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Armed Conflict and International Law: In Search of the Human Face

Liber Amicorum in Memory of Avril McDonald

Mariëlle Matthee
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Editors
Mariëlle Matthee
The Hague
The Netherlands

Brigit Toebes
Marcel Brus
Faculty of Law
University of Groningen
Groningen
The Netherlands

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Foreword

By the time this book is published it will be about three years ago that Avril McDonald suddenly passed away, at the age of 44, on 13 April 2010. She left behind a large group of friends and colleagues and a lot of unfinished projects. There was so much that she had wished to achieve and that she was passionate about: her friendships, her research projects, her students. Avril lived an intense life in which she demanded much of herself and of others, including her students, in order to realise the best achievable results. She could be very critical of herself and could be very straightforward to others, but her enthusiasm and humour made it acceptable to everyone.

Avril had worked very hard to reach the position which she had attained in 2010. In May 2009 she was appointed as Rosalind Franklin Fellow in International Law and Contemporary Conflict at the University of Groningen in the Netherlands and in 2010 she would have become adjunct professor and entitled to use the title of *professor*. In this professorship she would have combined her expertise in international humanitarian law (IHL) with questions related to the use of force in international law, in particular on the role of non-state actors in international conflict. Avril graduated in law in 1987 at Trinity College, Dublin. However, the first years of her career were not dedicated to law but to journalism as she obtained a graduate diploma in journalism in 1988 and worked for various journals and magazines in Ireland, Australia and the USA, mainly in New York. In 1995 she had returned to the study of law and obtained an LLM in Human Rights and Emergency Law from Queens University in Belfast. Combining her skills as a journalist and her knowledge of international law she worked at the International Criminal Tribunal for the Former Yugoslavia as a Legal Assistant in the Press and Information Office in 1996 and 1997. Her scholarly ambition did not stop there and she started working on a Ph.D. thesis at Queen's University Belfast which she completed in 2002, while at the same time working in The Hague and at the T.M.C. Asser Institute as managing editor of the Yearbook of International Humanitarian Law (1997–2007) and as Head of the international humanitarian law section at the Asser Institute. Her increasing academic contributions were combined with various teaching posts at various universities in the Netherlands, including in Groningen, where she succeeded Professor Frits Kalshoven in 2004 as the lecturer on the course in international humanitarian law.

Avril was a remarkable teacher, capable of making a 7-week course in IHL, only a half-semester course, to one of the most intense, valuable and also most liked courses in the curriculum for students specialising in international law. In these lectures she really tried to share with the students her passion for this area of the law. With her energetic presentations, her humour, her sometimes provocative style, she left a great impression on many groups of students and aroused a lasting interest in IHL for many. Avril used all her talents in her teaching, but she also worked very hard to prepare fully for each class and for giving students all she had. She could be very demanding and critical, but at the same time she would always be there for students to help them to learn from her critique.

In about 10–20 years Avril was able to become an expert in the field of international humanitarian law as is evident from her growing list of publications, her participation in training programmes and summer schools in various countries and for audiences ranging from the academic to the military, her active involvement as an organiser, the chair and most often a speaker in dozens of conferences and seminars in many places around the world. With her new appointment as the Rosalind Franklin Fellow at Groningen University she was about to reap the fruits of all her work. She had worked on a book on private military contractors in armed conflict, a project she had hoped to conclude soon, and was active in developing her Rosalind Franklin project in which she would focus on various aspects of the use of armed force by non-state actors and the consequences thereof for the further development of the law of peace and security and international humanitarian law. With this project she would investigate and comment on international legal developments on the basis of an understanding of the changed nature of conflicts in the world and the involvement of not only states and their armies, but a variety of armed groups, terrorists and criminal organisations not under the control of state authorities.

Avril's motivation and inspiration was in essence a humanitarian one; international human rights and the application of the concept of humanity to international and internal conflict were her driving force. *Armed conflict and international law, in search of the human face* is therefore a very fitting title for this book dedicated to her. This book is a tribute to Avril from her friends and colleagues. There were many others who would have liked to contribute but had to be declined for various reasons.

Avril loved books. Her apartment in The Hague was famous for the large collection of books she had built up, including a huge number of (international) law books. Her collection of law books has been donated by her family to the University of Groningen and has been incorporated in the collection of the University library and can now be used by her colleagues and students. This book is published with the help of the Avril McDonald Memorial Fund, a fund set up by her colleague Roseland Franklin Fellows and for which activities are organised every year to replenish the fund. The fund is intended to support talented young scholars in realising their academic dreams. The book would not have seen the light of day without the relentless efforts of Brigit Toebes and in particular

Mariëlle Matthee. In the editorial phase Mathilde Bos has assisted very effectively in the preparation of this book for publication.

We are confident that this book will not only be regarded as a tribute from those who have contributed, but will also help everyone to remember Avril McDonald for the very special person she was.

Groningen, Spring 2013

Marcel Brus
Professor of Public International Law
University of Groningen

Contents

Abbreviations

AFRC	Armed Forces Revolutionary Council
AMIS	African Union Mission to Sudan
ANCBS	Association of National Committees of the Blue Shield
BMA	British Medical Association
CCW	Certain Conventional Weapons
CDF	Civil Defence Forces
CESCR	Committee on Economic, Social and Cultural Rights
CETC (F)	Chambre de la Cour suprême du Cambodge
CPI (F)	Cour pénale internationale
DARPA	American Defense Advanced Research Projects Agency
DIH (F)	Droit international humanitaire
DoD	Department of Defense of the United States
DRC	Democratic Republic of Congo
DRTF	Disaster Relief for Museums Task Force
ECCC	Extraordinary Chambers in the Courts of Cambodia
ECHR	European Convention for the protection of Human Rights
ECOMOG	Economic Community of West African States Monitoring Group
FDLR (F)	Forces démocratiques de libération du Rwanda
GHF	Global Heritage Fund
HRL	Human Rights Law
HRW	Human Rights Watch
IAC	International Armed Conflict
ICA	International Council of Archives
ICBS	International Committee of the Blue Shield
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICL	International Criminal Law
ICOM	International Council of Museums
ICOMOS	International Council of Monuments and Sites

ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IEDs	Improvised Explosive Devices
IFLA	International Federation of Libraries
IHL	International Humanitarian Law
IMCuRWG	International Military Cultural Resources Working Group
IPB	International Peace Bureau
ISAF	International Security Assistance Force
JCE	Joint Criminal Enterprise
LLRC	Lessons Learnt and Reconciliation Commission
LOAC	Law Of Armed Conflict
LRA	Lord's Resistance Army
MAARS	Modular Advanced Armed Robotic System
MP	Military Police
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental Organisation
NIAC	Non-international Armed Conflict
OCHA	United Nations Organisation for the Co-ordination of Humanitarian Assistance
OEF	Operation Enduring Freedom
OHCHR	Office of the High Commissioner for Human Rights
OTP	Office of The Prosecutor
PCIJ	Permanent Court of International Justice
PMCs	Private Military Companies
POW	Prisoner Of War
RDC (F)	République Démocratique du Congo
REV	Robotic Evacuation Vehicle
REX	Robotic Extraction Vehicle
RoE	Rules of Engagement
RPVs	Remotely Piloted Vehicles
RUF	Revolutionary United Front
SCSL	Special Court for Sierra Leone
SLA	Sierra Leone Army
SWORDS	Special Weapons Observation Reconnaissance Detection System
TPIR (F)	Tribunal pénal international pour le Rwanda
TPIY (F)	Tribunal pénal international pour l'ex-Yougoslavie
TRC	Truth and Reconciliation Commission
UE (F)	Union Européenne
UAVs	Unmanned Aerial Vehicles
UGVs	Unmanned Ground Vehicles
USVs	Unmanned Surface Vehicles

UUVs	Unmanned Underwater Vehicles
UN	United Nations
UNESCO	United Nations Educational, Scientific and Cultural Organisation
WHO	World Health Organisation
WMA	World Medical Association

Photograph by Gearóid Dolan

A Lit Beacon in the Dark

On the Academic Work of Avril McDonald

Avril McDonald's work can be characterised as being rich and diverse in nature: diverse were not only the topics she discussed, but also the perspectives she skilfully imagined and defended. Her work reflects a thorough understanding of what goes on in situations of armed conflict. She addressed topics and questions that were not part of mainstream research and could run counter to viewpoints defended in international politics. For instance, she wrote on the conflict between the Israelis and the Palestinians before most others did.[1]

Her research was of high quality, and being a journalist by education and using her writing skills allowed her to make her publications accessible to both lawyers and non-lawyers working in the field of international humanitarian and criminal law. Furthermore, her frequent use of metaphors and references to well-known expressions in the English literature made her work enjoyable to read.[2]

One approach that runs as a common thread through Avril's work will be discussed more elaborately in this introduction: she searched for the human face of international humanitarian and criminal law in the day-to-day reality of armed conflict.

[1] See Chap. 6. See also Handmaker and McDonald 2006b.

[2] For instance, she humorously mentioned the current address of the International Criminal Court (Moon Road) and the analogy with its function did not escape her; its role being 'to shine a light into the darkest depths of human behaviour', McDonald 2004b. Furthermore, when discussing the challenges of and the responses to terrorism and international law, she compared the vision of the American politicians with the words used by Lewis Carroll in Alice in Wonderland to describe the misperceptions of the human mind, 'through the looking glass' effects (McDonald 2002a, p. 71). In her contribution on the Bosnian war chamber, she used the following metaphor: 'the goliath of international justice such as the ITCY', McDonald 2009, p. 328.

The Human Face

Looking for the human face of the international law of armed conflict can have many aspects. For Avril, it meant, in the first place, insisting on the special character of international humanitarian law itself. She recognized that the construction of a legal system for situations characterised by chaos, anarchy, violence and mutual distrust is in itself a very valuable event and at the same time a delicate path to tread. She defined it in one of her contributions:

> The law of war is called international humanitarian law not because it is obvious that humanity should exist in war but because it is not obvious at all to those who fight these wars, as opposed to those who legislate for them. Because of the natural human tendency to lose all inhibitions when fighting in armed conflict, the need for humanity in war has had to be implanted into the rules regulating this most barbaric of human activities.[3]

International humanitarian law is built on the recognition of two opposite sides of humanity. On the one hand, the term 'human' refers to the sympathetic kindness of members of the human race, for instance the human capacity for compassion, which is reflected in the protective scope of international humanitarian law; the protection of those not directly involved in the armed conflict.[4] On the other hand, it refers to the fragility of the human race, its 'dark side' and capacity to destroy. According to Avril, the construction of humanitarian law is based on a simple attitude of good sense and self-preservation, as she expressed in the following sentences:

> …, it [IHL] seems to be and is a question of good sense and self-preservation: do unto others as you would have them do unto you. This system of reciprocity only works, however, where there are two or more enemies who, as much as they might despise one another, are committed to observing the rules out of a sense of prudence, economy, self-preservation and advantage, or a combination of some or all of these and other motivating factors.[5]

She recognised that it is not purely for idealistic purposes that international humanitarian law has developed, but that it is actually based on common sense and on a very realistic view of human behaviour that calls for a clear and obvious incentive to obey rules regulating the conduct in armed conflicts. She stated:

> …This has been done for reasons that are not necessarily purely altruistic but because usually it has been considered to be militarily advantageous to do so. Humanity and advantage thus should not be seen as principles of the law that are naturally diametrically opposed and in conflict with one another; in fact, they are closely related and can be mutually reinforcing.[6]

For the protection of this vulnerable construction of humanitarian law, Avril always looked at the essence of the rules on the one side, and at the reality of

[3] McDonald 2008a, p. 244.

[4] See Chap. 3, Brollowski.

[5] McDonald 2008a, p. 243.

[6] Ibid., p. 244.

today's armed conflicts on the other. Are the rules still apt to the current situations; do they need to be adjusted? Where can and do we need to expand the rules of humanitarian law to guard the human face? Where do we need to refrain from applying the rules too strictly to keep in line with the pace of people and to prevent the disobedience of the rules of international humanitarian law?

Making a Real Connection with the Lives of People Directly Affected by Armed Conflicts

Avril's interest was undeniably in people affected by the reality of armed conflicts. The chosen topic for her Ph.D. on the rights to legal remedies of victims of serious violations of international humanitarian law and her first publications on how justice can be rendered to women, victims of violence and rape already illustrate her empathy with people who suffered from armed conflicts. From these first studies, she concluded that looking for victims' justice, without making connections with their lives, and without making them part of the process, will not lead to reconciliation:

> Above all, victims need to be consulted and listened to. Presuming to know what victims want and imposing 'solutions' on them that seem to have no real connection with their lives will not assist in promoting reconciliation.[7]

The wording 'above all' indicates how important this conclusion had become for Avril; to make a 'real connection' with the lives of the people directly affected by armed conflict. This approach, which could be referred to as looking for the human face of armed conflicts, is a core element in her work. If her position as a scholar could be characterised in one sentence, it might be described as ensuring that this real connection took place by promoting attention to the unheard voices of the people concerned, over and over again. Whether it be women raped during armed conflict,[8] or the Palestinians,[9] or the victims of serious violations of international humanitarian law in general,[10] or the 'hors de combat' or 'unlawful combatants' after September 11,[11] or the victims of the use of depleted uranium,[12] she tested the ability of international humanitarian and criminal law to respond to their concerns.

Her concern with people directly affected by armed conflict went beyond the obvious categories of victims of armed conflict; it extended to all people who are directly touched by armed conflict, whether in their position as victims or as military. She examined, for example, the legal status of military and security

[7] Ph.D. research of Avril McDonald, on file with the T.M.C. Asser Institute, p. 292.

[8] McDonald 1998, pp. 72–82.

[9] Handmaker and McDonald 2006b.

[10] McDonald 2006a, pp. 237–276. McDonald 2007a, pp. 34–44.

[11] McDonald 2002b, pp. 206–209. McDonald 2008a, pp. 219–262.

[12] McDonald 2008b, pp. 251–278.

subcontractors as an emerging group of civilians, directly or indirectly linked to hostilities and armed conflicts for whom there is a clear lack of international legal regulation that provokes questions concerning their international criminal liability or their status as prisoners of war.[13] She was aware of the ambiguous position the contractors were in, but she also had an eye for the realities of today:

> There is an almost inherent prejudice against and suspicion of PMCs [private military companies] and military and security contractors, and an assumption that the practice of contracting must be limited as must be the roles performed by subcontractors. Yet, these deeply held beliefs are challenged by the realities of modern war making and conflict. The growth in PMCs is a direct response to the rising demand for their services.[14]

She saw it as the responsibility and the challenge of international and national lawyers to take into account the concrete circumstances of the armed conflict, or of the post-conflict situation. Reconciliation cannot take place without the voice of victims and obedience of the rules of armed conflict depends on the willingness and capacities of soldiers to obey them. She stressed the importance of holding on to the essential principles of international humanitarian and criminal law. At the same time, she invited researchers and politicians to be attentive to changing circumstances of the people involved in armed conflict that would have an influence on their capacity to obey the rules or on the capacity of the people affected by armed conflict to come to reconciliation. For instance, in her contribution on the unlawful civilian participation in hostilities, she stated:

> Clearly, the investigation and the discussions cannot be purely academic, given that the phenomenon of unlawful civilian participation in hostilities has serious operational consequences. The close involvement of the military in these efforts is to be welcomed and further encouraged.[15]

Greater Justice as a Lit Beacon: The Role of Time and Developments

Time is an important element in the way Avril considered developments in the area of international humanitarian and criminal law. Repeatedly, she ended her conclusions with the words 'only time will tell.'[16] She realised that the ideal world reigned by justice is not established in a day, that our understanding and knowledge of today is insufficient to find all-inclusive solutions. She included the element of time as a valuable element, able to help us find our way in the quest for justice. She also realised that, on the other hand, there is urgency wherever war crimes touch humans. "Nothing can turn back the clock"[17] for those who have

[13] McDonald 2005, pp. 215–253. McDonald 2007b, pp. 357–401.

[14] McDonald 2005, p. 247.

[15] McDonald 2004a, p. 32.

[16] For instance, McDonald 2000, p. 26.

[17] McDonald 2007a, p. 34.

suffered greatly during armed conflict. Any justice or development in the legal system of international humanitarian law will come too late for them. This urgency can easily lead to the question "How can justice ever be made meaningful for such people?" and may lead to an attitude of frustration and despair. Avril had the ability to remain focussed on the realistic possibilities of nowadays and not be lost in expectations which are too high. She recognised the important accomplished steps, even if they were small, and emphasized the importance of protecting this accomplished work. An example is her publication on the rules on protecting persons hors de combat and the challenges that post-11 September brings along for a suitable interpretation of these rules:

> … the laws of war draw a line. Some things can never be justified on any account… What is absolute in the rules codified in the treaties is as far as we have managed to come so far in terms of the quality of mercy. International humanitarian law, as most particularly shown in its rules protecting persons hors de combat, is a statement of the extent, and limits, of our humanity in war. It represents a great success in terms of law making, but in terms of humanity it is a very small step. If only for that reason, the line should be held and not breached.[18]

In a similar way, she looked at the establishment of the International Criminal Court (ICC) and its functioning. Not neglecting in any way the fruitfulness of a critical approach, she proposed a different way to consider the ICC: "The best way to look at the ICC is not as a court, although it surely is, but as a centrifuge of a globalised system of prevention and punishment of international crimes."[19] By proposing this adjustment of perspective on the ICC, she invited the readers to temper their expectations in view of the realities of the limited resources and capacities of the ICC. At the same time, by renaming the role of the ICC, she shifted the focus of the readers from its incapacities to what the ICC is capable of doing today and thereby acknowledging the important step forward that its establishment can mean for the quest for greater justice. She ended:

> It seems fitting that the ICC's temporary seat is on a road in The Hague called Maanweg (moon road), given that its role is to shine a light into the darkest depths of human behaviour. For now, the question of how to make criminal justice really tangible to women victims of international crimes remains unanswerable but at least we can now seriously pose it and a start has been made in moving towards confronting the problem of international criminality with the beacon lit in The Hague.[20]

During her life, Avril carried out valuable and highly qualified research on various topics in the field of international humanitarian and criminal law. But more importantly, it was her attitude as a humanitarian lawyer that expresses the essence of humanitarian law; she remained attentive to the people directly affected by

[18] McDonald 2008a, p. 248.

[19] McDonald 2004b.

[20] Ibid.

armed conflicts and their perspectives and priorities. Through her care, their concerns found a way to be heard by the larger audience working in the field of international humanitarian and criminal law.

Mariëlle Matthee
Managing Editor

References

McDonald A (1998) Prosecuting IHL violations against women, Nemesis 14(1):132–142
McDonald A (2000) Sierra leone's uneasy peace: The amnesties granted in the lomé peace agreement and the United Nations' dilemma. Humanitäres Völkerrecht 13:11–26
McDonald A (2002a) Terrorism and international law: challenges and responses, contribution presented at the "Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law", International Institute of Humanitarian Law, Sanremo, 30 May–1 June 2002
McDonald A (2002b) Defining the war on terror and the status of detainees: comments on the presentation of judge George Aldrich. Humanitäres Völkerrecht 15:206–209
McDonald A (2004a) The challenges to International Humanitarian Law and the principles of distinction and protection from the increased participation of civilians in hostilities, background working paper for a roundtable at the University of Teheran. www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379. Accessed 4 July 2012
McDonald A (2004b) International crimes against women and the International Criminal Court", background paper for a meeting organised by the coalition for the International Criminal Court on women and the ICC, held in The Hague on 7 September 2004. www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13380. Accessed 4 July 2012
McDonald A (2005) The legal status of military and security subcontractors. In: Arnold R, Hildebrand PA (eds) International Humanitarian Law and the 21st century's conflicts: changes and challenges. Ed. interuniversitaires suisses (Edis). Lausanne, pp 215–253
McDonald A (2006a) The development of a victim-centered approach to International Criminal Justice for Serious Violations of International Humanitarian Law. In: Carey J et al (eds) International Humanitarian Law, vol 3 prospects, Transnational Publishers Inc., New York, pp 237–276
Handmaker J, McDonald A (2006b) Israel must be stopped, Electronic Lebanon, 31 July 2006. http://electronicintifada.net/content/israel-must-be-stopped/6267. Accessed 19 Nov 2012
McDonald A (2007a) The international victims reparations agency: helping victims to help themselves. In: Fijalkowski A (ed) International institutional reform: proceedings of the seventh Hague Joint Conference on contemporary issues of international law. T.M.C. Asser Press, The Hague, pp 34–44
McDonald A (2007b) Ghosts in the machine: some legal issues concerning US military contractors in Iraq. In: Schmitt MN, Pejic J (eds) International law and armed conflict: exploring the faultlines: essays in honour of Yoram Dinstein. Nijhoff Publishers, Leiden, pp 357–401
McDonald A (2008a) *Hors de Combat*: Post-September 11 Challenges to the rules. In: Hensel HM (ed) The legitimate use of military force: the just war tradition and the customary law of armed conflict. Ashgate Publishing limited, Farnham, Surrey, pp 219–262

McDonald A (2008b) International and domestic remedies for individuals suffering damage as a result of exposure to depleted uranium weapons. In: McDonald A et al (eds) Depleted uranium weapons and international law: a precautionary approach. T.M.C. Asser Press, The Hague, pp 251–278

McDonald A (2009) Bosnia's war crimes chamber and the challenge of an opening and closure. In: Doria J et al (eds) the legal regime of the International Criminal Court, essays in honour of professor Igor Blishchenko. Martinus Nijhoff Publishers, Leiden, pp 297–328

Published Academic Work of Avril McDonald

McDonald A (1998) Prosecuting IHL Violations against Women, 14 Nemesis 1, pp. 132–142
McDonald A (1999) Sex Crimes at the Ad Hoc Tribunals, 15 Nemesis, pp. 72–82
McDonald A (2000) Sierra Leone's Uneasy Peace: The Amnesties Granted in the Lomé Peace Agreement and the United Nations' Dilemma, 13 Humanitäres Völkerrecht, pp. 11–26
McDonald A (2002) Sierra Leone's Shoestring Special Court, 84 International Review of the Red Cross, pp. 121–143
McDonald A (2002) Defining the War on Terror and the Status of Detainees: Comments on the Presentation of Judge George Aldrich, 15 Humanitäres Völkerrecht, pp. 206–209
McDonald A (2002) Terrorism and International Law: Challenges and Responses, contribution presented at the "Meeting of independent experts on Terrorism and International Law: Challenges and Responses. Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law", International Institute of Humanitarian Law, Sanremo, 30 May – 1 June 2002
McDonald A (2004), The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities, Background working paper for a Roundtable at the University of Teheran. www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13379. Accessed 4 July 2012
McDonald A (2004) International Crimes against Women and the International Criminal Court", Background paper for a Meeting organised by the Coalition for the International Criminal Court on women and the ICC, held in The Hague on 7 September 2004. www.asser.nl/Default.aspx?site_id=9&level1=13337&level2=13380. Accessed 4 July 2012
McDonald A (2005) The Legal Status of Military and Security Subcontractors. In: Arnold R, Hildebrand PA (eds) International Humanitarian Law and the 21th Century's Conflicts: Changes and Challenges, Ed. Interuniversitaires suisses (Edis). Lausanne, pp. 215–253
McDonald A (2006) The Development of a Victim-Centered Approach to International Criminal Justice for Serious Violations of International Humanitarian Law. In: Carey J, et al (eds.) International Humanitarian Law. Vol. 3 Prospects, Transnational Publishers Inc., New York, pp. 237–276
Handmaker J, McDonald A (2006) Israel must be stopped, Electronic Lebanon, 31 July 2006. http://electronicintifada.net/content/israel-must-be-stopped/6267. Accessed 19 November 2012
McDonald A (2007) The International Victims Reparations Agency: Helping Victims to Help Themselves. In: Fijalkowski A (ed) International Institutional Reform: proceedings of the seventh Hague Joint Conference on Contemporary Issues of International Law. T.M.C. Asser Press, The Hague, pp. 34–44
McDonald A (2007) Ghosts in the Machine: Some Legal Issues Concerning US Military Contractors in Iraq. In: Schmitt MN, Pejic J (eds) International Law and Armed Conflict: Exploring the Faultlines: Essays in Honour of Yoram Dinstein. Nijhoff Publishers, Leiden, pp. 357–401

McDonald A et al (eds) (2008) Depleted Uranium Weapons and International Law: A Precautionary Approach, T.M.C. Asser Press, The Hague

McDonald A (2008) Depleted Uranium Weapons: The Next Target for Disarmament? United Nations Institute for Disarmament Research, Geneva. http://www.unidir.org/files/publications/pdfs/uranium-weapons-en-328.pdf

McDonald A (2008) International and Domestic Remedies for Individuals Suffering Damage as a Result of Exposure to Depleted Uranium Weapons. In: McDonald A et al (eds) Depleted Uranium Weapons and International Law: A Precautionary Approach, T.M.C. Asser Press, The Hague, pp. 251–278

McDonald A (2008) *Hors de Combat*: Post-September 11 Challenges to the Rules. In: Hensel H M (ed) The Legitimate Use of Military Force: The Just War Tradition and the Customary Law of Armed Conflict. Ashgate Publishing Limited, Farnham, Surrey, pp. 219–262

McDonald A (2009) Bosnia's War Crimes Chamber and the Challenge of an Opening and Closure. In: Doria J et al (eds) The Legal Regime of the International Criminal Court, Essays in Honour of Professor Igor Blishchenko. Martinus Nijhoff Publishers, Leiden, pp. 297–328

McDonald A (2009) Operation Cast Lead: Drawing the Battle Lines of Legal Dispute, 16 Human Rights Brief, pp. 25–29

McDonald A (2009) Jus in Bello: Conduct of hostilities, contribution to the Special HILAC Event (The Hague Initiative on Law and Armed Conflict) on International Legal Issues Arising from the Gaza Conflict (2008/2009), held at the T.M.C. Asser Institute on 26 March 2009.

As Managing Editor of the YIHL 1998–2005

McDonald A (1998) The Year in Review, Vol. 1 YIHL, pp. 113–160
McDonald A (1999) The Year in Review, Vol. 2 YIHL, pp. 213–253
McDonald A (2000) The Year in Review, Vol. 3 YIHL, pp. 169–225
McDonald A (2001) The Year in Review, Vol. 4 YIHL, pp. 255–327
McDonald A (2002) The Year in Review, Vol. 5 YIHL, pp. 255–312
McDonald A (2003) The Year in Review, Vol. 6 YIHL, pp. 239–291
McDonald A (2004) The Year in Review, Vol. 7 YIHL, pp. 281–323
McDonald A (2005) The Year in Review, Vol. 8 YIHL, pp. 221–264
McDonald A (2006) The Year in Review, Vol. 9 YIHL, pp. 247–310

Part I
In Search of Humanitarian Principles

Chapter 1
Fighting by the Principles: Principles as a Source of International Humanitarian Law

Jeroen C. van den Boogaard

Abstract The rules of international humanitarian law of armed conflict are codified in a rather extensive body of treaty law. In addition, extensive research has been conducted into the rules of customary international humanitarian law. The author of this contribution will argue that there is another important source of positive international humanitarian law: principles of international humanitarian law. In this chapter, the role of the principles of international humanitarian law, the functions they perform and their legal significance as a source of international humanitarian law will be assessed. With general public international law as its starting point, the chapter discusses the sources of international humanitarian law. It explains the important role of the Martens Clause and provides examples of how the principles of international humanitarian law may be applied in contemporary armed conflicts.

The author is a legal adviser, Ministry of Defence of the Kingdom of the Netherlands and a researcher/PhD candidate at the Amsterdam Center for International Law (ACIL), University of Amsterdam. The topic of this chapter forms part of the author's PhD research on the principle of proportionality in armed conflict. The author wishes to thank Terry Gill, Rogier Bartels, Emilia Richard and Paul Ducheine for their comments on an earlier draft version of this chapter. The author also thanks Frits Kalshoven, Geoffrey Corn, Etienne Henry and Tara Smith for their valuable insights. The opinions expressed in this contribution are those of the author and do not necessarily reflect the views of the Ministry of Defence or the ACIL. For any remaining errors only the author can be blamed. Refer to jcvandenboogaard@gmail.com for comments.

J. C. van den Boogaard (✉)
Dutch Ministry of Defence, The Hague, The Netherlands
e-mail: jcvandenboogaard@gmail.com

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Contents

Upon my face I've got to put on a smile,
make up my mind just to walk more miles
Because I know that it is not an easy road.
(from the 'Not an easy road', by Buju Banton)

I met and worked with Avril McDonald when she was Head of the International Humanitarian Law and International Criminal Department of the Asser Institute. Avril was an inspirational woman with a lively personality. I am thankful for having known her also on a personal level. She was an important inspiration for me personally, and also for this chapter.

1.1 Introduction

In the spirit of the title of this book, this chapter will deal with a topic that is very significant for the search for a human face of international law, both during armed conflict and in peacetime. It concerns the rules concerning the protection provided by international humanitarian law. There are detailed rules for the protection of those who do not, or no longer participate in hostilities, such as civilians, wounded and sick military personnel and persons who are deprived of their freedom in connection with a conflict. In addition, international humanitarian law limits the weapons and methods of warfare that may be used during armed conflict. These rules aim to preserve a sense of humanity in armed conflict, while recognising that there is a need for the members of the armed forces to use armed force in order to defeat their enemy.[1]

[1] Kalshoven and Zegveld hold that: "the 'limits' of the law of war may be distinguished into principles and rules. Overriding principles are military necessity and humanity. The first principle tells us that for an act of war to be at all justifiable requires that it is militarily necessary: a practical consideration; and the other, that the act cannot be justified if it goes beyond what can be tolerated from a humanitarian point of view: a moral component. Obviously these are extremely broad principles: over time, they have been elaborated into ever more detailed principles and rules". Kalshoven and Zegveld 2011, p. 2.

The rules of international humanitarian law are codified in a rather extensive body of treaty law.[2] In addition, extensive research has been conducted into the rules of customary international law, notably by the ICRC.[3] In practice, however, it is not the detailed set of rules of the Geneva Conventions and the other treaties of international humanitarian law that are normally taught to and applied by the weapons bearers, but the principles.[4] Soldiers will apply these principles of international humanitarian law to any situation they are confronted with, mixed with their own considerations of common sense and the orders they have received.[5] Even though compliance with international humanitarian law is measured on the basis of the question whether specific rules of international humanitarian law have been violated, the rules that soldiers apply are directly extracted from a very restricted amount of principles. Soldiers are comfortable with these principles because these are the main focus in their military training and exercises, together with a limited set of basic rules. Even on the operational level at higher headquarters, when planning military operations, most of the time the specific rules cannot be applied in the conduct of an armed conflict, since the distance to the battlefield is too large and the operations are still in their planning phase.[6] It is for example not yet possible to determine what the status is of persons that may be encountered during the operation: are they civilians or members of the opposing force? Are they perhaps civilians who lose their protection against direct attack because they are participating directly in the hostilities? Therefore, the operation plans will refer more generally to the principle of distinction.

These examples underline the importance of the principles of international humanitarian law as a source of positive international humanitarian law. It seems that the role of these principles is sometimes underestimated by international and military lawyers in their desire to formulate detailed rules for the parties to a conflict. As will be argued below, the role of the principles is crucial in the legal framework that governs armed hostilities. But the relevant questions are the following: which are these principles, and how can they be identified? What is the legal value of these principles? Can they, and if so, how do they, translate from abstract and broad principles of international law into more detailed rules of conduct on a battlefield? And how do they relate to the rules that can be found in the traditionally dominant sources of treaty law and customary international humanitarian law?

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[2] The ICRC IHL treaty database lists 102 IHL treaties and documents. See: http://www.icrc.org/eng/resources/ihl-databases/index.jsp.

[3] Henckaerts and Doswald-Beck 2005a, Vol I-II.

[4] This is reflected in the various contributions to the W. Hays Parks: Teaching the Law of War Symposium, published in the IDF Law Review, issue 3, (2007–2008); Particularly Turns 2007–2008, p. 31; Adler 2007–2008, p. 38; Sénéchaud 2007–2008, p. 52.

[5] See generally the ICRC Study on the Roots of Behavior in War, Muñoz-Rojas and Frésard 2004.

[6] This applies particularly for ground operations. The planning process of preplanned airstrikes against specific military targets will normally allow the planners at a higher headquarters to apply the detailed rules on targeting in full.

This chapter will discuss the place, function and relevance of the principles of international humanitarian law. To this end, the contribution will provide a short overview of the role of principles in general public international law, in relation to the other traditional main sources of international law. Subsequently, the concept of principles of international humanitarian law will be explored, in particular the role they may play and in which situation they are relevant. In this respect, the significance of the Martens Clause will also be discussed.

1.2 Principles in General Public International Law

The first question to be answered is which role principles play in international law. The prominent place of principles of international law as one of the three major sources of international law[7] has paradoxically not led to a general acceptance of its place, function and relevance in international law.[8]

The principles of international law may be defined as the more general notions behind specific rules. This means that they are the inspiration for the rules and may also be used as a means to interpret specific rules. As such, "principles have a wider scope of application and also more far-reaching consequences than rules. In other words, principles lay down broad generic normative obligations. Conversely, the existence of specific rules confirms the existing legal value of the principles from which they derive. Principles constitute a more important or fundamental standard than rules".[9] Dworkin draws a distinction between three different types of norms: policies, legal principles and legal rules. He characterises policies as norms that describe an objective that needs to be attained. As such, policies are not legally binding, but they provide a normative quality in political and moral terms.[10] Legal principles and legal rules both provide direction for legal obligations in particular circumstances, but the character of their direction is different. Rules apply in an "all-or-nothing fashion".[11] In other words: if the rule applies, the answer it provides must be accepted. Principles carry more weight than rules: they must be followed by decision makers, if relevant, "as a consideration

[7] Article 38 of the Statute of the International Court of Justice (ICJ) refers to "the general principles of law recognised by civilised nations" as one of the three major sources of international law. The Statute of the International Court of Justice, San Francisco, 26 June 1945, Trb. 1971, No. 55, http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

[8] See for example Degan 1992, p. 1, stating that "[n]o other source of law raises so many doctrinal controversies as the general principles of law 'recognized by civilized nations' (…) Writers disagree on the substance and content of general principles of law, as well as their legal scope and relationship with the other main sources, namely treaties and customary law"; See also Shaw 2008, p. 99; Mosler 1995, p. 517; Henkin 1989, p. 61; Lammers 1980, p. 53.

[9] Van Hoof 1983, p. 149; See also Petersen 2008, p. 287.

[10] Dworkin 1977, p. 22.

[11] Ibid., p. 24.

inclining in one direction or another".[12] The larger weight that is attached to principles does not, however, automatically lead to a conclusion that principles of international law would be superior to rules in the sense that they would be able to supersede or correct rules.[13] Principles function as a basis for specific rules, assist in the interpretation of those rules and fill gaps where necessary.

Principles of international law, as now incorporated in Article 38 (1) (c) of the ICJ Statute, should be regarded as an independent source of international law.[14] Unfortunately, international courts normally refrain from revealing the methodology that is used to identify principles of international law.[15] Nonetheless, it is clear that the existence of a principle may be based on a variety of factors, such as the other main sources of international law, other multilateral sources and the conduct of states and other actors in the international sphere. This includes what may be loosely described as 'soft law' sources, as produced by states and the organs of international organisations.[16]

It seems to be unnecessary to draw a distinction between the legal significance of the principles of general international law and the principles of its sub-branches.[17] Some principles are relevant to the entire corpus of international law (such as *pacta sunt servanda*), and some are only directly relevant to one or more subdivisions of international law (such as the principle of distinction in international humanitarian law). In international law, principles may be characterised as "general legal standards overarching a whole body of law governing a specific area".[18]

The prominence of conventional law, as a source of strong obligations for states and non-state actors[19] during armed conflict, is without debate. In addition, the importance of customary law as a source of international humanitarian law is evident.[20] International judicial bodies prefer to use those sources of law that most prominently express the consent of states to that rule, in order to maximise the acceptance of their rulings by states.[21] Therefore, it is useful to review the practice of these courts with respect to the link between customary law, treaty law and principles. However, neither the ICJ, nor its predecessor, the Permanent Court of International Justice (PCIJ), has referred expressly to the principles of international

[12] Ibid., p. 26.

[13] Lammers 1980, p. 69.

[14] Contra, for example Cheng 1953; For an overview, see Lammers 1980, p. 57.

[15] Bantekas 2006, p. 126.

[16] Shelton refers to soft law as "any international instrument other than a treaty that contains principles, norms, standards, or other statements of expected behaviour". See Shelton 2006, pp. 631, 632.

[17] Simma and Alston 1992, p. 102.

[18] Cassese 2005, note 3 on p. 189. See also Chetail 2003, p. 252.

[19] Zegveld 2002, pp. 18–26; Pejic 2011, p. 197.

[20] See for example Meron 2005, p. 835; Cassese 2005, p. 160.

[21] Friedmann 1963, p. 20.

law as a source.[22] Nonetheless, the principles of international law did play a role in a number of cases.[23]

One of the functions of principles in international law in relation to treaty law and customary law is that of filling the gaps that are left by the other two sources of international law, as the ICJ apparently did in the Anglo-Norwegian Fisheries case.[24] This function is not disputed.[25] It was the main incentive to include the principles as a source of international law in the statute of the PCIJ, because they would assist in preventing the situation which the PCIJ, and later the ICJ, would have to conclude to a *non liquet*.[26]

Secondly, principles of international law may also be used as an interpretative tool. The principles of international law may be invoked to provide guidance in one direction or another in the event that there is already a rule of treaty or customary international law in place, but its interpretation in a given situation is not clear.[27] Principles that are applied to fulfil this function come close to being policies as defined by Dworkin and therefore it could be questionable whether it still concerns legally binding norms.

Finally, the existence of a corrective function for principles of international law is strongly disputed. The idea that principles of international law could supersede, and set aside, rules of treaty or customary law, in order to correct the consequences of applying that rule to a given situation does not seem favourable at first sight. As an example, one could think of invoking the principle of military necessity to set aside the absolute prohibition of torture. The applicable treaty rules leave no doubt whatsoever that this is unacceptable at all times.[28] But for a rule that is less

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[22] Degan 1992, p. 41.

[23] For the PCIJ, see for example the *Chorzow Case* (The Factory at Chorzow (Claim for Indemnity), Germany v. Poland), Merits, Judgment No. 13, 13 September 1928, PCIJ Series A, No. 17 (1928), pp. 47–53, http://www.icj-cij.org/pcij/serie_A/A_17/54_Usine_de_Chorzow_Fond_Arret.pdf, and the *Lotus Case* (The Case of the S.S. 'Lotus'), Judgment No. 9, 7 September 1927, PCIJ Series A, No. 10 (1927), p. 31, http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf; The ICJ has applied principles of international law in many cases. As an example, the ICJ stated in the *Anglo-Norwegian Fisheries Case*: "it does not at all follow that in the absence of rules having the technically precise character alleged by the United Kingdom Government [concerning the course and length of straight base lines], the delimitation undertaken by the Norwegian Government in 1935 is not subject to certain principles which make it possible to judge as to its validity under international law". See the *Anglo-Norwegian Fisheries Case* (Fisheries Case, United Kingdom v. Norway), Judgment No. 5, 18 December 1951, I.C.J. Reports 1951, p. 132, http://www.icj-cij.org/docket/files/5/1809.pdf; For a thorough survey of the practice of the PJIC and the ICJ, see Degan 1992, pp. 41–53.

[24] See *supra* note 23.

[25] Bassiouni 1990, pp. 778, 779.

[26] Lammers 1980, p. 64; See also Shaw 2008, p. 98.

[27] Lammers 1980, pp. 64, 65.

[28] Torture is prohibited in both international and non-international armed conflicts; See Common Article 3 (1) (a) to the Geneva Conventions, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Article 12, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (GCI), Geneva, 12 August 1949, United

absolute, the situation may be different. If a rule would blatantly violate the interests of one party to a dispute, it may seem to be fair to apply a more overarching and important principle in order to correct an otherwise inequitable outcome. It seems that this is what the ICJ did in the Corfu Channel Case where it applied 'elementary considerations of humanity' as a legal basis to set aside other rules of international law.[29] However, it must be stressed that this should only be possible where the underlying policies, which in themselves are not legally binding, would point in the same direction as the principle does. The invocation of the principle of military necessity in international humanitarian law to supersede the specific treaty rule of the prohibition of torture can serve as an example. As the overarching goal (i.e. the policy) of international humanitarian law is to protect those who do not, or no longer take part in armed hostilities, the principle of military necessity cannot be invoked to set this aside. Not only because it would be contrary to the humanitarian policy, but also because torture is militarily unnecessary.[30] Military necessity is integrated into the specific rules of international humanitarian law and does not function as a general excuse to set its rules aside.[31] Today, the prevailing view of legal doctrine in international humanitarian law is that military necessity may only be invoked if it has been expressly mentioned in the rule itself as a reason to set aside the rationale of that rule.[32]

The conclusion is therefore that although the prominence of conventional and customary international law is a fact, there is still a relevant role to play for the

(Footnote 28 continued)
Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf; Article 32, Geneva Convention relative to the Protection of Civilian Persons in Time of War (GCIV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf; Article 75 (2) (a) (ii), Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (API), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf ; See also Article 2 (2) of the United Nations Convention against Torture (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment), New York, 10 December 1984, General Assembly of the United Nations, General Assembly Resolution 39/46, United Nations Treaty Series, Volume 1465, p. 85.

[29] ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment No. 1, 9 April 1949, I.C.J. Reports 1949, http://www.icj-cij.org/docket/files/1/1645.pdf, p. 22.

[30] The Lieber Code of 1863 already stated in Article 16 that "Military necessity does not admit of cruelty - that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions". Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863, as published in Schindler and Toman 2004, pp. 3–20.

[31] The doctrine of *Kriegsraison geht vor Kriegsmanier* that would allow for military necessity to set aside any other protective rule of international humanitarian law never became part of international law for exactly that reason; Garraway 2010b, p. 215.

[32] Dörmann 2002, p. 250.

principles of international humanitarian law. The most prominent role, that of filling the gaps, will be discussed first.

1.3 Gaps Left by the Treaties on International Humanitarian Law

It seems that the rules of international humanitarian law have been codified very comprehensively in treaty law. Are there still gaps remaining where the principles can play a gap-filling function? A first gap that may exist is the situation that one state is a party to a treaty containing rules of international humanitarian law, while its opponent or ally is not. Secondly, the nature of a certain conflict may cause significant problems. Thirdly, problems may arise if third armed actors, like multinational troops or peace forces are also present in a certain conflict zone.

