

Human Rights in Armed Conflicts and Constitutional Law

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Abstract—The main purpose of this paper is to determine the impact of both International Humanitarian Law and anti-piracy International Law on Constitutional Law. International Law is endowed with a rich set of norms on the protection of private individuals in armed conflicts and copes with the diachronic crime of maritime piracy, which may be considered as a private war in the high seas. Constitutional Law has been traditionally geared at two generations of fundamental rights. The paper will aim at answering the question “Which is the profile of 3G constitutional rights, particularly in the light of International Humanitarian Law?”

Keywords—Constitution, Humanitarian International Law, Piracy, 3G fundamental rights.

I. AN INTRODUCTION TO HUMAN RIGHTS IN “WARS”

TRADITIONALLY, private individuals were in the margin of Public International Law, just as women were the passive subjects (non-citizens) of a national legal order. If women in Switzerland gained the recognition of their electoral rights just in 1973 and in Saudi Arabia voted for the first time in 2015, the legal status of men was not much better before the current era. The republican approach to citizenship is crafted in the model of Ancient Athens, based on a strict public – private division and on the exercise of political power by equal citizens, nevertheless, representing the minority of the population [1].

The current paper examines the legal status of human rights in “wars” in a wide sense, namely not only in armed conflicts but also in case of maritime piracy, in combination with internal law on fundamental rights, whose traditional material has to do with the first generation (civil and political rights) and the second generation (social, cultural and economic rights) [2]. The challenge of this synthetic approach to both international and internal branches of Public Law is to correlate international norms with the approach to formal national Constitutions on the matter. It is also to examine the question of the profile of the newer generation of rights, the third one, particularly in the light of International Humanitarian Law.

II. THE GENEVA CONVENTIONS AND THE ADDITIONAL PROTOCOLS OF 1949

Henry Dunant, born in Geneva on 8 May 1828, composed the text “A Memory of Solferino”, which led to the institutionalization of the International Committee for Relief

of the Wounded. The Geneva Conventions include four treaties and three additional protocols, on the standards for humanitarian treatment in case of armed conflict.

The two most important fundamental principles of International Humanitarian Law consist in:

1. The principle of Humanity, and
2. The Principle of military necessity.

For this specific branch, to effectively regulate the behavior of warring parties, both adequate rules and actual compliance with those rules are necessary.

From late 60s and on, many countries that came from the decolonization process formulated the need of creating a new International Order enhancing International Humanitarian Law. Therefore, two Protocols have emerged as texts being additional to the Geneva Conventions of 1949 (6 June 1977). These Protocols include essentially two arrangements devoted to the “Protection of Cultural Goods and places of worship” [3]. It is to put the stress on the ecological content of the first Protocol. This text bans any use of methods or means of war aiming at causing widespread, long-term, and severe damage to the natural environment. Before 1977 there were no explicit regulations on protection of the environment, in the case of armed conflicts, within International Humanitarian Law [4]. This results in an integration of the notion of the environment to protect, namely not only the cultural environment but also the natural one, which constitutes a legal trend in internal law, as well. Indeed, in the beginning of the 70s a reflection began on the status of the environment as a human right at the national, international and European level, as it is the case of the Declaration of Stockholm, in 1972 [5].

III. THE HAGUE CONVENTION

International Law has various sources on the protection of cultural property. Firstly, there is the UNESCO Convention, signed in 1970 in Paris, including regulations on the ban of illegal importation, exportation and transmission of the ownership of cultural goods. This is the most important legal text on an international scale, against antiquities looting and the illegal commerce of cultural goods. Before this treaty, museums made use of the informal “three-foot rule” as a criterion whether they would acquire a movable monument (coming from antiquities looting) or not.

International Law of Armed Conflicts has focused on this crucial topic over the last decades, as it is the case of The Hague Convention for the protection of cultural property in the event of armed conflict, of 1954. This UNESCO Convention entered into force in 1956 and has been ratified by 126 states. It is the first international treaty of a world-wide

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vocation dedicated to the protection of cultural heritage in the event of armed conflict. Besides, the modern notion of International Law "common heritage of mankind" is exemplified by the seabed and ocean floor beyond national jurisdiction [6]. This notion also appears in the cultural field, for the first time in the preamble of this Convention [7]. More concretely, the Contracting Parties were convinced

"that damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world".

