

**Balancing Contradicting Human Rights Obligations in Armed Conflicts and Counter Terrorism
workshop
December 2 – 4, 2024, Prague, Czechia**

**Round Table Discussion II – Upcoming Challenges in Balancing Human Rights and IHL
Obligations in Counter-Terrorism Operations**

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Introduction

The intersection of human rights law (HRL) and international humanitarian law (IHL) in counterterrorism operations presents one of the most complex legal challenges of our time. While both legal frameworks aim to protect individuals, they do so in different contexts—HRL governs peacetime and prioritizes individual rights, whereas IHL applies in armed conflicts and accommodates military necessity. Counterterrorism operations often blur these boundaries, particularly when they extend beyond traditional battlefields and involve non-state actors engaged in hybrid warfare. The growing influence of technology, as well as the evolving nature of global conflicts, calls for greater legal clarity in this field.

Basic Premises

Several fundamental tensions arise when balancing IHL and HRL in counterterrorism operations:

- **Terrorism as a fundamental challenge:** Acts of terrorism inherently violate both IHL and HRL principles, but legal responses must navigate differing frameworks.
- **Applicability issues:** Determining whether IHL or HRL applies to specific counterterrorism measures remains a contentious issue, particularly in non-international armed conflicts (NIACs).
- **Divergent approaches:** IHL, in certain contexts, allows greater latitude for state actions under the doctrine of military necessity, whereas HRL imposes stricter limitations on state conduct.

These tensions manifest in specific legal questions that arise in counterterrorism scenarios. One such area of concern is the treatment of civilians and the legal consequences of refusing access to digital data, such as mobile phones, which may hold crucial security information.

Key Questions of the Discussion

A. Civilian Rights and Security: Access to Digital Devices

One of the pressing questions discussed was the legal basis for compelling civilians to provide access to their mobile phones during counterterrorism operations. The key considerations included:

- If a person refuses to unlock their phone, does this alone constitute a security threat justifying detention?
- How should competing obligations under IHL and HRL be balanced in such situations?
- To what extent do international legal instruments, such as the International Covenant on Civil and Political Rights (ICCPR), protect against coercive access to personal data?

There was a discussion on whether merely refusing to provide access to a phone meets the threshold of security detention under IHL. Some participants argued that without additional evidence of direct involvement in hostilities, detaining a civilian for refusal alone may violate HRL protections. Others emphasized the operational necessity of obtaining intelligence in counterterrorism contexts, highlighting scenarios where delayed access to data could lead to imminent threats.

A comparative perspective was raised regarding American Fourth Amendment jurisprudence, particularly the *border exception*, which allows U.S. authorities to demand phone access at border crossings. However, in this context, the question remains whether such an exception can be extrapolated to conflict zones where IHL and HRL both apply.

B. Extraterritoriality and the Interaction of IHL and HRL

Another central issue was the extraterritorial application of human rights treaties in counterterrorism operations. There is a growing body of case law addressing state obligations beyond their own territory, including:

- *Hassan v. United Kingdom*: The European Court of Human Rights (ECtHR) found that individuals detained by a state's military forces are covered by the European Convention on Human Rights (ECHR), even in extraterritorial settings.
- The question of data privacy under HRL was explored through UK case law, which suggests that purely cyber-based surveillance of individuals abroad does not trigger Convention protections. However, if data is collected outside a state's jurisdiction but processed within its territory, HRL obligations may be engaged.
- The discussion also touched on the Ukraine-Russia case concerning the downing of MH17 and artillery shelling in Donbas. One of the central legal questions is whether human rights treaties should apply to state conduct in the context of hostilities.

C. The Status of Data Under IHL

A particularly nuanced debate centered on whether data qualifies as an "object" under IHL. Traditional IHL definitions of military objectives are based on tangible, physical entities. However, digital information—despite being intangible—can hold significant strategic value. The *Tallinn Manual* on cyber warfare does not recognize data as a protected object, but some states advocate for a broader interpretation, arguing that data should be granted similar protections as physical civilian infrastructure.

The implications of this debate extend to issues of military necessity and proportionality:

- Can intelligence data, such as a terrorist group's operational plans, be lawfully seized under IHL?
- If so, should the same logic apply to financial or commercial data unrelated to military operations?
- How should confiscated digital information be handled, particularly regarding data destruction prohibitions?

A related case discussed was an Israeli Supreme Court ruling on financial institutions in the West Bank, where private banks used by Hamas were also utilized by civilians. The court had to determine the criteria for targeting financial assets without unlawfully impacting non-combatants.

Investigations and Accountability in Armed Conflicts

One of the most intricate legal questions concerns the duty to investigate deaths in armed conflict. The following issues were explored:

- Under HRL, states have a duty to investigate unlawful killings, but does this extend to all battlefield deaths?
- *Jaloud v. Netherlands* addressed extraterritorial jurisdiction concerning killings at military checkpoints. The ECtHR ruled that HRL protections apply even when individuals are detained or engaged at border controls.
- The duty to investigate extends to friendly fire incidents, raising operational challenges for armed forces. Some participants pointed out that statistics indicate approximately 20% of combat deaths in modern conflicts result from friendly fire. The implications for accountability mechanisms remain significant.

The Question of Non-State Actors' Human Rights Obligations

Another unresolved issue is whether non-state armed groups (NSAGs) have human rights obligations. The discussion explored:

- Whether members of NSAGs can be held accountable for human rights violations in the same way as state actors.
- The extent to which NSAGs must investigate battlefield deaths, particularly in internal conflicts.
- Whether the killing of state soldiers by rebel groups in combat constitutes a violation of the right to life.

A perspective raised was that while states have an obligation to investigate deaths, the extent of this duty varies depending on the circumstances. Some argued that if a combatant's death is clearly a result of lawful military engagement, there may be no requirement for further inquiry, whereas unclear cases warrant investigation.

Conclusion

Balancing human rights and humanitarian law in counterterrorism operations presents ongoing legal and operational dilemmas. While IHL provides a framework for armed conflict, its intersection with HRL continues to raise fundamental questions about extraterritoriality, the protection of digital data, and the obligations of both state and non-state actors. As armed conflicts and counterterrorism operations evolve in complexity, international legal frameworks must adapt to ensure both security and the protection of fundamental rights.

The discussion underscored the importance of continued legal and academic engagement on these issues to develop clearer guidelines for states and practitioners navigating the intricate relationship between IHL and HRL.