Rules of treaty law only apply to those states that are a party to the relevant treaties.[33] The good news is that the Geneva Conventions I–IV of 1949 have attained universal ratification. Therefore, the rules on the protection of wounded, sick and shipwrecked soldiers, prisoners of war and civilians in international armed conflicts and the basic protection for Common Article 3 situations apply universally. These rules apply on the territory of any state and to any party to an armed conflict. But not all conventions in the field of international humanitarian law have achieved such an impressive level of ratification. Most importantly, the Additional Protocols to the Geneva Conventions lack the ratification of a number of states. The level of ratification is even worse for a number of other conventions in the field of means and methods of warfare.[34] Thus, for example, in joint operations interoperability problems may arise when some forces are allowed to use certain weapons, whereas other states are not, because the contributing state is a party to a treaty. These problems may arise with regard to the conventions of Ottawa or Oslo, prohibiting the use of anti-personnel landmines and cluster munitions respectively. This leads to different legal obligations for the states concerned, because some are unable to refer to applicable specific rules.[35]

Secondly, an applicable rule of treaty law may be lacking because of the nature of a conflict. The reason for the lack of applicable treaty rules can be caused by (1) a strict interpretation of the applicability clauses of the treaties, (2) the rather artificial division found in international law between international and non-international armed conflict.

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[33] See Articles 26 and 34 of the 1969 Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, Volume 1155, p. 331.

[34] See the ICRC IHL treaty database: http://www.icrc.org/eng/resources/ihl-databases/index.jsp.

[35] The interoperability issue is however addressed specifically in Article 21 of the Oslo Convention on Cluster Munitions, Oslo, 30 May 2008. For the text of the treaty, see http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument.

With regard to the applicability clauses, reference must be made to Common Articles 2 and 3 of the Geneva Conventions, and Article 1 of both Additional Protocols I and II. Some armed conflicts have a very international character, but do not take place between two states. The conditions of Common Article 2 of the Geneva Conventions and Article 1 of Additional Protocol I cannot be said to be fulfilled, for example, in the type of conflict between a state and a non-state armed group, or a 'terrorist' armed group, on the territory of different states. Gaps may then exist because in some situations an armed conflict is neither an international armed conflict in the classical sense, nor an internal armed conflict (or civil war). This may be because one of the parties to the conflict is not a state, and the hostilities in the conflict do not (only) take place within the territory of the state that is a party to that conflict. This gap became most evident when the Bush administration embarked on its Global War on Terror,[36] invoking authority to use armed force without also accepting the constraints of the rules of international humanitarian law.[37] The 'seam' that was exploited here concerned the applicability mechanisms of the major treaties, as contained in Common Articles 2 and 3 of the 1949 Geneva Conventions. The Global War on Terror, that was the response of the US to the terrible 9/11 attacks, took a legal wrong turn when the type of conflict between the terrorist network of Al-Queda and the US and its allies (Operation Enduring Freedom) would not fit neatly into one of the categories of armed conflicts referred to in the applicability clauses.[38] The result was a policy-driven approach that invoked the authority to use armed force but failed to acknowledge the conclusion that the protective provisions are also part and parcel of the decision to use armed force.[39] As a result, it was concluded that the rules did not apply.[40] Another example that is difficult to fit into the applicability clauses is the war between Israel and Hezbollah in 2006.[41]

It has now convincingly been argued that if an armed conflict is not of an international character, it must therefore be of a non-international character, and

[36] Also, API, *supra* note 28, does not apply because the United States is not a party to it; See Hays Parks 2010, and compare Corn 2009, pp. 4–9; See also the ICRC IHL report for the 2011 Red Cross Conference: 'Report on IHL and the challenges of contemporary armed conflicts', pp. 48–53, available on: http://www.rcrcconference.org/docs_upl/en/31IC_IHL_challenges_report._EN.pdf.

[37] See for a clear analysis: Corn 2009, pp. 4–9.

[38] Obviously, the armed conflict in Afghanistan, starting in 2001, that led to the fall of the Taliban regime from power, was an international armed conflict until the Karzai government took office; See Ducheine and Pouw 2012.

[39] Corn and Talbot Jensen 2008, p. 789.

[40] Although the lack of applicable law was caused by a misinterpretation of the law rather than by a genuine gap, the result is the same.

[41] Ducheine and Pouw 2009, p. 76; Ducheine and Pouw argue that the armed conflict was also, from the side of Israel, aimed at Lebanon. Therefore, there would simultaneously be a classic international armed conflict between the two states.

common Article 3 of the Geneva Convention applies as a minimum.[42] There are, however, very little treaty rules for non-international armed conflicts, when compared to the rules for international armed conflicts. Also, international humanitarian law contains, for some situations, different rules for international armed conflicts and non-international armed conflicts.[43] Therefore, the division in international humanitarian law between rules for international armed conflicts and for non-international armed conflicts leads to problems. The only fact that one of the parties to those conflicts is not a state but a non-state actor would in a strict sense render the treaty rules of the Geneva Conventions and Additional Protocol I with regard to international armed conflicts inapplicable. The conflict would then only be regulated by the treaty rules of Common Article 3 of the Geneva Conventions.[44] Given the fact that international borders are crossed, and the conflict is certainly not of an internal character, it seems odd that only the few basic rules of common Article 3 would apply, and treaty rules on targeting would almost be non-existent.[45] An example could be the armed conflict in Lebanon in 2006 mentioned above or the armed conflict between the Turkish government and the Kurds that hide in Northern Iraq. The substantive difference between the amount of applicable treaty rules of international humanitarian law for non-international armed

[42] See for instance Pejic 2011, pp. 203, 204, arguing that there is no gap as far as the applicability of Common Article 3 is concerned; For Operation Enduring Freedom, the US Supreme Court came to a similar conclusion in its *Hamdan v. Rumsfeld* decision. See Supreme Court of the United States, Hamdan v. Rumsfeld, Secretary of Defence, et al., No. 05-184, 29 June 2006, United States Reports, Vol. 548. See http://www.supremecourt.gov/opinions/boundvolumes/548bv.pdf.

[43] Examples are the fact that there can be no situation of occupation in a non-international armed conflict, and the fact that the concept of prisoners of war is non-existent in non-international armed conflicts.

[44] For the applicability of Additional Protocol II to a non-international armed conflict, additional requirements must be met. See Article 1 of Additional Protocol II, Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (APII), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf.

[45] Some rules of the Protocols to the 1980 Conventional Weapons Convention could still be applicable during non-international armed conflicts for states that have also ratified the extension of the applicability of the Amendment of the Convention of 2001, for example Article 2 of Protocol III on Prohibitions or Restrictions on the Use of Incendiary Weapons; 1980 Conventional Weapons Convention (Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (with Protocols I, II and III)), Geneva, 10 October 1980, United Nations Treaty Series, Volume 1342, p. 137; Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects, Geneva, 21 December 2001, United Nations Treaty Series, Volume 2260, p. 82.

conflicts, compared to the rules applicable during international armed conflicts, may thus also lead to gaps in the applicable rules of treaty law.[46]

Thirdly, also the fact that an internationally mandated multinational armed force, such as a United Nations intervention force, is present in a certain context, does not automatically lead to the applicability of the treaty rules of international law to those forces. Of course, the troops will remain under obligations arising out of the treaties to which their state of origin is a party, but if it is accepted that a multinational force, under the leadership of an international organisation, may become a party to the conflict itself, this does not fit neatly in the definitions of the treaty law of international humanitarian law. In addition, some obligations cannot be attributed to the organisation. As an example, an international organisation would not be able to prosecute its troops who have violated the rules of international humanitarian law.[47] In some conflicts, the multinational troops are not a party to the conflict, but they may nonetheless play a role that involves the use of armed force beyond that of law enforcement. This is because their mandate allows them to operate in a way that amounts to armed conflict, albeit usually only for a limited time. Here again, the applicability of the treaties of international humanitarian law seems to leave a gap.

It is of course very common in general international law to turn to customary international law for guidance if treaty rules are lacking. This is no different in international humanitarian law. However, as will be explained next, there remain a number of reasons why this does not settle the issue, and gaps may still be left by customary international humanitarian law.

1.4 Gaps Left by Customary International Humanitarian Law

The gaps left by customary international humanitarian law are mainly of a procedural character. They are caused by the fact that the existence of rules of customary international humanitarian law is sometimes hard to prove. This is because there is no unanimity about the methodology to identify rules of customary international law. This lack of agreement on the methodology to identify rules of customary international law also exists in general international law.[48] What is the required level and character of the state practice and *opinio juris*? In some cases, there has just never been sufficient state practice with regard to a

[46] For a general discussion on the applicability of treaty and customary rules on non-state armed groups, see Clapham 2010.

[47] Van Hegelsom 2010, p. 110.

[48] See for example Shaw 2008, pp. 72–93 and the accompanying notes.

specific rule, rendering the existence of that rule impossible to prove. Does that mean that the rule simply does not exist?[49]

The ICRC Study on customary international humanitarian law is an impressive piece of work, yet its methodology has received both criticism as well as acclaim. The experience of its drafting process illustrates the difficulties that are encountered in the identification of customary rules.[50] The methodology which the International Tribunal for the former Yugoslavia has used to identify rules of customary international law was similarly heavily criticised.[51] The specific character of international humanitarian law makes the methodological problems even more prominent. International humanitarian law is a preventive framework, meant to regulate the hostilities as soon as they begin. The rules of international humanitarian law are the user's manual for the use of the arms that the parties to the conflict deploy in their operations, as well as for the methods they may use. The problem in terms of the creation of state practice is that it is difficult to get access to the practice during the operations for reasons of operational security. Also, in terms of the creation of *opinio juris*, there is no reason to pay attention to those instances when just nothing happens since an attack has been cancelled. Therefore, states will normally only express their opinions if something has gone wrong. The state that is under attack, however, for propaganda reasons, will be likely to declare an attack during which there has been damage to civilian objects or death or injury to civilians as grossly disproportionate.

The state practice one would therefore typically search for in order to identify a rule of customary law is the battlefield practice, such as the actual targeting behaviour of states during armed conflict.[52] This behaviour could, for example, be derived from action reports containing the deliberations of the military

[49] See Kirgis 1987 for an appreciation of the way the ICJ dealt with this situation in the *Nicaragua Case* (Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)), Merits, General List No. 70, 27 June 1986, I.C.J. Reports 1986, p. 14, http://www.icj-cij.org/docket/files/70/6503.pdf.

[50] See Henckaerts & Doswald-Beck 2005a, vol I, p. XXXI-XLV, the contributions of Bethlehem, Scobie and Hampson to the book by Wilmshurst and Breau 2007, Bellinger and Haynes 2007, and Henckaerts 2007 for a discussion on the various aspects of the methodology used in the ICRC Customary International Humanitarian Law Study.

[51] For example Kalshoven and Zegveld 2011 extend criticism to the way the ad hoc tribunals for Rwanda and the former Yugoslavia have identified customary international law and conclude that the tribunals should actually have been referring to principles: "In particular, this more recent extension of the scope of customary law of armed conflict appears to rest on the assumption that for this type of armed conflict, general opinion about preferred behaviour outweighs the requirement of demonstrable practice seen as law. To the extent that this 'general opinion of preferred behaviour' reflects accepted principle, we would prefer to call it that". And with regard to the ICRC Customary Law Study: "in particular with respect to internal armed conflict not all of these rules may rest on the type of actual field practice traditionally required of rules of customary law. Yet they may well reflect existing principles and thus deserve to be promoted under that heading". See Kalshoven and Zegveld 2011, p. 5; See also Baker 2010.

[52] See for example Bellinger and Haynes 2007, p. 445; Maxwell and Meyer 2007, pp. 10, 11; Fellmeth 2010, p. 4.

commanders demonstrating their argumentation before the attack, including both the reasons for proceeding with and cancelling an attack. The perfect inquiry into customary international humanitarian law would therefore draw from a large collection of these types of reports from various states and conflicts, providing proof as to how various factors were weighed in the decision-making process and the subsequent behaviour of operational planners and commanders.

Unfortunately, in practice, these assessments are not always publicly available, if they are made in written form at all.[53] There are a number of reasons for this,[54] the most important reason being that those who would be best placed to conduct a thorough assessment of targeting decisions are not among those with a particular interest in the outcomes of the assessment.[55] The principle of proportionality can serve as an example here. It has been suggested that in the event that civilian casualties occur as a result of a specific attack, an inquiry into the possible disproportionate use of force should always be conducted. This does not seem to be an obligation which would be welcomed by the parties to an armed conflict.[56] In addition, parties to an armed conflict are generally reluctant to "expose the decision process to public view [because] it could enable current or future adversaries to predict the military organization's strategy and tactics, undermining its effectiveness and exposing its personnel to danger".[57] For this reason other indications of state practice have been used to determine the customary character of rules of international humanitarian law, for example military manuals.[58] Of course, how states instruct their military is certainly relevant for the practice in the context of the conducting of hostilities in armed conflict. It seems to be more logical, however, to classify the way states have phrased the obligations for their militaries in their military manuals as an expression of *opinio juris* rather than state

[53] That does not mean, of course, that there is no oversight at all. For example, there was a practice of relatively independent oversight in the armed forces of the Kingdom of the Netherlands by the Royal Military Constabulary (Koninklijke Marechaussee) and the office of the Public Prosecutor of the Arnhem District Court with regard to instances where the members of the military used armed force during the deployment of Dutch troops in the Afghan province of Uruzgan from 2006 to 2011. Another example is the investigation into the bombing of two stolen fuel tankers on 4 September 2009 in Kunduz, Afghanistan. It was investigated by the German prosecutor and by the German Bundestag; See for the report of the Bundestag: http://dip21.bundestag.de/dip21/btd/17/074/1707400.pdf.

[54] Fellmeth mentions four reasons: the fact that the concept of sparing the civilian population in armed conflict emerged only rather recently, the fact that the way military operations are conducted is usually contingent on confidentiality restrictions, the fact that "few states are eager to publicize their own crimes" and, finally, the fact that most armed conflicts nowadays have a non-international character, and states regard the treatment of their own civilians as a "matter of sovereign internal control". See Fellmeth 2010, pp. 2, 3.

[55] Shamash 2005, p. 146.

[56] See Cohen 2010, pp. 29–36.

[57] Fellmeth 2010, p. 3.

[58] Particularly in the ICRC Customary Law Study, see Henckaerts and Doswald-Beck 2005b, Volume II, Practice.

practice. The military manuals indicate how states would like their armed forces to conduct their operations, or what they regard as legal behaviour. But also, a military manual may express no opinion at all, but merely restate the treaty obligations of states. On the other hand, the value that may be attached to a military manual varies greatly. Sometimes, a military manual is only a restatement of the treaty obligations a state has accepted, and should be considered as nothing more than that.[59] This is particularly the case for the military manuals of states that have not been involved in armed conflict for a long time, such as New Zealand.[60] The actual conduct during hostilities would be the state practice, demonstrating the conviction of the military to fight in accordance with the rules. In case of incidents involving (alleged) violations of the rules, the reaction of states to that incident may also be regarded as *opinio juris*.[61] But then many factors are still unclear, such as the question whether the practice of non-state actors should be taken into account.

In the author's view, a variety of indicators and methods may be considered to assess the customary status of a rule of customary international humanitarian law.[62] The rules of customary international humanitarian law are without doubt a crucial part of the framework of international humanitarian law.[63] However, controversy surrounding the methodology that should be used in finding customary law must not lead to the conclusion that no legal framework applies at all. In all instances, national law will obviously remain applicable, but in addition, those military operations that cannot be characterised as law enforcement operations need to be conducted in accordance with the legal framework which is the most fitting for military operations involving the use of force. This is the framework of international humanitarian law. The principles of international humanitarian law have the function to fill a possible gap. In fact, international humanitarian law contains a specific procedural rule that outlines the sources of rights and obligations under international humanitarian law. This rule is the Martens Clause, which is the subject of the following section.

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[59] See for example Schmitt 2007, p. 133.

[60] See for example the reference to this manual in Henckaerts and Doswald-Beck 2005b, Volume II, Part I, p. 27.

[61] Schmitt 2007, pp. 132, 133.

[62] See on the methodology to establish rules of customary international humanitarian law the discussions that were the result of the first edition of the ICRC Customary Law Study: Henckaerts and Doswald-Beck 2005a, vol. I, pp. xxxi–xlv; Henckaerts 2007, pp. 178–184; Meron 2005; Dinstein 2006, pp. 3–8; Bothe 2007, pp. 154–163, the critical remarks of the US Government as voiced by Bellinger and Haynes 2007 and the response by Henckaerts, see Henckaerts 2007; See also generally Penna 1984, pp. 202–209.

[63] See for example the foreword by the ICRC president, Dr. Jakob Kellenberger in Henkaerts and Doswald-Beck 2005a, vol. I, p. x.

1.5 The Role of the Martens Clause

It is common to use the wording of the Martens Clause as it is formulated in Article 1 (2) of Additional Protocol I:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

The Martens Clause first appeared in the preamble to the 1899 Hague Convention II. It was the result of the negotiations led by Friedrich Fromhold Martens, who was part of the Russian Delegation to the Peace Conference in The Hague.[64] The objective of the preamble was to solve a dispute between some smaller states, in particular Belgium, and a number of larger States such as Prussia and Russia on the issue of the status of civilians who took up arms against occupying forces: the so-called 'franc-tireurs'. The discussions in 1899, led by Martens, were the continuation of earlier discussions at the Conference of Brussels in 1874. To solve the deadlock, Martens accepted a Belgian proposal which was subsequently included in the preamble to the Convention and was reformulated in the 1907 Hague Convention.[65] The Martens Clause was thus initially a diplomatic tool to overcome a political dispute between states and not necessarily introduced 'out of humanitarian motivations'.[66] The Martens Clause was however to be repeated in most subsequent codifications of international humanitarian law.[67]

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[64] According to Best, his name was Fedor Fedorivitch Martens, "a jurist in the service of the Tsar, who served as Russia's principal expert in international law from the seventies until his death in 1908". See Best 1980, p. 163.

[65] Kalshoven 2006, pp. 48–52; Ticehurst 1997, p. 125; Greig 1985, pp. 48, 49; Hayashi 2008, p. 136; Meron 2006, pp. 17–19; Kalshoven 1971, pp. 57–62; Cassese 2000, pp. 187–216.

[66] Cassese 2000, p. 216.

[67] See the preamble to the 1925 Gas Protocol (Protocol for the prohibition of the use in war of asphyxiating, poisonous or other gases, and of bacteriological methods of warfare), Geneva, 17 June 1925, United Nations Treaty Series, LON Number 94; Article 63 (4) GCI, *supra* note 28; Article 62 (4) GCII, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (GCII), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-971-English.pdf; Article 142 (4) GCIII, Geneva Convention relative to the Treatment of Prisoners of War (GCIII), Geneva, 12 August 1949, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf; Article 158 (4) GCIV, *supra* note 28; The preamble to the 1980 Certain Conventional Weapons Convention, *supra* note 45; and Article 1 (2) of API, *supra* note 28; Note that the wording as codified in API has changed slightly since its first adoption; As Pustgarov notes: "Reckoning up the comparison, one can assert that Protocol I changed the Martens clause only in one point: it omitted the notion of 'civilized nations'. In other respects, it replaced outdated words with the language of contemporary legal parlance ('basic tenets' with 'principles', 'belligerents' with 'combatants'). The replacement of the term 'population' by 'civilians' did not change the content of the notion. But it has a definite meaning for humanitarian law, which attempts strictly to

It has been previously submitted that the Martens Clause provides the solution to fill any gaps that may exist in international humanitarian law, particularly during the Nuremberg trials. During these trials, the Martens Clause was applied to counter assertions that the Charter of the Tribunal was an example of retroactive penal legislation. In the *Altstötter* case, the Clause served to support the proposition that the deportation of civilians from occupied territories was prohibited under international humanitarian law and constituted a crime that could be prosecuted by the Tribunal.[68] In another case before the Tribunal, *Krupp et al.*, the Nuremberg Tribunal stated: "The Preamble is much more than a pious declaration. It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Convention and the Regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare".[69]

The Martens Clause was, as noted above, in the first instance included in the preamble to a number of treaties. As such, it served initially as nothing more than an 'exhortation', because a preamble does not possess legally binding power by itself.[70] However, since the Martens Clause has now been included in the main text of treaties, first in the denunciation clauses of the 1949 Geneva Conventions, and later in Additional Protocol I, the Martens Clause should be regarded as legally binding.[71] In addition, the Martens Clause itself is also regarded as a rule of customary international law.[72]

Also, after the conclusion of the Geneva Conventions of 1949, the Martens Clause was reiterated in Resolution XXIII (Sect. 2) of the Tehran Conference on Human Rights of 1968. The Resolution stated that, pending the adaption of new rules, all states should ensure that inhabitants and belligerents are protected in accordance with the principles referred to in the Martens Clause.[73] Its continuing

(Footnote 67 continued)
distinguish the civilian population and individual civilians from combatants with a view to protecting the former from the consequences of military operations. 'The laws of humanity' are synonymous in content with 'the principles of humanity'". See Pustogarov 1999, p. 128.

[68] Meron 2006, p. 18.

[69] *Krupp et al.*, Case No. 214, Judgment of 31 July 1948, (United States Military Tribunals 1948), reprinted in Lauterpacht 1948, pp. 620, 622.

[70] Kalshoven 2006, p. 51.

[71] Miyazaki 1984, p. 436; The provisions of API, *supra* note 29, are obviously only binding on the states that have ratified it.

[72] Skordas 2003, p. 325.

[73] Greig 1985, p. 66 and Meron 2006, p. 16; For the text of Resolution XXIII of the Tehran Conference on Human Rights of 1968, see Schindler and Toman 2004, pp. 347, 348.

relevance was also proven by the fact that the ICJ referred to it in the Nuclear Weapons Advisory Opinion in 1996,[74] and in a number of cases at the ICTY.[75]

It is submitted here that the Martens Clause is not a substantive rule, but is rather of a procedural nature. The rule explains where substantive guidance must be found in international humanitarian law. This is first in treaty law, but also in customary law, in its principles (phrased here as 'the principles of humanity') and finally in 'dictates of public conscience'. The Martens Clause should thus be taken as a starting point also in the general doctrine of the sources of international humanitarian law: it shows how new developments and situations can be legally handled in an effective and flexible way.[76] The Martens Clause may then play a catalyst role to deliver counterweight to the rather static character of treaty and customary international humanitarian law.[77] Therefore, the Martens Clause recognises the existence of the principles of international humanitarian law as a source of international humanitarian law. In addition, the clause notes "the existence of a moral code as an element of the laws of armed conflict in addition to the positive legal code".[78] The Martens Clause recognises the existence of wider principles behind specific rules of international humanitarian law:

> principles who were in no sense detracted from by the spelling out of the rules in question. Put in another way, it did not follow from the fact that certain conduct was proscribed that all conduct not covered by the proscription was allowed. In other words, many of the proscriptions were but specific applications of more general principles prohibiting inhumane or underhand conduct towards those involved in the conflict.[79]

There is broad agreement that the scope of the Martens Clause has shifted away from its initial purpose to be applied to the status of civilians who are resisting their occupiers. The Martens Clause has come to apply to the complete branch of international humanitarian law.[80] However, unfortunately, there is no accepted

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[74] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, General List No. 95, 8 July 1996, I.C.J. Reports 1996, http://www.icj-cij.org/docket/files/95/7495.pdf, p. 226, para 78 on p. 257 and para 87 on p. 260.

[75] See ICTY, *Prosecutor v. Furundzija*, Trial Chamber, IT-95-17/1-T, 10 December 1998, para 137, see http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf; ICTY, *Procsecutor v. Kupreskic et al.*, Trial Chamber, IT-95-16-T, 14 January 2000, paras 525 and 526, see http://www.icty.org/x/cases/kupreskic/tjug/en/kup-tj000114e.pdf; ICTY, *Prosecutor v. Martic*, Trial Chamber, IT-95-11-T, 12 June 2007, para 467, see http://www.icty.org/x/cases/martic/tjug/en/070612.pdf; See also Meron 2006, p. 22.

[76] Strebel 1995, p. 327.

[77] As an illustration of this static character, one may refer to the fact that the major codifications of international humanitarian law have always been concluded after major armed conflicts, too late to be meaningful in the preceding war. International humanitarian law then seems less efficient in fulfilling its most important function: to protect people from the horrors of armed conflict.

[78] Ticehurst 1997, p. 128.

[79] Greig 1985, p. 49.

[80] *Nuclear Weapons Advisory Opinion*, *supra* note 75, paras 78 and 87; See also Meron 2006, p. 18.

interpretation of the Martens Clause, and the understandings of the Clause differ widely.[81] One commentator notes that the Martens Clause "imports all sorts of considerations that the law itself never thought of, or, more practically, about which agreement between states turned out hard to find".[82] The Martens Clause may be interpreted in four different senses.[83] When the Martens Clause is understood in a narrow sense, all it means is that in addition to conventional international law, customary international law is also a source of international law obligations.[84] The ICRC Commentary to Additional Protocol I provides a wider interpretation, holding that the Martens Clause means that "something which is not explicitly prohibited by a treaty is not *ipso facto* permitted".[85] The widest possible interpretation is that according to the Martens Clause, in addition to conventional and customary international law, conduct in armed conflicts is also subject to the principles of international humanitarian law.[86] Yet another interpretation holds that the Martens Clause may today be understood as the basis of the premise that when international humanitarian law is not applicable, human rights law will continue to apply as "the sole body of applicable international law rules that cover questions of humanity when IHL is no longer applicable".[87]

It is submitted here that the Martens Clause is basically to international humanitarian law what Article 38 of the ICJ Statute is to international law as a whole (including international humanitarian law). Both provisions enumerate the sources of the legal framework. The Martens Clause enumerates more specifically the sources of international humanitarian law and underlines that as a matter of law, one should not only look for rules of international humanitarian law in treaties and customary international law, but also in its principles that apply as a matter of law. In sum: the Martens Clause is of vital importance for the whole branch of international humanitarian law as it points to the principles of international humanitarian law that fill the gaps left by customary and treaty law. The next issue to be explored is how the principles relate to the treaty rules and the customary rules of international humanitarian law.

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[81] Ticehurst 1997, p. 125; Kolb and Hyde note that "One may regret that in practice, the Martens Clause is not invoked as often as it could and should be". See Kolb and Hyde 2008, p. 64.

[82] Klabbers 2006, p. 73.

[83] See Hayashi 2008, p. 146, for a description of the first three of these functions, Hayashi 2008, pp. 146–150.

[84] See for example Greenwood, who holds that the suggestion that the Martens Clause goes further than customary international law "is impracticable since the 'public conscience' is too vague a concept to be used as the basis for a separate rule of law and has attracted little support". See Greenwood 2008, pp. 34, 35; See also Dinstein 2010, pp. 8, 9.

[85] Sandoz et al. 1987, p. 39.

[86] Ticehurst 1997, p. 125.

[87] Heintze 2004, p. 797; Kolb and Hyde 2008, p. 270.

1.6 Principles of International Humanitarian Law Complementing Treaty and Custom

In case there is a gap in the applicable treaty law, it is an obvious step to turn to customary international humanitarian law.[88] This will provide for many additional rules. But if it also proves to be difficult to identify applicable rules of customary international law, the Martens Clause dictates that the principles of international humanitarian law are to be applied. These principles provide the minimum yardsticks the parties to the conflict will have to apply.

International humanitarian law is generally accepted as only being applicable during armed conflict, except for those rules that are applicable at all times.[89] It does not seem logical, however, to apply only national law and human rights standards when military force is used outside armed conflict. After all, the mere use of military force already implies the applicability of the restraints of international humanitarian law rather than human rights restraints.[90] This is the practice of many peace operations, operated by NATO, or UN troops.[91] It should be noted that the application of international humanitarian law during these operations is usually invoked because of a policy decision. Some states apply the rules of international humanitarian law as a matter of policy to all their military operations. The textbook example is the Department of Defense of the United States. According to Directive 2311.01, "Members of the DoD Components comply with the law of war during all armed conflicts, however such conflicts are characterised, and in all other military operations".[92] A problem arises, however, if the policy changes. The policy maker will argue that whatever it can give, it can also take away.[93] It is submitted here that the invocation (through a policy decision) of the application of the principles of international humanitarian law is unnecessary, because the principles already apply as a matter of law. Therefore, their applicability cannot simply be denied by a policy decision.[94]

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[88] For a discussion on the hierarchy of sources of international law, see Shaw 2008, pp. 123–127.

[89] Such as Article 36 API, *supra* note 28, mentioned above and the implementation provisions regarding the dissemination of international humanitarian law and the availability of (military) legal advice, see for example Articles 82 and 83 API, *supra* note 28.

[90] As Arne Will Dahl eloquently phrased this question: "when one uses the tools of war, should one also use the rules of war?" Dahl posed this statement during the Conference of the International Society for Military Law and the Laws of War in Tunis, 2010; For the proceedings, see the Military Law and the Law of War Review 2009, vol. 48, no. 4, pp. 473–498.

[91] Garraway 2010a, p. 133.

[92] See DoD Directive 2311.01E of 9 May 2006, DOD Law of War Program, updated 22 February 2011, also available online, see: http://www.dtic.mil/whs/directives/corres/pdf/231101e.pdf.

[93] See Corn 2009, p. 6: "what national policy makers giveth, national policy makers can taketh away".

[94] Corn notes that in the context of the Global War on Terror, even if it would be accepted that the principles should be applied as a matter of policy, they should be applied in full. See Corn 2009, pp. 7–9.

Corn submits that in military operations conducted on the basis of status-based Rules of Engagement (as opposed to conduct-based Rules of Engagement), the principles of international humanitarian law apply.[95] He argues that if the applicable Rules of Engagement authorise troops "to engage opponents based solely on status identification, opponents who ostensibly seek to kill them, they know they are engaged in armed conflict".[96] In Corn's view, this application is not based on policy, but on the applicability of the principles arising from the Rules of Engagement, which lead him to conclude that the applicability is based on law.[97] Although I concur that the principles of international humanitarian law do indeed apply as a matter of law, I submit that the origin of its application is different. In the event that an armed force applies military armed force against an adversary, it has crossed a threshold that may not lead to the applicability of treaty rules, or arguably customary rules, but it does 'start a war', thus the principles of international humanitarian law as a minimum should always apply, already when the first bullet is fired.

The United Nations has been a party to many conflicts around the world. Finally in 1999, it adopted the Secretary-General's Bulletin on the Observance by United Nations Forces of International Humanitarian Law.[98] This Bulletin is binding within the UN organisation and could apply during different types of UN operations.[99] This is useful, because during classical blue-helmet peacekeeping operations, the factual situation on the ground may be calm, with the presence of the United Nations Security Council mandate.[100] However, what rules apply to these forces if they would wish to conduct military operations in the fulfilment of their mandate, which could amount to force? If the suggestion by Corn is followed, the question whether these troops are still operating under a law-enforcement paradigm, or not, is based on the question whether their Rules of Engagement are conduct-based or, alternatively, status-based. However, as is submitted here, this would be a undesirable mix-up of the legal frameworks of *ius in bello* and *ius ad bellum*. Instead, it is more likely that Rules of Engagement are status-based because the troops are engaged in an armed conflict. The authority to use force on the basis of the applicable Rules of Engagement ultimately follows from the

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[95] It must be noted that Rules of Engagement are not only based on legal obligations, but also on political considerations and other national restrictions; See generally: Cammaert and Klappe 2010 and Klappe 2011.

[96] Corn 2009, p. 33.

[97] Corn 2009, pp. 28, 29.

[98] United Nations Secretary-General (UNSG), Secretary-General's Bulletin: Observance by United Nations Forces of International Humanitarian Law, 6 August 1999, ST/SGB/1999/13, available at: http://www.unhcr.org/refworld/docid/451bb5724.html, accessed 28 August 2012; See Roberts and Guelff, p. 725.

[99] Prefatory note, Roberts and Guellf 2000, p. 721.

[100] For a thorough discussion of the obligations arising out of international humanitarian law for United Nations and other international organizations involved in military missions, see Sams 2011, pp. 45–71.

United Nations Security Council Mandate. This authority should be kept separate from the protective and restrictive rules and principles of international humanitarian law that apply as a matter of law because the UN troops use armed force. If they engage in the use of armed force, even if the operation is conducted in accordance with and in the fulfilment of their mandate, the application of international humanitarian law is invoked. If treaty rules are applicable, they must be applied. If, in their absence, customary rules can be identified, the latter must be applied. If these legal frameworks both fail to provide guidance, the principles of international humanitarian law must be applied.[101]

An example may be found in an exchange of letters between Belgium and the UN concerning a number of claims arising from UN operations in the Congo. In response to a letter from the Acting Permanent Representative of the Union of Soviet Socialist Republics, the UN explained why they were liable for the payment of claims for damage to Belgian civilians caused by the UN operations. The UN stated that "in regard to the United Nations activities in the Congo, it is reinforced by the principles set forth in the international conventions concerning the protection of the life and property of civilian population during hostilities as well as by considerations of equity and humanity which the United Nations cannot ignore". The UN also stated that "Claims of damage which were found to be solely due to military operations or military necessity were excluded".[102] Even though the object of the exchange of letters was the payment of compensation, the UN clearly stated that in order to determine whether its troops had committed wrongful acts, it had struck a balance between considerations of humanity and military necessity. The UN thus apparently found that the principles set forth in the international conventions concerning the protection of the life and property of civilians during hostilities applied. In other words, the UN concluded that the conventions themselves (which would be the Geneva Conventions) were not applicable. Therefore, they filled the existing gap through the application of the underlying principles of international humanitarian law. This example proves that especially in parts of international law where there is still discussion on the exact

[101] Corn notes that "While the characterization of the conflict remains significant for the purpose of applying specific treaty obligations, denying applicability of core LOAC principles merely because a *de facto* armed conflict does not fit within the inter/intra-state law-triggering paradigm is operationally counter-intuitive". See Corn 2009, p. 20; Corn's approach does ultimately lead to the identical conclusion that the principles of international humanitarian law apply as a matter of law. In my view, however, the authority that decides on the type of rules of engagement is in essence making a policy decision, and not creating law. For the soldiers who have to apply these principles during their operations, it obviously does not make a difference how the principles have become binding upon them.

[102] Exchange of letters constituting an agreement between the United Nations and Belgium relating to the settlement of claims filed against the United Nations in the Congo by Belgian nationals, New York, 20 February 1965; See UNITED NATIONS JURIDICAL YEARBOOK, 1965, Part One, Legal status of the United Nations and related inter-governmental organizations, Chapter II, Treaty provisions concerning the legal status of the United Nations and related inter-governmental organizations, pp. 39–41.

applicable legal framework (in this case the responsibilities of forces of international bodies during armed conflict) the principles of international law are applied.

In addition, if one reviews the historical development of general international law and also of international humanitarian law, it becomes clear that the distinction between national law systems and the system of international law has not always existed. It was only inserted after World War II.[103] The core principles of international humanitarian law may therefore be deemed to predate the division between the applicability of the rules of international humanitarian law to international armed conflicts or non-international armed conflicts. This division is found in both conventional international humanitarian law, and to an extent also in customary international humanitarian law. On the basis of the historical evolution of international humanitarian law one may conclude that the applicability of some principles of international humanitarian law may not be restricted to either an international or a non-international armed conflict, but that they are applicable in any situation where armed force is deployed to the level of an armed conflict. Therefore, the principles of international humanitarian law fulfil an indispensable role as a gap-filler. As a result, the framework of international humanitarian law consists of a complete system of rules for any situation where military force is applied, and is made up of rules of treaty and customary international law and the principles of international humanitarian law.

1.7 Other Functions

In addition to the function of filling existing gaps as explained in the previous sections, it is also worth taking a closer look at the other functions of principles in general international law. These functions, as mentioned above, are the interpretative and the corrective functions.

It has been argued above that the principles of international humanitarian law are legally binding. The question then arises whether the same notions should also be used as interpretative tools to explain specific rules of international law. It would seem that for interpretation purposes, the underlying notions of international humanitarian law could be suitable. These notions can, in Dworkin's terms, be described as 'policies'. The basic, but often opposing notions of humanity and military necessity would then obviously be the first two notions that would qualify. The application of these two notions would have to remain in balance to bring a solution in cases where the interpretation of specific rules is required. However, it seems that there are more policies than just the two notions of humanity and

[103] Corn 2009, p. 35 and the accompanying notes.

military necessity.[104] Other basic notions of international humanitarian law that do not seem to amount to a legally binding principle include the basic notion that in any armed conflict, the right of the parties to the conflict to choose methods and means of warfare is not unlimited[105]; the notion of equal application of the law of armed conflict[106]; and the notion of chivalry.[107]

The existence of a corrective function of principles of international humanitarian law is problematic, as has been mentioned in Sect. 1.2. Could it be that the legal binding character of principles of international humanitarian law—through the Martens Clause—may in some cases even set aside the rules of conventional and customary international humanitarian law?[108] Those international lawyers who underline the primacy of the consent of states as the only decisive factor to establish legal obligations under international law will oppose this. Their argument will be that this would lead to a situation in which states have completely lost control over the formation of international law. And caution indeed remains necessary: it should be avoided that general principles are used too loosely, in order to justify behaviour that is contrary to customary or conventional law. Still, the principle of military necessity, in my view a policy rather than a principle, has recently been invoked as a separate legal (not policy) restraining factor on the use of force against an adversary.[109] Another conceivable example where the principles of international humanitarian law could perform a corrective function is the following. Suppose, in an international armed conflict, the regular armed forces of a state fight an opposing force that hides in a populated area. The attacking forces' state recently became a party to the Cluster Munitions Convention, thus cluster munitions may not be used, but are nonetheless still available. According to very reliable intelligence, it is possible to attack the headquarters of the opposing force

[104] See for example Kalshoven 2004, p. 156: "That civilians ought to be respected in any situation of armed conflict may be regarded as an application of what the ICJ referred to as long ago as 1949, in the *Corfu Channel case*, as 'elementary considerations of humanity'. To me, the Court's 'considerations of humanity' do not provide yet another source of law: they are, literally, considerations that underlie the principles and rules of IHL. Being no more than that, they are not necessarily decisive in all circumstances. As considerations go, they have to compete among themselves. And in matters of warfare, humanity may be one elementary consideration but military necessity is another."

[105] See the preamble to the St. Petersburg Declaration (Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight), Saint Petersburg, 29 November/11 December 1868, reprinted in Schindler & Toman 2004, p. 91–93 and Article 35 (1) API, *supra* note 28.

[106] See Roberts, explaining that "The 'equal application' principle is that in international armed conflicts, the laws of war apply equally to all who are entitled to participate directly in hostilities, irrespective of the justice of their causes". In other words, this means the need to separate between *ius in bello and ius ad bellum.* See Roberts 2008, p. 932.

[107] See for example the contribution by Terry Gill in this book, Chap. 2, and Liivoja 2010.

[108] Hayashi calls this the dislocating function of the Martens Clause, see Hayashi 2008, p. 149.

[109] This example pertains to the debate on a possible restrictive function of the principle of military necessity, or the obligation to 'capture rather than kill'. See Melzer 2009, p. 82 and Pejic 2011, p. 224.

located in the built-up area, but the expected collateral damage to surrounding civilian and cultural property is rather high. It is known that civilians are absent. Suppose the use of cluster munitions in this attack, it is estimated, would provide a lower rate of collateral damage than a larger bomb would, but the resulting military advantage is expected to be the same: the headquarters will be destroyed. Would this allow for the applicable treaty rule that dictates not to use cluster munitions to be superseded by the proportionality principle of international humanitarian law? Although this is a difficult question, it seems that in this specific case the use of cluster munitions could be the better option. This example is clearly too conditional to conclude that a corrective function of principles of international humanitarian law exists on a general level. However, the two examples may be used by participants in an armed conflict to remind themselves that during the correct application of the rules of international humanitarian law, it remains important to also take the more general principles into account.

1.8 Conclusion

As explained above, situations may arise where the treaty rules and the rules of customary international humanitarian law do not provide solutions for a given situation. The conclusion that no international rules are applicable in a specific situation is not only unacceptable from a legal point of view and inconsistent with the history of IHL,[110] but also incorrect. The notions behind the specific rules that lack applicability for various reasons are always there and the principles of international humanitarian law always apply. They guide and bind armed members of the parties to the conflict and peacekeepers alike. These principles are the safety net that provide a basic level of protection and rules of behaviour. For its practical application it does not make a difference whether a certain rule is part of treaty law, has been established as a customary rule or is a recognised principle of international humanitarian law. These restraints apply as a matter of law. This makes the declaration superfluous that in a certain military operation the principles of international humanitarian law will be applied on the basis of political considerations, because they already apply as a matter of law.

It is outside the scope of this contribution to determine what the principles of international humanitarian law exactly are.[111] But it is clear that there is a need for a more precise methodology to identify principles of international humanitarian law. This methodology should be sufficiently flexible to include the main characteristics the principles must have. They must be legally binding, rather general,

[110] Corn 2009, pp. 32, 33.

[111] Corn and Jensen 2009 suggest that for the category of ́transnational armed conflict ́ the three essential pillars of this regulatory foundation are the principles of military necessity, targeting (object/distinction and proportionality), and humane treatment. See Corn and Jensen 2009, p. 79.

but specific enough to be applied during military operations. Proof of the existence of the principles should be found in a variety of international sources.[112]

The conclusion of this chapter is that the principles of international humanitarian law are more important than they may seem at first sight. Their significance is not limited to the fact that they are the inspiration and basis for the exact rules of international humanitarian law as found in treaty and custom. They have, on the basis of the Martens Clause, a separate legal significance. This significance becomes most prominent in instances where the applicability of the treaty and customary rules is subject to debate. Many of these situations exist. They will remain as long as the dichotomy between the rules that apply during international armed conflicts and during non-international armed conflict prevails, and not all states have ratified all relevant treaties on international humanitarian law. But also in situations where peacekeeping operations are deployed, the applicability of the treaty rules may not be appropriate, or possible, and the customary status of the rules may also be uncertain. In these situations, the only source where military commanders on the spot can turn to for their legal rights and obligations are the principles of international humanitarian law.

References

Online Documents

Clapham A (2010) The rights and responsibilities of armed non-state actors: the legal landscape and issues surrounding engagement. Geneva Academy of International Humanitarian Law and Human Rights. www.adh-geneva.ch/RULAC/application_of_international_law_to_non_State_armed_groups.php. Accessed 14 Feb 2012

Cohen A (2010) Proportionality in modern asymmetrical wars. Jerusalem Center for Public Affairs. http://www.jcpa.org/text/proportionality.pdf. Accessed 14 Feb 2012

Fellmeth A (2010) Interpreting proportionality doctrine through the lens of international custom. Paper presented at the conference 'proportionality in armed conflicts' at the Minerva Center for Human Rights, Jerusalem, Israel, 22 Nov 2010. http://law.huji.ac.il/upload/7_AaronFellmeth_p.pdf. Accessed 14 Feb 2012. A revised version of this paper was also published as Fellmeth A (2012) The proportionality principle in operation: methodological limitations of empirical research and the need for transparency. Israel Law Rev 45:125–150

Kalshoven F (2006) The respective roles of custom and principle in the international armed conflict. Acta Societatis Martensis 2:48–68. http://www.martens.ee/acta/2/048-068_Kalshoven.pdf. Accessed 14 Feb 2012

Liivoja R (2010) Chivalry without a horse: military honour and the modern law of armed conflict. In: Proceedings to the Estonian National Defence College 2010. http://works.bepress.com/cgi/viewcontent.cgi?article=1014&context=rain_liivoja. Accessed 14 Feb 2012

[112] For proposals for a methodology to identify principles of international humanitarian law, see in particular Frits Kalshoven 2006, p. 59; See also Bassiouni 1990, p. 809 and also Corn and Jensen 2009, p. 69.