The treaty has been completed by the first protocol, which came into force in 1956, and the second one, which has been in force since 2004.

Even nowadays, warring parties often show no respect for emblematic monuments, like the Old Bridge over the river Neretva, in Mostar. The monument was built during the 16th century, but was destroyed on the 9th of November 1993 by the Croatian defense force. These developments do not rule out the tendency of peaceful resettlement, exemplified by the fact that the bridge on the matter was rebuilt and opened in July 2004.

IV. AN INTRODUCTION TO MARITIME PIRACY LAW

Piracy is the most typical and diachronic crime of International Law, as far as it is committed outside of the territorial waters of any sovereign state [8]. At least till the abolition of privateering through the Declaration of Paris in 1856, it had appeared for centuries also in that alternative form. It may, as well, be committed in territorial waters, in which case it is not about a crime of International Law and eventually is not previewed in an explicit and specific way as "piracy", namely by specialized internal rules of the State involved. However, the most usual version of this crime is its presence in the high seas. As for this version, the UNCLOS, of 1982, has *ad hoc* rules, which preview no Criminal Law sanction but implicate the obligation of States Parties to collaborate against this kind of criminality. Piracy is considered as a "crime against humanity", transgressing the diachronic legal principle of freedom, particularly of navigation, in the high seas. So, this traditional concept is a precursor of that trend consisting in the "common heritage of mankind".

Pirates are private individuals, not State organs, who attack mainly ships (or planes) to get economic benefits. That is why, the doctrine describes them as private warring subjects.

Piracy in Somalia has been a threat to shipping since the second phase of the civil war in the early 21st century. Insurance companies significantly increased their profits relevant to the pirate attacks risks. The wider region of Somalia remained until recently the main region of piracy attacks, worldwide, although from 2013 and on there is an important decline in events. The most dangerous region is currently the Gulf of Guinea, mainly off Nigeria.

Anyway, the need of protection of shipping against piracy has led to two developments of major importance from 2008 and on. First, the European Union has created the first

shipping in its history to cope with piracy in the wider region of Somalia. This operation, called "Atalanta", is a European example of syncretism, having a very important impact, particularly in terms of prevention. With this military navy fleet, another similar operation collaborates, the NATO force "Ocean Shield". Nevertheless, another legal measure has been also adopted, this time of a different type of syncretism, in various national legal orders. It is about the institutionalization of the protection offered by private professional guards, being onboard only when the ships pass through zones of high danger for piracy attacks, such as Somalia, Nigeria etc. This international trend of traditional nautical countries is exemplified by Law 4058/2012 "Delivery of services by unarmed or armed guards to merchant ships and other dispositions", in the Greek legal order. One of the first cases of application of this measure consisted in the defense of the oil product tanker, registered in Greece, "Great Lady", in August 2012. Somali pirates attempted to rob the ship, protected by four unarmed professional guards, but in vain.

Finally, the French Republic was reluctant to modernize its Maritime Law by adopting this measure, as it was inspired from the "Colbert" doctrine, based on State interventionism. However, in 2014 it institutionalized the anti-piracy mission of private guards for merchant navy, registered in France, but guards onboard should not be less than three. In a parallel way, it still makes use of its own Military Navy, more precisely of the so-called "embarked teams of protection". Before this liberalization of the legal status, it had conducted various operations against current piracy, on its own.

The combination of the measures mentioned above, such as operation ATALANTA and the private guardianship, has been conducive to success against piracy in the wider region of Somalia. However, almost never have pirates been beaten at sea in the history of mankind...

V. 3G CONSTITUTIONAL RIGHTS

Modern constitutions take a specific approach to the phenomenon of peace, although regularly they are also endowed with rules on the declaration of war and the direction of armed forces. If the last rules belong to the organizational part of Constitutional Law, the clause relevant to peacekeeping is an anthropocentric one, having to do with the part consisting in Constitutional Rights Law. Indeed, there is the fundamental right to peace, having as carriers not only people but also private individuals. Constitutional Law has been recently enriched, in an important way, through its continuous osmosis with the normativity of International Law. International rules have transformed the war into a rather anachronistic means of dispute resolution between States, and therefore, have replaced it with peace. More precisely, peace became a legal rule after the traumatic experience of World War I, and an authentic *norm* after World War II.

