No. 283E

18.08.2004

BOFAXE

The ICJ advisory opinion on *the legal consequences of the construction of a wall in the occupied Palestinian territory:* The relationship between human rights and international humanitarian law

Replies and Comments

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Focus

International Court of Justice, *The legal consequences of the construction of a wall in the occupied Palestinian territory*, Advisory Opinion, 9 July 2004

"More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. 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. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law."

The relationship between international human rights law and international humanitarian law has for a long time intrigued many scholars. Historically, the law of peace and the law of war, i.e. human rights law and international humanitarian law in modern language, were strictly separated. Yet, the emergence of modern human rights law after World War II led to the creation of a certain category of rights called non-derogable. These rights are applicable under all circumstances, even in times of state of emergency and war (see for example article 15 of the European Convention on Human Rights). Further, the ICRC adopted in 1968 a resolution that reinforced the position that human rights law was applicable in times of armed conflicts.

Despite this evident overlap of these two *corpus juris*, some scholars still argued that there existed a moment where none of the norms relating to human rights or humanitarian law was applicable, thereby leading to a gap or a grey area. This stance seemed to have been abandoned in the 90s when a group of experts adopted a resolution based on human rights law, humanitarian law as well as refugee law. The fundamental principles adopted in Abo Turku on 2 December 1990 confirmed the existence of a group of rights that were applicable under all circumstances, i.e. that there was no gap or grey area. The United Nations Commission on Human Rights was seized of the matter, requested the Secretary-General to investigate the situation and then adopted several resolutions on the subject matter.

Nonetheless, some States maintained that human rights law and in particular, "the [International Covenant on Political and Civil Rights] was directed to the protection of human rights in peacetime, but that questions relating to unlawful loss of life in hostilities were governed by the law applicable in armed conflict" (ICJ, *Legality of the threat or use of nuclear weapons*, 1995, para. 24). In its advisory opinion on *the legality of the use of nuclear weapons*, the International Court of Justice expressly stated that even in times of armed conflicts the ICCPR was applicable. In another advisory opinion, this time relating to *the legal consequences of the construction of a wall in the occupied Palestinian territory*, the ICJ reiterated this position. In particular, it affirmed the applicability of the provisions of the ICCPR, the International Covenant on Economic, Social and Cultural Rights and the Convention on the Rights of the Child to the occupied territories (paras 102-113), a situation characterised as state of emergency according to international human rights law and occupation according to international humanitarian law.

The cumulative application of the two bodies of law inevitably begs the question as to which norms prevail. The ICJ specified the relationship between these two bodies of law. It had already declared in the advisory opinion on *the legality of the threat or use of nuclear weapons* that international humanitarian law was to be considered as *lex specialis*. In the 2004 advisory opinion, the Court clarified the point by stating that "there are […] 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" (para. 106). The existence of an overlap between human rights and international humanitarian law could not be more clearly stated. In case where the norms of these two bodies of law are applicable, the rules spelled out in humanitarian law should prevail. This is again declared in by the ICJ in paragraph 106 of its most recent advisory opinion.

Paragraph 106 nonetheless cuts the dreams of those who pleaded in favour of the convergence theory, i.e. of a merger of the two *corpus juris*. Another group of scholars supported the complementary theory, according to which the two bodies of law are not identical but complement each other, thus remaining distinct. The recent advisory opinion of the ICJ shows that the convergence theory seems to have lost support and the theory of complementarity to have won on the international level.

Responsibility

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BOFAXE are supported by the German Red Cross. The writer is solely responsible for the content.