Maxwell M, Meyer R (2007) The principle of distinction: probing the limits of its customariness. The Army Lawyer, Army Pamphlet 27-50-406, March 2007, pp 1–11. http://www.loc.gov/rr/frd/Military_Law/pdf/03-2007.pdf. Accessed 14 Feb 2012

Muñoz-Rojas D, Frésard J (2004) The roots of behavior in war: understanding and preventing IHL violations, ICRC, Geneva. http://www.icrc.org/eng/assets/files/other/icrc_002_0853.pdf. Accessed 14 Feb 2012

Literature

Adler H (2007–2008) Teaching the law of war in the Israel defence forces—W. Hays Parks symposium: teaching the law of war. Israel Def Forces Law Rev 3(6):34–48

Baker R (2010) Customary Law in the 21 century: old challenges and new debates. Eur J Int Law 21:173–204

Bantekas I (2006) Reflections on some sources and methods of international criminal and humanitarian law. Int Crim Law Rev 6(1):121–136

Bassiouni M (1990) A functional approach to 'General Principles of International Law'. Mich J Int Law 11(3):768–818

Bellinger J, Haynes W (2007) A US government response to the International Committee of the Red Cross study Customary International Humanitarian Law. Int Rev Red Cross 89(866):443–471

Betlehem D (2007) The methodological framework of the study. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC study on Customary International Humanitarian Law. Cambridge University Press, Cambridge, pp 3–14

Best G (1980) Humanity in warfare: the modern history of the international law of armed conflicts. Weidenfeld and Nicolson London, London

Bothe M (2007) Customary international humanitarian law: some reflections on the ICRC study. Yearb Int Humanit Law 8:143–178

Cammaert P, Klappe B (2010) Application of force and rules of engagement in peace operations. In: Gill T, Fleck D (eds) The handbook of the international law of military operations. Oxford University Press, Oxford, pp 151–158

Cassese A (2000) The Martens Clause: half a loaf or simply pie in the sky? Eur J Int Law 11:187–216

Cassese A (2005) International law, 2nd edn. Oxford University Press, Oxford

Cheng B (1953) General principles of law as applied by international courts and tribunals. Stevens and Sons, London

Chetail V (2003) The contribution of the international court of justice to international humanitarian law. Int Rev Red Cross 85(850):235–269

Corn G (2009) What law applies to the war on terror? In: Lewis M (ed) The war on terror and the laws of war: a military perspective. Oxford University Press, Oxford

Corn G, Jensen ET (2008) Untying the Gordian knot: a proposal for determining applicability of the laws of war to the war on terror. Temple Law Rev 81:787–830

Corn G, Jensen ET (2009) Transnational armed conflict: a 'Principled' approach to the regulation of counter-terror combat operations. Israel Law Rev 42(1):46–79

Degan V (1992) General principles of law (A source of general international law). Finnish Yearb Int Law 3:1–102

Dinstein Y (2006) The ICRC Customary international humanitarian law study. Israel Yearb Hum Rights 36:1–15

Dinstein Y (2010) The conduct of hostilities under the law of international armed conflict, 2nd edn. Cambridge University Press, Cambridge

Dörmann K (2002) Elements of war crimes under the Rome Statute of the International Criminal Court. ICRC, Geneva

Ducheine P, Pouw E (2009) Operation change of direction: a survey of the legal basis and the applicable legal regimes. In: De Weger M et al (eds) NL Arms, Netherlands annual review of military studies. Netherlands Defence Academy, Breda, pp 51–96
Ducheine P, Pouw E (2012) Controlling the use of force: legal regimes. In: Van Der Meulen J et al (eds) Mission Uruzgan: collaborating in multiple coalitions for Afghanistan. Amsterdam University Press, Amsterdam (Chapter 5)
Dworkin R (1977) Taking rights seriously. Duckworth London, London
Friedmann W (1963) The uses of 'General Principles' in the development of international law. Am J Int Law 57:278–299
Garraway C (2010a) Applicability and application of international humanitarian law to enforcement and peace enforcement operations. In: Gill T, Fleck D (eds) The handbook of the international law of military operations. Oxford University Press, Oxford, pp 129–133
Garraway C (2010b) International humanitarian law in self-defence operations. In: Gill T, Fleck D (eds) The handbook of the international law of military operations. Oxford University Press, Oxford, pp 213–216
Greenwood C (2008) Historical development and legal basis. In: Fleck D (ed) The handbook of international humanitarian law. Oxford University Press, Oxford, pp 101–150
Greig D (1985) The underlying principles of international humanitarian law. Aust Yearb Int Law 9:46–93
Hampson F (2007) Other areas of customary law in relation to the study. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC study on customary international humanitarian law. Cambridge University Press, Cambridge, pp 50–74
Hayashi M (2008) The Martens Clause and military necessity. In: Hensel H (ed) The legitimate use of military force. Ashgate Publishing Company, Farnham, pp 135–159
Heintze H (2004) On the relationship between human rights law protection and international humanitarian law. Int Rev Red Cross 86(856):789–814
Henckaerts J-M, Doswald-Beck L (2005a) Customary international humanitarian law: Rules, vol I. Cambridge University Press, Cambridge. http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf
Henckaerts J-M, Doswald-Beck L (2005b) Customary international humanitarian law: Practice, vol II. Cambridge University Press, Cambridge. http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf
Henckaerts J-M (2007) Customary international humanitarian law: a response to US comments. Int Rev Red Cross 89(866):473–488
Henkin L (1989) International law: politics, values and functions. Recueil des Cours 216:1–416
Kalshoven F (1971) Belligerent reprisals. Sijthoff Leiden, Leiden
Kalshoven F (2004) From international humanitarian law to international criminal law. Chin J Int Law 3:151–161
Kalshoven F, Zegveld L (2011) Constraints on the waging of war. Cambridge University Press, Cambridge
Kirgis F (1987) Custom on a sliding scale. Am J Int Law 81:146–151
Klabbers J (2006) Off limits: International law and the excessive use of force. Theor Inq Law 7(1):59–80
Klappe B (2011) Rules of engagement. In: Odello M, Piotrowicz R (eds) International military missions and international law. Nijhoff Leiden, Leiden, pp 145–160
Kolb R, Hyde R (2008) An introduction to the international law of armed conflicts. Hart Publishing Oxford, Oxford
Lammers J (1980) General principles of law recognised by civilised nations. In: Kalshoven F et al (eds) Essays on the development of the international legal order: in memory of Haro F. van Panhuys. Sijthoff & Noordhoff, Alphen aan den Rijn, pp 53–75
Lauterpacht E (1948) Annual digest and reports of public international law cases, vol 15. Longmans, Green and Co., London

Melzer N (2009) Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law. International Committee of the Red Cross, Geneva. http://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf
Meron T (2005) Revival of customary humanitarian law. Am J Int Law 99:817–834
Meron T (2006) The humanization of international law. The Hague Academy of International Law, Nijhoff Leiden, Leiden
Miyazaki S (1984) The Martens Clause and international humanitarian law. In: Swinarski C (ed) Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'honneur de Jean Pictet. Martinus Nijhoff Publishers, Leiden, pp 433–444
Mosler H (1995) General principles of law. In: Bernhardt R (ed) Encyclopedia of Public International Law, vol II. Elsevier, North Holland, pp 511–527
Parks WH (2010) 'Jus in bello' in the struggle against terror. In: Norton Moore J, Turner R (eds) Legal issues in the struggle against terror. Carolina Academic Press, Durham, pp 359–409
Pejic J (2011) The protective scope of common article 3: more than meets the eye. Int Rev Red Cross 93(881):189–225
Penna LR (1984) Customary international law and protocol I: an analysis of some provisions. In: Swinarski C (ed) Etudes et essais sur le droit international humanitaire et sur les principes de la Croix-Rouge en l'Honneur de Jean Pictet. Martinus Nijhoff, Leiden, pp 201–225
Petersen N (2008) Customary law without custom? Rules, principles, and the role of state practice in international norm creation. Am Univ Int Law Rev 23(2):275–310
Pustogarov V (1999) The Martens Clause in international law. J Hist Int Law 1(2):125–135
Roberts A, Guelff R (2000) Documents on the laws of war, 3rd edn. Oxford University Press, Oxford
Roberts A (2008) The equal application of the laws of war: a principle under pressure. Int Rev Red Cross 90(872):931–962
Sams K (2011) IHL obligations of the UN and other international organisations involved in international missions. In: Odello M, Piotrowicz R (eds) International military missions and international law. Martinus Nijhoff, Leiden, pp 45–71
Sandoz Y, Swinarski C, Zimmermann B et al (1987) ICRC commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Martinus Nijhoff, Leiden
Schindler D, Toman J (2004) The laws of armed conflict, fourth revised and completed edition. Martinus Nijhoff, Leiden
Schmitt M (2007) The law of targeting. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC study on Customary International Humanitarian Law. Cambridge University Press, Cambridge, pp 131–168
Scobie I (2007) The approach to customary international law in the study. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC study on customary international humanitarian law. Cambridge University Press, Cambridge, pp 15–49
Sénéchaud F (2007–2008) Teaching the law of war in the Israel Defence Forces—W. Hays Parks symposium: teaching the law of war. Israel Def Forces Law Rev 3(6):49–57
Shamash M (2005–2006) How much is too much? An examination of the principle of *Ius in Bello* proportionality. IDF Law Rev 2:104–148
Shaw M (2008) International law, 6th edn. Cambridge University Press, Cambridge
Shelton D (2006) Normative hierarchy in international law. Am J Int Law 100(2):291–323
Simma B, Alston P (1992) The sources of human rights law: custom, jus cogens and general principles. Aust Yearb Int Law 12:82–108
Skordas A (2003) Hegemonic custom? In: Byers M, Nolte G (eds) United States hegemony and the foundations of international law. Cambridge University Press, Cambridge, pp 317–347
Strebel H (1995) Martens' clause. In: Bernhardt R (ed) Encyclopedia of Public International Law, vol III. Elsevier, North HollandI, pp 326–327
Ticehurst R (1997) The Martens Clause and the laws of armed conflict. Int Rev Red Cross 37(316):125–134

Turns D (2007–2008) Some reflections on teaching the law of armed conflict in national and multinational contexts: a view from the United Kingdom. Teaching the law of war in the Israel Defence Forces—W. Hays Parks symposium: teaching the law of war. Israel Def Forces Law Rev 3(6):9–24

Van Hegelsom G (2010) Coalition warfare: who is a party to armed conflict in joint missions? Paper presented in Bruges, 23 October 2009. In: Armed conflicts and parties to armed conflicts under IHL: confronting legal categories to contemporary realities, Proceedings of the 10th Bruges Colloquium, 40 Collegium, pp 107–111

Van Hoof G (1983) Rethinking the sources of international law. Dissertation, Library of the Peace Palace, The Hague)

Zegveld L (2002) The accountability of armed opposition groups in international law. Cambridge University Press, Cambridge

Chapter 2
Chivalry: A Principle of the Law of Armed Conflict?

Terry Gill

Abstract This contribution explores the role and relevance of chivalry in relation to warfare past and present and its relationship to the law of armed conflict and poses the question whether it still is a principle of that body of the law. It also briefly addresses the question of what its potential relevance is as a guiding principle in the interpretation of legal and extra legal obligations alongside rules contained in conventional and customary law.

Contents

Avril McDonald was a lovely person and friend and an esteemed colleague, and this piece is dedicated to her memory with affection and respect.The author is Professor of Military Law, University of Amsterdam and The Netherlands Defence Academy.

T. Gill (✉)
Military Law, University of Amsterdam and The Netherlands Defence Academy, Amsterdam, The Netherlands
e-mail: T.D.Gill@uva.nl

T. Gill
Military Law, The Netherlands Defence Academy, Den Helder, The Netherlands

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2.1 Introduction

The notion of chivalry has a certain air of romance, and for many perhaps, of being "old-fashioned" and unworldly about it and is often associated with images of knights in shining armour fighting duels on horseback and wooing fair ladies perched on balconies. However, it has played an important role in the development of the law of war, now usually referred to as international humanitarian law or the law of armed conflict. In that context it can better be seen as embodying notions of honourable conduct and fair play, which have their roots in what is sometimes referred to as "the code of the warrior" and military tradition.[1] It has been, and still is, identified in some military manuals as one of the fundamental principles of this branch of the law and elements of it have obtained the status of binding rules of law of a conventional and/or customary nature.[2] It was historically at least partly based on a degree of mutual respect and reciprocity between adversaries sharing the same or similar traditions and subjected to the same dangers on the battlefield. The principal question that will be addressed in this short contribution is what role it has played in the development of the law of war and whether it had and still has a place in the law as a rule or principle of the law of war. If it did or does, what is its status today in the world of asymmetrical warfare and remote targeted killing, which are far removed from traditional face to face encounters between like-minded adversaries sharing a common code of warrior ethics and traditions? Does chivalry still have any relevance on today's battlefield? If so, what might its role and relevance be? Is it still a part of the law of armed conflict?

Before attempting to answer these questions, a short historical overview will be given of the role that chivalry has played in the development of the law (and practice) of armed conflict, alongside discussion of what the notion of chivalry signifies in relation to the law of armed conflict and conduct on the battlefield. The role of the fundamental principles of humanitarian law as general principles of law and as a normative framework for the entire corpus of positive legal obligations contained in conventions and specific rules of a customary nature will be examined and the place of chivalry alongside the other principles will receive attention. This will be followed by an examination of certain rules of treaty and customary law which are directly based upon the principle of chivalry and honourable conduct, followed by a more general discussion of the role of the fundamental principles of the law of armed conflict in general and chivalry in particular, as an assist in interpreting conventional and customary obligations and as a source of guidance or inspiration in applying extra legal considerations of an ethical or policy character, alongside longstanding military practice based on the notion of chivalry to the conduct of warfare. In this context, a particular role of chivalry as a possible

[1] French 2003, pp. 1–19.

[2] British Manual 1958, pp. 1, 2; US Army Manual 1956, p. 3; Canadian Joint Forces Manual 2001, Section 202, p. 2-1; US Navy 1997, pp. 5, 6; But see UK Manual 2004 and US Navy 2007, where no references to chivalry are made.

solution to the controversy surrounding the question of direct participation in hostilities will be advanced. It will be argued that rather than attempting to use the principle of military necessity as a restraint upon rules of a positive legal character, that the question of providing an opportunity to surrender to an adversary incapable of effective resistance, can be found in the notion of chivalry, as an extra-legal consideration based on military practice and tradition. In the final section, these elements will be brought together in an attempt to answer the questions posed above relating to the continued relevance (or lack thereof) of chivalry and notions of honourable conduct in the development of the law of war and its place in the contemporary law and practice of warfare.

2.2 The Relationship of Chivalry to Warfare and its Role in the Development of the Law of Armed Conflict

When referring to notions of chivalry and honourable conduct in relation to warfare, it is essential to identify what their essential characteristics are and to have some idea of how these have influenced the development of the law. Chivalry and martial honour have long been regarded as essential components of warrior ethics and military tradition.[3] They are reflected in most cultures in one way or another, ranging from Western warrior tradition dating back to classic antiquity and medieval chivalry, to the various warrior codes of the ancient and medieval Near East, India, China and Japan.[4] They also were practiced in various forms by many other cultures outside the arc of Eurasian/Mediterranean civilisation, including Native Americans and warrior peoples in Africa and the Pacific. While these traditions differ greatly in many respects, they do share a number of common characteristics. They generally honour bravery in the face of the enemy, loyalty to a common cause or individual, sense of identity (tribe, city state, class or caste, unit, later country), good faith in keeping one's word and honouring agreements and at least some degree of clemency towards those who are harmless, helpless or who have surrendered and requested mercy. While these codes do not always coincide with contemporary notions of humanity (prisoners of war were enslaved or sacrificed in many of them), they share a common idea or ideal that warfare was different from criminal homicide, that risking one's safety and life for the common interest was required from a warrior and that warfare was not reconcilable with wanton cruelty and destruction. All of them shared some notions relating to "fair play" and disdain of treachery in battle. Under the influence of both secular and

[3] French 2003, p. 21; Greenwood 2008, p. 18; Green 2000, pp. 23–25.

[4] French 2003, chapters dealing respectively with the Western, Chinese Shaolin warrior monastic code and Japanese Samurai warrior traditions, as well as with the warrior ethic of the Native Americans of the Great Plains; Greenwood 2008, pp. 16–17, referring to ancient and medieval traditions in the Near East and India as well as to warrior traditions in Africa and elsewhere.

religious morality, many of these traditions developed quite elaborate moral and legal codes of what was allowed and expected from warriors on the battlefield and for the treatment of persons who were not under arms or who were considered particularly vulnerable, as well as for objects and property considered to be sacred or otherwise worthy of respect.[5]

The influence of this has been acknowledged in writings relating to the historical development of the modern law of armed conflict. The influence of the medieval code of chivalry, along with religious and ethical influences (e.g. in the form of just war tradition), are generally referred to as the two main components of the pre-modern law of war. Rules existed and were enforced relating to the means by which and the manner in which warfare was conducted, respect for emissaries conducting negotiations relating to truces, prisoner exchanges or terms of capitulation, respect for women, clerics, the elderly and children, as well as the right of sanctuary and respect for religious and certain other types of objects and property.[6]

With the decline of feudalism and the gradual rise of dynastic, mercantile and increasingly States, the bearing of arms ceased to be a prerogative reserved to a warrior class or caste and became instead a profession.[7] In the late Middle Ages and Reformation this saw the increasing use of mercenary armies made up of soldiers of fortune who served and fought for pay and booty, and when not paid, were as much a danger to their employers and especially to the civilian population as any enemy.[8] The religious wars of the period were marked by a lack of any limitations and widespread devastation, which led to the attempt at reintroducing restraint through the development of (early) modern international law through the writings of such individuals as Suarez, Vitoria, Gentili and Grotius, who moulded together the traditions of just war into a reasonably coherent legal system, which served as the basis for modern international law.[9] This went hand in hand with the increasing of governmental control over the armed forces after the Peace of Westphalia and their transformation into professional armies and fleets in the service of the monarchical States of early modern Europe.[10] The officer class of these armies largely comprised the nobility and others who otherwise qualified as "gentlemen", who saw themselves as the heirs of the knightly tradition and generally conducted warfare (at least among themselves) in accordance with the emerging law of warfare and in accordance with notions of honour and chivalry.[11] Battles were fought, cease fires were observed and sieges were conducted in

[5] Greenwood 2008, p. 18; Green 2000, pp. 25, 26.

[6] Ibid.; See also Lyons and Jackson 1997, pp. 274–277, relating to the terms of surrender granted the Crusaders by Saladin centralised at Jerusalem.

[7] Howard 1976, pp. 16–19.

[8] Howard 1976, pp. 28–29.

[9] Howard 1976, p. 24; Greenwood 2008, p. 19.

[10] Howard 1976, pp. 48–49.

[11] Howard 1976, Chapter 4, "Wars of the Professionals", relating to eighteenth century armies and warfare.

conformity with sometimes elaborate (unwritten) rules and conventions, and since warfare had become the prerogative of the State which was waged for particular objectives, this led to both a certain limitation in the objectives of wars and the way they were conducted. This in turn also led to a certain degree of humanisation of warfare in the form of increased respect for civilians and their property (with the notable exception of storming a defended city) and more humane treatment of prisoners and the wounded. Under the influence of the Enlightenment, the distinction between combatants and non-combatants, and persons now referred to as *hors de combat,* became well-defined and generally adhered to in the practice of eighteenth century warfare.[12] This gradually became a code of customary law, which was seen as both legally binding as well as being a mark of a professional officer.

This customary code was gradually codified and further developed over the course of the nineteenth century. The famous Lieber Code was the first major step along this route and it was followed by many other such codifications in the latter part of the nineteenth century.[13] This codification process was at first largely a question of national regulation, but with the Hague Conventions of 1899 and 1907, it became part of international treaty law, alongside the adoption of the Geneva Conventions relating to the treatment of the wounded. The Hague Conventions reflected the existing rules and principles of the conduct of warfare that had characterised warfare between European States referred to above and as such were regarded as customary law, even in the face of the mass violence and slaughter of the ensuing world wars.[14] By this time the mass conscript armies of the nineteenth–twentieth centuries had replaced the earlier small professional armies of the previous one[15] and codification was the only means to ensure a reasonable degree of adherence to the law. However, these mass conscript armies, while armed with much more firepower and made up of a much broader spectrum of the population than their eighteenth century predecessors, still incorporated notions of honour and chivalry into their military tradition and attempted to instil them into the training and instruction of the members of the armed forces, in particular the officers who led them. They still form part of military training and instruction at military academies today.

[12] Greenwood 2008, pp. 19, 20.

[13] Greenwood 2008, p. 21; Green 2000, pp. 29–31.

[14] Gill 2007, pp. 86, 87; Green 2000, pp. 33–36; Greenwood 2008, p. 24.

[15] Howard 1976, Chapter 6, pp. 96–115, on the character of late nineteenth and early twentieth century armed forces and warfare.

2.2.1 Some Examples of Chivalry in the Practice of Warfare

A few examples from military history may serve to illustrate the influence of chivalry and honourable conduct in warfare. These will be purely illustrative and are not intended to serve as a systematic examination, which would go far beyond the confines of a single short article such as this one.

An example of what was considered to be honourable conduct often cited in relation to eighteenth century and nineteenth century warfare is the notion of "leading by example" and indifference to danger and wounds, as a means of both inspiring the same from the other members of the army and gaining and maintaining the respect of fellow officers. The central motivation of the officer according to one noted military historian was honour: 'honour was paramount and it was by establishing one's honourableness with one's fellows that leadership was exerted over the common soldiers'.[16] This involved not only indifference to danger in one's public comportment, and keeping one's word and faith, thereby setting an example, but also respect for the same qualities in fellow officers, including those from the opposing side. This was the reason why an officer who had fought bravely and honourably was treated with respect upon surrender, for example, by allowing him to retain his sword or sidearm as a mark of respect. It also lay behind the practice of allowing an officer to give his parole enabling him to move about freely within certain agreed limitations and accepting his word of honour to not participate in fighting until officially exchanged for a prisoner of similar rank. It also influenced the practice of sending forward "parlementaires" to attempt to negotiate a surrender when the chances of successful resistance were considered negligible and it lay behind the respect for the "white flag" and the inviolability of such an emissary during negotiations. A well-known example of this was in the final stages of the battle of Waterloo where the elite "Old Guard", surrounded and outnumbered after being repulsed in their final attempt to force the British position and now assaulted on the right flank by the Prussians, were called upon to surrender.[17] The offer was refused, but the offer was made in conformity with established practice and notions of honourable conduct. This practice carried over even into the Second World War, for example, during the battle of Arnhem, when the outnumbered and outgunned detachment of British paratroops defending the tenuously held crucial bridge over the Rhine, were offered the chance to surrender before the main assault commenced. Like the other example, this offer too was rejected, but in the ensuing hard fighting, captured British "paras" were generally treated humanely and with respect, having earned it in the eyes of their adversaries by their tenacious defence and general adherence to the rules of war.[18]

If surrender was accepted, it was almost always respected and was often accompanied by terms allowing for not only respect for the lives of the captured,

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[16] Keegan 1978, p. 191.

[17] Lachouque and Brown 1997, pp. 488, 489.

[18] Kershaw 2009, p. 222.

but often including some degree of respect for the honour and dignity of the defeated party. Two examples will have to suffice to illustrate the point. The surrender of British General Burgoyne at Saratoga in 1777, generally considered as the turning point in the American Revolutionary War, was carried out with full respect for the terms agreed and both sides showed scrupulous attention to the "honours of war".[19] In the final stages of the Crimean War, while peace negotiations were underway to surrender the fortress of Sevastopol and end the war, French and Russian troops who had faced each other over months of gruelling trench and siege warfare fraternised, shared rations and exchanged gifts of tobacco and small items, while the officers exchanged visits and mutual compliments and courtesies.[20] In some cases such expressions of mutual respect at surrender could have far-reaching consequences, as was the case in the American Civil War in relation to the surrender at Appomattox by General Lee, commanding the Confederate Army, to General Grant, commanding the Union Army, with the terms of surrender offered and the way it was conducted, contributing in no small measure to a fairly smooth transformation to peace and reconciliation between the two sides.[21]

Considerations of mutual respect and chivalry have also been observed with regard to the fallen of opposing armies for many centuries. Alexander followed the Greek tradition of burying the dead of both sides after a battle and erecting a memorial to the fallen[22] and the same tradition was observed by the German commander at St. Nazaire following a daring British commando raid in 1942, which put the docks intended to house the battleship *Tirpitz* out of action. In that case, the German Commander ordered that the 169 commandos who had fallen in the action be buried with full military honours and mounted an honour guard at the cemetery in recognition of their bravery.[23]

While examples such as these do not take away from the violence or negate the horror and cruelty of war, they do illustrate that alongside these elements there is room for some degree of mutual decency and respect between adversaries and the notion of chivalry and martial honour has played some part in contributing to this. It formed part of "the code of the warrior" and had an undeniable influence upon the development of "the laws and customs of war". We will now turn to the question whether it actually continues to form part of the contemporary law.

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[19] Hibbert 1990, pp. 196, 197.

[20] Figes 2010, p. 409.

[21] Anderson and Anderson 1988, pp. 448–454.

[22] Keegan 1987, p. 46.

[23] Weider History Group 2012.

2.3 Chivalry and Honourable Conduct as Part of the Law of War

The law of war, like any other branch of international law, is based on the sources enumerated in Article 38 of the Statute of the International Court of Justice. The two primary sources are multilateral conventions, such as those of Geneva and The Hague, and customary law representing practice recognised as legally binding. Alongside these are general principles of law, and as secondary sources, decisions of courts and tribunals and *doctrine*. The place and function of general principles within this system has been the subject of some controversy, but it is generally agreed that principles of law can include both fundamental norms of international law of a more general nature than specific rules, including some norms of a peremptory nature, and elements of municipal law common to most or all legal systems which can have relevance for international law.[24]

The contemporary law of armed conflict consists of hundreds of treaty provisions and according to the ICRC customary law study, over 160 rules of customary law.[25] As such it has become a complex and highly detailed branch or subdiscipline of international law, and while most of its rules are reasonably uncontroversial, some are the subject of diverging interpretation and elements of its relationship to other areas of international law, such as human rights law, have given rise to a considerable degree of controversy. One might question how an individual soldier, or even a commander, could ever be expected to know all of the rules or find his or her way through the controversies and grey areas. The answer is that, while the detail of the law is complex and sometimes controversial, its essence is contained in a handful of fundamental principles which are interrelated and form a system, which have been recognised throughout its long history and which form the foundation for all the rules contained in the two primary sources of treaty and custom. These principles provide the normative framework upon which the entire system of rules is based and can additionally serve as aids in interpretation and as a means to fill gaps and ensure coherence. They underlie and provide the normative basis for every single rule of treaty and customary law and as such, while not normally used to identify specific rights or obligations, are of fundamental importance in the interpretation and application of the rules contained in the primary sources. They are in short, general principles of international law in the sense of fundamental norms of a more general character referred to above.[26]

The fundamental principles of military necessity and humanity are the two keystone principles which lie at the heart of the balance between military requirements and the need and objective to limit the suffering and devastation caused by war and provide protection to those most vulnerable, such as the

[24] Van Hoof 1983, pp. 148–151.

[25] Henckaerts and Doswald-Beck 2005.

[26] Military manuals on the law of armed conflict such as those cited in n. 2 *supra*, usually begin with a treatment of the basic principles of the law of armed conflict.

wounded and captured, and to the civilian population. These two main principles are complemented by several other fundamental principles which are drawn from the two main ones and which complement them in forming the overall system. These include the principle of distinction, which has the function of demarcating who and what is, and is not, subject to attack; the principle of proportionality (*in bello*) which sets out a balance between expected military advantage and probable incidental injury and damage to civilians and civilian objects in conducting attacks upon military targets; the principle of prohibition of unnecessary suffering and superfluous injury in the use of certain types of weapons and means of combat as a sub-principle of humanity; and the principle of equal application, which establishes an equality between opposing forces and participants in the application of the law of war, irrespective of considerations of the legality of resorting to force between States or the motivations of the opposing parties.

The question posed earlier is whether these principles also include considerations of chivalry and honourable conduct, whether in the form of a separate principle, or as part of those named above. Clearly, not all of what is (or perhaps more accurately was) regarded as chivalry or martial honour has been codified into law, but there is no doubt that significant elements have found their way into treaty and customary law and as such represent binding legal obligations. Other elements remain more a question of military tradition or ethics than positive legal obligations, but nevertheless exert some degree of influence. We will examine a few examples of both by way of illustration. Those elements which are the source of binding legal obligations contained in conventions and custom will be examined first, followed by an examination in the next paragraph of the ancillary role of basic legal principles in general and chivalry in particular, as sources of guidance which can and do include extra legal considerations and practices and traditions which, while not legally binding, can nevertheless exert a significant influence.

One area where notions of honourable conduct have become part of the law is in the prohibition of perfidy. This relates to the prohibition of feigning wounded or otherwise protected status, as well as the intent to surrender, as a means of gaining advantage in combat. The Hague Regulations on Land Warfare of 1907 and Additional Protocol I of 1977 lay down strict prohibitions of using treachery (perfidy) to kill or wound (and under API to capture) members of the opposing armed force or to misuse flags of truce, national flags, uniforms and emblems of the enemy or those of neutral States in combat or to misuse the protected emblems and signs of the Geneva Conventions.[27] These prohibitions have obtained a customary status and extended somewhat to include, for example, the flag and distinctive emblem of the United Nations and form part of customary law; violation

[27] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hereinafter HR 1907), The Hague, 18 October 1907, Article 23B jo. Article 23F; Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Hereinafter AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 75, Articles 37–39.

of which can be considered to constitute a war crime.[28] These prohibitions undoubtedly have their root in notions of martial honour and chivalry, which required adversaries to fight openly and without treachery. The same consideration applies to the prohibition of attacking individuals who have laid down their arms and surrendered at discretion.[29] Not only is attacking persons who have surrendered a violation of basic humanity, it is no less a violation of trust and dishonourable conduct to attack a person who has yielded and placed himself at the disposal of the opponent. No honourable warrior in the chivalric tradition would attack an opposing warrior who had yielded and asked for quarter.[30] This also underlies the prohibition of denying quarter and declaring no quarter will be granted, or conducting hostilities in such a manner as to make surrender impossible.[31]

Another element of chivalry and honourable conduct which is incorporated into the law is the prohibition of using protected persons and objects as shields from attack or in direct support of military operations. Protected persons such as civilians, the wounded and prisoners of war are to be separated from combatants as far as possible and clearly indicated for what they are. Using their immunity from attack as a shield for military operations not only violates their protected status and renders them subject to loss of protection, thereby violating both the principles of humanity and distinction, but is also without doubt a form of dishonourable and treacherous conduct akin to misuse of flags and emblems. The same applies to the use of specially protected objects, such as places of worship, hospitals and cultural monuments as shields from attack.[32]

Another example of how notions of chivalry and honourable conduct have found their way into binding legal provisions is in rules relating to the inviolability of parlementaires and respect for flags of truce and for ceasefires and armistices, for example, to negotiate terms of surrender or to permit collection and treatment of the wounded, or evacuation of non-combatants. These rules of treaty and custom are based on long-standing practices in the conduct of warfare and have their root in notions of chivalry and martial honour as referred to above. This likewise applies to the manner in which capitulations are to be carried out and observed "in accordance with the rules of military honour" and the concomitant requirement that "once terms have been settled they must be scrupulously observed".[33]

A final example of how elements of chivalry and military honour have found their way into the law is to be found in certain of the provisions relating to the

[28] AP I, Ibid., Article 38:2; Rome Statute of the International Criminal Court, Rome, 17 July 1998, U.N. Doc. A/CONF.183/9, Article 8, para 2(b), vii.

[29] HR 1907, *supra* note 27, Article 23C.

[30] Ackerman 2003, pp. 115–137 at 126, 127.

[31] HR 1907, *supra* note 27, Article 23D; AP I, *supra* note 27, Article 40.

[32] AP I, *supra* note 27, Article 51:7.

[33] HR 1907, *supra* note 27, Article 35.

treatment of prisoners of war. Prisoners of war are allowed to wear their uniforms, badges of rank and nationality, decorations and retain personal items, including money and objects of value (within certain conditions). These rules have to do with respect for the military honour of the captured personnel and function alongside provisions relating to prohibition of violence, cruelty, mistreatment and insult to not only safeguard their well-being, but also to set them apart from convicts and persons suspected of criminal offences. They are to observe military protocol and respect in matters such as saluting only officers of higher rank and officers and prisoners of equivalent status and receiving in turn the recognition of respect due to their rank and status.[34] The internal hierarchy and (military) customs of the captured personnel is generally recognised and respected in so far as it is not prejudicial to security and good order, with the ranking officer or non-commissioned officer among the prisoners normally serving as POW representative to the camp commander. They are subject to the military disciplinary system of the detaining power with the same rights and obligations as members of its own forces.[35]

The above-mentioned examples of rules and the practices which underlie them have their root in notions of chivalry, military honour and mutual respect which form part of military tradition. While these examples are not exhaustive, they do serve to illustrate how many elements of chivalry and honourable conduct, alongside military tradition relating to these notions, have been incorporated into binding legal rules of the law of war. As such, chivalry and honourable conduct can qualify as a fundamental principle of the law of war from which rules and prohibitions of a binding legal nature are derived. Whether one sees it as a separate fundamental principle alongside military necessity, humanity, distinction and proportionality, or as being incorporated into these, is less important than the fact that it exercises the function that all of these fundamental principles do as the foundation upon which positive legal obligations contained in treaty provisions and custom are based.

2.3.1 Chivalry as a Guiding Principle

What has been said above in relation to the incorporation of elements of chivalry and honourable conduct into positive legal obligations should not obscure the fact that not all of its elements, especially many notions of martial honour deriving from military tradition, are necessarily "law" in the sense of constituting positive rights and obligations. However, the functions of a general principle are not only to

[34] Convention (III) relative to the Treatment of Prisoners of War (Hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf. Articles 27, 39, 40, 43–45.

[35] GC III, Ibid., Articles 22:3, 82:1, 87:1.

serve as a basis for specific rules and obligations, but as a means of aiding in the interpretation of such existing obligations and filling gaps where these exist. In this sense, principles of law are legal tools which aid and complement specific rules contained in treaties and customary law. While principles are rarely cited in court decisions as a source of specific obligation,[36] they are sometimes referred to in the sense of noting a generic obligation, such as is the case with the well-known "Martens Clause", or as an assist in interpreting specific rules.[37]

In a wider sense, general principles can also refer to extra legal considerations, which function alongside the law in a strictly positive sense, as a means of regulating conduct and denoting obligations of a moral or ethical character which have a place alongside the binding rules of law. No aspect of human behaviour, including warfare, is simply a question of legal rights and prohibitions, important as these are. Behaviour in war as in peace is also regulated by considerations of morality, trust, courtesy and tradition, as well as on the basis of considerations of policy and good sense. This applies in a more general sense as well. For example, while the concept of equity is part of the law in most legal systems, the broader notion of "fairness", from which equity is largely derived, includes both legal and extra legal considerations and as such is more than just a purely legal notion. Certain legal rules may be perfectly "legal" in the sense of being legally binding and having been adopted in accordance with established procedure, however, this does not guarantee they will inevitably be "fair" in all circumstances in the sense of providing the right outcome and doing justice to all concerned.[38] Likewise, while law and fundamental notions of morality generally coincide to a considerable extent, this is not inevitably the case, nor is it always possible, or perhaps desirable in all situations, particularly in cases where morality is equally "grey" or contested just as law sometimes is. It can be highly dangerous to allow individual notions of morality to prevail over legal considerations, since the latter normally represent a *communis opinio* of what is acceptable conduct and what is an acceptable response to misconduct, rather than one's own private sense of what is "right" or "wrong". Nevertheless, there is still a place, indeed a need, for extra legal considerations as a means of governing conduct alongside positive legal obligations, as a complementary means of regulating conduct.[39] In almost all cases, in the event of a clash between positive legal obligations and those of an extra legal character, the former will prevail at the level of society at large (if not always at the individual level), although most legal systems will take account of non-legal considerations and ethical motivations to at least some extent in

[36] Van Hoof 1983, pp. 144–146.

[37] For example in ICJ, *Legality of the Threat of Use of Nuclear Weapons*, Advisory Opinion, General List No. 95, 8 July 1996, I.C.J. Reports 1996, http://www.icj-cij.org/docket/files/95/7495.pdf, p. 226, para 78 at p. 257.

[38] For an extensive treatment of "fairness" as both a legal and overarching ethical principle, see Franck 1995, Chapters 1 and 2.

[39] A modern classic dealing with the ethical dimension of war is Micheal Walzer's *Just and Unjust Wars*, Walzer 1977.

apportioning blame and determining the consequences of unlawful behaviour. The notion of peremptory norms of a *ius cogens* nature is an instrument which brings together, to a large extent, the concepts of law, justice and morality,[40] and many of the rules and fundamental principles of the law of war constitute such universally binding obligations, but even these do not cover all possible situations and contingencies.

What does all of this have to do with chivalry, one might ask? The answer may lie in this ancillary function of general principles of law (and conduct) in general sense as a guiding principle alongside the law, and a possible complementary role or function of chivalry and honourable conduct in particular. An example may serve to illustrate what this function might be.

In the ongoing controversy relating to "Direct Participation in Hostilities", one of the most contentious issues has been the purported effect of the principle of military necessity as an additional restraint upon the conduct of hostilities, with one side of the argument contending that, in addition to the rules of humanitarian law and without prejudice to the applicability of other bodies of international law (i.e. human rights law), hostilities are also limited to what is strictly required under the circumstances, leading to an additional legal obligation to capture enemy personnel rather than target them in combat situations when this is not strictly required by the rules of International humanitarian law. This is fiercely contested by a significant number of experts in the humanitarian law of armed conflict who argue that the constraints on attacks cannot be derived from general principles and are contained in the rules themselves, and that there is *a fortiori* no legal obligation to capture persons subject to attack, rather than target them in the conduct of hostilities.[41]

Without pronouncing either side in this contention to be either "right" or "wrong", I believe a possible solution lies elsewhere, namely in looking for the influence of chivalry and military tradition, not so much in the sense of a guiding legal principle, but as an extra legal consideration, which has long played a role in the way battles and engagements are conducted when circumstances and conditions permit. There is a long tradition of offering surrender as an "honourable alternative" to hopeless resistance in situations of overwhelming superiority, which has been referred to previously. While part of this has long been part of the law, in the sense of requiring quarter be granted when surrender is offered, there is no strictly *legal* requirement to offer surrender to an outnumbered, outgunned or surrounded adversary who has no realistic option of prevailing or escaping intact, but has not (yet) indicated the intention to surrender. This is neither a part of the law now, nor has it ever been so. Nevertheless, this has a long tradition in the practice of adversaries on the battlefield, and while it is not a matter of the *law* of war, it could be said to be part of the *custom* of war in a non-legal, but no less

[40] Van Hoof 1983, pp. 153–156.

[41] ICRC 2008, Chapter IX; For criticism see *inter alia* Schmitt 2010, Watkin 2010, and Hays Parks 2010 and the reply thereto by Melzer 2010.

persuasive sense. It is not derived from an additional legal constraint on the conduct of hostilities emanating from the principles of military necessity, or humanity, but rather from a tradition and custom which has its roots in chivalry and "fair play" between adversaries. Unlike legal obligations under the contemporary law of armed conflict, it is largely a matter of reciprocity in the sense of honour and respect for adversaries who have conducted themselves bravely and in accordance with the rules and customs of war, as well as from a sense of sharing the same dangers. It flows additionally from a sense of basic humanity; humanity here not in the sense of a binding legal rule, but as a consideration of morality and ethics.

Viewed in this way, there are few military officers who would deny the existence of such a tradition or deny that when circumstances permit, it would be the honourable and "decent" thing to do to offer an adversary a fair chance to surrender rather than fight on hopelessly and needlessly sacrifice lives. Of course, since this custom is based largely on mutual respect, it is hard to imagine such an offer being made to an adversary which had not fought honourably and who instead had used every opportunity to violate the law and custom of warfare. Nevertheless, even in such circumstances, considerations of ethics, alongside those of policy (for example, counter insurgency doctrine poses restraints on hostilities which can go well beyond what is required as a matter of legal obligation), might well militate in favour of moderation. Regardless of whether one acted out of a sense of moral obligation, mutual respect and sense of honour or policy; it would not be a question of binding legal obligation, but a matter of either morality and chivalry, or good sense and expediency, which acted as a restraint in situations where one enjoyed overwhelming superiority and offered an adversary the option of surrender. Such restraints could well have the same effect in many cases, without causing the level of controversy that has resulted over the purported binding nature of obligations not contained in positive rules of law. They would act as a complement to binding legal obligations, also based on a combination of considerations of chivalry and humanity (now as part of the law), which prohibit denial of quarter and conducting hostilities on the basis of "taking no prisoners" when surrender is offered. There is a fine line between legal and extra legal considerations, but they are distinct. Violation of a legal obligation, carries with it legal responsibility and possible trial and conviction for commission of a war crime, while the other does not. Nevertheless, non-binding moral obligations and traditions can also act as a powerful incentive for particular conduct and are no less relevant for not having a legal sanction attached to them.

2.4 Chivalry's Relevance and Limits in Warfare

The example of the role of chivalry in relation to the controversy surrounding the role of basic principles in relation to the question of direct participation in hostilities illustrates how chivalry and honourable conduct is both part of the law in

the sense of being partly incorporated into binding rules, in this case relating to the duty to accept surrender when offered, while at the same time acting as a guiding principle which has a legal function in assisting the interpretation of specific rules and an extra legal dimension alongside the law as a reflection of practice and military tradition, for example, in offering an adversary which has no prospect of successful resistance or escape a chance to surrender. It also is an indication that chivalry is both a general principle of the law upon which specific rules are based as well as a principle of the custom or practice of warfare in a non-legal sense. It provides a good case for illustrating its continued relevance, even in contemporary warfare between mismatched opponents in terms of capabilities, motivation and methods of fighting, at least in some circumstances.

