progressing from the ranks of NCOs. In those States relying upon some form of conscription it is normally the case that commissioned officers will be volunteers, whilst the NCOs may be comprisedof some conscript soldiers. Military organizations will, usually, considerit inappropriate to treat all ranks equally in relation to certain aspects of military life.The treatment of individuals on a basis of equality is, however, a fundamental principle of most, if not all legal systems. It certainly is in internationallaw. International humanitarian law requires protected personsunder the Geneva Conventions of 1949 to be treated without, for example,'any adverse distinction based, in particular, on race, religion or political opinion [5]'.

It is difficult to conclude that, by the mere fact of joining the armed forces voluntarily, a person has consented to all the treatment to whichhe is subjected in the armed forces, or that he has waived those of hishuman rights available to him as a civilian. He will not have waived any specific human rights available to him by enlisting although those rights must be considered in a military context. No human rights instrument provides directly for this. The 'particular characteristics of military life'may, however, be taken into account and treatment which would amount to a breach of the human rights of a civilian may not draw the same conclusionif the individual is a soldier. An example of this is the acceptance, certainly by the European Court of Human Rights, of military courts totry soldiers and, in appropriate cases, to deprive them of their liberty. Itis difficult to imagine the Court accepting 'courts' established by civilian employers having the same consequences [6].

Once the State has accepted that women may become soldiers it willowe then, as a group, obligations different from men soldiers. Experiencehas shown that in an armed forces environment women members are at some risk from sexual predations of men soldiers. This may take the formof sexual harassment, sexual assault or rape. The acceptance of women into the armed forces is seen asan equal treatment rather than a human rights

issue. Some States prevent them from volunteering to be infantry soldiers whilst other States impose no such restrictions. A further beneficial consequence of the wider participation of women in the armed forces of a number of States has been to reduce the need to reach military force level targets through some form of conscription. It is recognized that women members of the armed forces may be captured during an international armed conflict andtaken prisoner of war. The third Geneva Convention 1949 directs States totake particular measures where women combatants become prisoners ofwar [7].

Whilst it is accepted by soldiers that they will have to risk their lives in time of armed conflict and they may well be killed or wounded this is not so readily accepted in times of peace.In practice, however, a soldier is more likely to be killed. Degrading or humiliating treatment of which they have or ought to have knowledge. It is unlikely that a State will deliberately deprive a soldier of his life during peace time unless it has retained the death penalty for particular military offences. Although an unintentional killing of a person during an official form of military training may involve the application of a human rights provision designed to protectlife, it is unlikely to do so unless the risk of death was very likely to occurand could, with reasonable action, have been prevented [8].

In *Yavus* v. *Turkey* a soldier was shot and killed by an army firearm in hisbarracks by another soldier who had been convicted of willful homicide prior to being conscripted into the army. The killer was not permitted to have a firearm with him while in the part of the barracks concernedand he had obtained the ammunition for it improperly. The Court held that Turkey was not in breach of its obligations to the deceased since the applicants had 'failed to show that the authorities knew or could be takento have known that there was a real and immediate risk to the life of the deceased soldier' [9].

The importance of an independent investigation into the death of an individual has been stressed, particularly by the European Court of Human Rights, as a corollary of the right to life within the 1950 Convention. This is unlikely to be satisfiedby a military board of inquiry drawn from the same unit as the deceased since it lacks the necessary ingredient of independence from those it is purporting to investigate. For the State to be responsible for a breach of its obligation to respect the life of the soldier it will need to be shown that the armed forces actedin breach of the soldier's right to life. The commanding officer of theunit concerned could, of course, argue that neither he nor any of his commissioned officers sanctioned the unlawful acts on the part of subordinates and that the killing of the soldier could not, therefore, be laid atthe door of the armed forces. The killing, it might be argued is no differentfrom one committed by one soldier against another off the barracks foran entirely private purpose.The European Court on Human Rights has faced a number of situationswhere the acts of individuals not acting as the agents of the State haven evertheless led to the responsibility of the State for a deprivation ofthe right to life of an individual. In none of these cases has the actor, who actually caused the death, been acting purportedly on behalf of aState organ. The Court has stressed that theState may be responsible for a breach of human rights to a person withinits jurisdiction where the 'authorities knew or ought to have known atthe time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third partyand that they failed to take measures within the scope of their powerswhich, judged reasonably, might have been expected to avoid that risk [10].'

There has been a campaign for some time to persuade States not to recruitchild soldiers into their armed forces. One of the difficult issues has beenthe age at which a person is considered to be a 'child' soldier. In Additional Protocol I 1977, to the Geneva Conventions 1949 the minimum age for recruitment was set at fifteen and in the Optional Protocol to theConvention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000 (Optional Protocol 2000), parties have agreed notto permit children under the age of eighteen to take a direct part in hostilities. This Protocol also permits, with certain safeguards, States to recruit individuals younger than eighteen into their armed forces but specifically directs that no compulsory recruitment should take place under this age. A further difficulty has been the recruitment of child soldiers to serve inarmed groups. The Optional Protocol purports to prohibit armed groups from recruiting individuals under the age of eighteen years. The culmination of this development has been the inclusion in the Rome Statute1998 of the International Criminal Court of the war crime of 'conscripting or enlisting children under the age of fifteen years into the national armed forces (or into armed forces or groups)'. Although these principles are not stated directly in a human rights instrument they have been considered to reflect such a basis. It appears that the 'United States in particular took the view that the insertion of the war crime of enlisting children under the age of fifteen did not reflect customary international law and was more a human rights provisionthan a criminal law