It is important to underline the fact that International Law (initially) and Constitutional Law (afterwards) have promoted the notion of human rights, let alone they have acquired a common place, the field of 3G rights. This generation, which has gradually emerged over the last decades, is mainly

relevant to the fundamental principle of solidarity towards private individuals and society. Carriers of these original rights may be private individuals but also entire peoples. Although there is no unanimity in the level of the doctrine, as for the legally binding character of these rights, various rights are invoked, such as to peace, to the environment, to cultural heritage, to sustainable development etc.

The current research considers 3G rights as the complementary material of the previous generation, consisting in social rights, in the light of the constitutional principle of solidarity. Obviously, social rights implicate a back-up of the State towards the private individuals, particularly those belonging to the weakest groups of the population, in socioeconomic or other terms. In other words, they correspond to a kind of specific obligation of the State, which enacts the role of a donator towards society, according to the Social State principle. This constitutional principle appears in some formal Constitutions, such as the German and the Greek ones, in the form of social rule of law. It is to signalize that among the social rights, there are such rights which can operate uniquely in the relations between an individual and a State (vertical relations), whilst other rights can operate also – or some of them only – in the relations between two individuals (horizontal relations). For instance, employee rights operate both in the situation when an employer is a State and in a situation when an employer is a private entity [9].

The doctrine, encouraged by the jurisprudence, has highlighted the fact that 3G rights are not merely rights but also a kind of duties. Obviously, various terms are in use to declare the obligatory function of the legal goods on the matter. A mainstreaming example is the protection of the natural and cultural environment. According to a pioneer jurisprudence of the Greek Council of State, the protection is not merely a universal right, explicitly consecrated in article 24, paragraph 1 of the Constitution, but also the “responsibility” of everybody. As far as this new trend is concerned, it is to underline the fact that the notion of “responsibility” has acquired a new sense against the classic one. Indeed, if the traditional concept on responsibility means a constrained obligation, the modern alternative has to do with an obligation with a less obvious applicability and with an intensively moral background. It results in a dynamic, being relevant to the fraternity commitment of the society of citizens.

VI. A CREATIVE OSMOSIS BETWEEN INTERNATIONAL LAW AND CONSTITUTIONAL LAW

The main finding of the present paper consists in the creative recent osmosis between International Law, particularly the Humanitarian one, and Constitutional Law. The internal branch on the matter has become richer, through the movement on solidarity human rights. Moreover, it has adopted a more ethical approach to the legal position of private individuals and foreign people, as it is the case of the mixed phenomenon of 3G rights – duties. The emblematic right in the field of International Law is peace between States, which is not considered as merely an obligation of the States

involved, but also a duty of other entities, the private ones included. Indeed, the right of private individuals or of people to peace has also the aspect of the duty to act in a peaceful way (through the education of the new generations, the practice of non-violence etc.) [10].

Anyway, the frequent lack of concrete legal sanctions in the case of non-exercise of solidarity rights reminds of the similar consecration of social fundamental rights, implicating no judiciable claims of private individuals against the State. Furthermore, it is important to point out that International Law, mainly after World War II, has acquired a radically opposite and innovative orientation against the traditional status quo in favor of private individuals and against the use of violence (ban of wars comparable with the ban of privateering adopted in 1856, confrontation of antiquities smuggling in an international context, introduction of the principle of sustainability, particularly in the double form of sustainable development...).

Not only has Constitutional Law proved to be extremely open to the developments coming from International Law, but has also been endowed with “new rights” based on open formulation clauses, such as the clause of article 25 paragraph 1 of the Greek Constitution [11]. This is also the case of article 2 of the Italian Constitution, which has emphasized the protection of rights and has been considered as “great” by the doctrine [12]. Finally, scholars consider that there is a fourth generation set of fundamental rights, which is still under recognition [13]. This very recent development has to do with various topics, such as genetic engineering and bioethics, the new technologies of communications, the world of animals, and could be correlated with the “forgotten” human right to the pursuit of happiness. Constitutional Rights Law goes beyond the traditional concept of human rights, in correspondence with technological progress...

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