While this does not signify that considerations of chivalry will always determine the way in which adversaries conduct themselves, it does show that such considerations can have relevance even now. It should be borne in mind that even in "classical warfare" between reasonably like-minded opponents pitted against each other in face to face battles, chivalry never determined the outcome, nor did it prevent the intensive use of force and violence to achieve the desired outcome (eighteenth and nineteenth century battlefields were "killing fields" by today's standards). Likewise, it never prevented the use of weapons and tactics aimed at negating the advantage of the opposing side as a whole or of neutralising the superiority the adversary possessed in a certain arm of the army or method of fighting. Archers were used to mow down mounted knights at Crecy and Agincourt, just as massed volley fire smashed the assault of Napoleon's cavalry and elite infantry at Waterloo, and guerrilla tactics and deception have been used throughout warfare by a weaker opponent against a stronger one to neutralise their superiority in open engagements. (Long range) missile warfare, whether by means of ballista, long or crossbow, musket, artillery, machinegun or sniper rifle (or for that matter helicopter gunships or missile armed unmanned aerial vehicles or "drones"), has been part of warfare for centuries and is the "great leveller", making no distinction between rank, class, skill or bravery of the recipients. Superior firepower has also long been used to neutralise superior skill, location or mobility possessed by an adversary as, for example, in the use of aerial supremacy by the Allies in their breakout from Normandy in 1944, or its use by US forces in the fighting in Vietnam.[42] In short, chivalry and martial honour have never precluded maximising one's advantages and neutralising those of the opponent, except in so far as certain conduct (e.g. perfidy) or weaponry (e.g. poison) has been banned as illegal. This has not, however, prevented it from exerting an influence on the way war was conducted and inducing a degree of restraint and mutual respect between adversaries in so far as this was feasible and not incompatible with military requirements under the circumstances.

[42] For a comprehensive study of how the elements of firepower, manoeuvre and mobility interacted in Western military history from ancient to modern warfare see Jones 1987.

Does this still hold true today? Can notions of chivalry and honourable conduct still have relevance in the context of post modern asymmetrical warfare? The answer to this is, in my view, a qualified "yes". On the negative side of the ledger are several considerations, including: a much greater gap in capability between modern well equipped armed forces on the one hand and their increasingly likely opponents on the other, a corresponding greater disregard by most non-State armed groups for the laws of war (much less for extra legal notions of chivalry and honourable conduct) than in traditional engagements between regular armed forces, and the influence of extremist ideology, religion and ethnic hatred, along with extreme reactions thereto in the form of bending or violating the rules and conventions of warfare as both a means of punishment and as a form of expediency to overcome (perceived) disadvantages posed by the disregard of legal and moral restraints by many such non-State armed groups. Put simply, many would question why one should fight in accordance with notions of chivalry and honour, or even in accordance with the laws of war against a foe which has no regard for them and routinely violates the law of war, indeed sometimes uses it as a means of gaining a military or propaganda advantage.

On the positive side of the ledger is the fact that the law of war has obtained a degree of acceptance, authority and universality that has made it an inescapable part of today's perception of what is minimally required conduct in armed conflict. This includes those rules and principles which have their roots in chivalry and honourable conduct, some of which were referred to above. Another factor is the fact that, notwithstanding the above-mentioned negative considerations relating to much of contemporary warfare alongside the inherent limitations of chivalry in relation to maximisation of advantage in weapons and tactics which have always existed, there are compelling legal, moral and policy reasons for conducting oneself honourably irrespective of whether the other side does so. From a legal standpoint, adherence to the law is required, regardless of whether the opponent does so or not. From a moral standpoint, disregard of law and indeed of extra legal considerations of basic humanity and honourable conduct strips the violator of the right to condemn the conduct of the adversary and risks sacrificing the very values one is defending. From a policy standpoint, respect for the law, fairness and honourable conduct will strengthen morale and sense of purpose among the forces engaged and will significantly strengthen domestic and international acceptance of the use of force and the way it is employed.

In sum, while there are undeniable challenges to the law and to conducting warfare in accordance with notions of chivalry and honourable conduct, in contemporary warfare there are compelling reasons to do so despite them. Such challenges have always existed in one form or another and some of them are not as new as is sometimes supposed (irregular/asymmetrical warfare and even the use of terror tactics as psychological warfare, for example, are nothing new). Adherence to the law and to ethical and other principles, such as military honour, are both required from a legal and ethical standpoint and moreover do not prevent or significantly hinder achieving the objective of war, which is, as it always has been "to win". On the contrary, they can make a significant contribution to achieving

one's objectives both in a narrow sense of achieving military objectives (for example, treating prisoners humanely and honourably, not only is the "right" thing to do, but makes it more likely that an adversary will surrender when successful resistance is no longer possible, thereby saving lives and resources of one's own side) and in a wider sense of adhering to fundamental notions of decency, humanity and fairness which are what one is ultimately fighting to preserve. Adherence to chivalry and honourable conduct may also well contribute to achieving a reconciliation between former adversaries once hostilities have been concluded.

2.5 Conclusions

Our short examination of the notions of chivalry and honourable conduct leads to a number of conclusions. Firstly, chivalry and martial honour have always been part of the "the code of the warrior" and have played a significant role in the development of the law of war. Secondly, they have been incorporated into numerous binding rules of treaty and customary law and as such perform the function of a general principle of law, which include the fundamental principles of the law of war as a normative framework and a basis upon which specific obligations are based. Thirdly, that as a fundamental principle of the law of war, they perform another of the functions of a general principle of law, namely as a means to assist in the interpretation of the law and as a guiding principle in both a legal and in a wider sense of incorporating extra legal considerations of ethics and military tradition into the practice of warfare. On the basis of these conclusions, it seems fair to say that chivalry and honourable conduct are still a principle of the law of armed conflict and can have relevance in contemporary warfare, notwithstanding undeniable obstacles and challenges to their application.

One area where these different functions of chivalry operate as a basic principle of the law of armed conflict and as a guiding principle which takes account of extra legal considerations of an ethical and policy nature as well as incorporating long-standing military practice and tradition is in relation to the controversy surrounding the question whether the principle of military necessity provides for legal restraints in addition to obligations contained in treaties and custom; specifically in relation to the question whether a legal obligation exists to capture rather than target an enemy combatant or fighter directly participating in hostilities under certain circumstances. I have argued that the solution to this controversy may lie in the double role of chivalry, both as a foundation for positive legal obligations prohibiting denial of quarter and the duty to not conduct hostilities in a manner which precludes survivors being taken prisoner, and as a guiding principle based on ethical considerations and long-standing military practice and tradition, whereby an adversary who has no feasible chance of successful resistance is offered a chance to surrender.

The profession of arms has always included considerations of honour in the conducting of hostilities and treatment of a defeated or helpless adversary and persons not under arms, alongside considerations of basic humanity and military necessity. There are no compelling reasons to conclude that this has fundamentally changed in contemporary warfare, or that it ought to change as a result of changed technology or lack of adherence to such considerations by many adversaries. Chivalry and honourable conduct in this context are not about romantic notions of courtly behaviour and jousting on horseback to win the favour of a fair lady, but rather are part of the professional and ethical code of any member of the armed forces, as well as being part of the law of war as long as it has existed.

References

Official Documents

British Manual (1958) British manual of military law. The Law of War, vol III. United Kingdom Ministry of Defence, HMSO (1958)

Canadian Joint Forces Manual (2001) Canadian Joint Forces manual on the Law of Armed Conflict, B-GJ-005-104/FP-021

ICRC (2008) Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law, adopted by the Assembly of the International Committee of the Red Cross on 26 Feb 2009, 90 IRRC, No. 872 (Dec 2008), pp 991–1047

UK Manual (2004) Joint Service Manual of the Law of Armed Conflict. Joint Services Publication 383, United Kingdom Ministry of Defence

US Army Manual (1956) US Army manual law of land warfare, FM 27-10 1956

US Navy (1997) US Navy, annotated supplement to the commander's handbook of the Law of Naval Operations, NWP 9 (REV A)/FMFM 1-10 1997

US Navy (2007) US Navy, Marine Corps and Coast Guard Commander's handbook on the Law of Naval Operations, NWP 1-14M

Literature

Ackerman F (2003) "Never to do outrageousity nor murder": the world of Malory's Morte Darthur. In: French S (ed) Code of the warrior: exploring warrior values past and present. Rowman and Littlefied Publishers, Lanham, pp 115–137

Anderson N, Anderson D (1988) The generals: Ulysses S. Grant and Robert E. Lee. Alfred A. Knopf Publishers, New York

Figes O (2010) Crimea. Penguin Books, London

Franck T (1995) Fairness in international law and institutions. Oxford University Press, Oxford

French S (2003) Code of the warrior: exploring warrior values past and present. Rowman & Littlefield Publishers, Lanham, Maryland

Gill T (2007) Het Haags Landoorlogreglement na 100 jaar (The Hague Regulations on Land Warfare after 100 years). Mededelingen van de Nederlandse Vereniging voor Internationaal Recht 135:71

Green L (2000) The contemporary law of armed conflict, 2nd edn. Manchester University Press, Manchester
Greenwood C (2008) Historical development and legal basis. In: Fleck D, Bothe M (eds) The handbook of international humanitarian law, 2nd edn. Oxford University Press, Oxford, pp 1–43
Hays Parks W (2010) Part IX of the ICRC "Direct participation in hostilities" study: no mandate, no expertise and legally incorrect. NYU J Int'l L & Pol 42:769
Henckaerts J-M, Doswald-Beck L (2005) Customary international humanitarian law: Rules, ICRC, vol I. Cambridge University Press, Cambridge. http://www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law/index.jsp
Hibbert C (1990) Redcoats and rebels: the merican revolution through British eyes. Avon Books, New York
Howard M (1976) War in European history. Oxford University Press, Oxford
Jones A (1987) The art of war in the Western world. Oxford University Press, Oxford
Keegan J (1978) The face of battle. Penguin Books, London
Keegan J (1987) The mask of command. Penguin Books, London
Kershaw R (2009) It never snows in September: the German view of market garden and the battle of Arnhem. Ian Allen Publishing, Hersham, Surrey
Lachouque H, Brown A (1997) The anatomy of glory: Napoleon and his guard. Greenhill Books, London
Lyons M, Jackson D (1997) Saladin: the politics of holy war. Cambridge University Press, Cambridge
Melzer N (2010) Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities. NYU J Int'l L & Pol 42:831
Schmitt M (2010) Deconstructing direct participation in hostilities: the constitutive elements. NYU J Int'l L & Pol 42:697
Van Hoof G (1983) Rethinking the sources of international law. Kluwer Law and Taxation Publishers, Deventer
Walzer M (1977) Just and unjust wars: a moral argument with historical illustrations. Penguin Books, London
Watkin K (2010) Opportunity lost: organized armed groups and the ICRC direct participation in hostilities interpretive guidance. NYU J Int'l L & Pol 42:641
Weider History Group (2012) Raid on St. Nazaire: Operation Chariot during World War II. http://www.historynet.com/raid-on-st-nazaire-operation-chariot-during-world-war-ii.htm. Accessed 21 Nov 2012

Chapter 3
Military Robots and the Principle of Humanity: Distorting the Human Face of the Law?

Hanna Brollowski

Abstract This article aims to raise awareness of the potential challenges involved in sending (autonomous) robots to war. Drawing on multiple disciplines, the author finds that the advantages and disadvantages of using robotic soldiers may well allow one to argue either way. However, taking into consideration the principle of humanity as a cornerstone of international humanitarian law, particularly strong concerns arise. Since robots are not able to conceive of ethical and moral concerns in addition to lacking analytical skills, it is held that they are not able to act in accordance with the rules which are applicable during armed conflict. An urgent need is recognised for the international (legal) community to take ownership of the process to regulate the deployment of robots in war situations.

Contents

The author is PhD candidate at the University of Amsterdam.

H. Brollowski (✉)
University of Amsterdam, Amsterdam, The Netherlands
e-mail: hannab35@hotmail.com

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Foreword

In his brilliant 2010 lecture to commemorate Avril's life, Prof. McCormack drew an analogy between her death and the volcanic eruption of Eyjafjallajökul. He spoke of her 'infectiousness' that spread in a way which was similar to the way the volcanic ashes spread all over the world and changed the course of so many people's lives during those days.[1] Avril has definitely succeeded in infecting me with her incredible passion for international law and the *search for the human face* thereof. I knew Avril as a teacher and before I met her, I never thought that I would want to work in the field of IHL. That obviously changed after Avril's class. The classes were held without a break and at an incredibly fast speed (quite similar to the explosive speed with which robotic sciences evolve). Everyone had cramp in their hands afterwards from having to write so quickly in order to keep up with her. In calling her after an examination to 'briefly' ask for a comment on my essay, I ended up talking to her for an hour and a half (on a mobile phone from Germany….). At the end of the conversation, she promised to always help if I needed anything and she always kept that promise. When I got my first job at the ICRC, she said that was the best Christmas present for her … spreading her passion for IHL. She was incredibly committed to her students and I felt immensely honoured to be sitting in her old chair at her old desk for almost a year and a half during the time I worked at the Asser Institute. I am very thankful for her inspiration and also to the editors of this book for the opportunity to allow me to share this. I think everyone who has had the pleasure of meeting her will keep a little bit of that volcanic ash with him …

3.1 Introduction: Preliminary Remarks

The revolution in technology in the twentieth and twenty-first centuries has transformed humanity in nearly every aspect of our everyday lives. Recently, in the never-ending quest to foster technological development, the focus has moved towards robotics. Especially in Asia, household robots are no longer a novelty with South Korea announcing plans to equip each household with a robot by 2020.[2] Roomba, iRobot's automatic vacuum cleaner (also available as a lawn mower), or the sock robot developed to fold socks have fascinated many housewives.[3]

[1] See also McCormack and Radin 2009, pp. IX–XII.

[2] Lovgren 2006.

[3] iRobot website 2011; Sockification Youtube 2011.

In addition to the aspirations of making the life of housewives/men more comfortable, however, South Korea has also developed weapon-carrying robots to assist in controlling the border with North Korea,[4] and they are not the only ones investing vast amounts of money in this field of research. The goal of the 2001 Future Combat Systems project of the United States (US) was to ensure that, by 2015, at least one-third of operational ground combat vehicles were unmanned. It was estimated that it would cost at least US $230 billion.[5] Between 2004 and 2007, detailed 25-year plans for unmanned aircraft, ground and navy vehicles, and a roadmap until 2032 followed.[6] By 2011, the US had at least 7,000 airborne military robots and another 12,000 robots on the ground[7] At least 42 other countries were using some form of military robots.[8] The era of robotic weapons has long begun and war-waging has been transformed in unthinkable ways.

There is no explicit treaty rule prohibiting the deployment of robots or robotic weapons during armed conflict. Thus, it seems that the decision to employ robots does not *prima facie* result in a breach of international law. Nevertheless, as is well known, sources of international law, besides conventions and customary norms, may also include 'general principles of law recognized by civilized nations'.[9] Assuming that it is such a recognised principle, this article aims to assess whether deploying robots during armed conflict violates 'the principle of humanity' while simultaneously undermining the human aspect of war. First, it is necessary to establish how morality and war relate to one another. On the other hand, it is vital to understand how the notion of humanity, amongst other things as a legal concept, has developed and whether the significance of the concept can be maintained in relation to military robots. For this, a brief overview of some of the existing technology will be provided, before judicial decisions and academic discourse will be consulted as subsidiary means of interpretation.

The topic involves a multiplicity of aspects which are relevant to various disciplines including engineering, law, philosophy and medicine, not all of which can be represented in depth here. At the same time, robotics is also a massive source of inspiration for today's entertainment industry, which is highly influential in human

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[4] The Telegraph 2010.

[5] National Defense Authorization Act for Fiscal Year 2001, US Public Law 106-398, Section 220, 106th US Congress, 2nd session, 2000 http://www.dod.mil/dodgc/olc/docs/2001NDAA.pdf; Economist 2007; Sparrow 2007, p. 64.

[6] Unmanned Aircraft Systems Roadmap 2005–2030, Office of the US Secretary of Defense, 2005; Joint Robotics Program Master Plan FY2005, LSD (AT&L) Defense Systems/Land Warfare and Munitions, 3090 Pentagon, Washington DC 20301-3090; The Navy Unmanned Undersea Vehicle (UUV) Master Plan, Department of the Navy, USA, 9 November 2004; Unmanned Systems Roadmap 2007–2032, US Department of Defense, 10 December 2007; All cited in Sharkey 2008a, p. 86.

[7] CBC News 2011.

[8] Ibid.

[9] Statute of the International Court of Justice, San Francisco, 26 June 1945, Trb. 1971, No. 55, Article 38.1.(c) 'The Statute of the International Court of Justice' is available at http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0.

culture and shapes our everyday life more than ever. The sporadic reference to mainstream culture is thus deliberate. Rather than 'fear-mongering' or even suggesting a technological deadlock, the author aims to familiarise the reader with the different facets of the problem and to raise awareness of some of the foreseeable (legal) challenges. Accordingly, an attempt will be made to point out key difficulties and to suggest a possible way forward.

3.2 Robots in War

3.2.1 Degrees of Autonomy: From Modern Slaves to (Artificially) Intelligent Machines

The etymological origin of the word 'robot' can be traced back to the Czech word *robota* meaning slave or servitude,[10] and, considering the household robots listed above, the name seems suitable for these modern-day electronic slaves. These robots, once positioned correctly and switched on by a human being, fulfil one specific task with a certain level of autonomy. In that sense, they are similar to 'fire and forget' arms systems, which in reality can be deemed semi-autonomous at most.[11] Although research continues in the field of semi-autonomous military robots as well as robots controlled by a human operator, it is the technological progress in the field of autonomous robots that is potentially problematic and even dangerous for the meaning of international humanitarian law generally, and the validity of the principle of humanity in particular. These robots are not only autonomous in the sense that they can complete a definite task, but display some form of synthetic aptitude. Indeed a number of scholars have suggested that future robots will possess some form of artificial intelligence.[12] The 'radical futurist and prophet of innovation' Ray Kurzweil forecasts an exponential growth in technological advances in robotics, amongst other things, foreseeing that before 2050 sentient artificial intelligence will exhibit moral thinking and respect for human beings.[13]

According to Kurzweil,

> [w]ithin several decades, machines will exhibit the full range of human intellect, emotions and skills (…). By 2019 a $1,000 computer will at least match the processing power of the human brain. By 2029 the software for intelligence will have been largely mastered, and the average personal computer will be equivalent to 1,000 brains.[14]

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[10] Capek 1920.

[11] Sparrow 2007, p. 65.

[12] Sparrow cites an Air Armament Center Public affairs report of 2000 'This bomb can think before it acts' as published in leading Edge magazine 42(2):12; See also Kurzweil 1990, 2000; Greenwald 2011.

[13] Kurzweil, Ibid.

[14] Kurzweil 2009; This article was originally published in the 2008 Scientific American 'Special Report on Robots'.

In 1997, Gary Kasparov got a taste of what it is like to compete against a computer, when IBM's Deep Blue beat the then World Champion in a well-publicised chess tournament.[15] While this demonstration of artificial intelligence is clearly impressive, it is questionable whether the notion of robotic autonomy refers to the same kind of autonomy that a human being usually possesses. Sparrow, amongst others, works with the assumption that "to say of an agent that they are autonomous is to say that their actions originate in them and reflect their ends".[16] Yet, autonomous robots, even if equipped with a high degree of artificial intelligence enabling them not only to compete with, but to beat a human opponent, are still man-made. Their predefined purpose is decided by human programmers. Even if a certain leeway in the form of the means chosen to achieve that set goal is given, it seems that the degree of autonomy is not quite the same. Even if artificial and human intelligence are therefore regarded as two distinct categories, it still remains difficult to describe the different levels of artificial intelligence. The US Army for instance distinguishes between ten levels of autonomy.[17] The continuum ranges from totally human operated to fully autonomous robots, meaning complete independence from direct human oversight.[18]

While soon, with the cost of robots continually decreasing,[19] the average person may have his/her own electronic sparring partner to practice chess, for the layman, descriptions of an army of robots seem to belong to the script of a sci-fi movie, and not to a book dealing with aspects of international humanitarian law. However, when thinking of the recently deceased Steve Jobs, the icon of the communication revolution and the co-founder of Apple Inc., who, as early as 1980, foresaw the role of the Internet and its transformative power in the everyday lives of people worldwide,[20] the imminent paradigm shift caused by the use of robots in war does not seem so unlikely. Indeed, the current trend is to increase the autonomy of military robots in order to further decrease the personnel necessary to sustain the overall war effort. In addition, increasing the autonomy of robots is seen as reducing the risk that the communication link with a human operator is intercepted and the robot is thus rendered useless. Further, with higher degrees of autonomy and less oversight needed, one human operator may be able to supervise whole 'swarms' of robots.[21] Autonomous robots would to all intents and purposes

[15] IBM website 2011.

[16] Sparrow 2007, p. 65; For reasons of simplicity, here, autonomous robots are presumed to be those robots programmed by humans for one or more specific tasks, however, without the involvement of a human operator in important decision-making structures.

[17] The US Air Force has four levels and the US Navy distinguishes between scripted, supervised and intelligent robots; Sharkey 2008b, p. 16.

[18] The US Army has ten levels of autonomy, the US Air Force has four levels and the US Navy distinguishes between scripted, supervised and intelligent robots; Sharkey 2008b, p. 16.

[19] Prices of robots were 80 % cheaper in 2006 than in 1990; Sharkey 2008c, p. 1800.

[20] Isaacson 2011.

[21] Kurshid et al. 2004, p. 775.

function as 'force multipliers'[22] and once one nation manages to develop them, a strong incentive exists for others to follow suit.[23] Robots may soon roam the battlefields worldwide and it is important to at least be aware of the imminent paradigm shift that will occur when autonomous robots enter the sphere of armed conflict.

3.2.2 Shape, Size and Function

There are a vast number of fascinating examples of robots that have been developed over the years, not all of which can be discussed at this stage. Singer in *Wired for War* allows a captivating, yet provocative and, indeed, sheer frightening view of what may be expected in the future of warfare.[24] A key feature of the robots discussed in this article is that they are unmanned. Depending on the terrain in which the robots are supposed to be used, there are different forms of locomotion.[25] There are unmanned ground vehicles (UGVs), unmanned aerial vehicles (UAVs), unmanned boats, including both unmanned surface vehicles (USVs) and unmanned underwater vehicles (UUVs). Most ground robots operate on wheels and look similar to cars or tanks. Some readers may immediately think of KITT, the car that accompanied David Hasselhoff on his missions in *Knight Rider*. Lacking not only the friendly voice of KITT, but more importantly its autonomy, the bulldozers employed by the Israeli Defence Forces are not autonomous, but are operated via remote control. Unlike in the TV series, they do not assist in the pursuit of criminals, but dismantle obstacles in urban combat areas. The earliest version of a 'car come robot', however, was the Navlab 5. Once a common Pontiac Mini-van, the Navlab 5 was equipped with a GPS system, a camera and a system that controlled the steering wheel. In 1995, as part of the *No Hands Across America* project, the car drove from Pittsburgh to Los Angeles, almost entirely without the help of its passengers.[26] In 2004 and 2005, the American Defense Advanced Research Projects Agency (DARPA)—one of the largest funders of research into military robotics[27]—ran autonomous vehicle races in the Mohave Dessert, followed by the Urban Challenge in 2007.[28] In order to deliver much needed humanitarian goods to conflict zones, such unmanned vehicles may become a vital asset in the future. Other vehicles commonly used during times of

[22] Sharkey 2008b, p. 16.

[23] Sparrow 2007, p. 69.

[24] Singer 2010.

[25] Kurshid et al. 2004, p. 775.

[26] No Hands Across America 2011 http://www.cs.cmu.edu/afs/cs/user/tjochem/www/nhaa/general_info.html; See also Singer 2010, p. 90.

[27] Singer 2010, p. 140.

[28] Singer 2009, p. 33; Sharkey 2008b, p. 15.

peace and operated by humans, such as planes, have also been converted into (semi-) autonomous robots. The beginning of studies into UAV technology date back to the beginning of the history of aviation in the early 1900s; however, serious international efforts concerning the military utility of modern-day UAVs only emerged after the Second World War.[29] Since then, the technological and mechanical enhancements of UAVs have led to a so far unknown level of sophistication. As a consequence, during the twentieth and twenty-first centuries, much attention has been dedicated to their role during warfare, and besides technicians and military strategists, many an international lawyer has recently concerned himself/herself with questions regarding the regulation of UAVs under the international legal regime applicable during armed conflict.

Remotely piloted vehicles (RPVs) started to play a significant role during the Vietnam War during which the US used the Ryan147H-18, also known as 'Fire-bee' or 'Fire Fly', for surveillance purposes. This RPV was able to autonomously fly pre-programmed, long-range reconnaissance missions.[30] Since then, not only the name has changed. The fact that RPVs are now commonly referred to as UAVs indicates the ever-increasing degree of autonomy of the flying objects. In addition, the silhouettes of the unmanned planes have changed significantly and the kinds of capabilities UAVs are equipped with become ever more awe-inspiring. In the late 1970s Israel developed the 'Scout', an inexpensive UAV made of fibreglass that could transmit real-time, 360° surveillance data via a television camera. Its improved version, the 'Pioneer', followed in the late 1980s and quickly found its way into the American armed forces. Just one 'secondhand version' of the same was used by the US during the 1991 Gulf War, together with a few unmanned tanks turned landmine clearers.[31] Since the late 1990s, during the Balkan war, but also during the recent wars in Afghanistan and Iraq, the US has deployed both the RQ1 'Predator' as well as the 'Global Hawk', both high-tech surveillance drones that can supply (live) footage from different heights of up to 65,000 feet via high-definition colour television, infrared cameras and synthetic aperture (SAR).[32] The information gathered is sent directly to the screens in the Pentagon.[33] The larger

[29] Tesla developed remote-controlled torpedoes in the late nineteenth century (Sharkey 2008a, p. 86) and during World War II, Nazi Germany used the Fieseler Fi-103, also known as Vergeltungswaffe-1, or the V1 flying bomb during the attacks on London in 1944. The V1-UAV could be pre-programmed to fly a relatively short distance before dropping to the ground and exploding and is similar in function to cruise missiles; however, it has less in common with the modern-day UAVs and robotic aerial vehicles of concern in this article.

[30] Global Security website 2011; Fairly little public knowledge existed about the drones used in the Vietnam War and that experienced some major difficulties—16 % of the RPVs crashed; Singer 2009, p. 29.

[31] Singer 2009, p. 30.

[32] Despite being linked to human operators on the ground, who decide when to send out the robot, the Global Hawk carries out its mission autonomously; Singer 2009, p. 40.

[33] Ibid.

and much more powerful 'Reaper' is even able to read number plates from a 3 km distance.[34]

These are only a few of the many examples of modern UAVs that now come in all shapes and sizes.[35] In addition to the trend in naming robots like animals, scientists have drawn their inspiration directly from nature, designing 'biomimetic' robots.[36] This is amongst other things due to the fact that wheeled vehicles can operate only on limited terrain. Even tracked vehicles can tackle only 50 % of all terrain, whereas legs are much more versatile. However, they are incredibly expensive and difficulties remain with coordinating balance and movement.[37] Biologically inspired robots are often smaller than vehicles with insects and birds especially popular as sources of inspiration. There are bird-like micro-drones with flapping wings, robotic dragonflies or hummingbirds. The 'Raven' and the 'Wasp' for instance are used by soldiers to check out their direct environment.[38] The smaller these robots, and the less indistinguishable from insects or birds, the better they are for intelligence or surveillance missions. However, as a consequence of the reduced size, these robots are usually limited in the amount of time they can stay aloft. Specifically designed for these short scouting missions, the 'Raven' can stay airborne for only 90 min.[39] The much larger 'Predator', on the other hand, can fly for 24 h[40] and DARPA has initiated plans for the massively sized VULTURE (Very-high altitude, Ultra-endurance, Loitering Theater Unmanned Reconnaissance Element)—a surveillance robot able to stay aloft for as long as five years.[41]

There are also robots resembling reptiles or mammals. The 'Stickybot' for example looks like a gecko. Inspired by the morphologic study of lizards, it can climb smooth surfaces using adhesive technologies.[42] The snake-bot, a robot made up of a chain of independent links is extremely flexible. It can manoeuvre through difficult terrain, climb stairs as well as tree trunks and is especially useful in tight spaces like pipes or areas obstructed with a lot of rubble.[43] The 'Big Dog' is a rough terrain robot, equipped with four strong legs that are built to absorb shock and recycle energy from one step to the next. It looks similar to a big dog or a small mule, and is able to carry heavy equipment and loads for soldiers on scouting missions. The robot monitors its own functionality including battery charge, oil temperature and engine functions and is further equipped with a variety of sensors

[34] Johansen 2011.

[35] For an overview of the history of UAVs in warfare see Cook 2007.

[36] 'Biology' and 'mimetic' meaning to mimic or copy; Singer 2010, p. 91.

[37] Singer 2010, pp. 89, 90.

[38] Singer 2009, p. 40.

[39] Ibid.

[40] Singer, p. 39.

[41] Singer, p. 41.

[42] Santos et al. 2008.

[43] Thinkbotics website 2011.

maintaining, amongst other things, its balance and navigation.[44] Underwater robots include the 'Robo-Lobster',[45] or 'MANTA', the latter operating fully autonomously and able to 'seek out, attack and destroy enemy submarines'.[46]

The impressive list of biologically inspired robots is much longer and more stunning robots are being developed on a daily basis. Scientists have gone even further and started to build 'humanoid' robots. Honda's 'ASIMO' is a promising example that resembles a human soldier amongst other things in stature, locomotion and speech recognition capabilities.[47] A team of robotics scientists at the Technical University of Munich has even developed robots with human faces. In addition to beaming a deceptively realistic three-dimensional image of a human face on the back of a plastic mask, the researchers have equipped the 'mask-bot' with a mechanism to create human-like facial expressions and voice structures. Further equipped with emotion synthesis software, mask-bots can even simulate visible emotional nuances.[48]

The desire to provide even robots used during war with human-like features can also be observed with the so-called med-bots. The 'REV', the Robotic Evacuation Vehicle, similar to an ambulance, carries the 'REX', the Robotic Extraction Vehicle, which looks similar to a stretcher and is designed to remove a wounded soldier from a dangerous situation and to bring him or her to safety inside the robotic ambulance. While being transported inside the ambulance to a medical base, the soldier can be scanned for injuries and receive first aid while communicating with doctors over a flat-screen TV. This 'human touch' particularly in vulnerable situations where injured soldiers may feel scared and helpless has been considered particularly comforting.[49] No doubt, even at their current state of development, these so-called med-bots save lives. Future plans even foresee systems with capacities for automatic diagnoses and surgery carried out by remote doctors very much like the procedures in civilian hospitals involving robotic gadgets.[50] There are also robots being developed to assist medical personnel by either finding injured soldiers and leading the medics to them or following the doctors around the battlefield and carrying their equipment.[51] No humanitarian law would find fault with these developments, and no international lawyer would see even the smallest challenge to humanitarian law in these developments. Besides the 'med-bots', some other robots provide significant relief and safety advantages

[44] Boston Dynamics website 2011.

[45] Singer 2010, p. 115.

[46] Sparrow 2007, p. 63.

[47] Kurshid et al. 2004, p. 775.

[48] The project is carried out at the Institute for Cognitive Systems (ICS) at the TU Munich; Innovations-report 2011.

[49] Singer 2010, p. 113.

[50] Singer 2010, p. 112.

[51] These kinds of robots are being developed for instance by Applied Perception Inc., see Voth 2004, p. 2.

to soldiers in the field. These robots are employed for jobs that are dirty, dull and dangerous (also commonly referred to as three-D jobs).[52] These include assisting, for instance, with the dismantling of improvised explosive devices (IEDs) or scouting the territory. Outside the battlefield, the Japanese scientist Ishiguro has developed a robot that can simultaneously access a number of video cameras within a confined space to allow it to survey otherwise secluded corners.[53] A similar robot equipped with portable cameras with all-around vision and possibly heat-flow sensors would be extremely helpful in locating and possibly discovering humans—besides enemy combatants; this of course also applies to injured comrades or civilians who could be recovered with the help of REV and REX.

Where the benefits of those robots deployed for three-D jobs, to facilitate intelligence gathering or even to help save the lives of injured soldiers are surely incontestable, the situation is a different one when robots, and especially autonomous ones, are equipped with weapons. Some models originally designed for surveillance purposes have indeed been subsequently equipped with weapons systems—the 'Predator' being an example of a surveillance robot subsequently armed with Hellfire antitank missiles.[54] Similarly, the 'Packbot', being particularly versatile in its locomotion and able to "climb stairs, rumble over rocks, squeeze down twisting tunnels, and even swim in under six feet of water",[55] and initially designed to dismantle roadside bombs has been fine-tuned afterwards.[56] It emanated from a 1998 contract with DARPA, but made its first appearance assisting rescuers during 9/11.[57] Having being modified, it can now carry a shotgun.[58]

The situation is much more complicated when robots are specifically designed in order to scare the enemy and undermine the opponents' will to fight, or when robots are effectively designed to kill.[59] The 'Reaper', able to self-navigate, search out and attack targets on the ground from a 3 km height via laser-guided technology and until recently considered the 'world's deadliest drone', already has competition in this field by the even more powerful Avenger.[60] A shining example of versatility, a special version of the Talon, the Special Weapons Observation Reconnaissance Detection System (SWORDS) is the first robot equipped to carry

[52] Schmitt 1999, p. 143.

[53] Ishiguro 2005 cited in Wallach and Allan 2009, 162 ff., 247.

[54] The Predator is equipped with Hellfire antitank missiles; Johansen 2011.

[55] Singer 2009, p. 33.

[56] Johansen 2011.

[57] Singer 2009, p. 33.

[58] Johansen 2011.

[59] In 2009 the UN Special Rapporteur Philip Alston already questioned the legality of the US use of drones to kill militants in Afghanistan and Pakistan, cited in Bowcott 2010.

[60] Johansen 2011.

almost any choice of weapon while roaming the battlefield.[61] Costing roughly US $200,000 each, the choice of weapons include M240 or M249 machine guns, Barrett.50 calibre rifles, 40 mm grenade launchers or antitank rocket launchers.[62] The even more robust Modular Advanced Armed Robotic System (named MAARS after the Roman god of war) can be equipped with similar armoury.[63] While with the Reaper, SWORDS and MAARS a remote human operator is at least involved in the final targeting decision,[64] both the Packbot and the Predator function with a higher degree of autonomy, the latter being 'famously lethal' for its use by the CIA in November 2002 to attack and destroy a car containing alleged Al-Qaeda terrorists.[65]

The speed with which robot technology develops seems ever more fast-paced compared to the slow progress with which international legal norms develop. The set of legal rules which is applicable during armed conflict is not an exception, but it does differ from other areas of international law in that it seems to combine two—at first sight—inherently incompatible categories—humanitarianism and war. This is obvious in the fact that two different labels are often used interchangeably—international humanitarian law (IHL) and law applicable during armed conflict (LOAC).[66] With 'humanitarianism' one easily associates positive concepts such as morality, ethically correct behaviour and altruism, whereas 'armed conflict' evokes negative images of hate, destruction and death. However, history has taught us that both concepts are intrinsically linked to the human race and that humans, however ethical and humanitarian at heart, have always engaged in wars (and most likely always will).[67] Therefore, a combined analysis of morality, law and war is warranted.

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[61] Some major technological difficulties have been experienced with the SWORDS; Popular Mechanics website 2008.

[62] Sharkey 2008b, p. 14.

[63] Ibid.

[64] Singer 2010, p. 30; Singer 2009, p. 35; Sharkey 2008b, p. 14.

[65] Sharkey 2008b.

[66] Throughout the article the term 'international humanitarian law' or IHL shall be used rather than that of 'law of armed conflict'. This is on the one hand simply due to the thematic focus of this collection on the *human face of the law*, and, on the other, to pay tribute to the development of international law over the last decades. Further, the preference for the term IHL is also rooted in the idea that nowadays a declaration of war or the explicit acknowledgement of both parties of a state of armed conflict is no longer a prerequisite for the application of IHL. Rather, the relevant rules apply objectively as a matter of fact, and in addition to times of international armed conflict, in non-international armed conflicts as well as situations of occupation. In a sense, the term 'IHL' is thus wider than LOAC, except for the law of neutrality which is not primarily concerned with humanitarian considerations and therefore falls outside the scope of IHL; See Greenwood 2009, p. 11.

[67] Keegan 1993.

3.3 The Human Side of It: The Relationship Between Morality, Law and War and the Development of the Notion of 'Humanity'

3.3.1 Morality and Law

Already in 1625, Grotius advocated the relevance of 'natural law' in his *De Jure Belli ac Pacis*.[68] To this day, positivists continue to reject the notion that States are 'governed by morality or natural reason'[69]; however, the influence of morality and the principle of humanity have been particularly strong after the cruelties of the Holocaust. Both notions were indeed relied upon for the analysis of legal norms during the Nuremberg trials, amongst others through interpretative methods such as the *Radbruch formula*. The formula describes the notion that where statutory law is incompatible with the requirements of justice 'to an intolerable degree' it cannot be considered as law.[70] It is thus essentially based on the notion that the individual is able to judge a certain situation, an order or the content of a legal rule on the basis of his or her own moral knowledge.[71] It is not possible to imagine international law today without such legal philosophical concepts such as the formula developed by Radbruch.[72] Implementation in practice is meant to prevent the form of 'total discipline' as existed during World War II. In the course of the Eichmann trial, Hannah Arendt strongly criticised this so-called *Kadavergehorsam* which had the public (with a few exceptions) blindly adhere to all orders without questioning their morality.[73] The assumption is therefore that morality may trump legal rules in certain situations, or rather, that the obligation to follow legal rules becomes moot, if the rules contradict presumably higher moral values. This conundrum has led to many heated debates, creating a proverbial 'minefield of ethics'.[74] However, in cases such as those referred to above, there is little room for disagreement. No international lawyer would defend the atrocities of the NS regime based on the fact that they occurred in accordance with the then prevailing German legal code. Fortunately, as it stands today, international law meets most

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[68] Grotius 1625.

[69] Schachter 1991, p. 36; Ago 1957, p. 693.

[70] Radbruch et al. 2003.

[71] Ibid.

[72] Highly disputed, Radbruch's formula was taken up again during the trials over the Berlin wall shootings and was recently of interest in ECHR, *Kononov v. Latvia*, Grand Chamber Judgment, Application no. 36376/04, 17 May 2010 http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-98669#{"itemid":["001-98669"]}; See also Mertens 2006, pp. 277–295 and Miller 2001, pp. 653–663.

[73] Arendt 2006, pp. 135–150.

[74] Lin et al. 2008, p. 42.

concerns relating to any potential conflict between morality and the law. In accordance with the principle of 'ex inur, ius non oritur' no illegal act can create a lawful situation, and any law that breaches a peremptory norm has to be considered moot ab initio.[75] As most peremptory norms overlap with the most basic assumptions of what is morally and ethically right, the relationship between morality, ethics and law may indeed also be regarded as one of mutual reinforcement. Especially, humanitarian and human rights law are for the large part the result of the codification of what seems morally right and just.[76] In addition, the more recent development of international criminal law reflects the increasing sentiment that there is a moral imperative to ensure that certain crimes cannot go unpunished. In 1998, the Rome Statute of the International Criminal Court was signed. The signatories confirmed in the preamble that they were "mindful of the (…) unimaginable atrocities that deeply shock the conscience of humanity".[77] Accordingly, besides having jurisdiction over war crimes, genocide, and acts of aggression, the court may also adjudicate cases concerning allegations that crimes against humanity have been committed.[78] Already after the Second World War, universal jurisdiction was accepted for this category of crime and it was recognised that no particular nexus, other than common humanity, was required to permit jurisdiction thereover.[79] In *Humanity's Law*,[80] Rutli captures the normative shift towards a higher valuation of humanity in both legal and political considerations, the momentum of which has continued until today. She describes how priorities that traditionally lay with the protection of the nation State have been transformed to favour the protection of human security.[81] It is evident that the dictates of humanity span and reshape international politics and law, especially the areas of international humanitarian law, human rights law and international criminal law in combination with the law on State responsibility.[82]

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[75] See Article 53 of the Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations Treaty Series, Volume 1155, p. 331.

[76] Ingierd touches upon even broader questions concerning 'Moral Responsibility in War' focusing specifically on complex peace operations. She recognises the difficulties involved in practically applying a concept such as morality to conflict situations; Ingierd 2010.

[77] The Rome Statute of the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 5. http://untreaty.un.org/cod/icc/statute/romefra.htm.

[78] Ibid., Article 7.

[79] Robertson 2000, p. 239.

[80] Ruti 2011.

[81] See for instance the Report of the Secretary-General to the Security Council 2005, para 12.

[82] An in-depth discussion of the complementation and contradiction between these areas of international law is outside the scope of this chapter.

3.3.2 The Development of International Humanitarian Law and the (Legal) Notion of the Principle of Humanity

The four 1949 Geneva Conventions[83] form the cornerstones of international humanitarian law and their significance and worldwide acceptance is reflected in the fact that all States have ratified these four Conventions.[84] Their importance has been confirmed by the International Court of Justice (ICJ) which held that the rules codified amongst others in the Geneva Conventions "indicate the normal conduct and behaviour expected of States".[85] Common Article 1 to the four 1949 Geneva Conventions[86] requires that all States 'respect and ensure respect' for the rules of the Conventions,[87] most of which are based on the principle of humanity. The influential principle itself, however, played a crucial role in the development of international humanitarian law long before 1949.

In 1868, the St. Petersburg Declaration dealt with the prohibition of causing unnecessary suffering and consequently banned certain weapons because "the employment of such arms would (…) be contrary to the law of humanity".[88] Perhaps the most significant supporter of the principle had his shining moment at a later point. The Russian diplomat Fyodor Fyodorovich Martens saw the human being at the centre of international life and the need for respect for the individual as the crux of international relations.[89] According to him, "[p]rotection of the individual is the ultimate purpose of the State and the goal of international

[83] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GC I), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter GC II), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (III) relative to the Treatment of Prisoners of War (hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Collectively referred to as 'the Geneva Conventions' or 'the Conventions'. http://www.icrc.org/ihl.

[84] According to the ICRC, 194 States are parties to the Geneva Conventions; ICRC 2011b.

[85] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, General List No. 958, 8 July 1996, I.C.J. Reports 1996, pp. 257, 258, paras 79, 82; ICJ, *Corfu Channel Case* (United Kingdom of Great Britain and Northern Ireland v. Albania), Judgment No. 1, 9 April 1949, I.C.J. Reports 1949, p. 22.

[86] Common Article 1 of the Geneva Conventions of 1949, *supra* note 83.

[87] Azzam 1997, p. 55.

[88] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November–11 December 1868. Schindler and Toman 1988, p. 102. or http://www.icrc.org/ihl.nsf/INTRO/130?OpenDocument.