provision. The war crime set out in the Rome Statute 1998 applies only where the State is engaged in an armed conflict and itwill not therefore prohibit recruitment of soldiers under the age of fifteen during peacetime. In this case the State will only be under an obligation to prevent this if it is a party to the Optional Protocol 2000 and it fails to take 'all feasible measures to ensure that members of its armed forceswho have not attained the age of 18 years do not take *a direct part inhostilities*'. In a State not party to the Optional Protocol 2000, wherethe child is conscripted into the armed forces during time of peace, it will be difficult to conclude that the human rights of the child have been adversely affected given the acceptance of service of a military characteras a general exemption from the prohibition on forced or compulsory labor [11].

Whilst the various human rights treaties require a State to respect aperson's family and private life the characteristics of military lifemust be considered. Certain acts by military superiors may be considered not to bea breach of a human rights instrument although they could be describedas degrading treatment if carried out in a civilian context. The humanrights instruments permit interference with the right to a private life indefined circumstances if such interference is necessary in a 'democratic society in the interests of national security' or such as is not 'arbitrary or unlawful'. An order to a soldier to travel with his unit to a military baseabroad in order to prepare for an armed conflict could clearly be justifiedand therefore a non-interference with his private life, although he will beseparated from his family. Similar orders, which lead to a separation of a soldier from his family, will fall into this category if such a separation is necessary for training purposes. A military commander who argued that he did not want his soldiersin barracks to communicate with their families by any means would findit difficult to justify this action in terms of 'national security'. The most likely situation envisaged here is where conscript soldiers wish to let their families know the conditions in which they are required to perform theirmilitary service. They might want to let others know of the poor food, living conditions, the treatment they are receiving from other conscripts or the nature of their daily life. The only plausible ground upon whicha commander could argue for such a position is that if this information became widespread the ability of the State to secure the presence of individuals for conscripted military service would be compromised, through an increase in those failing to attend for their military service. Any attempts to prohibit these relationships would appear to give rise to a claim that the soldier's right to privacy has been denied. In the absence of any effect on the military working environment (which will be the case if the relationship is kept secret by the parties concerned) any argument for making such activities a disciplinary offence must be based upon the need to ensure the maintenance of military discipline or the highest standardsof professional personal conduct, in particular, the avoidance of an abuse of authority. Where this relationship is unknown in the military unit concerned there is little risk of a detrimental effect on discipline [12].

The link between the armed forces and a deity is particularly strong during wartime where loss of life among soldiers is expected to occur. The right of the State to impose limitations on a soldier's manifestation of his religion is curtailed by human rights treaties. None of these limitations refers to national security as a ground for restricting the manifestation of religious beliefs. The point can therefore be made with some certainty that a soldier has the right to manifest his religious beliefs providing they do not cause a breakdown of 'order' within the military environment. This may be unlikely to occur unless an armed conflict is predominantly seen by at least some soldiers as a religious one.This right is recognized in various human rights treaties. There is specific reference to the armed forces only in the 1950 Convention which stipulates that the relevant Article (11)'shall not prevent the impositionof lawful restrictions on the exercise of these rights by members of thearmed forces . . .' In all treaties the right may be restricted in the interestsof 'national security or public safety, for the prevention of disorder orcrime' [13].

Rather like restrictions on the freedom of assembly, restrictions on the freedom of expression may be used by a higher military authorityto conceal matters of concern to soldiers as a particular group. Military punishments are likely, for example, to be imposed for individual acts involved in disclosing military 'secrets' or for challenging the orders of a superior officer or even for 'undermining the morale' of the armed forces. In a memorable phrase the European Court of Human Rights has commented that the freedom of expression 'does not stop at the gates of army barracks [14].

Thus, the liability of a State, party to an international human rights instrument, for a breach of human rights by members of its armed forces if applicable will not be extinguished merely because the armed forces are assigned to a multinational force. Those armed forces may come under the command of a senior officer from another State who may direct that individuals inthe hands of the armed

forces under his command are to be treated ina particular way. The rules of engagement of the armed forces alleged tohave committed a breach of human rights may be silent on such detail orbe drawn in such a way that they pose no impediment to obedience of the orders of the foreign commander. It is also a strong possibility that thecommander may be a national of a State not party to any international human rights instrument. He may not have human rights issues fore most in his mind. Despite armed forces taking part in operations outside the boundaries of their State and under the command of a foreign senior officer ultimately they will remain subject to the control of their own State. The treaty regime of a particular human rights instrument is unlikely to accept thata participating State can be permitted to pass its responsibility under that treaty to another State or to an international organization, such as the United Nations or NATO [15].

To achieve this standard of treatment itwill have to create an infrastructure of legal advisers, courts and detention facilities for those convicted. This is likely to be an unwelcome addition to the responsibilities of the visiting force and it may deter some States from contributing a nationalcontingent to a multinational force. A potential contributing State mayalso be unclear as to how any detainees are to be dealt with after the State ends any contribution made to the force.

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