

IHL and the Protection of Minorities

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Introduction

Discrimination and social, economic, and political marginalization of minorities can be a structural precondition or be instrumentalised in the lead up to an armed conflict. So there are compelling arguments to include a minority rights dimensions as a factor in early warning and conflict prevention strategies. Yet, I will not further elaborate on this because the focus of my intervention is on international humanitarian law: international humanitarian law is not concerned with the reasons why an armed conflict breaks out. Instead, international humanitarian law strives to protect persons affected by armed conflict and limits the means and methods of warfare that can be used by the parties to a conflict. Importantly, parties to an armed conflict can be both state and non-state actors and international humanitarian law binds both. I am going to address three points: First, the impact of armed conflict on minorities; second the way IHL protects minorities through the prohibition of adverse distinction, and third, the prohibition of adverse distinction as a principle underlying humanitarian action.

1) Impact of armed conflicts on minorities

Armed conflicts tend to exacerbate the pre-existing challenges that minorities are facing and to contribute to the deepening or instrumentalization of a divide along ethnic, linguistic and religious lines. This, in turn, often leads to the securitization of minorities in the sense that the parties to a conflict will try to co-opt them for their own purposes or see them as a threat. Although, as the Special Rapporteur pointed out in her recent report to the General Assembly, there is little or no disaggregated data on the impact of armed conflict on minorities, the available information suggests that armed conflicts disproportionately affect minorities: both states and non-state armed groups may deliberately target minorities or they may see minorities as a 'soft target' because they are less protected; minorities may be displaced by virtue of being a minority; and sexual and gender-based violence is often employed in a symbolic manner to attack the identity of minority groups or as part of a genocidal strategy.

2) Prohibition of adverse distinction as a guiding principle in IHL

In light of the impact of armed conflict on minorities, the question is how does IHL protect them? IHL does not provide any specific protection for minorities as such. However, IHL protects minorities through the prohibition of adverse distinction, the IHL equivalent to the principle of non-discrimination in human rights.

Without going into details, the prohibition of adverse distinction is a guiding principle in IHL. In particular, during both international and non-international armed conflicts, IHL prohibits adverse distinction in the treatment of civilians and other persons not or no longer participating in hostilities. The reference to adverse distinction means that in certain circumstances and depending on the special needs of certain groups preferential treatment must be granted. The prohibited grounds of adverse distinction were expanded over time and they are not exhaustive. They include adverse distinction based on race, colour, sex, language,

religion or belief, political or other opinion, national or social origin, wealth, birth or other status, or any other similar criteria. Hence, the prohibition of adverse distinction includes that members of national, ethnic, religious, or linguistic minorities are not to be discriminated against. Yet, it is also broader as it includes other grounds, such as political opinion. In other words, the prohibition of adverse distinction protects minorities, but it is not specifically designed or tailored towards the protection of minorities.

Although the prohibition of adverse distinction is a guiding principle underlying IHL, it remains remarkably underexplored in scholarship and state practice. In relation to the protection of minorities, two issues would deserve further analysis.

First, the prohibition of adverse distinction is geared towards the treatment of individuals. It is not clear whether and how the direct and indirect impact of an armed conflict on minority groups and their identity could be covered.

Second, the prohibition of adverse distinction is generally understood as being limited to the treatment of persons who are in the hands of a party to a conflict, including those who are detained, who are in internment camps, or who are in occupied territory. It applies to protection obligations, such as the provision of medical aid or the guarantee of humane treatment. It is an open question whether the prohibition of adverse distinction may have a broader, “umbrella” function in requiring non-discrimination in the application of all the rules in IHL, including those governing the conduct of hostilities. In this context, it could also play a further role for the protection of minority groups.

3) The prohibition of adverse distinction underlying humanitarian relief

The third aspect that deserves to be mentioned is that the principle prohibiting adverse distinction also applies to humanitarian relief. IHL regulates the question of access for humanitarian relief. Without entering into a detailed discussion of the relevant rules, it is generally understood that the parties to an armed conflict must allow humanitarian relief for civilians in need which is impartial in character and conducted without any adverse distinction.

This brings me to my concluding remarks on the accountability of humanitarian actors during humanitarian crises. IHL does not address the accountability of humanitarian actors as such. Yet, as just explained, no adverse distinction in the delivery of humanitarian relief is permitted. If a State or armed group told a provider of humanitarian relief that it could provide assistance to only some national, ethnic, religious, or linguistic groups and not others, amounting to adverse distinction against minorities, humanitarian actors would arguably be outside the framework provided by IHL and have an obligation to reject such operations as incompatible with principled impartial humanitarian action. Finally, one could also argue that in order to ensure that humanitarian relief does not have an indirect adverse distinction based on prohibited grounds, including in relation to minorities, humanitarian actors should take into account the specific needs and challenges faced by minorities in accessing humanitarian relief during armed conflict.