[89] Martens 1871; Martens 1882, p. 178; Martens 1879, p. 45 (in Russian); All cited in Pustogarov 1996.

relations".[90] Nonetheless, and despite rejecting the militarism of his own homeland, Martens was a realist. Other than many pacifist organisations (of which there were 125 in Europe by 1895) which advocated the complete renunciation of war, he recognised this aim to be 'utopian'.[91] Rather, his goal was to focus on the less daunting, yet more realistic and clearly no less crucial task of ameliorating the suffering and horrors associated with war.[92] He originally submitted a draft to the International Conference convened in Brussels in 1874, but official codification in the form of a convention was rejected due to a lack of political will. The text was merely adopted in the form of a declaration after the conference, and it took two more decades for Martens' words to be entered into a legally binding format. At the 1899 first Hague Peace Conference, the clause was included in the preamble to cover the actions of occupation armies.[93] The relevance and validity of the clause have been reaffirmed by the inclusion of a slightly amended version in numerous IHL treaties, including the 1949 Geneva Conventions and both 1977 Additional Protocols.[94] The original version read as follows:

> Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.

In Additional Protocol I, its relevance was particularly underlined by the fact that its basic contentions were moved from the preamble, where it appeared in the first draft of 1973, to a substantive provision, namely Article 1 (2). The first textual change involved replacing 'the laws of humanity' with the 'principle of humanity'

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[90] This contention echoes ideas of the Enlightenment including those previously held by scholars such as Rousseau and Locke in relation to the 'social contract'. In addition, they adequately capture the spirit of human rights law more generally such as captured in the Universal Declaration of Human Rights; The Universal Declaration of Human Rights, United Nations, General Assembly, General Assembly Resolution 217 (III), 10 December 1948, UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948), p. 71.

[91] Pustogarov 1996.

[92] Ibid.

[93] Final Act of the International Peace Conference, The Hague, 29 July 1899. http://www.icrc.org/ihl.nsf/FULL/145?OpenDocument and Schindler and Toman 1988, pp. 50, 51.

[94] Convention (IV) respecting the Laws and Customs of War on Land and its annex; Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907; Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, United Nations Treaty Series, Volume 1342, p. 137; and GC I, Article 63(4); GC II, Article 62 (4); GC III, Article 142(4), and GC IV, Article 158(4), *supra* note 83; Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, Article 1; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter AP II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125, Preamble.

possibly pointing towards a broader meaning of the term than strictly in its legal sense. Only minor additional changes were made, altering 'usages established between civilized nations' to 'established customs', and 'the requirements of the public conscience' to 'dictates of public conscience'. However, no significant meaning is attached to these alterations.

Against the background of the historic evolution of the principle as part of international law, however, a question arises as to what does 'humanity' mean? To define the concept of humanity is in itself a daunting task. Even Pictet admitted that it is "something understood but not actually expressed".[95] Coupland cites the definition contained in the Oxford English Dictionary describing humanity both as "human race; mankind" and "human beings collectively", but also as "the character or quality of being humane" and "behaviour or disposition towards others such as befits a human being".[96] Despite the fact that this analysis is concerned with the 'principle of humanity' in general rather than with a specific treaty rule alone, it is appropriate to follow the accepted methodology of interpretation as codified in the 1969 Vienna Convention on the Law of Treaties.[97] Accordingly, the ordinary meaning of a term should be the starting point for this analysis. Coupland thus correctly includes the above definition and further helps by offering two interpretations on their basis. On the one hand, he develops the notion of 'humanity' as a category referring to all human beings collectively and, on the other, as the moral notion akin to altruism and philanthropy. He distinguishes between humanity-sentiment and humanity-humankind respectively.[98] Interestingly, both of these distinct concepts are covered by the same term in the English language (as is the case in French (la humanité) and Spanish (la humanidad)), whereas the German language uses the terms 'Menschlichkeit' and 'Menschheit' respectively. Wortel focuses on the first of the two, but starts her analysis from another angle. She tries to find out whether 'humanity' should be regarded as principle, a moral (intrinsic) value as opposed to an instrumental value, as virtue or a doctrinal notion.[99] The distinction between the different categories and the associated terminology is rather complicated and is not obviously relevant for the legal discourse *per se*. Here, the decision seems to have been made when the original wording of the Martens' Clause referring to 'laws of humanity' was altered to 'the principles of humanity'.

Traditionally, scholars seem to have preferably relied on the notion responding to Coupland's second option—humanity-humankind.[100] However, the 'humanitarians' in the discussion portray a different approach. The father of all humanitarians,

[95] Pictet 1958, p. 15.

[96] Oxford English Dictionary 1989; Coupland 2001, pp. 969–989.

[97] Vienna Convention on the Law of Treaties, *supra* note 75, entered into force 27 January 1980.

[98] Coupland 2001, pp. 969–989.

[99] Wortel 2009, pp. 779–802.

[100] Robertson 2000, p. 239; Meron 2000; Cassese 2000.

the Swiss merchant Henry Dunant,[101] after witnessing the suffering of thousands of soldiers during the battle of Solferino in the Italian War of Unification in 1859, collected his memories in his book 'The battle of Solferino'[102] and initiated the foundation of the International Committee of the Red Cross (ICRC) four years later. Dunant was strongly inspired by his Christian moral understanding, but it is clear that he was most motivated by feelings of human empathy. Today, the ICRC is not affiliated with any particular religion but is based on a set of principles to ensure its impartiality, neutrality, independence, voluntary service, unity and universality.[103] All of these are trumped by the principle of humanity, from which, according to Pictet, "all other principles hang".[104] According to him, the other principles thus merely function as means to actualise humanity. Humanity itself, however, is the "ideal [of the organisation], the reason for its existence and its object".[105] The ICRC is the 'guardian of the Geneva Conventions' and its mandate includes monitoring the application of international humanitarian law.[106] As such, the history of its formation as well as the principle of humanity as its raison d'être are closely connected to the original efforts to codify international humanitarian law.

Like the ICRC, all existing legal norms are man-made. Brownlie therefore concludes that 'humanity' itself should be regarded as source of international law.[107] Similarly, Meron holds that in the less regulated cases of non-international armed conflict "the central source for the rules will be the principles of humanity".[108] This analysis is based, at least in part, on the *Corfu Channel Case* in which the judges referred to "general and well-recognized principles" including "elementary considerations of humanity, even more exacting in peace than in war".[109] This is evidence that the shift towards humanity described above is also found—if in a more nuanced way—in the jurisprudence of international courts and tribunals relying on the concept of humanity. In another example, the ICJ Advisory Opinion on the *Legality of Nuclear Weapons*, considerable reference was made to the Martens' clause both by the judges and in the national submissions made to the court, the General Assembly and the World Health Organisation. Various different suggestions for the interpretation of the clause were made from announcing its

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[101] Riesenberger and Riesenberger 2011.

[102] Dunant 1986.

[103] ICRC 1990, p. 8.

[104] Pictet 1956, p. 14.

[105] Pictet 1956, p. 12.; The founders of the organisation described their aim as preventing and alleviating human suffering, protecting life and health, ensuring respect for the human being and promoting mutual understanding, friendship, co-operation and lasting peace amongst all peoples; Durand 1981, p. 54.

[106] Statute of the ICRC, Article 5. http://www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm.

[107] Brownlie 1998, p. 28.

[108] Meron 1998, p. 74.

[109] ICJ, *Corfu Channel Case*, *supra* note 85, p. 22.

redundancy, to reducing it to the status of a reminder of existing treaty obligations and customary norms, to stressing 'its continuing validity'.[110] The court itself settled for calling it "an effective means of addressing the rapid evolution of military technology".[111] In their dissenting opinions, Judges Koroma and especially Judge Shahabuddeen took a clearer position. While the former considered the attempt to employ "an extreme form of positivism" to be "futile",[112] Judge Shahabuddeen explained in detail his opinion that the Martens' Clause carries significant independent normative force beyond functioning as a reminder of other existing norms.[113] The Japanese oral statement before the ICJ in the same opinion made concrete reference to the principle of humanity and recognised that it is "the spirit of humanity that gives international law its philosophical foundation".[114] These examples attest to the relevance of the principle of humanity and the Martens' Clause. In addition, the International Law Commission confirmed that the most important meaning of the clause is its application to situations that are otherwise not (yet) regulated by international law.[115]

Yet, the exact meaning of the clause continues to be controversial with a multiplicity of interpretations available. Cassese refers to the clause as a "legal myth", "a diplomatic gimmick intended to break a deadlock in the negotiations between the smaller and Great Powers" on the occasion of the 1899 Hague Peace Conference and suggests at least three different interpretations. First, he sees the function of the clause as excluding any arguments that what is not forbidden in international law must *a contrario* be allowed.[116] Other proponents of this first approach, such as Schwarzenberger,[117] have been harshly criticised for their 'narrow historical interpretation of the clause'.[118] Cassese's second version highlights the interpretative value of the clause, ensuring an interpretation of legal rules in otherwise unclear cases in accordance with the principle of humanity and the demands of public conscience.[119] Ticehurst proposes a similar approach.

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[110] Written Submission by the Russian Federation as requested by the General Assembly, 13; Written Submission on the Opinion requested by the General Assembly by the United Kingdom, 21; Nauru, Written Submission on the Opinion requested by the World Health Organisation, 46; All cited in Ticehurst 1997.

[111] ICJ, *Legality of the Threat or Use of Nuclear Weapons, supra* note 85, para 78.

[112] ICJ, Ibid., Dissenting Opinion of Judge Koroma, http://www.icj-cij.org/docket/files/95/7523.pdf, p. 14.

[113] ICJ, Ibid., Dissenting Opinion of Judge Shahabuddeen, http://www.icj-cij.org/docket/files/95/7519.pdf, p. 2.

[114] Japan, Oral Statement before the ICJ, public sitting of Tuesday 7 November 1995, p. 18, http://www.icj-cij.org/docket/files/95/5935.pdf, see also Ticehurst 1997.

[115] United Nations Report of the International Law Commission on the Work of its Forty-Sixth Session, 2 May–22 July 1994, GAOR A/49/10, p. 317.

[116] Cassese 2000, p. 187.

[117] Schwarzenberger 1958, pp. 10, 11.

[118] Röling 1960, pp. 37, 38.

[119] Cassese 2000, p. 189; See also Blinz 1960, pp. 139–160.

However, to appease those States and scholars insisting on a positive interpretation of international law, he also suggests relying more on the standard of 'the dictates of the public conscience' to objectively determine the meaning of the Martens' Clause and with it the concept of humanity.[120] It is not clear, however, whether it would be significantly easier to determine the exact meaning of this category. Opinions differ as to what sources should be consulted. While Nauru refers to a broader array of (legal) communications as a source for an appropriate analysis,[121] Judge Shahabuddeen in his dissenting Opinion in the *Nuclear Weapons Case* held that only authoritative sources such as the General Assembly should be relied upon.[122] This, however, poses additional problems in cases where no resolution was adopted unanimously such as in the case of the legality of nuclear weapons.[123] The topic of robots during war has so far entirely escaped the attention of either the Security Council or General Assembly. With respect to nuclear weapons, it has been argued that the sum of the resolutions has "either directly or by inference, condemned (…) nuclear weapons, representing 'the dictates of public conscience' (…) within the ambit of the Martens Clause prohibition".[124] Yet, Greenwood warns that in general 'the public conscience' is too vague a concept to be used as the basis for a separate rule of law and has attracted little support.[125] On the other hand, relying on the general lay opinion would most likely prove even more daunting. Concerning the regulation of robots, the wider public may well adopt an extreme position: given that they are most likely influenced by representations of robots in popular culture, some may recall the monster of Dr. Frankenstein (who turned on his creator) or the tragedy unfolding around Robotrix in *Metropolis*. Kubrik's *Space Odyssey*, or *Blade Runner*, *the Matrix*, *iRobot* and many other movies come to mind that feature evil artificial intelligence. A rejection of the idea of autonomous robots would thus be the logical consequence in accordance with the innate suspicion people generally feel towards anything unknown. It is, however, not stringently necessary to circumvent an interpretation of the concept of humanity on its own in a teleological form[126] in order to analyse the compatibility of robots during war with that concept.

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[120] Ticehurst 1997.

[121] Nauru, Written Submission on the Opinion requested by the World Health Organisation, *supra* note 85.

[122] Dissenting Opinion of Judge Shahabuddeen, *supra* note 85.

[123] United Nations, General Assembly, General Assembly Resolution 38/75, 15 December 1983, A/RES/38/75, p. 69.

[124] McBride 1984, p. 406.

[125] Greenwood 2009, p. 28.

[126] The teleological approach was defined by the ICTY in the Čelebići case, Prosecutor v. Delalić et al.,

Judgment, Trial Chamber II, Case No. IT-96-21-T, 16 November 1998, at para 163, accordingly:

"(A)lso called the 'progressive' or 'extensive' approach of the civilian jurisprudence, (it) is in contrast with the legislative historical approach. The teleological approach plays the same role as

Cassese finally concedes that Martens created an "ingenious blend of natural law and positivism".[127] However, Martens did much more than that. He regarded the human being as being at the core of the law, and put the concept of humanity as the most basic reference point of international law back on the scene. For the regulation of warfare, it is not only crucial as a reference point on a *prima facie* level for the decision whether certain means or methods of warfare are illegal. Rather, it functions on an additional level applicable to each soldier in concrete battlefield scenarios, demanding that his/her very existence as a human being, and the concurrent ethical understanding of this fact, leads him/her to exercise caution and allowing reason, morality and mercy to prevail even on the battlefield, where possible. It is precisely this estimation of the value of humanity and its importance as a concept during armed conflict that seems to be endangered by the advancement of robotic technologies and the deployment of robot-soldiers during war. The significance of the principle is particularly crucial for contacts between soldiers, friendly ones as well as hostile. No matter whether one leans towards an interpretation of humanity as 'Menschlichkeit' or Menschheit', both the fact that robots differ in terms of their external properties from those of humanity, meaning the human race, as well as the fact that they do not possess something akin to the sentiment of humanity has consequences for the interaction between robots and humans during armed conflict.

3.4 Mingling Robotic and Human Soldiers: The Robot–Human Interface

Next to the disposition to wage war or embark on the quest to define what is moral, another human characteristic is the need to form some kind of relation to persons or objects in one's environment. As seen above, research to develop ever more physically human-like robots is already well underway. These efforts to assimilate robots as much as possible with real people reflect the human tendency to anthromorphize objects. In '*Moral Machines: Teaching Robots Right from Wrong*', Wallach and Allen describe this phenomenon in detail.[128] In its extreme form, this may in fact lead to a blurring of the distinction between human and robot to the

(Footnote 126 continued)
the 'mischief rule' of common law jurisprudence. This approach enables interpretation of the subject matter of legislation within the context of contemporary conditions. The idea of the approach is to adapt the law to changed conditions, be they special, economic or technological, and attribute such change to the intention of the legislation". http://www.icty.org/x/cases/mucic/tjug/en/cel-tj981116e.pdf.

[127] Ibid., para 189.

[128] A discussion on personhood (a hot topic especially in bioethics today) in relation to robots is outside the scope of this chapter.

extent that even emotional relationships can develop.[129] In 2007, the Washington Post reported on the human "uncanny ability to make emotional connections with their manufactured helpmates".[130] This can occur both with 'humanoid' robots as well as with their mechanic looking counterparts. From rather harmless examples where the robots are given names, instances were recalled where the deployment of the robot for the very task it was designed for was cancelled by soldiers in charge because they regarded acting otherwise as 'inhumane'.[131] In another example, a soldier developed such a close relationship to a robot he named Scooby Doo, that after the robot was dismantled by a roadside bomb and could not be repaired, the soldier did not want a replacement, but 'wanted Scooby Doo back'.[132]

This rather obscure example illustrates only one aspect of the difficulties that develop during contact between human beings and robots or what is also referred to as the human–robot-interface. It is important to take a closer look at the dynamics between robots and humans, seeing that, even though the number of robots deployed during armed conflict will most likely continue to increase, at this point in time it is unimaginable that an entire war will be fought by machines alone. Consequently, people and robots will have to interact in some way or another.

Human–machine interfaces are complicated due to the fact that humans usually communicate with one another in a number of interacting fashions, a small percentage of which is purely verbal—the rest is a mix of non-verbal cues such as mime, gestures, posture and the tone of the voice.[133] For robots to be able to register these signals, they would have to be translated into algorithms that build the basis of programmed computer orders. Converting orders into algorithms is no longer a sensational task. In fact, our everyday lives depend on it in various ways—each time we use our mobile phone, the computer or even the next cash machine. Difficulties arise, however, where emotions or feelings need to be translated into numbers. The vital aspect is literally '*lost in translation*'. Thus, questions arise as to the extent to which robots are in reality able to master the art of human communication signals, both in sending out these cues as well as responding to the signals sent out by their human counterparts. The way even humans respond to the cues sent out by other humans is a relatively new subject of interest for psychological intelligence studies.

During the time of the First World War, the first paper-based IQ tests developed by Stanford Psychologist Lewis Terman were used to separate the intelligent from

[129] Wallach and Allan 2009, pp. 42–45, 63, 163, 210.

[130] Lin et al. 2008 briefly discuss the rather absurd possibility of sending out 'comfort robots' with the troops to take on the role of 'lovers' or 'relationship partners'. Lin et al. 2008, pp. 81–83.

[131] Garreau 2007.

[132] Cited in Singer 2010, photograph comments.

[133] Borenstein 2008, p. 5.

the 'ordinary' American soldier.[134] These tests focused on the mathematical and logical skills of a person, based on the assumption that the ideal (intelligent) human brain should function very much like a computer and accordingly be able to perform rational calculations. Even nowadays, a person is usually thought of as 'clever' or 'smart' based on his or her ability to think logically and rationally. However, the conception of the human brain as analogous to the hardware of a computer or calculator would indeed provide a poor working model both for psychologists and for the purposes of this article. When conferring the Oxford English dictionary, one finds that intelligence as a character trait is defined as an "ability to acquire and apply knowledge and skills",[135] a much wider description which is more similar to the ability to learn rather than the description of a set condition.

The notion of intelligence has undergone some significant changes in the last few decades. In the early 1980s in *Frames of Mind*, Gardner refuted the traditional, monolithic understanding of intelligence.[136] He established the theory of multiple forms of intelligence. According to him, there are at least seven components to a person's degree of intelligence, of which the two traditional core modalities, mathematical-logical and verbal-linguistic skills, are but two aspects.[137] One of Gardner's other categories, interpersonal intelligence, is of particular relevance for communication on the battlefield as it relates to the capacity to interact with others. Different from *intra*personal intelligence referring to the self-reflective capacities of a person, a high degree of *inter*personal intelligence is evident in individuals who are able to "communicate effectively and empathize easily with others".[138] Individuals with high interpersonal intelligence function well in groups, either as leaders or as a link that keeps the group together. Thorndike has therefore referred to this form of ability as 'social intelligence'.[139] Although denounced as a 'useless category' in the 1960s, further research to conceptualise the notion has been undertaken. Despite the fact that the role of emotions was recognised, most psychologists, however, refrained from analysing emotions on their own, but rather looked at the (meta)cognitive abilities of human beings to recognise, understand

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134 Minton 1988.

135 Oxford English Dictionary 2011.

136 Gardner 1985.

137 There are at least five other different cognitive abilities that complement one another and together form the pieces that make up the intelligence of a person. These include spatial, bodily-kinetic and musical intelligence, and interpersonal as well as intrapersonal abilities. Accordingly, next to a person's capacity to perform mathematical calculations or recognise forms and patterns, it is also important how well one may be able to visualize certain ideas, how developed is one's ability to cope with words and languages, or how pronounced is one's ability to exercise control over bodily motions. In addition, musical intelligence relates to the auditory skills of a person and his or her sensitivity for sounds, rhythms and tones. Artistic intelligence in the wider sense may relate to a person's feelings for the composition of colours and forms.

138 Gardner 2002; Gardner 1995 (*emphasis added*).

139 Cited in Goleman 2011, p. 64.

and reflect upon their own and others' emotions.[140] Outside the ability to cognitively understand one's own emotions and consciously adapt one's (re)actions accordingly, however, a person with a high degree of inter- and intra-personal intelligence also exhibits a natural instinct for the 'right' response in a situation involving his or her own and/or another person's feelings. This type of 'social' intelligence is at least partially an innate characteristic, the emotional basis of which has received little attention. Nonetheless, it is clear that the level of emotional intelligence of a person also stands in a direct relation with the ability to form moral judgments.[141]

Consequently, emotions are not regarded as a weakness or an obstacle for rational thinking—on the contrary. In accordance with the etymological origin of the word 'emotion' coming from the Latin term 'emovere', meaning 'to move towards something', it is recognised that the vast repertoire of human emotions and automatic reactions usually fulfils a specific purpose.[142] After all, the instinct of self-preservation has ensured the survival of the human kind for quite some time. One distinct form of emotional intelligence is empathy. The level of empathy that an individual displays usually also depends on a mix of inter- and intra-personal skills,[143] both of which develop and grow—to a certain degree—through experiences. The more experiences a person has gone through, the more personal insight is usually possible. Similar to the notion of maturity, it would then seem that it would be possible to improve one's emotional abilities and even to learn how to be (more) empathetic over time.[144] The circle would close, seeing that the basic definition found in a common dictionary delineates intelligence as the ability to learn. However, it has also been recognised that the neural constitution of the brain plays an important role for a person's natural level of emotional intelligence, and empathy itself is understood as an innate human trait, which, other than maturity, does not merely develop over the years through experiences, but is intrinsically connected to our very nature. Scientists have observed that even babies cry when they hear another baby crying and that toddlers attempt to comfort their playmates when they are upset.[145] This ability to 'feel with the other' indeed becomes more refined over time and children learn to distinguish their own feelings from those of another person. With this knowledge, their empathy changes in that it develops from unconscious responses based on instincts alone into a mix of both a natural sensitivity for another's feelings, on the one hand, and a

[140] The two prominent schools researching personal intelligence include behaviourists like B.F. Skinner who restrict their research to describing human behaviour, and researchers focusing on (meta)-cognition like Gardner. Both refrain from analysing emotions themselves; Goleman 2011, p. 64.

[141] Hoffman 1984.

[142] Goleman 2011 (*quoting the findings of P Ekman*), p. 22.

[143] Meaning both the level of insight into one's own feelings as well as knowledge of the human nature more generally.

[144] Goleman 2011, p. 65 (*quoting Salovey*)

[145] Goleman 1989.

conscious response towards the other's feeling based on moral principles.[146] By the end of childhood, the ability to 'feel with the other' has usually developed to its fullest extent and young adults often experience empathy with groups entirely separated from their own experience. As a result, the want to show solidarity with those (often underprivileged) groups and alleviate their suffering is usually high.[147] This spirit of altruism rooted in natural empathy with those less fortunate may also explain the relatively high number of young adults interested in social and political activism. Altruism can hence be understood as a particularly broad form of empathy, much akin to the notion of humanity as sentiment, but it also refers to a set of moral principles and rules that affect and determine one's behaviour towards any human being, e.g. humanity as a whole.[148] The lack of empathy towards our fellow human beings, on the other hand, is generally perceived negatively, as emotionally cold or calculating. Opposed to altruism, the total absence of empathy in a human being in its extreme form is regarded as an emotional defect and a psychological anomaly as is often discovered in cases involving persons who are psychological ill, such as psychopaths.[149]

The feeling of empathy as well as the sentiment of humanity is something that robots will (even in the far future) hardly be able to develop, not least due to the fact that the ability to be empathic is directly related to an individual's own prior experiences.[150] While it is possible to program robots to follow a certain set of orders and respond to a given situation in a certain way, robots' ability to learn or 'acquire knowledge' is at least limited, although not excluded in all possibilities. Hugo De Garis, Associate Professor of computer science at Utah State University, is optimistic that "modern electronics can build artificial neurons forming artificial brains allowing machine-learning in the near future".[151] However, even if robots were to acquire learning capacities, it would still seem unlikely that they could form an understanding of 'the principle of humanity' or feelings of empathy tantamount to those of human beings. Seeing that the concept of humanity both occupies a prominent place in the legal discourse of international humanitarian law as well as forming a vital aspect of human intelligence and human relations, it is then necessary to consider whether this robotic 'handicap' may influence the way robots should be regulated, or whether there is even an appropriate way to program robots for their use during armed conflict at all.

146 Hoffman 1984.
147 Goleman 1989, p. 138.
148 Hoffman 1984.
149 Ibid.
150 Goleman 1989, p. 138.
151 Voth 2004, pp. 4–5.

3.5 Challenges of Teaching International Humanitarian Law to Machines[152]

As early as 1942, science fiction author Isaac Asimov recognised the need for an ethical code of conduct for robots. In *Runaround*, he introduced his Three Laws of Robotics.[153] Even the makers of Star Trek equipped their artificial life-forms with 'ethical subroutines' to determine what is right or wrong. Assimov or the creators of Star Trek, not being engineers, did not consider the intricacy of translating rules or regulations into realistic computer programs. Not being lawyers, they never contemplated the challenges of applying proper legal rules to robots. Nonetheless, even they recognised the urgency to build in a safety link and ensure the supremacy of the human being (or humanity)—if in made-up stories. Different authors have since attempted to 'fix' Assimov's laws for robotics,[154] and recently other parts of society have become interested in the matter.[155] Unfortunately, a detailed discussion of the possible regulation of (autonomous) robots during war is outside the scope of this article. However, it is overall questionable whether it is at all possible to create a set of finite (legal) rules to be translated into the form of a computer program that guarantees that robots implement international

[152] This article concerns the use of robots during war and the effect this may have on the principle of humanity. It is obvious, however, that these robots will only then become a possible danger if they are equipped with weapons with the potential of harming both humans and the principle of humanity. It seems that when an autonomous robot is armed with an otherwise legal weapon, the weapon itself becomes autonomous. This reasoning is reflected in the fact that some scholars prefer the term 'Automatic Weapons System' (AWS) when discussing armed, autonomous robots. One could argue that under the changed circumstances, a new legal test would be adequate, possibly with the outcome that the armed robot or AWS was now illegal. For a description of some of the existing AWS, see Sparrow 2007, p. 63. Particularly impressive is his description of the US Air Force's Low Cost Autonomous Attack System (LOCAAS) which can "autonomously search for, detect, identify, attack and destroy (…) targets of military interest"; See also Borenstein 2008, p. 2.

[153] 1. A robot may not injure a human being, or through inaction, allow a human being to come to harm. 2. A robot must obey orders given it by human beings except where such order would conflict with the First Law. 3. A robot must protect its own existence as long as such protection does not conflict with the First of Second Law; Asimov 1942. In 1985 Asimov added a Zeroth law: 0. A robot may not harm humanity, or by inaction, allow humanity to come to harm, Asimov 1985. By adding the Zeroth law, he raised the bar significantly and included the crime of non-assistance of a person in danger.

[154] Dilov (1974) 'The Way of Icarus', or Clarke (1994) 'An extended Set of the Laws of Robotics', cited in Lin et al. 2008, 31 ff.

[155] In a more scientific effort to address potential problems, the United Kingdom's Engineering and Physical Sciences Research Council (EPSRC), together with the Arts and Humanities Research Council, designed a 'semi-legal' set of rules. See Engineering and Physical Research Council website 2011; In 2007, South Korea also initiated the creation of a 'Robot Ethics Charter' in which futurists and science fiction writers were to create an ethical code to prevent humans abusing robots and vice versa. To the knowledge of the author, however, there has been no outcome concerning the international legal regulation of robots; BBC News 2007.

humanitarian law and, as part thereof, the principle of humanity. In addition, in cases where a breach of IHL in fact occurs, it is equally difficult to establish a tenable chain of responsibility in accordance with the principle of legality.[156] To do so, is, besides being a legal prerequisite, also a moral requirement to retain a basic level of humanity and to respect the value of human life—even during war.[157] If, on the one hand, the capacities and therefore also the degree of the true autonomy of robots are limited, it makes sense to regard them as tools with multiple functions. Like other principally harmless objects, they may be transformed into potentially lethal weapons by a resourceful individual. In these cases, establishing the chain of responsibility is relatively easy and the person committing the crime by means of the robot must be held responsible.[158] If robots exhibit a higher degree of autonomy, however, the situation is more complex. Sparrow describes rather surreal possibilities of punishing robots themselves[159]; however, as of now, no meaningful penal measures tantamount to those applied to human beings can be applied to robots. Searching for a human agent then, anyone from a large number of people could be held responsible. Manufacturers, programmers and designers as well as military decision-makers are all directly involved in the process of creating and deploying these robots.[160] Indeed, even questions of State responsibility in terms of common Article 1 to the 1949 Geneva Conventions may become relevant.[161] Irrespective of the quest to determine who is ultimately held responsible for the failure of a robot to apply IHL, however, it is first of all vital to analyse whether it is at all possible in the first place to program robots so as to ensure that they do not violate humanitarian law.

Lin et al., in their report on '*Autonomous Military Robotics: Risk, Ethics, and Design*'[162] examine the different possibilities of applying top-down, bottom-up or hybrid approaches to develop a sort of ethical software for robots.[163] According to

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[156] The principle of *nulla poena nullum crinem sine lege* is based, amongst others, on the principle of non-retroactivity and the principle of certainty. It means "that an act can be punished only if, at the time of its commission, the act was the object of a valid, sufficiently precise, written criminal law to which a sufficiently certain sanction was attached"; See Kreß 2008.

[157] The principle that we must be able to identify those responsible for deaths in war is based on moral consequentialism and deontology; Sparrow 2007, pp. 66–68, also citing Nagel 1972 and Walzer 2000.

[158] Sparrow finds that in these cases, responsibility would fall on the commanding officer.

[159] Sparrow describes a rather surreal scenario in which punishments could be foreseeable for robots. He also looks at the possibilities to attribute responsibility to the programmer or the commanding officer; Sparrow 2007, pp. 69–73.

[160] Lin et al. 2009, p. 55; See also Wallach and Allan 2009, p. 201, 207; Asaro 2008.

[161] Common Article 1 to the 1949 Geneva Conventions, requires States to 'respect and ensure respect' for the Geneva Conventions. Although there does not seem to be agreement as to the scope of this responsibility, it is clear that it would at least extend to the obligation to ensure respect for the relevant legal rules within their national jurisdiction.

[162] Lin et al. 2008.

[163] With the hybrid approach consisting of both top-down and bottom-up aspects; Ibid., pp. 27–42.

them, top-down programming would involve the establishment of a rigid set of rules that, once translated into algorithms, would be followed by the robot.[164] A bottom-up approach for robot ethics, on the other hand, emphasises the desired outcome of a behaviour much akin to consequentialist or utilitarian approaches in traditional ethics.[165] At first sight, it seems extremely difficult to anticipate what could be the best possible result of various scenarios in which a robot may be involved during armed conflict. Thus, theoretically, programming a robot with the help of a top-down approach to follow the applicable legal rules would seem a sensible solution to ensure that robots act in accordance with IHL. For Lin et al. this—or more specifically the programming of robots with the applicable rules of engagement—is the preferred option, because they find that such an approach would firstly circumvent any potential conflict between morality, ethics and law, and secondly it ensures a minimum standard of 'correct' behaviour by the robot—even if it falls short of truly moral behaviour.[166] But war means chaos! IHL is a particularly complicated set of legal rules, the majority of which is not built on linear straightforward rules demanding one 'correct' response in a number of definite scenarios—such as stopping at a red traffic light. Each scenario depends on a test that balances the principles of distinction,[167] proportionality,[168] military necessity[169] and humanity—the outcome of which, in turn, may profoundly vary depending on the perspective of those making the calculation. Even the basic principles of IHL continue to attract attention and their interpretation is often a

[164] This kind of theory has its origins in the deontological understanding that ethics are intrinsically duty-based, and that being moral effectively means fulfilling one's duties. Kant's categorical imperative is a shining example of a deontological top-down theory, as are Asimov's laws; Lin et al. 2008, p. 28.

[165] Lin et al. 2008, 38 ff, p. 88.

[166] Ibid.

[167] The principle of distinction requires that only combatants, but never civilians, are made the direct object of attack (Civilians are negatively defined as all those persons who are not members of the armed forces of a party to an armed conflict with the exception of religious and medical personnel GC III, *supra* note 83, Articles 4, 6; AP I, *supra* note 94, Articles 43, 50). However, in cases where civilians are not directly targeted for instance, their loss of life may be acceptable as 'collateral damage' (Stein 2004). However, the distinction between a civilian and a combatant has increasingly become more blurred during modern conflicts which are often non-international in kind and consequently involve Non-State actors. In non-international, as in international armed conflicts, civilians enjoy immunity from attack for as long as they do not engage in any 'direct participation in hostilities' (AP II, *supra* note 94, Article 51 (2)). This notion, however, is a hotly debated topic and the discussion surrounding the ICRC Interpretative Guide to the notion of 'DPH' is far from settled (Melzer 2009). Similar to most other rules of IHL, the prohibition on killing civilians is therefore highly nuanced.

[168] AP I, *supra* note 94, Article 51(5) (b).

[169] AP I, *supra* note 94, Article 57 (3); Achieving international agreement as to what constitutes military necessity has also proven difficult, but it is clear that it is meant as a restriction rather than a permissive rule in the sense that all means or methods of warfare that are not directly necessary for the attainment of a definite military advantage are prohibited, not that all means necessary for attaining such a goal are allowed; Kwakwa 1992, p. 36.

matter of the prevailing *Zeitgeist.* The present trend towards humanity already referred to above and leading, amongst other things, to increased protection for the human being is also reflected in the ICRC's Guide on Direct Participation in Hostilities.[170] Hotly debated, Rule 9 of the guide suggests that the least possible harm is done to the enemy equivalent to a requirement of minimum force. This is in accordance with the principles of military necessity and proportionality, but it also demonstrates the increasing influence of human rights law on IHL.[171] The basic idea is that of 'the least evil' requiring that as little harm as necessary is caused, i.e. that superfluous suffering is avoided. Pictet lists a number of specific examples:

> capture is preferable to wounding an enemy, and wounding him better than killing him; that non-combatants shall be spared as far as possible; that wounds inflicted be as light as possible, so that the injured can be treated and cured; that wounds cause the least possible pain, that captivity be made as endurable as possible.[172]

The theme of humanity in the form of a preference for 'humane' treatment is easily discernable. So is, however, the relative nature of the rules. Assuming that it is not possible to develop a clear code to program robots and reconsidering the other options suggested by Lin et al., it then seems that a bottom-up approach oriented upon the principle of humanity would be a suitable way to regulate robots. Interestingly, although otherwise neglecting the principle of humanity, the researchers describe the so-called 'friendliness theory' according to which robots would be programmed to be altruistic.[173] This approach would indeed circumvent the difficulties involved with both translating the rules of IHL into algorithms and the problems related to the occurrence of unforeseen situations. However, the theory is flawed. An altruistic robot would not be incredibly useful during armed conflict, where the unambiguous goal is to defeat the enemy—though not by way of inhumane means.[174]

Lin et al. then look at the possibility of a hybrid system of top-down and bottom-up approaches. They find that a hybrid system would indeed resemble human thought processes leading to (moral) judgments. As seen above, human beings use both a set of appropriate learned rules in combination with a moral appreciation of the circumstances, which in turn may be based on knowledge, instinct or both. This combined approach allows human beings to analyse and react to every situation in our everyday life, however unforeseen. In consideration of this fact, the Geneva Conventions only demand that the basic underlying principles are known.[175] As most rules are derived from the principles, it is feasible to

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[170] Kwakwa 1992, p. 36.

[171] Ibid.

[172] Pictet 1985, p. 62.

[173] Lin et al. 2008, p. 38.

[174] Ibid.

[175] Compare: GC I, Article 47; GC II, Article 48; GC III, Article 127; GC IV, Article 144, *supra* note 83.

translate the specific rules contained in a long list of Articles into more easily understandable maxims and rules of engagement for soldiers.[176] The principle of humanity is precisely such a maxim that should be anchored in the soldiers' understanding of what conduct is expected of them in the line of duty. Complex regulations are to be avoided and the essential rules broken down so that they can be applied during extreme situations on the battlefield, where the often cited 'fog of war' may quite literally cloud a soldier's judgement. The fact that the importance of ethical training for soldiers has been increasingly recognised over the last few years reflects this aspect. In situations of doubt (or when the top-down approach would no longer help), a human soldier can refer to his or her own moral principles and be guided by a sense of humanity (the bottom-up aspect).

Robots, however, are simply unable to perform value-laden calculations assessing the military necessity or proportionality of an action in a given context, or to define what can be considered unnecessary and superfluous suffering. At their current level of development, they have no sensing or computational capability to make differentiated decisions to allow any complex judgement on the basis of these key principles. In addition to difficulties in answering practical yes/no questions (*Is a person hurt? Is he carrying a gun etc.*), decisions involving the principle of humanity and the associated moral understanding demand advanced analytical skills as well as a certain degree of emotional intelligence. Moreover, robots not only lack a concept of morality, but also contextual awareness. Citing Aristotle, Wortel explains the importance of the context in situations requiring moral choices, stating that while "[i]t might be possible to inculcate virtues through training and education,[…] it seems impossible to prescribe them in a doctrine".[177] This requirement of 'active engagement' is reflected in international criminal law. The concept of the 'reasonable person' as well as the mental element and actual awareness of the illegality of an act are important features in various provisions of the Rome Statute.[178] As a 'reasonably person', each soldier should ideally subject each war scenario to an (internal) analysis of what legal rules are applicable. Consequently, at least in theory—each soldier should perform a calculation of what is considered the most appropriate course of action in terms of the principles of distinction, military necessity, proportionality, humanity and the prohibition on causing unnecessary suffering respectively. Even the robots of the future are unlikely to be able to perform such tasks.

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[176] The ICRC has issued a comprehensive handbook as a reference guide for the implementation of IHL, ICRC 2011a.

[177] Morality and humanity thus differ from philosophical understandings such as Kant's 'categorical imperative' which is an ultimate obligation that is not dependent on a certain situation; Wortel 2009, p. 790.

[178] The Rome Statute of the International Criminal Court, *supra* note 77, Articles 25, 28, 30, 31; See also the Statute of the International Tribunal for the Former Yugoslavia, Security Council Resolution 827, 25 May 1993, S/RES/827, http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept09_en.pdf, Article 7.

Admittedly, to demand an in-depth legal analysis of every soldier in every scenario may be unrealistic. Particularly in the realities of modern-day conflict, soldiers will encounter situations that are unknown and unforeseeable. A compromise may be found by referring to a term coined by Nobel Prize Winner Herbert Simon. '*Satisficing*', a combination of the adjectives 'satisfying' and 'sufficing', denotes the idea that an optimal situation for decision-making hardly ever exists. Rather, the available time and amount of information is always limited. This is particularly the case during war. Nonetheless, an *acceptable* decision in such a situation would be any decision that, though not *the* best option, is *one of the best possible* in the circumstances.[179] Proponents of military robots in fact argue that even though it may not be possible to create an infallible military robot, compared to human weaknesses robotic soldiers are certainly the lesser of two evils and that "as AI technology improves, a human operator may prove not merely redundant but positively disadvantageous".[180] This argument primarily relates to the fact that robots (and computers generally) come with an immense storage capacity for detailed information that they may gather and analyse (if programmed accordingly). In addition, they may be able to perform complex calculations much quicker than the human brain.[181] Nonetheless, computers succumb to the human ability to analyse a situation and immediately filter out irrelevant information. Thus, where robots would clearly trump humans in the quantity of information they can process, humans would win the direct comparison in terms of quality.[182] The ability to classify information correctly and to act upon a change in circumstances is particularly relevant in unforeseen situations. Taking the example of robotic bulldozers used to dismantle houses in urban combat zones for example, it would be at least extremely difficult, if not impossible, for a robot to recognise the change of situation if children were to appear amongst the reportedly empty houses in a game of hide and seek. While a human soldier would recognise the changed circumstances and alter his or her course of action accordingly, a robot would most likely follow its pre-programmed orders.

Against this background, it has been suggested that, since especially during armed conflict one unforeseen circumstance follows the other, it not only makes sense to keep a human 'in the loop', but it is a legal requirement.[183] However, the more autonomous robots become, the wider the loop becomes. In addition, even if human oversight is given, robots may be perceived by soldiers as safer and the willingness to rely on a computer analysis is especially high during stressful situations. Thus, soldiers, even if and when granted any such power, seem hesitant to exercise their veto over a computer-generated response. In 1988, an aerial

[179] Simon 1982 (emphasis added).

[180] Sparrow 2007, p. 68; Arkin even argues that using robots would lower the number of civilian deaths, Arkin 2007, p. 57.

[181] Sharkey 2008b, p. 16.

[182] Wallach and Allan 2009.

[183] Isenberg cited in Borenstein 2008, p. 8.

incident involving a semi-autonomous computer-radar system led to the death of all 290 passengers and crew aboard Iran Air Flight 655. Despite the fact that the Aegis computer radar system onboard a US Navy guided missile cruiser stood in contradiction to all available hard data including the size of the plane and the fact that it had broadcast a signal identifying it as a civilian airline, none of the eighteen US officers present interrupted the program when it mistook the plane for an enemy fighter jet and shot it down. The case was brought before the International Court of Justice and settled in 1996[184]; however, it serves as a profound illustration of how fatal the wrongly perceived security of technology may be.[185]

It is easily perceived that, in terms of purely physiological factors, robots are certainly superior to humans. They are not influenced by illness, fatigue or hunger. Neither do they experience changes in their heart rate, skin conductivity or hormone levels. They cannot even become ill (although 'heat-strokes' are imaginable). Additionally, many shooting errors may be eliminated through improving precision and certainty for aiming.[186] Moreover, robots can function without distraction through stress, manipulating factors such as a rush of adrenalin in the extreme akin to a state of drunkenness,[187] or disturbing experiences such as the immediate death of one of their colleagues at their side.[188] They do not have to deal with the detrimental experience that especially long-term dispatch to a conflict zone will eventually have on a human being, no matter how professional the soldier. On the other hand, as technical products, robots are susceptible to malfunction and technological failures have already repeatedly led to the crashes of unmanned aerial vehicles.[189] Furthermore, a number of attempted decapitation operations also involving UAVs and aimed at alleged Al-Qaeda terrorists have gone awry, causing the death of both adult and child civilians.[190]

Leaving the imperfection of both robotic and human soldiers aside, for the purposes of this article it is crucial to determine whether the principle of humanity indeed carries more weight on the ground, if human soldiers, not robots, fight each other in a conflict.

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[184] ICJ, *Case Concerning the Aerial Incident of 3 July 1988* (Islamic Republic of Iran v. United States of America), Settlement Agreement, 9 February 1996, http://www.icj-cij.org/docket/files/79/6639.pdf.

[185] Against this background, it is particularly worrisome that more research is underway to develop systems of artificial intelligence to analyse all potentially relevant incoming data, identifying it as friendly or hostile and re-presenting the respective conclusion to a human operator; Sparrow 2007, p. 69.

[186] Singer 2010, p. 31, 36; Arkin 2007, pp. 6, 7.

[187] As Patricio Perez describes in Van Baarda 2004.

[188] Weiner 2005, citing Gordon Johnson, Joint Forces Commander at the Pentagon.

[189] Borenstein 2008, p. 4.

[190] Sharkey 2008b.

3.6 On the Ground: Human Soldiers, the Principle of Humanity and the Realities of War

Admittedly, armed conflict is an extreme situation in which even the most moral and empathetic individuals may struggle. However laudable the shining example of Dunant or the impressive work of the ICRC may be, it can be extremely difficult for soldiers to develop feelings of empathy towards their opponents. The pictures of Abu Ghraib, Bagram or Guantánamo pay sad tribute to this fact, as do many reports of all kinds of crimes committed during the conflicts of the last decades. Van Baarda reminds us that there are "comparatively few reports (…) of soldiers who transcend the conceptual framework of friend-or-foe when circumstances become permissive". According to him, "[b]oth the joy of killing and the framework of black and white concepts become a major challenge. He sees them as a major source of moral confusion and an impediment to retaining a measure of humanity".[191] Indeed, a report by the US army found that "Only 47 % of the soldiers and 38 % of the Marines agreed that non-combatants should be treated with dignity and respect".[192] However, it seems that this—admittedly—bleak picture lacks nuances in part. Wars are increasingly fought with the involvement of Non-State actors more likely joined by a common cause—not on the basis of their nationality. Therefore, both an assumption of benevolence as well as malevolence on the basis of nationality cannot be made. What remains is 'humanity' as a common denominator. A soldier may of course experience feelings of solidarity or aversion in a traditional opposition of 'us' versus 'them'. Wortel in fact explains that in order to discuss the principle of humanity and its applicability during war, a close consideration of the existing relationship between 'I' and 'Other' is necessary.[193] Communicating a sense of 'togetherness' and 'otherness' can create an intensified form of group pressure and even when away from direct fighting action, yet in close proximity to the battlefield, a soldier's loyalty towards his comrades will be far more extreme and more influential on any decision-making process than in everyday life. During a fire fight, a soldier may feel pressured into having to choose a course of action possibly expected by his or her comrades, yet incompatible with his or her own ethical convictions. In these situations, a robot would not be influenced adversely by sentiments such as group pressure. In contrast, when a soldier may have to decide between his or her statutory obligation to follow orders and his or her own conflicting moral conviction,[194] his or her 'humanity' may well function as a safeguard and prevent a crime. Indeed, international criminal law provides that a soldier must in fact refuse to carry out orders

[191] Van Baarda 2004.

[192] Office of the Surgeon Multinational Force-Iraq and Office of the Surgeon General United States Army Medical Command (2006) cited in Borenstein 2008, p. 2.

[193] Wortel 2009, p. 787.

[194] This scenario describes precisely the situation in which principles like the Radbruch formula discussed above are relevant.

s/he knows to be illegal.[195] Outside the legal aspect, however, it again becomes evident that the principle of humanity and the resulting moral understanding as well as empathy fulfil a vital role, effectively functioning as a safeguard in dealing with the opponent during war.

Pictet recognised that the individual may be reluctant to apply the principle of humanity; especially where the object involved may be the enemy.[196] However, the sheer lack of reports of such instances should not be understood to mean that no soldier behaves in accordance with the law (or the concurrent rules of engagement) or moral demands. In fact, the behaviour of law-abiding citizens in accordance with existing norms rarely leads to a detailed report, even in the domestic context. Nonetheless, van Baarda's detailed description of how emotions and adverse experiences may make a fighter prone to abuse his power is a probative depiction of what a possible scenario may look like. No less conclusive, however, is a field report by a young soldier deployed during the Falklands War. This soldier, previously set on killing his opponent as a matter of fulfilling his duty, recognised an enemy prisoner as a fellow human being with whom he even shared certain character traits and hobbies.[197] Martens, just as Dunant, would rejoice in this story illustrating the power of humanity. Another impressive example, where humanity trumped all other concerns, occurred during the First World War in what became known as the 1914 Christmas Truce. During unauthorized ceasefires mostly between German and British (as well as French) forces on the Western Front, soldiers from opposite sides joined for carol singing, unofficial gatherings, and even friendly games of football. Gifts were exchanged with one another and cries of '*A bas la guerre*' and '*Nie wieder Krieg!*' filled the air. The truces at Christmas time attracted attention due to the large number of men involved, but also during other times there was silent agreement between the opponents that enemy soldiers were not attacked during times of rest, exercise, or when recovering the bodies of comrades. Weintraub describes this remarkable event as being "dismissed in official histories as an aberration of no consequence" but underneath the historical description, it seems that both sides, while exchanging handshakes and sharing cigarettes, respected the principle of humanity—without any further need for an explicit explanation.[198] Also in the following year, though far less widespread, Christmas truces occurred, but they were strongly condemned by superior orders. From 1916 onwards and with the introduction of poisonous gas as a weapon, no more truces took place—partially due to the fact that the opposite side was regarded as less humane.[199]

History has taught us that men can be cruel. Yet, there are impressive counterexamples. Ultimately, it is an untenable argument that because human soldiers

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[195] Rome Statute of the International Criminal Court, *supra* note 77, Article 33.

[196] Pictet 1956, p. 16.

[197] Van Baarda 2004.

[198] See also Hamilton and Reed 2009.

[199] Weintraub 2002.

'may' commit mistakes, misjudge situations or act inhumanely, the possibility that robots will do so as well should be accepted. It is preferable to aspire to train soldiers in such a way as to minimise their failure of judgement, not altogether lower the level of acceptance for mistakes as a precondition to accept the participation of autonomous robots in combat action. This is not least due to the fact that, even if it is cold comfort, there are at least adequate national (and to an increasing extent international) accountability measures in place, if and when soldiers do err in their decision making. Furthermore, there may be broader implications of sending robots to war than are discernible at first glance. Given the effect of gas as a weapon on the bearing of soldiers, one is left to ponder what consequence replacing human soldiers by robots may elicit.

3.7 Twenty-First Century Warfare: Strategic (and Other) Implications of Sending Robots to War

The changes in warfare during the twenty-first century and the increasing asymmetries especially in counter-terrorist operations demand that tactics and strategies be adjusted to meet new challenges.[200] Most proponents of the use of (especially autonomous) robots on the battlefield come from a military background. In accordance with them, drones are the most efficient way of eliminating key figures in terrorist organisations that mostly operate covertly.[201] On the other hand, from a military operational and political point of view, especially against the background of the recent conflict in Afghanistan and the currently pursued strategy by the International Security Assistance Force (ISAF), it has become increasingly important not only to focus on defeating the opponent militarily, but rather to 'win over the hearts and minds of the people' to conclude the conflict with their support. Dunlop tellingly discusses in detail the relationship between the will of the people and the war-sustaining capability of a belligerent. With the help of the examples of, amongst others, Germany during World War II, the Vietnam War or the conflict in Kosovo, he describes the vital impact that the loss of popular support can have.[202] However, even though he recognises the illegality of directly attacking the civilian population, his alarming suggestion that psychological warfare, even where it foreseeably results in civilian casualties, is acceptable, is more than questionable.[203] 'Targeting' the will of the people should not be understood as permission to attack the population of the enemy in the military sense. This would be a dangerous construction, especially considering that

[200] Schmitt 2007.

[201] CNN 2009.

[202] Dunlap 2007, pp. 117–125.

[203] Dunlap 2007, p. 122; See also Parks 1990.

collective punishment is clearly prohibited.[204] In general, the operational mandates in modern conflicts increasingly focus on the protection of the civilian population.[205] It is rather doubtful whether sending out '*killer robots*'[206] amongst the civilian population would be an asset in that undertaking.

It is a modern-day phenomenon that demands on the individual constantly grow and each person is pressured to increase his or her working potential to function ever more effectively. It is not surprising that the possibility to deploy one robot with the brain capacity of 1,000 human beings (if one was to believe Mr. Kurzweil) is a tempting vision for military strategists. Yet, it is ultimately debatable whether fewer casualties on the one side would not result in a higher number of deaths on the other. While the technologically more advanced party to a conflict may thus benefit, the other side, not equipped with the same robotic gadgets, may have to bear the cost. The calculation of striking a balance between the protection of one's own force as opposed to the protection of the civilian (enemy) population is not an easy one, but it is necessary. Therefore, at least from today's standpoint, it seems unlikely to design effective and morally acceptable operations without the willingness to expose human soldiers to a certain risk. Additionally, there is ample evidence that the enhanced combat techniques of one party to the conflict may well lower the moral stance of the other. Their options are effectively limited by their technological disadvantage, which may tempt them to resort to terrorist methods such as attacks on civilians.[207] What is more, efforts to decrease the human cost of war may also be regarded as a weakness in some cultures. Especially terrorists, who work with fear and generally target the civilian population of their opponent, could be encouraged to pursue this strategy. Ultimately, thus, an enhancement of technology in warfare on the one side may further aggravate the asymmetry already present in modern-day warfare.[208] On the other hand, robots, just like weapons can be easily duplicated. By now, whole armadas of (semi-)autonomous robots complement not only the American war efforts. "Iran has launched a UAV bomber with a range of several hundred miles",[209] and other States known for their lax interpretation of international humanitarian law are beginning to

[204] This is reflected in many treaties as well as military manuals and other practice. See for instance Geneva GC III, Articles 26, 87; and GC IV, Article 33, *supra* note 83; AP I, Article 75 (2) (d); and AP II, Article 4 (2) (b), *supra* note 94; Or the Draft Code of Crimes against the Peace and Security of Mankind, 1991, International Law Commission, A/CN.4/L.459 and Add.1, Yearbook of the International Law Commission, Volume 1, http://untreaty.un.org/ilc/documentation/english/a_cn4_l459.pdf, Article 22(2) (a); For more practice in this respect see Doswald-Beck and Henckaerts 2005, Rule 103 and the practice relating to Rule 103.

[205] This is further reflected in the increasing endorsement of such concepts as the principle of the Responsibility to Protect, in itself a concept which is based on the understanding of the moral responsibility towards people in need; ICISS 2001.

[206] Krishnan 2009; Sparrow 2007; Sharkey 2007.

[207] Kahn has suggested that for non-state actors at a technological disadvantage' terrorism may be the only way to fight back, Kahn 2002.

[208] Krishnan 2009.

[209] Sharkey cited in Bowcott 2010. See also BBC News 2011a, b.

follow suit[210] and it would be "naïve to think they will remain in the hands of governments".[211]

Finally, on a broader political scale, even if it were a possibility, reducing the number of casualties through the employment of robots instead of human soldiers would decrease the overall costs of war. This would possibly make recourse to war more acceptable as a political means of pressure by lowering the political costs at home for making such a decision. Traditionally, there exists a clear separation between the rules which are applicable during armed conflict (*jus in bello*) and the legal rules governing the use of (military) force (*jus ad bellum*).[212] It seems, however, that any developments facilitating recourse to war would be counter-intuitive to today's ethical and moral point of view, especially the stance of international law, and the United Nations Charter and its explicit preference for peace and peaceful dispute settlements.[213]

3.8 Conclusion

A direct comparison with science fiction movies is surely not the first framework that comes to mind for a serious, academic attempt to analyse the possible impact of deploying robots during war. Unfortunately, it seems, high-ranking officials themselves, at times, also underestimate the seriousness of the problem. CIA director Leon Panetta called the lethal airstrikes carried out in Pakistan in 2009 "the only game in town in terms of confronting or trying to disrupt the Al Qaeda leadership".[214] Others have suggested that armed robots may function as 'battle buddies', which soldiers want 'yesterday', creating the image of a child desperate to receive the newest toy available.[215] Images of controlled cars or model planes indeed come to mind when one sees pictures of small remote-controlled robots. Other versions are controlled via a joystick or a control panel that could well have been developed by Nintendo. With a generation of new recruits who have grown up in the era of video games, these similarities come in handy because they

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[210] Sri Lanka, for instance, has invested in robotic weapons; Singer 2010, citing evidence of such developments within the Tamil Tigers.

[211] Dr. Steve Wright, Reader in Applied Global ethics at Leeds Metropolitan University cited in Bowcott 2010.

[212] This distinction has been challenged post-Nuremberg not least by the ICJ, *Legality of the Threat or Use of Nuclear Weapons*, op cit, para 105. The Court was unable to pronounce an absolute prohibition of nuclear weapons, leaving room for their use in 'extreme circumstances of self-defence', thereby seemingly blurring the two categories; Sharma 2008, p. 9, 18; This tendency has been largely rejected by Moussa 2008, p. 263; Sloan 2009, p. 47.

[213] United Nations, Charter of the United Nations, San Francisco, 24 October 1945, 1 United Nations Treaty Series XVI; See also Lin 2010.

[214] CNN 2009.

[215] Jewell 2004.

facilitate and speed up the training process.[216] Apparently, for the first time ever, more individuals are trained to handle UAVs via remote control than actually learning how to fly fighter jets.[217] The creation of distance between the soldier and the hostilities including not only a physical, but also a cognitive and emotional detachment from the battlefield is indeed similar to that which one may experience when playing a computer game.[218] The analogy drawn by Panetta may thus not be all that inaccurate. Nonetheless, it points to the fact that today's decision-makers have not yet understood the seriousness of the possible impacts the deployment of robots to war may have for humanity.[219] To dismiss the foreseeable challenges, however, would be fatal, and risk the curbing of humanitarian protection during wartime. While the current author in no way aims to suggest putting a hold on technological progress, caution is necessary.

Looking at different examples for the potential use of robots, it becomes clear that there may be situations where deploying a robot will have a higher possibility of succeeding in a certain mission. However, it would be a mistake to bend the legal architecture in such a manner so as to always favour this option. Tasks additional to those traditionally required of soldiers, especially relating to the protection of the civilian population, often require a broad set of inter-personal skills and a heightened sensitivity towards the civilian population.[220]

Tailoring IHL to address all potential challenges of deploying robots and machines during wartime is a gigantic task, and the possibility that the existing legal framework is eroded should not be underestimated. States have always been reluctant to increase restrictions on their freedom of action—especially in situations of war. Ultimately, technological progress in the field of robotics will continue. Along the lines of Kurzweil's understanding of human (linear) progress, the speed of innovation in the branch of war robots is likely to accelerate.[221] Even though it has recently been suggested that the development of 'thinking and feeling' robots during war is unrealistic,[222] eventually robots will be developed, and with the arms industry being the most lucrative by far, the focus on their use during armed conflict will remain.[223] Many still invisible challenges may only

[216] Recently, even the ICRC has been concerned with violence and computer games and their influence on war. See ICRC 2011c.

[217] Johansen 2011.

[218] Also referred to as externalisation; Grossman's seminal book 'On Killing' (1995) describes how killing becomes easier via distance and atrocities become more likely; Singer 2009, p. 44.

[219] Wallach and Allan refer to the 2001 ARMS (Autonomous Robots for Military Systems) study by Singh and Trayer. They note that ethics and morality do not come up anywhere in the seventy-two-page text, and safety is mentioned only in the titles of other cited works; Wallach and Allan 2009, p. 223.

[220] Examples include policing or humanitarian assignments.

[221] Ibid.

[222] Hudson 2011.

[223] Most funding for research into robotics and artificial intelligence comes from the military; Sparrow 2007, p. 62.

surface later on. As such, much of the topic is uncharted scientific new territory and many of the reflections in this article are speculative to a certain degree. Until then, it is vital to draw on all available expertise and allow an interdisciplinary discussion that can benefit from a mix of legal, moral, ethical, philosophical and technological considerations,[224] but may, ultimately, have to involve strategies of trial and error. Wallach and Allan suggest that "maybe attempts to produce artificial consciousness by computation are like the earliest attempts at human flight, which involved a lot of feathers and flapping".[225] Even everyday items such as aircraft, cars, colour TVs and computers at one time were revolutionary innovations. Some of them still bear a considerable degree of risk. Yet, no one would voluntarily dispense with them. During armed conflict, however, testing autonomous, armed robots may easily have deadly consequences.[226]

From a legal point of view, the force of the 'principle of humanity' and its potential to address otherwise unregulated questions of humanitarian law should not be dismissed. As indicated by the separate opinions of Judges Koroma and Shahabuddeen, the Martens' Clause containing an explicit reference to the importance of humanity is more than a simple reminder to States of their already existing obligations via treaty law. It is at the centre of the law and our civilised existence depends on it. Further, the combined progress and increasing interaction of international humanitarian law, human rights law, international criminal law and the law of State responsibility provides evidence of the increasing importance of the principle of humanity. Unfortunately, while the art of juristic interpretation is at the core of international jurisprudence, little literature exists on the difficulty in applying these legal disciplines to the cases involving robots during armed conflict. More legal scholars should engage in the process of defining both a clearer understanding of the principle of humanity, on the one hand, and possible regulatory mechanisms for the deployment of robots during armed conflict on the other.

Washington Irving wrote in 1824 "[t]here is a certain relief in change, even though it be from bad to worse. It is often a comfort to shift one's position and be bruised in a new place".[227] This may well capture many aspects of the historic development of humanity and warfare. It is now vital to ensure that any potential 'bruises' remain as such and to closely monitor any progress made in this area to prevent any 'long-term injuries'. Without the benefit of hindsight, it is necessary

[224] The way in which robots may indeed transform war has already received some attention from the scholarly community For instance the conference 'Drone Wars' was held in London on 18 September 2010, and a three-day workshop in Berlin on 20–22 September 2010 was organised by the International Committee for Robot Arms Control (ICRAC). In late 2011, the delegation of the ICRC in Israel and the Occupied Territories together with the Minerva Center for Human Rights and the Hebrew University of Jerusalem held a Conference on' New Technologies, Old Law: Applying International Humanitarian Law in a New Technological Age touching on the issue.

[225] Sparrow 2007, p. 67.

[226] Sharkey 2007, p. 122.

[227] Irving 2010.

for the international community to seize this opportunity and take ownership of the process of developing a mechanism to regulate war robots, avoid any potential pitfalls and create a spirit of responsibility that matches that of innovation.

References

Online Documents

Arkin RC (2007) Governing lethal behaviour: embedding ethics in a hybrid deliberative/reactive robot architecture. Technical report GIT-GVU-07-11. Mobile Robot Laboratory, College of Computing, Georgia institute of technology. Page 6 et aeq. Available at http://www.cc.gatech.edu/ai/robot-lab/online-publications/formalization35.pdf, last accessed 14 May 2013

Asaro P (2008) Armed robots & armed control: challenges & strategies, computer professionals for social responsibility's technology in wartime conference. http://technologyinwartime.org/node/4. Accessed 23 Dec 2011

Van Baarda T (2004) Military ethics in peacekeeping and in war: maintaining moral integrity in a world of contrast and confusion. J Humanit Assist. http://www.jha.ac/articles/a129.htm. Accessed Dec 2011

BBC News (2007) Robotic age poses ethical dilemma. BBC News, 7 March 2007. http://news.bbc.co.uk/2/hi/technology/6425927.stm Accessed 26 Dec 2011

BBC News (2011a) Iran shows film of captured US drone. BBC News, 8 Dec 2011. http://www.bbc.co.uk/news/world-middle-east-16098562. Accessed 26 Dec 2011

BBC News (2011b) Iran shoots down Western spy drones in Gulf. BBC News, 2 Jan 2011. http://www.bbc.co.uk/news/world-middle-east-12105225. Accessed 26 Dec 2011

Borenstein J (2008) The ethics of autonomous military robots. Stud Ethics Law Technol 2(1), Article 2. http://www.bepress.com/selt/vol2/iss1/art2. Accessed 22 Dec 2011

Boston Dynamics website (2011) Big Dog: the most advanced rough-terrain robot on Earth, Boston Dynamics. www.bostondynamics.com/robot_bigdog.html. Accessed 23 Dec 2011

Bowcott O (2010) Robot warfare: campaigners call for tighter controls of deadly drones. The Guardian, 16 Sept 2010. http://www.guardian.co.uk/technology/2010/sep/16/robot-warfare-conferences. Accessed 23 Dec 2011

CBC News (2011) How robots are transforming war. CBC News: Technology & Science, 23 Feb 2011. http://www.cbc.ca/news/technology/story/2011/02/23/technology-robots-war.html. Accessed 24 Dec 2011

CNN (2009) U.S. airstrikes in Pakistan called 'very effective'. CNN Politics, 18 May 2009. http://edition.cnn.com/2009/POLITICS/05/18/cia.pakistan.airstrikes/. Accessed 24 Dec 2011

Dunant H (1986) Un souvenir de Solférino, Publication CICR1986 réf.0361. http://www.icrc.org/fre/resources/documents/publication/p0361.htm. Accessed 23 Dec 2011

Economist (2007) Robot wars. The Economist, 17 April 2007. http://www.economist.com/science/tq/displaystory.cfm?story_id=9028041. Accessed 22 Dec 2011

Engineering and Physical Research Council website (2011) Principles of robotics, engineering and physical research council. http://www.epsrc.ac.uk/ourportfolio/themes/engineering/activities/Pages/principlesofrobotics.aspx. Accessed 30 Dec 2011

Garreau J (2007) Bots on the ground. Washington Post, 6 May 2007. http://www.washingtonpost.com/wp-dyn/content/article/2007/05/05/AR2007050501009_pf.html. Accessed 21 Dec 2011

Goleman D (1989) Beginnings of empathy. New York Times, 28 March 1989. http://www.nytimes.com/1989/03/28/science/researchers-trace-empathy-s-roots-to-infancy.html?pagewanted=all&src=pm. Accessed 24 Dec 2011

Global Security website (2011) www.globalsecurity.org/intell/systems/firebee_2.htm. Accessed 23 Dec 2011

Greenwald T (2011) Ray Kurzweil on the future of innovation at Singularity University. Forbes Magazine, 10 Dec 2011. http://www.forbes.com/sites/tedgreenwald/2011/10/12/ray-kurzweil-on-the-future-of-innovation-at-singularity-university/. Accessed 23 Dec 2011

Hudson A (2011) Robot war 'still a long way off'. BBC News, 4 Oct 2011. http://news.bbc.co.uk/2/hi/programmes/click_online/9604610.stm. Accessed 24 Dec 2011

IBM website (2011) http://www.research.ibm.com/deepblue/. Accessed 26 Dec 2011

ICISS (2001) The responsibility to protect. Report of the International Commission on intervention and state sovereignty, December 2001. International Development Research Centre, Ottawa. http://responsibilitytoprotect.org/ICISS%20Report.pdf. Accessed 23 Dec 2011

ICRC (2011a) The domestic implementation of International Humanitarian Law—a manual. ICRC, Geneva. http://www.icrc.org/eng/assets/files/publications/icrc-002-4028.pdf. Accessed 23 Dec 2011

ICRC (2011b) Signatories to the Geneva conventions. http://www.icrc.org/IHL.nsf/(SPF)/party_main_treaties/$File/IHL_and_other_related_Treaties.pdf. Accessed 23 Dec 2011

ICRC (2011c) Is there a place for the laws of armed conflict in video games? ICRC, Resource Centre. http://www.icrc.org/eng/resources/documents/faq/ihl-video-games-faq-2011-12-08.htm. Accessed 30 Dec 2011

Ingierd H (2010) Moral responsibility in war: a normative analysis focusing on peacekeepers. Dissertation, Department of Political Science, University of Oslo By Helene Christiansen Ingierd, June 2010, Peace Research Institute Oslo. http://www.prio.no/sptrans/595789605/Moral-Responsibility-in-War-Ingierd-Doctoral-dissertation.pdf. Accessed 26 Dec 2011

Innovations-report (2011) Mask-bot: a robot with a human face, Innovations-report, 7 Nov 2011. http://www.innovations-report.de/html/berichte/energie_elektrotechnik/mask_bot_a_robot_a_human_face_185261.html. Accessed 30 Dec 2011

iRobot website (2011) http://www.irobot.com/de/. Accessed 30 Dec 2011

Jewell L (2004) Armed robots to march into battle. Department of Defense, 6 Dec 2004. http://www.defense.gov/transformation/articles/2004-12/ta120604c.html. Accessed 24 Dec 2011

Johansen A (2011) Krieg der Roboter, Die Welt Online, 10 Sept 2011. http://www.welt.de/print/die_welt/wissen/article13596376/Krieg-der-Roboter.html. Accessed 24 Dec 2011

Kurzweil R (2009) The coming merging of mind and machine. The Scientific American, 23 March 2009. http://www.scientificamerican.com/article.cfm?id=merging-of-mind-and-machine. Accessed 24 Dec 2011

Lin P (2010) Robots, ethics & war. J Mil Ethics (forthcoming). http://cyberlaw.stanford.edu/node/657. Accessed 30 Dec 2011

Lovgren S (2006) A robot in every home by 2020—South Korea says. National Geographic News, 6 Sept 2006. http://news.nationalgeographic.com/news/2006/09/060906-robots.html. Accessed 23 Dec 2011

Melzer N (2009) Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law. IRRC 90(872):991–1047. http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf Accessed 11 Dec 2011

Moussa J (2008) Can *jus as bellum* override *jus in bello*? Reaffirming the separation of the two bodies of law. IRRC 90(872):963–990. http://www.icrc.org/eng/assets/files/other/irrc-872-moussa.pdf. Accessed 23 Dec 2011

No Hands Across America (2011) http://www.cs.cmu.edu/afs/cs/usr/tjochem/www/nhaa/nhaa_home_page.html Accessed 28 Jan 2013

Oxford English Dictionary (2011) Oxford English Dictionary, online version. www.oxforddictionaries.com/definition/intelligence. Accessed 23 Dec 2011

Popular Mechanics website (2008) Non-answer on armed robot pullout from Iraq reveals fragile bot industry. Popular Mechanics, 1 Oct 2009. www.popularmechanics.com/blogs/technology_news/4258103.html. Accessed 21 Dec 2011

Pustogarov V (1996) Fyodor Fyodorovich Martens (1845-1909)—a humanist of modern times. IRRC (312):300–314. http://www.icrc.org/eng/resources/documents/misc/57jn52.htm. Accessed 30 Dec 2011

Report of the Secretary General to the Security Council (2005) Report of the Secretary General to the Security Council on the protection of the civilian population in armed conflict, 28 Nov 2005, UN Doc S/2005/740. http://www.un.org/Docs/sc/committees/sanctions/s99957.pdf. Accessed 30 Dec 2011

Schmitt M (1999) The principle of discrimination in 21st century warfare. Yale Hum Rights Dev Law J 2:143–182. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1600631. Accessed 23 Dec 2011

Sharkey N (2008a) Grounds for discrimination: autonomous robot weapons. RUSI Def Syst:86–89. http://rusi.org/downloads/assets/23sharkey.pdf. Accessed 23 Dec 2011

Sharma S (2008) Reconsidering the Jus Ad Bellum/Jus In Bello distinction. In: Stahn C, Kleffner J (eds) Jus Post Bellum: towards a law of transition from conflict to peace. T.M.C. Asser Press, The Hague, pp 9–30. http://www.elac.ox.ac.uk/downloads/Rodin%20-%20Two%20Emerging%20Issues%20of%20Jus%20Post%20Bellum.pdf. Accessed 30 Dec 2011

Schindler D, Toman J (1988) The laws of armed conflicts. Martinus Nijhoff Publisher, Dordrecht

Sloan R (2009) The cost of conflation: preserving the dualism of Jus Ad Bellum and Jus in Bello in the contemporary law of war. Yale J Int Law 34:48–112. http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1117918. Accessed 11 Dec 2011

Sockification Youtube (2011) http://www.youtube.com/watch?v=KKUaVzf3Oqw. Accessed 30 Dec 2011

The Telegraph (2010) South Korea deploys robot capable of killing intruders along border with North. The Telegraph, 13 July 2010. http://www.telegraph.co.uk/news/worldnews/asia/southkorea/7887217/South-Korea-deploys-robot-capable-of-killing-intruders-along-border-with-North.html. Accessed 23 Dec 2011

Thinkbotics website (2011) www.thinkbotics.com/serpentronic.htm. Accessed 23 Dec 2011

Ticehurst R (1997) The Martens Clause and the Laws of Armed Conflict. IRRC(317). http://www.icrc.org/eng/resources/documents/misc/57jnhy.htm. Accessed 23 Dec 2011

Weiner T (2005) New model army soldier rolls closer to the battlefield. New York Times, 16 Feb 2005. http://query.nytimes.com/gst/fullpage.html?res=9900E7DD133AF935A25751C0A9639C8B63. Accessed 11 Nov 2011

Literature

Ago R (1957) Positive law and international law. AJIL 51:691–733

Arendt H (2006) Eichmann in Jerusalem: a report on the banality of evil. Penguin Classics, New York

Asimov I (1942) Runaround, Astounding science fiction. Street and Smith, Manhattan

Asimov I (1985) Robots and empire. Doubleday, New York

Azzam F (1997) The duty of third states to implement and enforce international humanitarian law. Nordic J Int Law 66:55–75

Blinz G (1960) Die Martens'sche Klausel. Wehrwissenschaftliche Rundschau - Zeitschrift für die Europäische Sicherheit 22:139–160

Brownlie I (1998) Principles of Public International Law. Clarendon Press, Oxford

Capek K (1920) R.U.R (Rossum's Universal Robots). Penguin Classics, New York

Cassese A (2000) The Martens Clause: half a loaf or simply pie in the sky? EJIL 11(1):187–216

Cook K (2007) The silent force multiplier: the history and role of UAVs in warfare. Aerospace conference, IEEE, pp 1–7. http://ieeexplore.ieee.org/xpl/login.jsp?tp=&arnumber=4161584

&url=http%3A%2F%2Fieeexplore.ieee.org%2Fxpls%2Fabs_all.jsp%3Farnumber%3D4161584. Accessed 28 Jan 2013
Coupland R (2001) Humanity: what is it and how does it influence international law? IRRC 83(844):969–989 http://www.icrc.org/eng/resources/documents/misc/57jrlm.htm. Accessed 28 Jan 2013
Doswald-Beck L, Henckaerts J-M (2005) Customary international humanitarian law Volume I: Rules Customary law study. Cambridge University Press, Cambridge. http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf. Accessed 28 Jan 2013
Dunlap C (2007) Targeting hearts and minds: national will and other legitimate military objectives of modern war. In: Epping V, Heintschel von Heinegg W (eds) International humanitarian law facing new challenges. Springer, Berlin, pp 117–125
Durand A (1981) The International Committee of the Red Cross. ICRC, Geneva
Gardner H (1985) Frames of mind: the theory of multiple intelligences. Basic Books, New York
Gardner H (1995) How kids are smart: multiple intelligences in the classroom. National Professional Resources, Port Chester
Gardner H (2002) Interpersonal communication amongst multiple subjects: a study in redundancy. Exp Psychol 49
Goleman D (2011) EQ-emotionale Intelligenz, Jubiläumsedition. Deutscher Taschenbuchverlag, München
Greenwood C (2009) Historical development and legal basis. In: Fleck et al (eds) The handbook of international humanitarian law. Oxford University Press, Oxford, pp 1–44
Grotius H (1625) De Jure Belli Ac Pacis
Hamilton A, Reed A (2009) Meet at dawn, unarmed: Captain Robert Hamilton's account of trench warfare and the Christmas truce in 1914. Dene House Publishing, Warwick
Hoffman M (1984) Empathy, social cognition, and moral action. In: Kurtines W et al (eds) Moral behaviour and development: advances in theory, research and applications, John Wiley & Sons, New York
ICRC (1990) Compendium of reference texts on the International Committee of the Red Cross and Red Crescent Movement. International Committee of the Red Cross and the League of Red Cross and Red Crescent Societies, Geneva
Irving W (2010) Tales of a traveller. Nabu Press, Berlin
Isaacson W (2011) Steve jobs: a biography. Simon & Schuster, New York
Ishiguro H (2005) Android science: towards a new cross-disciplinary framework. Paper presented at the Cog-Sci 2005 workshop: towards social mechanisms of android science, Stresa, Italy
Kahn P (2002) The paradox of riskless war. Philos Public Policy Q 22:2–8
Keegan J (1993) A history of warfare. Pimlico, London
Kreß C (2008) Nulla poena nullum crimen sine lege. In: Wolfrum R (eds) The Max Planck encyclopedia of Public International Law. Oxford University Press, online edition. www.mpepil.com. Accessed 30 Dec 2011
Krishnan A (2009) Legality and ethicality of autonomous weapons. Ashgate Publishing Ltd., Farnham
Khurshid J et al (2004) Military robots—a glimpse from today and tomorrow. 8th International conference on control, automation, robotics and vision, Kunming, China, 6–9th Dec 2004, Conference Publications, vol 1, pp 771–777
Kurzweil R (1990) The age of intelligent machines. MIT Press, Cambridge
Kurzweil R (2000) The age of spiritual machines: when computers exceed human intelligence. Penguin, New York
Kwakwa E (1992) The international law of armed conflict: personal and material fields of application. Kluwer Academic Publishers, Dordrecht
Lin P et al (2008) Autonomous military robotics: risk, ethics, and design. Report prepared for the US Department of Navy, Office of Naval Research (Version 1.0.9.) by the Ethics + Emerging Sciences Group at California Polytechnic State University, San Luis Obispo. http://ethics.calpoly.edu/ONR_report.pdf. Accessed 23 Jan 2013

Lin P et al (2009) Robots in war: issues of risks and ethics. In: Capurro R, Nagenborg M (eds) Ethics and robotics. AKA Verlag, Heidelberg
McCormack T, Radin S (2009) In Memoriam—Avril McDonald, 5 July 1965–13 April 2010. Yearbook of international humanitarian law 2009, pp IX–XII. http://www.asser.nl/upload/documents/1142010_21818In%20Memoriam%20Avril%20McDonald.pdf. Accessed 23 Jan 2013
McBride S (1984) The legality of weapons of social destruction. In: Swinarski C (ed) Studies and essays on international humanitarian law and Red Cross principles in honour of Jean Pictet. Martinus Nijhoff, Dordrecht
Meron T (1998) Human Rights and humanitarian norms as customary law. Clarendon Press, Oxford
Meron T (2000) The Martens Clause, Principles of humanity, and dictates of public conscience. AJIL 94(1):78–89. http://users.polisci.wisc.edu/kinsella/martens%20clause.pdf. Accessed 28 Jan 2013
Mertens T (2006) Nazism, legal positivism and radbruch's thesis on statutory injustice. Law Critique 14(3):277–295
Miller R (2001) Rejecting Radbruch: The European Court of Human Rights and the crimes of the East German leadership. Leiden J Int Law 14(3):653–663
Minton H (1988) Lewis M. Terman: pioneer in psychology testing. New York University Press, New York
Nagel T (1972) War and massacre. Philos Public Aff 1:123–144
Oxford English Dictionary (1989) Oxford English Dictionary, 2nd edn. Clarendon Press, Oxford
Parks W (1990) Air war and the law of war. Air Force Law Rev 32:1–225
Pictet J (1956) Red Cross principles. ICRC, Geneva
Pictet J (1958) The Geneva Conventions of 12 August 1949, Commentary, vol IV. ICRC, Geneva. http://www.icrc.org/ihl.nsf/CONVPRES?OpenView. Accessed 23 Jan 2013
Pictet J (1985) Development and principles of International Humanitarian Law. Martinus Nijhoff and Henry Dunant Institute, Dordrecht/Geneva
Radbruch G et al (2003) Rechtsphilosophie, Studienausgabe. UTB Uni-Taschenbücher Verlag, Tübingen
Riesenberger D, Riesenberger G (2011) Rotes Kreuz und Weiße Fahne - Henry Dunant 1828–1910 - Der Mensch hinter seinem Werk. Donat Verlag, Bremen
Robertson G (2000) Crimes against humanity: the struggle for global justice. Penguin Books, London
Ruti G (2011) Humanity's law. Oxford University Press, New York
Röling B (1960) International law in an expanded world. Djambatan, Amsterdam
Santos D et al (2008) Gecko-inspired climbing behaviors on vertical and overhanging surfaces. In: Proceedings: IEEE ICRA 2008, Pasadena, 19–23 May 2008. http://bdml.stanford.edu/twiki/pub/Main/ClimbingAdhesionPublications/Santos_et_al._-_2008_-_Gecko-inspired_climbing_behaviors_on_vertical_and_overhanging_surfaces.pdf. Accessed 28 Jan 2013
Schachter O (1991) International law in theory and practice. Martinus Nijhoff, Dordrecht
Schmitt M (2007) Asymmetrical warfare and International Humanitarian Law. In: Heintschel von Heinegg W, Epping V (eds) International humanitarian law facing new challenges. Springer, Berlin, pp 11–46
Schwarzenberger G (1958) The legality of nuclear weapons. Stevens, London
Sharkey N (2007) Automated killers and the computing profession. Computer 40(11):122–124. http://ieeexplore.ieee.org/xpl/login.jsp?tp=&arnumber=4385276&url=http%3A%2F%2Fieeexplore.ieee.org%2Fxpls%2Fabs_all.jsp%3Farnumber%3D4385276. Accessed 28 Jan 2013
Sharkey N (2008b) Cassandra or false prophet of doom: AI robots and war. IEEE Comput Soc 23(4):14–17. http://ieeexplore.ieee.org/xpl/login.jsp?tp=&arnumber=4580539&url=http%3A%2F%2Fieeexplore.ieee.org%2Fxpls%2Fabs_all.jsp%3Farnumber%3D4580539. Accessed 28 Jan 2013
Sharkey N (2008c) Computer Science: the ethical frontiers of robotics. Science 332(5909): 1800–1801

Simon H (1982) Models of bounded rationality. MIT Press, Cambridge
Singer P (2009) Military robots and the laws of war. New Atl J Technol Soc 23:25–45. http://www.thenewatlantis.com/docLib/20090203_TNA23Singer.pdf. Accessed 28 Jan 2013
Singer P (2010) Wired for war. Penguin Books, London
Sparrow R (2007) Killer robots. J Appl Philos 24(1):62–77
Stein T (2004) Collateral damage, proportionality and individual criminal responsibility. In: Heintschel von Heinegg W, Epping V (eds) International humanitarian law facing new challenges. Springer, Berlin, pp 157–161
Voth D (2004) A new generation of military robots. IEEE Comput Soc 19(4):2–5 (Los Alamitos). http://ieeexplore.ieee.org/xpl/login.jsp?reload=true&tp=&arnumber=1333028&url=http%3A%2F%2Fieeexplore.ieee.org%2Fxpls%2Fabs_all.jsp%3Farnumber%3D1333028 Accessed 23 Jan 2013
Wallach W, Allan C (2009) Moral machines: teaching robots rights from wrong. Oxford University Press, New York
Walzer M (2000) Just and unjust wars: a moral argument with historical illustrations, 3rd edn. Basic Books, New York
Weintraub S (2002) Silent night: the story of the World War I Christmas truce. Plume, New York
Wortel E (2009) Humanitarians and their moral stance in war: the underlying values. IRRC 91(876):779–802

Chapter 4
Some Reflections on Self-defence as an Element in Rules of Engagement

Frits Kalshoven and Thyla Fontein

Abstract From 16 to 20 June 2007, the International Security Assistance Force (ISAF) and the Taliban were engaged in a fierce battle over Chora, Afghanistan, resulting in many civilian casualties in and around that capital city. ISAF is a coalition of states established to contribute to the maintenance of security, but which through their frequent engagement in actual warfare have become parties to the armed conflict in Afghanistan. As a result, their actions are governed by international humanitarian law. This includes the prohibition of indiscriminate attacks, i.e. attacks expected to cause civilian casualties at a level excessive in relation to the military advantage anticipated. The hostilities in and around Chora have given rise to the question whether they might have violated this prohibition (a question ultimately answered in the negative). In this debate, self-defence was among the arguments raised in justification. Self-defence usually figures as a standard clause in the rules of engagement. These are texts which, established by commanders, permit or limit the use of force by their armed forces. The chapter briefly discusses the character of these instruments and of the clauses they contain. The focus is in particular on the self-defence clause. Self-defence may be individual or collective, and it may arise on three different levels: as national self-defence, unit self-defence or individual self-defence. National self-defence is the right for states to defend themselves against an attack or imminent attack. Unit self-defence is a notion generally accepted in military practice without having a firm legal basis in most countries. In contrast, individual self-defence is recognised in every domestic legal system. In the closing

Frits Kalshoven is Professor Emeritus of Public International and Humanitarian Law, Leiden University, The Netherlands. Thyla Fontein is Master of Public International Law, Leiden University.

F. Kalshoven (✉)
Public International and Humanitarian Law, Leiden University, Leiden, The Netherlands
e-mail: f.kalshoven@kpnmail.nl

T. Fontein
Public International Law, Leiden University, Leiden, The Netherlands
e-mail: thylafontein@gmail.com

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chapter, the chapter focuses on the relevant Dutch legal system, because the troops involved in the battle over Chora were Dutch forces and collective unit self-defence might have been at issue as an exculpatory argument in that case.

Contents

4.1 Introduction

It is a sad occasion when a collection of chapters is produced in memory of a departed colleague. The loss is all the more poignant if, as in the present case, the person who passed away was in full bloom and everything could still be expected of her. The first author has long had the privilege of knowing and working with Avril McDonald. He is grateful, both, for the opportunity to contribute to this liber in her name, and to carry out this work in cooperation with a promising young lawyer who is at the very beginning of her career.

From 16 to 20 June 2007, the International Security Assistance Force (ISAF) and the Taliban were engaged in a fierce battle over Chora, the capital town of Uruzgan province in Afghanistan. While the Taliban, in its attempt to capture the town, killed a great number of civilians, the counter-attack by an ISAF battalion caused many civilian casualties as well. In the debate that followed, one argument was that the ISAF actions could be justified on the grounds of self-defence, a notion that figures as a standard clause in armed forces' rules of engagement. In this chapter, we discuss this notion of self-defence and its possible role in legitimising or justifying the use of force in this type of situation.

ISAF, a coalition of states, was set up in December 2001 in reaction to the September 11 attacks on the World Trade Center in New York and the Pentagon in Washington. In an even more immediate reaction, the United States-led Operation Enduring Freedom (OEF) started in October 2001 as a full-fledged fighting force acting in individual and collective self-defence,[1] with two objectives: to disrupt the Al Qaeda bases in Afghanistan and to remove the Taliban de facto government from power.

[1] As recognised by the United Nations Security Council in Resolution 1368, adopted on 12 September 2001, the day after the Al Qaeda attacks.

OEF rapidly achieved the second objective. With the Taliban de facto government removed from Kabul and an Afghan Interim Authority set up in its place, the Security Council on 20 December 2001 authorised the establishment of ISAF, mandating it to assist the Authority in "the maintenance of security in Kabul and its surrounding areas".[2] As distinct from OEF, ISAF was not established to fight its own war. As a security force, it was designed at the outset to act in support of the Afghan authorities in and around Kabul in their efforts to 'maintain security'. To this end, the Security Council authorised ISAF to "take all measures necessary to fulfil its mandate".[3] While the clause 'all measures necessary' in a Security Council resolution generally implies authorisation to use lethal force, the quoted phrase limits this to such measures as might become necessary to 'assist in the maintenance of security'. This task was likely to involve a level of force higher than that allowed in a classical peacekeeping operation, but was intended to remain below the level of all-out warfare. This suited participating governments, who wanted to avoid the suggestion that they might be involved in an armed conflict, let alone one linked to the U.S. 'War on Terror'.[4]

The situation changed in 2003; in August, NATO assumed the leadership of ISAF,[5] and in December, the Security Council expanded ISAF's mandate to cover other Afghan regions.[6] From that moment onwards, ISAF took over command in an increasing number of Afghan regions, and in July 2006 in the southern region. This included Uruzgan,[7] a province which at the time was regarded as relatively peaceful, enabling the Task Force Uruzgan (at the time, a Dutch battalion) to engage in numerous activities aimed at improving the living conditions of the local populace. However, the situation did not remain stable, witness the fierce battle waged in June 2007 to prevent the Taliban from capturing the capital. In this

[2] United Nations Security Council, Resolution 1368, 12 September 2001, U.N. Doc. SC RES 1386 (2001), para 1; The Afghan Interim Authority in late 2002 was succeeded by the Afghan Transitional Authority.

[3] Ibid., para 3.

[4] See also Cole 2009, p. 145: "Although positions on the legal basis for operations varied among ISAF contributing nations, most relied on a combination of the Security Council Resolution and the consent of the government of Afghanistan. In fact, many contributing nations were pleased to distance themselves from the US notion of the Global War on Terror, understanding it (rightly or wrongly) to be the concept of an international armed conflict against international terrorist organizations wherever they might be in the world".

[5] "On 11 August 2003 NATO assumed leadership of the ISAF operation, ending the six-month national rotations. The Alliance became responsible for the command, coordination and planning of the force, including the provision of a force commander and headquarters on the ground in Afghanistan". NATO website ISAF, History para 3.

[6] United Nations Security Council, Resolution 1510, 13 October 2003, U.N. Doc. S/RES/1510 (2003).

[7] The decision taken on 8 December 2005 by the NATO foreign ministers "was implemented on 31 July 2006, when ISAF assumed command of the southern region of Afghanistan from US-led Coalition forces, expanding its area of operations to cover an additional six provinces – Day Kundi, Helmand, Kandahar, Nimroz, Uruzgan and Zabul …" NATO website ISAF, Stage 3, to the south, para 2.

'battle of Chora' all kind of weaponry was used, including heavy artillery and long-distance air support. The numerous civilian casualties ISAF's action had entailed ran counter to what may be the essence of the type of 'counter-insurgency operation' it was engaged in, which is to "remain friendly towards the populace while staying vigilant against insurgent actions".[8]

The question arises whether this state of affairs warranted the conclusion that international humanitarian law (IHL) had become applicable. A first point to note here is that in 2001, the invasion of Afghanistan by the U.S.-led OEF had brought the partners of that coalition into a situation of international armed conflict, with Al Qaeda and Afghanistan (at the time, the Taliban and the Afghan army) as opponents.[9] In contrast, and although ISAF was established at about the same time as OEF, this body was not set up as a participant to the conflict.

In 2003, with the Taliban ousted from power, the situation in the country changed into one of internal armed conflict with, in *jus ad bellum* terms, the Taliban in the offence and the Afghan authorities in the defence.[10] ISAF, for its part, assisted the authorities in the maintenance of security. While, as noted before, this could be a fairly peaceful activity, hostilities flared up from time to time, culminating in a case like Chora where ISAF undertook to defend the town against a very determined Taliban attack; a case of open warfare. Given these circumstances, as a matter of *jus in bello*, ISAF members had become parties to the armed conflict as well.[11] Note that qualification of a situation as an armed conflict does

[8] As stated in Chapter 5, Executing Counterinsurgency Operations, of FM 3-24.

[9] The United States also claimed to wage war against Al Qaeda: the 'War on Terror'. We do not enter into this claim here. On the characterisation of the situation as an international armed conflict, see also Cole 2009, p. 143: "Early coalition contributions to the invasion of Afghanistan also reflected the generally held view that this was an international armed conflict. The deployment of forces and the details of their rules of engagement (ROE) were based on the premise that this was a conflict between the 'coalition of the willing' on the one hand and Taliban forces, al Qaeda and the Afghan army on the other".

[10] In terms of *jus in bello*, the authorities were bound by Common Article 3 of the Geneva Conventions of 1949, as well as by the generally accepted humanitarian principles and rules of customary law. Afghanistan became a party to the Additional Protocols of 1977 to the 1949 Geneva Conventions only in 2009; Geneva Conventions (I, II, III, IV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125; Information available on the website of the International Committee of the Red Cross, http://www.icrc.org/.

[11] Our conclusion differs theoretically, though not practically, from views expressed by Boddens Hosang and Ducheine who, in line with an opinion expressed by the Dutch Government, hold that while the relatively quiet phases of ISAF presence do not qualify as an armed conflict, the Chora incident and similar events represent temporary and local armed conflicts leading to *de jure* applicability of the *jus in bello*. Ducheine and Pouw 2009, also quoting Boddens Hosang 2009.

not require continuous warlike activity, nor must a party to an armed conflict be set on destroying its opponent: defence is warfare as well.

A next question is whether the conflict the ISAF members had become parties to, amounted to an international or non-international armed conflict. On this, we may rely on the International Committee of the Red Cross (ICRC), which in a recent report notes the emergence of a category of conflicts it indicates as "multinational NIACs" (non-international armed conflicts):

> [A]rmed conflicts in which multinational armed forces are fighting alongside the armed forces of a "host" state – in its territory – against one or more organized armed groups. As the armed conflict does not oppose two or more states, i.e. *as all the state actors are on the same side, the conflict must be classified as non-international*, regardless of the international component, which can at times be significant. A current example is the situation in Afghanistan (even though that armed conflict was initially international in nature).[12]

The ICRC adds that in this case, "[t]he applicable legal framework is Common Article 3 and customary IHL". Article 3 common to the four Geneva Conventions of 1949 provides basic standards of human behaviour for any situation of armed conflict, but these do not concern actual warfare.[13] However, the reference to 'customary IHL' is meant to cover this lacuna: here, the ICRC has its study on 'Customary International Humanitarian Law' in mind.[14] The study identifies 161 rules, with the majority stated to be applicable in non-international armed conflicts as well.

All of this leads to the conclusion that, in theory, Common Article 3 combined with customary law and, in practice, the law of international armed conflict, are indeed applicable to those ISAF activities that were actually governed by IHL. This includes an operation like the defence of Chora, but also in ostensibly more peaceful times, the frequent search for IED, the ill-famed 'improvised explosive devices' or the forceful search of houses believed to shelter persons engaged in planting such devices, yet another 'defensive' activity that has entailed numerous civilian casualties.

It was precisely after the Chora incident that the self-defence argument cropped up. As mentioned at the outset, it was in this context that the phenomenon of rules of engagement (RoE) entered into play: documents in which self-defence holds a prominent place.

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[12] ICRC 2011 (emphasis added).

[13] Common Article 3 to the Geneva Conventions of 1949, *supra* note 10, provides in part that "each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

[…]

2) The wounded and sick shall be collected and cared for.

[…]".

[14] Henckaerts and Doswald-Beck 2005.

4.2 Rules of Engagement

The behaviour of military units on mission is governed by a variety of sources, from treaties and national laws down to the operational order of the day. Somewhere in between hover RoE.[15] These are texts designed *inter alia* to influence conduct and, in particular, the use of force. They are neither formal lawmaking instruments nor, at the other extreme, do they set the operational targets that units are expected to achieve. The U.S. Dictionary of Military and Associated Terms defines them as "[d]irectives issued by competent military authority that delineate the *circumstances* and *limitations* under which United States forces will initiate and/or continue combat engagement with other forces encountered".[16]

Another U.S. publication, entitled 'Legal Support to Military Operations', adds that RoE must be "reviewed by legal advisors for compliance with applicable law and policy".[17] A slightly older manual provides in somewhat broader terms that RoE "may take the form of execute orders, deployment orders, memoranda of agreement, or plans", and it states that "[p]roperly developed rules of engagement fit the situation and are clear, reviewed for legal sufficiency, and included in training […] Rules of engagement vary between operations and may change during an operation. Adherence to them ensures Soldiers act consistently with international law, national policy, and military regulations".[18]

Rules of engagement are widely used, by states individually and, with the growing frequency of combined operations such as OEF and ISAF, by coalition forces as well. NATO document MC 362/1, NATO Rules of Engagement, broadly defines RoE as "directives to military forces (including individuals) that define the circumstances, conditions, degree, and manner in which force, or actions which might be construed as provocative, may be applied".[19] The Sanremo Handbook on Rules of Engagement,[20] a publication of the Sanremo International Institute of Humanitarian Law, stays closer to the military language of the U.S. Dictionary when it defines RoE as texts "issued by competent authorities and [that] assist in the delineation of the circumstances and limitations within which military forces may be employed to achieve their objectives". It adds that "[w]hatever their form, [RoE] provide authorisation for and/or limits on, among other things, the use of force, the positioning and posture of forces, and the employment of certain specific

[15] The acronym is variously written as ROE and RoE. While official documents often choose the first version, we have preferred the second as the more elegant.

[16] Department of Defense 2010.

[17] Department of Defense 2011.

[18] FM 3-0 paras 1–85, pp. 1–19.

[19] Bumgardner et al. 2010, p. 254.

[20] Cole et al. 2009; At the Round Table of the Institute, which was held from 8 to 10 September 2011 in Sanremo, the audience was informed that the Handbook meanwhile has been translated into a great number of languages.

capabilities".[21] RoE "are not used to assign missions or tasks [or] to give tactical instructions", such matters "are assigned through Operations orders and other similar instruments of command and control".[22]

The Handbook notes that "[t]he conduct of military operations is governed by international law, including the law of armed conflict (LOAC)". It adds that "[b]oth nations and individuals are obliged to comply with LOAC".[23] That may be so, but current history provides many examples of parties to armed conflicts, and especially armed opposition groups, that order their forces to use violence against the civilian population in general or specified (categories of) civilians, or against objects under special protection, such as hospitals or vehicles provided with the Red Cross or Red Crescent emblem, all of this in blatant violation of the law.[24] It does not seem unlikely that such parties state their intentions in texts comparable to the RoE of the Sanremo Handbook. At all events, it should be noted that respect of the law is not an inherent element of RoE.

The Sanremo Handbook refers to the reverse possibility, of RoE prescribing conduct that remains below the upper limit of lawful violence: "in some circumstances, [states] may limit permissible levels of incidental injury or collateral damage to levels below that acceptable under LOAC […]". It accordingly "allows for the creation of RoE that *provide for the conduct of operations in compliance with national policy*".[25] Depending on its formulation, such a provision may amount to a standing order under the applicable domestic military law.

The Handbook distinguishes between many different situations, each with their own peculiarities regarding permissible or advisable recourse to violence, and lethal force in particular. Rather than entering into these many possibilities, we refer the reader to the long list of detailed suggestions set forth in Annex B, the 'Compendium of ROE'.[26] We may recall the two situations mentioned in the Introduction: OEF, a full-fledged armed conflict, and ISAF, a security operation.[27]

ISAF's operations in support of a friendly government have led to frequent review of the RoE, in particular, as the political need to avoid casualties among the civilian population grew. It should be noted here that adaptability to changes in the

[21] Cole et al. 2009, p. 1.

[22] Ibid., p. 2.

[23] Ibid; The law of armed conflict is synonymous to 'international humanitarian law' (IHL).

[24] A particularly notorious case was the attack on the World Trade Center, with Al Qaeda claiming that the people working there could be equalled to combatants. In general, the past 'liberation wars' as well as recent cases of 'asymmetric warfare' in the Middle East and elsewhere provide an endless stream of acts violating the most fundamental principles of IHL.

[25] Cole et al. 2009, p. 2 (emphasis added).

[26] Cole et al. 2009, pp. 28–62.

[27] NATO classifies situations of this type in politically even more neutral terms as Non-Article 5 Crisis Response Operations, i.e., situations that do not (as required in Article 5 of the North Atlantic Treaty) arise from an armed attack against one or more of the member states that would be considered an attack against them all; See AJP-3.4 (A) 2010.

physical or political field is a general characteristic that sets RoE apart from treaties and other sources of international law regulating the conduct of war.

4.3 Self-defence as a Key Element in Rules of Engagement

As briefly mentioned in Part I, a predominant feature of many contemporary RoE is the insistence on self-defence. The very first point the addressees may note is that they have the right to self-defence; and, as if this were not enough, the text may close with a repetition of the reminder of their right to self-defence. A soldiers card issued in December 1992 to members of a U.S. unit engaged in a relief operation in Somalia notes that "[n]othing in these Rules of Engagement limits your right to take appropriate action to defend yourself and your unit"; goes on to confirm that "[y]ou have the right to use force to defend yourself against attacks or threats of attack", and, removing even the last conceivable bit of doubt, recalls that the addressee must always be "prepared to act in self-defense".[28]

An annex to the Sanremo Handbook provides model RoE cards which summarise "the key ROE principles regulating the use of force by individuals for a particular mission".[29] Cards are provided for three distinct situations involving military action indicated as 'self-defence', 'peace operations' and 'armed conflict', with the level of permitted force increasing with every step on the ladder. Self-defence refers to the classical peacekeeping mission that does not in and of itself include active recourse to force; peace operations constitute the middle category that includes today's notions of security assistance and counter-insurgency, and armed conflict refers to the situation of plain warfare.

The model RoE cards each open with the identical message that "nothing in your ROE limits your right to take action in self-defence", adding that only such force may be used as is "necessary to *neutralise* the threat", this includes deadly force.[30] The Handbook distinguishes three types of self-defence: national self-defence, unit self-defence and individual self-defence. National self-defence is "the defence of a nation, a nation's armed forces, and a nation's persons and their property"; unit self-defence is "the right of unit commanders to defend their unit, other units of their nation, and other specified units" and individual self-defence is "the right of an individual to defend himself or herself (and in some cases other individuals)".[31]

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[28] FM 100-23, Appendix D, Annex A: ROE Card, Joint Task Force for Somalia Relief Operations—Ground Forces.

[29] Cole et al. 2009, pp. 71–75.

[30] The cards provide that before opening fire in self-defence, and "if time and circumstances permit … [y]ou are to warn by shouting". This suggests that the model RoE presented in the Handbook are soldiers cards. These characteristically contain far less policy, if any, than do the RoE directed at higher levels.

[31] Cole et al. 2009, pp. 83–85.

What do these clauses stand for; what practical significance can they have and what law, if any, do they refer to? Here, some general points may be noted at the outset. First, the fact that a RoE is in force presupposes the existence of one of the three types of situation, mentioned above, where the military may have an active role to play. And, second, recourse to any right of self-defence in a legal procedure can only arise if the claimant stands accused of an act in contravention of a rule of (international or domestic) law or other norm-setting provision, for instance, the applicable RoE.

Taking the right of national self-defence first, this obviously refers to the right of the state to defend itself against foreign armed attacks, as provided in Article 51 of the UN Charter. Individual claims might conceivably arise if the military authorities of a country at war stand accused of having made the armed forces conduct hostilities in flagrant violation of IHL; the argument might be that the war would otherwise have been lost. At the International Criminal Court, the claim would be expressly excluded; Article 31 (1b) of the Statute provides that "[t]he fact that [a] person was involved in a defensive operation conducted by forces shall not in itself constitute a ground for excluding criminal responsibility". Apart from that, the treaties in force make the point clear that the law must be respected "in all circumstances", including the case where the war has taken a wrong turn.[32]

Other scenarios might be envisaged where lower personnel of a country at war claim that an act in violation of the law or of the applicable RoE was committed in defence of the nation. However, the chance that the claim is honoured in a court of law seems slim indeed, given the lack of a basis in existing criminal legislation.

In effect, the real significance of the national self-defence clause may lie outside the legal realm, conveying the message that "all is well, you are fighting for a just cause". This may actually reflect the internationally recognised legitimacy of an operation. Where authorisation was not sought (because the state has decided to commit an act of aggression) or has been withheld (as with the invasion of Iraq in 2003 by the U.S.-led 'coalition of the willing'), the message that "you have the right of self-defence" may even more clearly act as a moral boost, proclaiming that "the world may have refused our claim but we are doing the right thing".

The next item on the list, unit self-defence, leads to similar questions. There is no doubt that the notion of 'unit' has a strong resonance in many armed forces. Company commanders may have become friends at the military school and soldiers probably were in the same boot camp. Units of these lower echelons may be strongly inclined to assist each other; and if this results in a violation of their RoE, the excuse that it was a matter of collective unit defence may lie readily at hand.

[32] Thus, the identical provision in Article 1 of the four Geneva Conventions of 1949 and Additional Protocol I of 1977, *supra* note 10; text available on the website of the ICRC, www.icrc.org.

Again, however, unit self-defence appears not to have found a place in many existing criminal legislations[33] and, again, the true significance of the right of unit self-defence may lie in its cohesive power.[34]

There remains the right of individual self-defence as specified on a soldiers card, i.e. self-defence by individual members of armed forces.[35] Here, the situation is the opposite of the two preceding cases: the claim of individual self-defence in justification of an unlawful act is as universally recognised as individual claims of national or unit self-defence are unknown. The facts underlying claims arising in the context of military operations will obviously differ from what normally happens on the domestic scene. Even so, it is generally accepted that in the military sphere, for a claim of self-defence to be accepted, it must have been both necessary as a last resort and proportionate to the perceived threat. Indeed, the RoE itself may include these requirements in the phrase formulating the individual right of self-defence.

Another matter is that domestic legislation and practice on self-defence are not identical in all countries. We will not discuss these differences, confining us further down to the situation in the Dutch legal system. It remains to consider here in what circumstances recourse to the right of self-defence will be necessary.

Take the case of an ISAF soldier who, on a mission expected to involve the use of force, advances in terrain under Taliban control: if he receives and returns fire, this is just warfare, and there is no place for a claim of individual self-defence. However, when the soldier kills an unidentified person who turns out to have been an unarmed civilian, the soldier is guilty of an unlawful killing and, if prosecuted, will escape punishment if his appeal to the right of self-defence is honoured.

The general conclusion is that a claim of individual self-defence in a warlike situation may enter into play when a soldier carries out an act which, whether or not part of the task he was ordered to perform, appears to have resulted in a violation of the applicable law of armed conflict. Whether the claim is honoured ought to depend exclusively on the facts of the case. This should in principle be a matter for a court to decide. In practice, it is equally possible that as a matter of policy, claims of self-defence are accepted at an earlier stage without all that much formal investigation, in order thus to keep cases out of the public eye.

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[33] An important exception is the United States, where unit self-defence is not merely a right but an obligation, and individual self-defence is a derivate of unit self-defence: "Unit commanders always retain the inherent right and obligation to exercise unit self-defense in response to a hostile act or demonstrated hostile intent. Unless otherwise directed by a unit commander as detailed below, military members may exercise individual self-defense in response to a hostile act or demonstrated hostile intent. When individuals are assigned and acting as part of a unit, individual self-defense should be considered a subset of unit self-defense. As such, unit commanders may limit individual self-defense by members of their unit." Operational Law Handbook 2012, Chapter 5, E 2, a (1) Inherent Right of Self-Defense.

[34] For an author who paid particularly close attention to the notion of unit self-defence, see Stephens 1998.

[35] The term 'individual self-defence' is also used as the counterpart of 'collective self-defence'.

4.4 Self-defence and Rules of Engagement in Dutch Law

As mentioned in the Introduction, on 16 June 2007, Taliban forces attacked the Chora district of Uruzgan province and primarily Dutch ISAF troops employed artillery shelling and airstrikes to regain control over the district, resulting in numerous civilian casualties. Following investigations into the battle over Chora by the Dutch Government, UN Assistance Mission in Afghanistan, Afghanistan Independent Human Rights Commission and others, various reports suggest evidence that the acts may have amounted to violations of Common Article 3 of the Geneva Conventions and questioned whether less damaging methods could have been used. However, they generally concluded that the actions were in accordance with IHL, and the Dutch Ministers of Foreign Affairs, Defence and Cooperation Development stated that defending Chora fell within ISAF's mandate and was permitted based on the right to self-defence and the RoE.[36] In this way, self-defence was advanced as justification for the acts committed by the Dutch forces and mentioning the right to self-defence might have caused confusion as to which level of self-defence, as described above, was meant. With respect to national self-defence, it is accepted that the Netherlands, as contributing nation to NATO, was acting in collective self-defence through permission of the Security Council.[37] In order to understand such claim as individual self-defence, one must understand it within the Dutch legal system.

Dutch authorities have exclusive criminal jurisdiction over Dutch ISAF personnel and these are therefore immune from arrest or detention by Afghan authorities.[38] This is determined in the Military Technical Agreement signed by the Afghan Interim Administration and ISAF in 2002.[39] Moreover, when making status of forces agreements, the Minister of Defence ensures that the Netherlands has exclusive criminal jurisdiction over its soldiers. This jurisdiction is also established in Dutch legislation, and thus the Netherlands has jurisdiction over all criminal acts of Dutch soldiers, wherever they take place.[40]

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[36] Ministers van Buitenlandse Zaken, Defensie en Ontwikkelingssamenwerking 2007.

[37] Ministerie van Defensie 2010.

[38] Fournier 2007.

[39] Military Technical Agreement Between the International Security Assistance Force (ISAF) and the Interim Administration of Afghanistan ('Interim Administration'), Annex A, Section 1.

[40] Wetboek van strafrecht, 3 March 1881, Articles 2 and 4 of the Dutch Military Criminal Code from http://wetten.overheid.nl/BWBR0001854/geldigheidsdatum_15-11-2012; Borghouts et al. 2006, p. 15.

In the Netherlands, the International Crimes Act,[41] the Dutch Military Criminal Code,[42] and the Dutch Criminal Code[43] make punishable the unlawful use of force by soldiers. When Dutch military forces operate in an international coalition such as ISAF, the legitimacy of the use of force is also dependent on the mandate set by the coalition or organisation. ISAF has a mandate to use force under Chapter VII of the UN Charter and thus also falls under the authority of the UN Security Council. As mentioned earlier, in 2003, NATO took command of ISAF and set the RoE for ISAF. When an unlawful use of force is suspected, there are different ways in which self-defence, independently or as stated in RoE, can function as a justification or excuse for the violation under Dutch law. Section 1 of the Dutch Criminal Code consists of general provisions including the grounds excluding criminal responsibility, which also apply to offences in the Dutch Military Criminal Code, as long as the law does not provide otherwise.[44] At the most basic level, a Dutch soldier, like anybody else, is always able to claim his individual right to self-defence based on Article 41[45] of the Dutch Criminal Code, as reflected in the self-defence clause in the RoE.

Another ground excluding criminal responsibility can be found in Article 42[46] of the Dutch Criminal Code, which justifies an act when it is reasonably necessary in order to execute a legal duty. Similarly, if RoE were considered an official order from a Dutch authority,[47] these could also lead to the exclusion of criminal responsibility pursuant to Article 43[48] of the Dutch Criminal Code, if the act was reasonably necessary to carry out that official order.[49] There was extensive discussion in the Netherlands and there remains disagreement on the status of RoE and tactical directives issued by foreign military authorities, and whether they are

[41] Wet Internationale Misdrijven, 16 August 2009, from http://wetten.overheid.nl/BWBR0015252/geldigheidsdatum_16-08-2009.

[42] Wetboek van Militair Strafrecht, 27 April 1903, from http://wetten.overheid.nl/BWBR0001869/geldigheidsdatum_22-12-2011.

[43] Wetboek van Strafrecht, *supra* note 40.

[44] De Graaff 1965.

[45] Article 41 states: "1. A person who commits an offense where this is necessary in the defense of his person or the person of another, his or another person's integrity or property, against immediate, unlawful attack is not criminally liable [justification]. 2. A person exceeding the limits of necessary defense, where such excess has been the direct result of a strong emotion brought about by the attack, is not criminally liable [excuse]."

[46] Article 42 states: "A person who commits an offense in carrying out a legal requirement is not criminally liable [justification]."

[47] Ambtelijk bevel.

[48] Article 43 states: "1. A person who commits an offense in carrying out an official order issued by a competent authority is not criminally liable [justification]. 2. An official order issued without authority does not remove criminal liability unless the order was assumed by the subordinate in good faith to have been issued with authority and he complied with it in his capacity as subordinate [excuse]."

[49] Dolman et al. 2005, p. 409.

considered legal provisions, legal orders or something else.[50] The suggestion was raised to allow foreign military authorities to gain the same legal position as a Dutch commanding officer that decides on the RoE, through Article 75(a)[51] of the Dutch Military Criminal Code.[52]

In one case, the Court of Appeals in Arnhem decided that the applicable RoE fell "within the scope of the term 'military order' pursuant to Article 135"[53] of the Dutch Military Criminal Code.[54] However, it did not decide that all RoE be considered legal orders.[55] In the case before us, the RoE in force for ISAF at the time would have to be analysed and a judge would have to decide whether these meet the demands of Article 135. If they would, then violating the RoE would be unlawful but might be justified by the self-defence clause therein.

Article 38[56] of the Dutch Military Criminal Code offers a solution to the issues presented by the previously discussed articles. When combining this article with Article 71,[57] an otherwise unlawful act committed during an armed conflict that is in conformity with IHL and within the limits of a soldier's competence cannot be punished. Since ISAF was operating during an armed conflict as recognised by the government of the Netherlands, this article is of great significance. It can be used as a defence to exclude criminal responsibility, and it thereby offers protection for soldiers during armed conflicts, in which circumstances are different than normal

[50] Dolman et al. 2005, p. 406; Jorg 1996, p. 54; Kroon and Jacobs 1996, pp. 124–130; Vink 2010, pp. 86–91; Coolen and Walgemoed 2008, pp. 95–97; Coolen and Walgemoed 1996, pp. 238–241.

[51] Article 75a states: "Een verhouding van meerdere tot mindere bestaat ten opzichte van vreemde militairen slechts voor zover zulks door Ons of van Onzentwege door door Ons aan te wijzen autoriteiten wordt bepaald."

[52] Kroon and Jacobs 1996; Coolen and Walgemoed 1996, p. 239.

[53] Article 135 states: "Onder dienstvoorschrift wordt verstaan een bij of krachtens algemene maatregel van Rijksbestuur of van bestuur dan wel een bij of krachtens landsverordening onderscheidenlijk landsbesluit gegeven schriftelijk besluit van algemene strekking dat enig militair dienstbelang betreft en een tot de militair gericht ge- of verbod bevat."

[54] Judgment Court of Appeal (Military Division) Arnhem, The Netherlands, Case No. 21-006275-04, 4 May 2005 ("Het hof is van oordeel dat de ROE voldoen aan alle eisen, die artikel 135 van het Wetboek van Militair Strafrecht aan een dienstvoorschrift stelt", juridisch kader para b5, http://zoeken.rechtspraak.nl/resultpage.aspx?snelzoeken=true&searchtype=ljn&ljn=AT4988&vrije_tekst=21-006275-04); Dieben and Dieben 2005; Knoops 2008, p. 181.

[55] Dolman et al. 2005, p. 409.

[56] Article 38 states: "1. Niet strafbaar is hij die in tijd van oorlog binnen de grenzen zijner bevoegdheid een naar de regelen van het oorlogsrecht geoorloofd feit begaat, of wiens bestraffing strijdig zou zijn met een verdrag, geldende tussen Nederland en de mogendheid waarmede Nederland in oorlog is, of met enig voorschrift, ingevolge zodanig verdrag vastgesteld. 2. Niet strafbaar is de militair die geweld gebruikt in de rechtmatige uitoefening van zijn taak en in overeenstemming met de regels die voor de uitoefening van die taak zijn vastgesteld."

[57] Article 71 states: "In dit wetboek wordt onder oorlog mede verstaan: een gewapend conflict dat niet als oorlog kan worden aangemerkt en waarbij het Koninkrijk is betrokken, hetzij ter individuele of collectieve zelfverdediging, hetzij tot herstel van internationale vrede en veiligheid."

and urgent decisions may have to be made without time to discuss alternative options. In the event that the RoE would permit a more extensive use of force than permitted by IHL, IHL would serve as the upper limit, as decided in this provision. Paragraph 2 of Article 38 is the most significant provision. This paragraph came into force in November 2010 and has retroactive effect on the basis of Article 1 of the Dutch Criminal Code.[58] It excludes punishment when a soldier uses force in the legitimate exercise of his tasks and competency, and in compliance with the rules set for the exercise of his tasks. This article includes orders and instructions, especially the RoE, aide-mémoire and soldiers card issued by foreign military authorities.[59] This provision also covers situations that are not recognised as an armed conflict and are thus not covered by para 1.[60] This means that RoE can be used to exclude criminal responsibility when they have been properly followed. Jurisprudence with respect to this article still needs to develop; however, the need for a stricter rule than how it currently stands might increase.

It seems that Article 38(2) underlies the decision of the public prosecutor not to prosecute Dutch forces for the incident in Chora. Although some of the investigations and reports suggest that there is evidence that the acts may have amounted to violations of Common Article 3 of the Geneva Conventions,[61] the Office of the Public Prosecutor decided to terminate its investigation. It concluded that the use of force was exercised in accordance with IHL, the applicable RoE and the right to self-defence.[62] The ministers also stated that the use of airplanes and helicopters was in accordance with ISAF rules and procedures.

In all these military cases, there remains a problem regarding prosecution. Decisions to prosecute are still very much a political choice, because the public prosecutor makes this decision together with the minister of defence. In cases where the involved military authority is against a criminal procedure, because it may be in conflict with the interests of the armed forces, the minister of defence resolves this disagreement with the minister of justice. Specific cases might not be dealt with due to various interests involved, especially the protection of a country's reputation and preventing bad publicity.

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[58] Article 1 states: "1. No act or omission is punishable which did not constitute a criminal offense under the law at the time it was committed. 2. Where a change has been made in the law subsequent to the time the offense was committed, the provisions of the law most favorable to the accused shall be applicable."

[59] Ducheine 2010, p. 152.

[60] Ibid., p. 150.

[61] AIHRC and UNAMA.

[62] Ministerie van Defensie 2008.

4.5 Conclusion

Having looked at the rules of engagement and self-defence as a justification for the battle over Chora, one can see that this claim could have been based on various grounds. National self-defence is undoubtedly not applicable in this case. Unit self-defence on the other hand, can be argued, but due to the lack of a legal basis, would be unlikely to succeed. Lastly, individual self-defence could have been argued, but due to the fact that the acts occurred in an armed conflict, allows international humanitarian law to be the governing set of rules. The significance of self-defence clauses in RoE lies in the fact that they simply repeat the inherent right of soldiers to protect themselves and thereby reflects domestic rules on self-defence. In the Netherlands as in other countries, self-defence is recognised in its Criminal Code and is not notably different to other countries. The status of the RoE, however, has developed within the Dutch legal system and has been given a fundamental legal status in 2010. This step was finally taken after heavy discussion on their foundation and role in the Dutch legal system. As a result of the newly implemented article, the rules of engagement, even those issued by foreign military authorities, are now recognised as a legitimate body of rules to be followed by Dutch soldiers, even though rules of engagement are changeable.

References

Documents

AIHRC and UNAMA, Joint investigation into the civilian deaths caused by the ISAF operation in response to a Taliban attack in Chora district, Uruzgan on 16th June 2007. http://www.warisboring.com/wp-content/uploads/2007/11/aihrc_chora11.pdf. Accessed 30 Dec 2011

Bumgardner S et al (2010) NATO Legal Deskbook. http://transnet.act.nato.int/WISE/Library/Legal/LEGALDESKB/file/_WFS/LEGAL%20DESKBOOK%20FINAL%20version%20-%2022%20SEPT%202010.pdf. Accessed 31 Dec 2011

Cole A et al (2009) San Remo handbook on rules of engagement, IIHL, San Remo. Available on the website of the International Institute of Humanitarian Law, San Remo. www.iihl.org. Accessed 30 Dec 2011

FM 3-0: Field Manual No. 3-0, Operations; Headquarters, Department of the Army, Washington, DC, 27 Feb 2008

FM 100-23: Field Manual No. 100-23, Peace Operations; Headquarters, Department of the Army, Washington, DC, 30 Dec 1994

Henckaerts J-M, Doswald-Beck L (2005) Customary International Humanitarian Law. Now available as a daily updated database. www.icrc.org/eng/war-and-law/treaties-customary-law/customary-law. Accessed 30 Dec 2011

ICRC (2011) International Humanitarian Law and the challenges of contemporary armed conflicts, Report prepared for the 31st International conference of the Red Cross and Red Crescent, Geneva, 28 November–1 December 2011, Part II. The Notion and Typology of Armed Conflicts, section 2, Classification of Armed Conflicts, a) Typology of Common Article 3 NIACs. www.rcrcconference.org/docs_upl/en/31IC_IHL_challenges_report._EN.pdf. Accessed 30 Dec 2011

Ministers van Buitenlandse Zaken, Defensie en Ontwikkelingssamenwerking (2007) Bestrijding internationaal terrorisme. http://www.rijksbegroting.nl/algemeen/gerefereerd/1/1/0/kst110402.html. Accessed 30 Dec 2011

Ministerie van Defensie (2008) OM: Geweldsaanwendingen Chora rechtmatig. http://www.defensie.nl/actueel/nieuws/2008/06/30/4686547/OM_Geweldsaanwendingen_Chora_rechtmatig. Accessed 30 Dec 2011

Ministerie van Defensie (2010) Het Nederlandse aandeel in operatie Enduring Freedom. http://www.defensie.nl/nimh/geschiedenis/internationale_operaties/missieoverzicht/46169139/enduring_freedom/nederlandsaandeel. Accessed 30 Dec 2011

Operational Law Handbook (2012) International and Operational Law Department. The Judge Advocate General's Legal Center and School, Charlottesville, Virginia

Literature

AJP-3.4 (A) (2010) NATO, Allied Joint Doctrine for Non-Article 5 Crisis Response Operations. http://www.cimic-coe.org/download/AJP_3.4.9_CivMilCoop_ratification_draft.pdf

Boddens Hosang J (2009) Aandachtspunten in de ISAF ROE vanuit het strategisch-juridische kader, 102 Militair Rechtelijk Tijdschrift 5, pp 219–226

Borghouts H et al (2006) Borghouts H, Daverschot R, Gillissen G, Evaluatie toepassing militair strafprocesrecht bij uitzendingen. http://www.eerstekamer.nl/id/vi3heba3h2wg/document_extern/w31487rapportcieborghouts/f=/vi3hed1fqxxy.pdf

Cole A (2009) Legal issues in forming the coalition. In: Schmitt MN (ed) The war in Afghanistan, Legal Analysis, vol 85 U.S. Naval War College International Law Studies, Naval War College, Newport, pp 141–153

Coolen G, Walgemoed G (1996) Dienstopdrachten gegeven door buitenlandse militairen. Militair Rechtelijk Tijdschrift 89:238

Coolen G, Walgemoed G (2008) Militair Strafrecht. Kluwer, Deventer

De Graaff H (1965) Outlines of military criminal and disciplinary law in the Netherlands. Mil Law & Law War Rev 4:17

Department of Defense (2010) Joint Publication 1-02, Department of Defense Dictionary of Military and Associated Terms (as amended through 15 August 2012). http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf

Department of Defense (2011) Joint Publication 1-04, Legal Support to Military Operations, I-12: Chapter I, figure I-3. http://www.dtic.mil/doctrine/new_pubs/jp1_04.pdf

Dieben D, Dieben T (2005) Aspects concerning the criminal case against Eric O. http://www.libertysecurity.org/article351.html

Dolman M et al (2005) Dolman M, Gill T., Ducheine P., Functioneel geweldgebruik in internationale operaties: een spiegel van rechtspraak en praktijk. Militair Rechtelijk Tijdschrift 10:369

Ducheine P (2010) De status van aanwijzingen van buitenlandse commandanten bij de beoordeling van functioneel militair geweldgebruik. Militair Rechtelijk Tijdschrift 103(3):145

Ducheine P, Pouw E (2009) Operaties in Afghanistan: Rechtsbases en rechtsregimes, Research Paper 91, Faculty of Military Sciences, Netherlands Defence Academy, p 34. http://dare.uva.nl/document/215152

Fournier S (2007) NATO Military Interventions Abroad: How ROE are adopted and jurisdictional rights negotiated. Paper presented at the XVth international congress of social defence entitled: "Criminal Law between war and peace: Justice and cooperation in criminal matters in international military interventions", Toledo, Spain. http://www.defensesociale.org/xvcongreso/ponencias/SylvainFournier.pdf

Jorg N (1996) De zaak Clegg. Militair Rechtelijk Tijdschrift 89(2):54

Kroon W, Jacobs M (1996) Rules of engagement: Een verkenning. Militaire Spectator 166(3):124–130

Knoops G (2008) Defenses in Contemporary International Criminal Law. Martinus Nijhoff Publishers, Leiden

Stephens D (1998) Rules of engagement and the concept of unit self defense. Naval Law Rev 45:126–151

Vink A (2010) Grenzen aan geweldgebruik binnen de Rules of Engagement: de Tactical Directive. Militair Rechtelijk Tijdschrift 103(2):86–91

Chapter 5
The Current Relevance of the Recognition of Belligerency

Sasha Radin

Abstract The doctrine of belligerency often came to the fore in the 19th and early 20th centuries. Since this time it has rarely been used, leading many to claim that the concept has fallen into desuetude. Others maintain that the recognition of belligerency continues to be relevant today. Should the doctrine still have significance, it can contribute to providing more detailed protection for those involved in such conflicts. This article suggests that the doctrine of belligerency is not obsolete, but because of developments in international law and changes in realities on the ground, a number of aspects of the doctrine need to be revisited in order to clarify what the doctrine might look like in a post-World War II world. The concept as traditionally conceived must be adjusted for it to remain relevant.

Contents

The author is a PhD candidate at the Asia Pacific Centre for Military Law at the University of Melbourne Law School and a Visiting Research Scholar at the Naval War College, Newport Rhode Island.

S. Radin (✉)
Asia Pacific Centre for Military Law, University of Melbourne, Melbourne, Australia

S. Radin
Naval War College, Newport, RI, USA
e-mail: sasha.radin@usnwc.edu

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5.1 Introduction

History easily refutes assumptions that the presence of armed groups[1] in conflict is a new phenomenon. Their existence stems back to times long before our modern State-based Westphalian system came into being.[2] However, our modern laws of armed conflict[3] are rooted in a State-centric system. Up until 1949, the definition of war was a contest between two or more States.[4] Armed conflicts within a State (internal armed conflicts) were considered to be a matter for that State to deal with under its domestic law and external interference constituted a violation of the State's sovereignty.[5] The regulation of conflicts between a State and an armed group in a second State by international law was simply not envisioned. The exception to State monopoly over the regulation of violence was the doctrine of belligerency, a customary international law doctrine governing internal conflicts between a State and an armed group.[6] The doctrine of belligerency emerged in the

[1] Other terms have been used to describe armed groups, including irregulars, partisans, brigands, pirates, and barbarians. For the purposes of clarity, the terms 'armed groups' or 'organized armed groups' will be used throughout this chapter.

[2] For some early examples of irregular warfare see Lacqueur 1976, p. 3; The Treaty of Westphalia in 1648 is seen as the birth of our modern-day nation-state system. The number of armed groups may have proliferated in recent years; however, they have long existed and fought in conflicts.

[3] Modern-day laws of armed conflict refer to the period when the modern codification of the laws of war began in the mid-1800s until now; Greenwood 1987, p. 790; Note: This chapter will use the term 'laws of armed conflict' to refer to the law after 1949 and 'laws of war' to refer to the international law regulating conflict before 1949.

[4] As stated by Lauterpacht 1952, p. 203:

> To be war, the contention must be between States. … A contention may of course arise between the armed forces of a State and a body of armed individuals, but this is not war.

In the same book see: 'War is a contention between two or more States through their armed forces…' p. 202; See also Green 2008, pp. 54, 55; UK Ministry of Defence 2004, para 3.1.2; Kotzsch 1956, p. 37; and Fleck 2008a, p. 608.

[5] UK Ministry of Defence 2004, para 3.1.2; Draper 1983, pp. 254–255.

[6] Note that the concept of belligerency here has a different meaning than when the term belligerents is used to denote combatancy status, or the lack thereof (lawful belligerents, unprivileged belligerents, and unlawful belligerents).

early 1800s through State practice[7] and often came to the fore in the 19th and early 20th centuries.[8] Traditionally, the recognition of belligerency entailed a complex combination of both objective and subjective criteria that could trigger the application of the full body of international laws applicable during war.[9]

The legal landscape changed significantly with the introduction of the 1949 Geneva Conventions.[10] The drafters intentionally replaced the narrow legal concept of 'war' with the broader concept of 'armed conflict'.[11] The use of the term armed conflict had two important consequences. One was to abandon the requirement that a formal declaration of war be made in order for the law to

[7] Castrén 1966, pp. 39–41, 80–81; Moir 2002, pp. 3–4.

[8] According to Bugnion 2003, p. 15, "… the first recorded case of recognition of belligerency occurred during the American War of Independence". In 1815, the United States effectively recognized the belligerency of those fighting for independence from Spain in Latin America. See: Castrén 1966, pp. 39–41; Moir 2002, pp. 6–7; and the U.S. Supreme Court case of *Santissima Trinidad and the St. Sandor* (1822) as cited in Cullen 2010, pp. 14–15. The United Kingdom did so 4 years later. See Castrén 1966, pp. 39–41 and Moir 2002, pp. 6–7; During the American Civil War (1861–1865) and the Spanish Civil War (1936–1939), questions of belligerency were widely discussed. See Castrén 1966, pp. 38–74.

[9] The laws of war were codified in the Hague Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907 (hereafter the Hague Regulations), *available at* http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument. The laws of war also includes the law of neutrality. The main sources for the law of neutrality can be found in the Hague Conventions of 1907. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land 1907, The Hague, 18 October 1907, *available at* http://www.icrc.org/ihl.nsf/FULL/200?OpenDocument; and the Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval Warfare 1907, The Hague, 18 October 1907, *available at* http://www.icrc.org/ihl.nsf/FULL/240?OpenDocument.

[10] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GC I), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (II) for the Amelioration of the Condition of Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea (hereinafter GC II), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (III) relative to the Treatment of Prisoners of War (hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter GC IV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75. The Geneva Conventions are today universally ratified.

[11] UK Ministry of Defence 2004, para 3.1.1; See ICRC Commentary to Common Article 2 in Pictet (1952–1960) Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949 Commentary, 22, 23 [hereinafter ICRC Commentary], and Schindler 1979b, pp. 125, 126.

apply.[12] The other was the groundbreaking inclusion of non-international armed conflicts into the codified regulatory framework of violence in the form of Common Article 3.[13] As a result, the legal classification of conflict changed from the two categories of peace and war; to peacetime, non-international armed conflicts (NIACs), and international armed conflicts (IACs).[14] In particular, it is the creation of a legal regime for non-international armed conflicts that is important for the analysis here.[15] The fact that since these changes were made there has been little or no resort to the doctrine of belligerency[16] has led many to claim that the concept has fallen into desuetude.[17] Others maintain that the recognition of belligerency continues to be relevant today, although it is not often used.[18]

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[12] Article 2 Common to the four Geneva Conventions (Common Article 2), *supra* note 10:

> …the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Greenwood 1987, pp. 791–792; See ICRC Commentary to Common Articles 2, 22, 23.

[13] Article 3 Common to the four Geneva Conventions (Common Article 3), *supra* note 10:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions.

[14] Note that while IACs generally are conflicts between States, this is not always the case. Therefore, it is possible to categorize conflicts involving armed groups as either IAC or NIACs. See Sect. 8.4.

[15] There was no legal concept of non-international armed conflict prior to 1949.

[16] Opinions differ as to whether there have been no instances of recognized belligerencies, or simply only a few cases. For example, Schindler 1979a, p. 5, states that there have been no cases of recognized belligerencies since 1945. Bungion on the other hand, cites the 1967 civil war in Nigeria as an example of a recognition of belligerency. See Bugnion 2003, p. 18. In any case, if recognition has occurred it has not been frequent.

[17] Moir 2002, pp. 20, 21; Riedel 2000, p. 47; Rosas 1976, p. 245; Schindler 1979b, p. 145; Castrén 1966, p. 136; Cassese 2008, p. 128; Moir even goes so far as to say that the concept of belligerency was already fading in the late 1800s, in Moir 2002, p. 41; The UK Ministry of Defence 2004, p. 382. Desuetude means that a rule or obligation no longer exists, whether treaty law or custom; Wouters and Verhoeven 2011, paras 13–15; Commentators cite the introduction of Common Article 3, *supra* note 10, APII, Article 1(4) API, and the lack of State practice as evidence of the disuse or desuetude of the concept. Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (hereinafter AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125; Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter AP II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125.

[18] Dinstein 2012, p. 409:

> As a matter of fact, explicit "recognition of belligerency" is largely in "disuse" today. But the basic concept of "recognition of belligerency" is as relevant as ever.

This article assesses the current relevance of the doctrine of belligerency. It suggests that not only does the doctrine of belligerency still have significance, but it can also contribute to providing more detailed protection for those involved in armed conflict. The recognition of belligerency traditionally triggered the full body of international law applicable to inter-State conflicts. In contrast, the law of non-international armed conflicts is limited in its scope. For example, rules governing detention in non-international armed conflicts leave many gaps in protection.[19] As a result, should a situation qualify as a belligerency far more protection would be available to civilians and combatants alike.[20] However, because of developments in international law and changes in the realities on the ground, a number of aspects of the doctrine need to be revisited in order to clarify what the doctrine might look like in a post-World War II world. It should not simply be assumed that the concept would be interpreted in the same way today, as it was pre-1949.

The article is divided into three parts. The first provides an overview of the doctrine of belligerency as traditionally understood. The second examines whether or not legal developments post-WWII have rendered the concept of belligerency obsolete, namely the codification of Common Article 3 to the Geneva Conventions and the Additional Protocols to the Geneva Conventions.[21] The third part considers what form this doctrine might take on today given the different practical and legal realities. It concludes that the concept as traditionally conceived must be adjusted for it to remain relevant.

5.2 Rebellion, Insurgency, and Belligerency

Before the introduction of non-international armed conflicts into the modern laws of armed conflict in 1949, disturbances or conflicts *within* a State were seen, from a legal perspective, to take roughly three forms: rebellion, insurgency, or

(Footnote 18 continued)

See also Dinstein 2009, p. 34; Dinstein 2010, p. 28; Heintschel von Heinegg 2012, pp. 214, 228; and Bugnion 2003, p. 32; Much of Castrén's book, *Civil War*, is devoted to the subject of belligerency, was written subsequent to the Spanish Civil War, the establishment of the UN and the adoption of Common Article 3 and provides examples of belligerency post-WWII. This indicates the relevancy to which Castrén accords the doctrine. Castrén 1966, pp. 82–86, 95, 136, 168; Lootsteen examines the current relevance of the doctrine in 'The Concept of Belligerency in International Law', Lootsteen 2000.

[19] ICRC 2011, p. 10:

> In contrast to the Fourth Geneva Convention rules governing international armed conflicts, there are no international humanitarian law treaty provisions on procedural safeguards for internment in non-international armed conflicts.

[20] Bungion 2003, p. 32 and Lootsteen 2000.

[21] AP I, *supra* note 17; AP II, *supra* note 17.

belligerency.[22] A rebellion was considered to be the lowest level of violence. If the violence increased in intensity, it might reach the level of an insurgency. Only the third and most severe form of violence, that of belligerency, could trigger the laws of war. It is worth reiterating here that historically 'war' was a legal condition, with corresponding rights and obligations. Thus, there could be factual situations of intense and protracted violence, which would not fall under the legal regulations of 'war'.[23] These three forms of violence will be explained in the following analysis, with the main focus on belligerency.

5.2.1 Rebellion

The first form of internal violence was a rebellion. A rebellion fell on the lower end of the spectrum of violence. Although no clear criteria existed to define a rebellion, it was characterized by sporadic internal disturbances and the ability of the State's police forces to suppress the rebellion.[24] Significantly, rebellions were considered to be solely internal matters for the State concerned. The law of war was not applicable and interference by outside States on behalf of the rebels was considered to be an illegal intervention in the domestic affairs of a State.[25] The unrest that took place in East Germany, Poland, and Hungary in 1953 and 1956 was examples of rebellions.[26]

5.2.2 Insurgency

A situation with more sustained violence where a rebellious group possessed increased organization and when the legitimate Government was no longer able to maintain order was considered to be an insurgency.[27] In the case of insurgencies,

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[22] At different times different terms were used for these three forms of conflict. For example, Lieber used the term 'insurrection' as the lowest form of violence. He defined 'rebellion' as 'an insurrection of large extent' and 'civil war' as the most severe form of internal conflict. Section X—Insurrection–Civil War–Rebellion, Lieber 1863. However, the point is that for legal purposes three different categories of violence existed.

[23] Greenwood 1987, p. 283.

[24] Kotzsch 1956, p. 230; Moir 2002, p. 4; Cullen 2010, p. 9.

[25] Kotzsch 1956, pp. 230–231; Falk 1964, p. 199: "Violent protest involving a single issue… or an uprising that is so rapidly suppressed as to warrant no acknowledgment of its existence on an extranational level".

[26] Falk 1964, p. 199.

[27] Menon 1994, p. 120: "Insurgency is an intermediate stage between a state of peace and a state of war"; Falk 1964, pp. 199–200; Castrén 1966, pp. 208–212.

domestic law, not the law of war, was the applicable framework, unless the State and the armed group involved specifically declared the laws of war to apply.[28] In other words, the recognition of insurgency could only give rise to legal rights and obligations under the law of war to the degree that the matter was expressly agreed upon between the State and the rebels.[29] This meant that the State and the armed group could agree upon which international law rules applied, if any, and for what period of time. Because of the *ad hoc* nature of the recognition of insurgency, the criteria for a situation to be considered an insurgency were not clear.[30] According to Castrén, this intermediate stage of conflict existed in order to allow for some regulation when and where needed, and to indicate that the rebels were no longer considered to be 'pirates or other law breakers'.[31] It provided third States with the flexibility to be involved (on the side of the State) without officially joining the conflict, and without being bound by the laws of neutrality.[32]

The practice of the United States with regard to recognizing insurgencies was instrumental in developing the custom.[33] The first instance of the recognition of

[28] Lauterpacht 1948, p. 270; Lauterpacht 1948, p. 271:

> Actually, international law knows of no 'recognition of insurgency' as an act conferring upon insurgents international rights flowing from a well-defined status. That insurgency has been recognized in any given case means that specific rights have been conceded or particular municipal enactments brought into being. It does not create a status from which further and more general rights can be deduced.

Kotzsch 1956, pp. 232, 233; Castrén 1966, p. 97.

[29] Lauterpacht 1948, p. 277:

> Recognition of insurgency creates a factual relation in the meaning that legal rights and duties as between insurgents and outside States exist only in so far as they are expressly conceded and agreed upon for reasons of convenience, of humanity, or of economic interest.
>
> At the same time, however, to the extent to which legal rights and duties as between insurgents and outside States are mutually agreed upon or expressly conceded, they form the substance of a legal relation between those States and the insurgents.

[30] Cullen 2010, p. 11; Castrén 1966, p. 212 states that it is '…impossible to define in advance the legal situation consequent on recognition of insurgency'. Castrén also describes the recognition of insurgency as being in the process of developing, in Castrén 1966, p. 210; Wilson 1988, p. 24; Falk 1964, pp. 199–200: '"Insurgency" is a catch-all designation provided by international law to allow states to determine the quantum of legal relations to be established with the insurgents'; Some say that the criteria for insurgency include the requirements that the insurgents observe the laws of war and have an established government. However, Castrén holds that there is no such legal duty for insurgency, Castrén, pp. 98–99; Menon 1994, p. 123, provides a list of conditions for insurgency in Menon.

[31] Castrén 1966, p. 208.

[32] Cullen 2010, p. 12; The laws of neutrality would be triggered once the situation was recognized as a belligerency and the laws of war would apply.

[33] Castrén 1966, pp. 208–211.

insurgency was during the Cuban Civil Wars by the United States (1868–1878 and 1895–1898).[34] The US recognized a number of other insurgencies in Latin American in the late 1800s. For example, the US accepted certain measures by insurgents during the Colombian Insurrection (1885–1886),[35] including actions taken by them in the State's territorial waters to prevent the transfer of material to their opponents.[36] In addition, the US negotiated with Bolivian insurgents during the 1899 Bolivian Insurrection[37] in order to protect American citizens.[38]

5.2.3 Belligerency

The final category of conflict was that of a belligerency. An assessment of the objective and subjective criteria for recognition below will show that in order for the recognition of belligerency to take place the violence had to be sustained and protracted to the degree that the conflict resembled a war between States and the belligerency had to be recognized.

The legal consequences of the recognition of belligerency were significant. The impact differed depending on whether the territorial State or a third (outside) State recognized the belligerents. The recognition of belligerency by the territorial State had two effects. It would both trigger the full body of the laws of war between the State and the armed group[39] and the laws of neutrality vis-à-vis third States.[40] The recognition of belligerency by a third State had the more limited consequence

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[34] Castrén, 1966, pp. 46–47, 209; Cuba fought for its independence against Spain in two wars. The first (1868–1878) ended in a stalemate. The second (1895–1898) was successful and became an international war.

[35] In this conflict, the Federalists (the proponents of a more federalist system) rebelled against the ruling Nationalists (the proponents of a more centralized system). In 1886 the nationalists suppressed the insurgency.

[36] Castrén 1966, p. 209. Castrén pointed out that these rights gained by the insurgents did not extend to the high seas.

[37] The Bolivian liberals overthrew the conservatives in this internal conflict, also known as the Federal Revolution.

[38] Castrén 1966, p. 210; Menon 1994, pp. 122–123.

[39] Dinstein 2012, p. 409; The laws of war were codified in the Hague Regulations. The purpose of this chapter is not to discuss the content of the laws of war, but their threshold of applicability.

[40] Dinstein 2012, p. 409; Hague Convention V and Hague Convention XIII, *supra* note 9; Kalshoven defines the law of neutrality as follows: "Neutrality law is the branch of law of war (*jus in bello*) which governs the relations between belligerent and neutral States (and their nationals) arising from the occurrence of an international armed conflict. It defines the rights and duties of neutral States with respect to the parties to the conflict, and *vice versa*". See Kalshoven 2007, p. 961; See also Heintschel von Heinegg 2007, p. 560:

> The object and purpose of the law of neutrality is to protect States from the harmful effects of an ongoing international armed conflict and, by subjecting the neutral States to certain legal obligations, to prevent an escalation of the conflict.

of triggering the laws of neutrality. In other words, the recognition of belligerency by a third State would not affect the legal relations between the territorial State and the armed group.[41]

If a third State recognized the belligerency, the rights and duties which accompany the laws of neutrality would be brought into effect between the territorial State and the recognizing State,[42] and between the armed group and the recognizing State.[43] These legal consequences reflect the understanding that when a conflict reached the level of a belligerency, its effects extended far beyond the territorial State to relations between other nations.[44]

In order for these legal consequences to be triggered, the practice of States has widely been interpreted to require that the situation fulfills objective elements in addition to the subjective component of recognition. The four factors generally considered necessary for recognition were:

1. The existence of civil war;
2. Control of territory by the armed group;
3. Possession of a governmental administration by the armed group; and
4. Compliance with the laws of war by the armed group.[45]

(Footnote 40 continued)

As with the laws of war/armed conflict, this chapter will not discuss the laws of neutrality, beyond discussing the threshold of their applicability to armed groups under the doctrine of belligerency.

[41] Lauterpacht 1952, p. 251; Moir 2002 pp. 7, 8; Castrén 1966, p. 141, p. 170; See also Lootsteen 2000, p. 120:

> If the *de jure* government does not recognize the insurgency as a belligerency, either tacitly or explicitly, all other forms of recognition would not in fact serve to bestow upon the insurgents any protections to which they would be entitled under the laws applicable during international conflicts.

In general, the recognition of belligerency on the part of third States was not thought to bestow an obligation for the territorial State to recognize a belligerency, although third State recognition could exert political pressure on the territorial State; Castrén 1966, p. 144; This was particularly the case if third State recognition was widespread; Baxter 1974, p. 518.

[42] Abi-Saab 1988, p. 218; Schindler 1979a, p. 3; Kotzsch 1956, p. 223; Falk 1964, p. 205; Moir 1998, p. 10; Bugnion 2003, p. 15.

[43] See Article 7 of the Institute of International Law Resolution of 1900 (Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection); Kotzsch 1956, p. 223; Falk 1964, p. 205; Moir 1998, p. 10; Bugnion 2003, p. 15.

[44] Neff 2005, p. 258.

[45] Moir 1998, pp. 346, 347; Draper 1983, p. 257; Lauterpacht 1948, pp. 175, 176; Kotzsch 1956, pp. 221, 222; United States Supreme Court Prize Cases, 67 U.S. 635 (1862), at 668-669; Some considered the likelihood of the armed group's success to be an additional subjective criterion of recognizing a belligerency. Menon 1994, p. 118. This view reflected the State-centricity underlying the doctrine. Not everyone agreed with this interpretation. See Menon 1994, p. 119.

In sum, all three categories of conflict had different criteria for applicability and legal consequences. However, it was not always straightforward to distinguish between the three categories. In practice, the line between an insurgency and a belligerency was not necessarily easily determined.[46] The Spanish Civil War (1936–1939) exemplified this difficulty.[47] However, the distinction between the two categories was important given the considerable legal consequences of the recognition of belligerency. The difference between rebellions and insurgencies, while factually manifested in varying levels of intensity, was not always legally apparent. That is, rebellions and insurgencies could have the same legal effect of both remaining under the sole internal regulation of the State despite significant disparities in levels of violence. Alternatively, should the State decide to invoke elements of the laws of war on an *ad hoc* basis, the legal consequences of an insurgency could diverge from those of a rebellion. Despite the ambiguities present in discerning between the three types of conflicts, the fact remains that the recognition of belligerency would significantly transform the legal dimensions of a conflict. Given the nature of the consequences emanating from the recognition of belligerency, a closer examination of the subjective and objective criteria is necessary.

5.2.3.1 Factual/Objective Criteria

The cumulative requirements of the factual criteria created a high threshold for the applicability of the doctrine of belligerency.

First, in order for a belligerency to be recognized the scope and intensity of the conflict had to reach the proportions of a civil war.[48] One indicator for the existence of a civil war was the length of the hostilities.[49] Thus, a state of belligerency could not exist during the uprising of the Commune of Paris (1871) as it only lasted for 70 days.[50] Another factor was the intensity and widespread nature of the hostilities. Thus, many commentators have maintained that one of the reasons the

[46] Castrén 1966, p. 212:

> … the legal effects of recognition of belligerency may be limited (provided it is direct and unequivocal) and, conversely, cases may occur where relatively extensive rights are included in a recognition of insurgency. As a result of this it may sometimes in practice be difficult to distinguish between these forms of recognition. The term used is not decisive; each case must be judged on its merits. (footnotes omitted).

[47] Even though the objective criteria were fulfilled, and actions by third States and the Spanish Government could be seen as a tacit recognition of belligerency, the situation was generally seen as an insurgency. This is discussed at p. 129 below.

[48] The term 'civil war' here is not meant to introduce yet another category of conflict. It seems that the main point of this criterion was to ensure that the hostilities reached a certain intensity. See United States Supreme Court Prize Cases 67 U.S. 635 (1862), *supra* note 45, at 666–667 for the Court's view that a civil war essentially meant the recognition of belligerency.

[49] Kotzsch 1956, pp. 221–222.

[50] Castrén 1966, p. 48.

rebels in the Spanish Civil War should have been accorded belligerency status was based on the widespread nature and intensity of the war.[51] It was considered that the scope of the conflict should be general in character, as opposed to localized.[52] According to one commentator, this meant that the conflict should involve a 'large proportion of the population'.[53] It could also relate to the amount or type of armed forces used. The Great Powers, for example, refused to recognize the belligerency during the 1894 Brazilian Revolution on the ground that the hostilities were limited to the navy units, rather than involving the entire army.[54]

The second criterion is that the armed group controls territory.[55] The degree of territorial control necessary was not clear[56]; however, it was considered that at least a substantial part of the territory should be under the control of the armed group.[57] This criterion should be seen in combination with the condition that a civil war exists and that the armed group possesses a government-like entity to administer the territory. In order to be able to run a government entity and conduct hostilities of the intensity of a civil war, presumably a considerable amount of territorial control would be necessary.

The third criterion is that the armed group should have a government-like entity. While related to the above prerequisite of territorial control, this requirement contains distinct elements. The group should have some kind of political administration resembling a government. The US Government, for example, refused to recognize the Confederate insurgency during the American Civil War on the basis that the Confederate States had no organized government.[58] The type

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[51] Castrén 1966, p. 62; As will be mentioned below (p. 129), the Spanish Civil War was widely seen as an insurgency, rather than a belligerency. The other reasons were related to the subjective requirement of the doctrine of belligerency.

[52] Lauterpacht 1948, p. 175; Draper 1983, p. 257.

[53] Moir 1998, pp. 13–14.

[54] Lauterpacht 1948, p. 175.

[55] Abi-Saab interprets Article 8 in the 1907 Institute of International Law Resolution to mean that this requirement was only necessary for third State recognition of belligerency, and not for the territorial Government to recognize the belligerency. See Abi-Saab 1972, Footnote 4.

[56] Cullen 2010, p. 21.

[57] Lauterpacht 1948, p. 175; Draper 1983, p. 257. The Institute of International Law stated that the rebels must be in "possession of a definite portion of the national territory" in Section 1 of its 1900 Resolution on Insurrection, quoted in Menon 1994, p. 115; Castrén 1966 believes that in order to have territorial control, the group needed to be organized, Castrén 1966, pp. 177–178.

[58] Kotzsch 1956, pp. 221–222. See also President Grant's statement to Congress in 1869, quoted by Kotzsch 1956, pp. 221–222

> The question of belligerency is one of fact, not to be decided by sympathies for, or prejudices against either party. The relations between the parent State and the insurgents must amount, in fact, to war in the sense of international law. Fighting, though fierce and protracted, does not alone constitute war, there must be military forces acting in accordance with the rules and customs of war – flags of truce, cartels, exchange of prisoners, etc. – to justify a recognition of belligerency, there must be, above all, a *de facto* political organization of insurgents.

of government administration considered necessary is not clear. Some hold that the government-like entity must be a civil authority; that an organized army would not fulfill the criterion.[59] Others simply consider that the group needed to have enough organization in order to give effect to its commands.[60] Yet, others do not think that this requirement of a government is absolutely necessary, but that in practice some entity should exist that is in charge of how the war is being fought.[61] On the whole, it seems that the condition was generally interpreted to require a political, State-like entity.

Finally, and importantly, the hostilities should be conducted in accordance with the laws of war. This criterion encompassed the requirement that the armed group be sufficiently organized and that it have a responsible command, as it would be difficult for a group to ensure respect for the laws of war without some degree of organization and command structure.[62]

The threshold for these four objective criteria was quite high. This was consistent with the premise that most violence remained within the realm of the internal affairs of a State. Only if the situation would develop into one resembling a State-on-State conflict would the need for regulation by the international law of war be seen by States to arise. If the intensity of the violence was sufficiently high, and if the armed group controlled enough territory and had a governmental administration, the situation would most likely have developed into one resembling a State-on-State conflict. In such cases, as a practical matter, more equal relations with the armed group would be required, both on the part of the territorial State and on the part of third States.[63] Concerns of reciprocity were an underlying driving force for the territorial State to acknowledge the application of the laws of war if these criteria were fulfilled.[64] It was in the territorial State's interest that the armed group treat members of the State's armed forces as (prisoners of war) POWs and that the group abide by other rules of war. However, even when these objective elements were fulfilled, the belligerency was not necessarily recognized due to the subjective criterion of recognition.

(Footnote 58 continued)
The US Supreme Court, however, declared that the blockade was evidence of a belligerency in the United States Supreme Court Prize Cases 67 U.S. 635 (1862), *supra* note 45.

[59] Beale 1896, p. 407.

[60] Kotzsch 1956, pp. 221–222; Lootsteen 2000, p. 109.

[61] Castrén 1966, pp. 135, 179.

[62] Lauterpacht 1948, p. 176; Draper 1983, p. 257; Kotzsch 1956, pp. 221–222; Draper 1983, pp. 259–260; Moir 1998, p. 14.

[63] Lauterpacht 1948, p. 257; Menon 1994, p. 111: "… when the armed conflict in its material aspects became similar to an interstate war. For it is only then that reciprocity could come into play and the institution of recognition of belligerency would offer some advantage to the established government or to third parties with a view to protecting their interests in the areas held by the rebels as well as their maritime commerce behind the shield of neutrality;" Abi-Saab 1988, p. 218; Moir 1998, p. 5.

[64] Abi-Saab 1972, p. 95.

5.2.3.2 Political/Subjective Criteria

While the above criteria were more or less objective, the second aspect of the doctrine of belligerency—its recognition—was quite political in nature and subject to differing views and inconsistent practice.[65] The main issues raised in the context of the recognition of belligerency were: was there a duty to recognize belligerency once the factual objective criteria were satisfied?; what acts constituted a tacit recognition of belligerency?; and when were third States' interests seen to be affected?

As to the first issue, once the factual criteria were met, the territorial State involved in the conflict and/or third States whose interests were affected could recognize the armed group as belligerents, either implicitly or explicitly.[66] A question arose as to whether or not a State had the *duty* to recognize a belligerency if the objective conditions were met.[67] In general, commentators agree that in such cases neither the territorial State nor third States were obligated to recognize belligerents. However, there was much discussion in terms of whether or not the law should change in this regard.[68] It seems that to hold that a territorial State or a third State was obliged to recognize a belligerency if the objective criteria were met would essentially render the subjective condition irrelevant. On the flip side, it was considered by some that the territorial State always had the right to recognize the armed group as belligerents, even if the factual criteria had not been met.[69] In practice, the recognition of belligerency by the territorial State would usually happen later in the conflict once it had become clear that the territorial State could not quickly suppress the situation.[70]

De facto recognition, also known as implicit or tacit recognition, was sometimes allotted by States; explicit recognition of belligerency was rare.[71] What constituted *de facto* recognition was, however, debated. Some indications of tacit recognition of belligerency were a declaration of a blockade, a declaration of neutrality, conferring rights on the high seas, entering into treaties with the armed groups, prisoner of war exchanges, and requesting the armed groups to observe the

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[65] The recognition of belligerency is not to be confused with the recognition of a State. Moir 1998, pp. 5–6. The recognition of belligerency is about the existence of an armed conflict, while the recognition of a State is about the legitimacy of a government and entails a separate body of law; See also Dinstein 2012 and Neff 2005, pp. 262–263.

[66] Kotzsch 1956, p. 223; Moir 2002, p. 339; Perna 2006, pp. 29, 30: Lootsteen 2000, p. 113.

[67] Menon gives the views of a variety of scholars on the subject in Menon 1994, pp. 124–133; Falk 1964, p. 204; Lootsteen 2000, pp. 117–118.

[68] Castrén 1966, p. 140, pp. 174–175.

[69] Castrén 1966, p. 138.

[70] Moir 1998, p. 343.

[71] Lauterpacht 1948, pp. 177, 182; Lauterpacht 1952, pp. 250, 251; Wilson 1988, p. 23; Castrén 1966, p. 136, p. 146.

laws of war.[72] The United Kingdom, France, Spain, the Netherlands, and Brazil, for example, all effectively recognized the belligerency of the South during the American Civil War by declaring their neutrality.[73] Many at the time saw Lincoln's declaration of a blockade of the Southern ports in the US as an implicit recognition of the belligerency of the Confederate rebels by the US Government.[74] The fact that most cases of recognition were implied and that what constituted tacit recognition was not necessarily agreed upon, resulted in diverse opinions on the matter.[75]

For a third State to legally recognize a belligerency, the factual criteria had to have been met *and* the third State's interests needed to have been affected.[76] Whether and when a third State's interests were affected was a subjective matter. The consequences for premature recognition could be severe. Should a third State recognize belligerency where these criteria were not met, or were at a point where recognition was considered to be premature, the situation could be considered an illegal intervention by the third State in the domestic affairs of the territorial State.[77] Such intervention could be seen as a violation of neutrality, and the territorial State could respond accordingly.[78] Yet, if undertaken at the appropriate time, the recognition of belligerency could offer a third State the advantage of free trade with either side of the conflict, within the limits of the law of neutrality.

A situation where a third State might recognize a belligerency, in practice, mainly occurred in maritime conflicts, since at that time, a third State's interests were more likely to be affected when the seas were involved.[79] During the 1830 Polish insurrection and the Hungarian War of 1848, the belligerency of the rebels

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[72] Cullen 2010, pp. 16–17; Castrén 1966, p. 148; Menon 1994, p. 111; Falk 1964, p. 203; Note that this latter indication of tacit recognition—requesting the observance of the laws of war—closely resembles the objective criteria that an armed group complies with the laws of war. Although similar, they are not the same. One of the underlying reasons for the doctrine of belligerency to come into being was as a practical matter—States wanted their soldiers to be treated in accordance with the laws of war. Therefore, the fact that a State *asks* for the observance of the laws of armed conflict could be an indication that the State recognizes the need for reciprocity.

[73] Moir 1998, p. 9; Castrén 1966, p. 45; United States Supreme Court Prize Cases 67 U.S. 635 (1862), *supra* note 45; at 669 The UK tacitly recognized belligerency in the conflict between Greece and the Ottoman Empire in the 1820s by enacting legislation forbidding its nationals to take part in the conflict; Neff 2005, p. 262.

[74] Although the US Government itself denied that it had in any way recognized the belligerency. Castrén 1966, p. 45; Moir 1998, pp. 348–349; US Supreme Court Prize Cases 67 U.S. 635, at 670 (1862), *supra* note 45. In 1928, the UK implicitly recognized the belligerency in the internal conflict in Portugal by respecting a blockade instituted by the rebel armed group. Neff 2005, p. 262.

[75] Castrén 1966, p. 147.

[76] Moir 2002, p. 342; Cullen 2010, p. 26; See Castrén 1966, pp. 179–180, for the view that the condition that a third State's interests need to be affected was not agreed upon by commentators.

[77] Kotzsch 1956, p. 223.

[78] A State could decide on reprisals or, in some circumstances, declare war. Neff 2005, p. 260.

[79] Moir 1998, p. 343.

was not recognized, despite the objective criteria being fulfilled in both cases. Some commentators say this may have been because the interests of third States were simply not affected.[80]

The Spanish Civil War (1936–1939) illustrates the difficulties entrenched in the subjective criterion of recognizing a belligerency. It also deserves particular mention as it has been the subject of much debate and the literature, and is, in fact, the last time that the doctrine of belligerency was widely discussed in the political and legal arenas. The example highlights how a situation that fulfilled the objective criteria for belligerency, and seemingly also satisfied the subjective criteria of tacit recognition, was not recognized as a belligerency by Spain and was characterized by restraint and conflicting views on the part of third States.[81] The factual conditions were generally seen to have been met as the conflict was protracted and widespread; the rebels had a government and controlled a considerable part of the territory; and Franco's forces were organized and disciplined.[82] The interests of third States were clearly affected, particularly since Franco's rebel forces had superior air and sea power and commercial warfare was undertaken at sea.[83] Certain actions by the territorial Government, including a blockade of regions under rebel control and the exchange of prisoners, could be interpreted as effective, or tacit, recognition of the belligerency.[84] However, the Spanish Civil War was commonly seen to be an insurgency and not a belligerency by most States. There were various political reasons for this, one of which was the fear that the conflict would escalate to a full-scale international war, involving multiple States, should the belligerency be recognized.[85]

Altogether, the threshold for the applicability of the laws of war with regard to the doctrine of belligerency was very high; requiring both an armed group which resembled a State and the political will of the involved State and third States to recognize the group as such. Furthermore, the complexity and ambiguity of many aspects of the system made its application unlikely. Thus, although the doctrine triggered the laws of war, this occurred only in very limited circumstances and was still very much premised on a State-centric system. Only when an internal conflict reached such proportions that the rebellious group took on State-like attributes and was recognized as having done so, could the group benefit from and be bound by the laws of war.

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[80] See, for example, Castrén 1966, pp. 43–44.

[81] Cassese 2008, p. 131; Castrén 1966, pp. 59–62.

[82] There were, however, frequent abuses of the laws of war.

[83] Castrén 1966, pp. 52–53, 56, 60.

[84] Although the Madrid Government adamantly denied any recognition of belligerency. Castrén 1966, pp. 54–55.

[85] Castrén 1966, p. 63.

5.3 The Current Relevancy of the Recognition of Belligerency

Compared to the 1800s and early 1900s, there is no doubt that the doctrine of belligerency has declined in use today. However, it is one thing to claim that the recognition of belligerency is uncommon, and another to posit that it is no longer relevant.

Since the Spanish Civil War there has been little or no resort to the recognition of belligerency.[86] One possible reason for the decline in its use is that despite being frequently debated in the political and legal spheres, the doctrine was not very effective due to its high threshold and subjectivity.[87] However, the major factor contributing to the decline of the doctrine was probably that other legal frameworks for regulating hostilities involving armed groups emerged. First of all, and most significantly, a codified framework was created for regulating non-international armed conflicts in the form of Common Article 3. The codification of Additional Protocol II in 1978 established yet another type of non-international armed conflict. In addition, API Article 1(4)[88] generated the treaty law possibility for an armed group to be a party to an international armed conflict under certain limited circumstances. This section considers the relation between the doctrine of belligerency and legal developments post-World War II in order to conclude that while probably contributing to the decline in usage of the doctrine, the codification of Common Article 3, APII, and API has not rendered the recognition of belligerency obsolete.

5.3.1 Recognition of Belligerency and Common Article 3

Common Article 3 has a much lower threshold of applicability than the doctrine of belligerency and triggers a different set of rules. Therefore, rather than replacing the doctrine of belligerency, Common Article 3 constitutes an additional legal framework where a minimum set of humanitarian rules applies to a wide range of situations. This can be construed from the drafting history and the subsequent interpretations of Common Article 3 as developed through customary international law.

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[86] It is worth noting that Article 2 of the 1957 Protocol to the Havana Convention on Duties and Rights of States in the Event of Civil Strife, Washington D.C., 9 December 1957, United Nations Treaty Series, Volume 284, pp. 201–214, refers to the recognition of belligerency.

[87] Cullen 2010, p. 22; Cullen also suggests that States preferred not to recognize belligerencies, because recognizing an insurgency offered the States more flexibility in their behavior.

[88] API, *supra* note 17, Article 1(4):

> … armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.

The criteria discussed at the time of drafting Common Article 3 and the context in which the suggested requirements were made supports the position that Common Article 3 was not intended to replace the doctrine of belligerency. These criteria can be found in the International Committee of the Red Cross' (ICRC) Commentary to Common Article 3.[89] They are very similar to the criteria for the recognition of belligerency, in both its objective and subjective elements. However, it is important to take into account that these criteria are a compilation of *separate* draft proposals and as such are not intended to be cumulative.[90] They

[89] ICRC Commentary to Common Article 3, *supra* note 11 at p. 36:

> (1) That the Party in revolt against the de jure Government possesses an organized military force, an authority responsible for its acts, acting within a determinate territory and having the means of respecting and ensuring respect for the Convention.
> (2) That the legal Government is obliged to have recourse to the regular military forces against insurgents organized as military and inpossession of a part of the national territory.
> (3) (a) That the de jure Government has recognized the insurgents as belligerents; or
> (b) That it has claimed for itself the rights of a belligerent; or
> (c) That it has accorded the insurgents recognition as belligerents for the purposes only of the present Convention; or
> (d) That the dispute has been admitted to the agenda of the SecurityCouncil or the General Assembly of the United Nations as being athreat to international peace, a breach of the peace, or an actof aggression.
> (4) (a) That the insurgents have an organization purporting to have the characteristics of a State.
> (b) That the insurgent civil authority exercise de facto authority over the population within a determinate portion of the national territory.
> (c) That the armed forces act under the direction of an organized authority and are prepared to observe the ordinary laws of war.
> (d) That the insurgent civil authority agrees to be bound by the provisions of the Convention.

The Commentary itself is not binding, although it is considered to have some weight in interpreting the Geneva Conventions; Moir 2002, p. 35; ICTR, *The Prosecutor v. Jean-Paul Akayesu*, (hereinafter *Akayesu* Trial Judgment), Case No. ICTR-96-4-T, Trial Chamber I, Judgment, 2 September 1998, http://www.unictr.org/Portals/0/Case/English/Akayesu/judgement/akay001.pdf, para 619; ICTY, *Prosecutor v. Limaj et al. (Trial Judgment)*, (hereinafter *Limaj* Trial Judgment), Case No. IT-03-66-T, Trial Chamber II, Judgment, 30 November 2005, para 86.

[90] Provost 2002, p. 265; The draft proposals were submitted by Australia, the US, France, Greece, Italy, Monaco, Norway, the UK, Switzerland, the USSR, Burma and Uruguay; Final Record of the Diplomatic Conference of Geneva 1949, Vol II B, 120. As such, they were suggested indicators for the existence of an armed conflict and were not meant to be obligatory. ICRC Commentary to Common Article 3 (GCIII), *supra* note 11 at 35; Fleck 2008a, pp. 616–617; UK Ministry of Defence 2004, pp. 386–387; *Limaj* Trial Judgment, Ibid., para 86; ICTY, *Prosecutor v. Slobodan Milošević*, (hereinafter Milošević Decision), Case No. IT-02-54-T, Trial Chamber I, Decision on Motion for Judgment of Acquittal, 16 June 2004, http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/040616.pdf, para 19; ICTY, *Prosecutor v. Boskoski and Tarculovski* (hereinafter *Boskoski* Trial Judgment), Case No. IT-04-82-T, Trial Chamber II, Judgment, 10 July 2008, http://www.icty.org/x/cases/boskoski_tarculovski/tjug/en/080710.pdf, para 176.

therefore overlap and reflect the wide range of views held during some of the most contentious debates during the negotiations for the Geneva Conventions.[91] Most significantly for the point being made here, these criteria were initially discussed in the context of restricting the *types* of non-international armed conflicts to which the *whole* of the four Geneva Conventions would apply.[92] Had this initial idea prevailed, then the codified regulation of non-international armed conflicts would have strongly resembled the customary law doctrine of belligerency in terms of its legal consequences. However, critically, the delegates ultimately decided to broaden the types of conflict to which only a very limited set of humanitarian rules would apply—resulting in Common Article 3.[93] Given that the criteria listed in the ICRC Commentary were suggested *before* the decision was made to create a legal regime with a lower threshold and only a minimal set of rules, it is not surprising that a number of the criteria listed in the Commentary were drawn from the traditional concept of the recognition of belligerency.[94] Despite some ambiguity in the ICRC Commentary,[95] the drafting history suggests that Common Article 3 has a different threshold of application and a far narrower set of rules once triggered than does the recognition of belligerency.

Moreover, developments in jurisprudence, the practice of States and the proliferation of armed groups since 1949 have arguably created an even lower threshold of applicability for Common Article 3 than initially contemplated,[96] thus distancing the legal regime even further from that of the doctrine of belligerency. Common Article 3 is widely thought to apply when the violence has reached a certain level of intensity and the armed group(s) involved is sufficiently

[91] Views ranged, for example, from the high threshold of requiring the recognition of belligerency to the less stringent criteria that an armed group be organized, possess territory, and cause the resort to military force by the government.

[92] Final Record of the Diplomatic Conference of Geneva 1949, Vol II B, 120. With the exception that the POW and Maritime Conventions would have the additional requirement of reciprocity. While the Special Committee agreed that the Conventions should cover NIACs in some form (Final Records, Vol II B, 121) they considered that either the type of NIACs or the provisions applicable in NIACs, or both, should be restricted (Final Record of the Diplomatic Conference of Geneva 1949, Vol II B, 122).

[93] Provost 2002, p. 266; ICRC Commentary to Common Article 3 (GCIII), *supra* note 11, at p. 36; *Limaj* Trial Judgment, *supra* note 89, para 86; Cullen 2010.

[94] These include both subjective and objective elements from the notion. For example, some of the delegates called for the recognition of belligerency and a State-like organization.

[95] The ICRC Commentary to Common Article 3, *supra* note 11, at pp. 36, 37, gives slightly mixed messages by stating that the '… scope of application of the Article must be as wide as possible', and yet likening the type of conflicts governed by Common Article 3 to those '… which are in many respects similar to an international war, but take place within the confines of a single country'.

[96] Cullen 2010, pp. 49–50.

organized.[97] The minimum criteria for Common Article 3's applicability today differ from the four objective criteria found in the doctrine of belligerency. The intensity necessary for Common Article 3's application need not reach that of a civil war.[98] In contrast to the objective requirement under the doctrine of belligerency, Common Article 3 is not seen to require territorial control.[99] The armed groups involved must be organized; however, there is no requirement for a government-like structure.[100] In addition, while it appears that Common Article 3 requires that the armed group have the *ability* to abide by the laws of armed conflict,[101] there is no obligation that members of the armed group must actually comply with the law in order for Common Article 3 to be triggered.[102] In contrast, the recognition of belligerency not only explicitly requires that the armed group complies with the law of armed conflict, but also the prerequisite is directly aligned with one of the underlying bases for the recognition of belligerency—reciprocity. Once a conflict reached such proportions that the armed group could capture and detain members of the State armed forces and generally inflict a higher

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[97] See ICRC Opinion Paper 2008. These criteria were first iterated in the 1995 ICTY, *Prosecutor v. Dusko Tadic a/k/a "DULE" Tadić* (hereinafter *Tadić* Jurisdiction Appeal Decision), Case No. IT-94-1-AR72, Appeals Chamber, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, http://www.icty.org/x/cases/tadic/acdec/en/51002.htm, para 70:

> … Armed conflict exists whenever there a resort to armed force between States *or protracted armed violence* between governmental authorities and *organized armed groups* or between such groups within a State.

This definition confirms the view that Common Article 3 is applicable to conflicts between two armed groups. Today, there are a number of issues relating to Common Article 3's threshold of applicability that are debated. Some issues include whether or not Common Article 3 applies to cross-border hostilities and to what degree the intensity requirement has a temporal element to it. In addition, there is not consensus on what rules apply as a matter of customary international law to non-international armed conflicts.

[98] See *Boskoski* Trial Judgment, *supra* note 90, para 177, for a good summary of indications that the required level of intensity has been reached for Common Article 3 to apply.

[99] See for instance, Provost 2002, p. 267; Moir 2002, pp. 38, 43; Pejic 2004 pp. 85–86; Abi-Saab 1988, p. 237; Bothe et al 1982, p. 623; Kritsiotis 2010, p. 290; Green 2008, p. 349; Tahzib-Lie and Swaak-Goldman 2004, p. 246; Vite 2009, p. 79; *Milošević* Decision, *supra* note 90, para 36; However, see Draper 1979, who held that Common Article 3 does require control of territory.

[100] In fact, it is widely held that the degree of organization required need not mirror that of a State's military. Again, see *Boskoski* Trial Judgment, *supra* note 90, paras 199–203, para 277, for indications that Common Article 3s requirement that a group be sufficiently organized are met. However, there is no agreement on the minimum level of organization required.

[101] Although not explicit in the treaty law, jurisprudence and commentators support the premise that the ability of an armed group to abide by the law of armed conflict is a criterion for Common Article 3. See the *Boskoski* Trial Judgment, *supra* note 90, paras 199–203, para 277, which cites the 'ability to implement the basic obligations of Common Article 3 as an indicator that an armed conflict exists'; Schmitt 2012, Footnote 68; Sassoli 2006, pp. 13–14; Tahzib-Lie and Swaak-Goldman 2004, pp. 250–251; Moir 2002, pp. 36, 43; Draper 1979, pp. 90–91.

[102] APII, *supra* note 17, Article 1 does not require compliance, but calls for the ability to comply; Schmitt 2012, Footnote 68; Given that APII has a higher threshold than Common Article 3, it would be unlikely that Common Article 3 would require a higher standard for this criterion.

level of damage, it was in the State's interest that the armed group would comply with the laws of war. Furthermore, Common Article 3 applies based on *objective* factors, in contrast to the subjective element found in the recognition of belligerency.[103]

Therefore, Common Article 3 does not actually regulate the same types of conflicts as the recognition of belligerency. Instead, the codification of Common Article 3 and its subsequent interpretation as developed through customary international law have introduced an additional category of conflict regulated by the law of armed conflict. The ICRC Commentary to Common Article 3 supports this interpretation.[104] It is more likely that Common Article 3 was intended to provide minimum guarantees in an attempt to fill gaps in protection during internal conflicts, in recognition of the doctrine of belligerency's failure to do so, either because of its stringent objective criteria or due to the very subjective nature of the doctrine.

It could also be argued that in fact the framework introduced by Common Article 3 more closely resembles conflicts that would have previously been considered insurgencies, than those recognized as belligerencies.[105] While the criteria necessary for an insurgency to exist were never very clear,[106] the situation had to have been characterized by sufficient violence and the group needed to be organized. This bears a strong resemblance to the Tadic criteria of organization and intensity. These criteria do not call for the same level of organization as that in a State's armed forces,[107] nor does the intensity need to be at the level of a civil war.[108] Moreover, factually, the line between circumstances traditionally considered to be rebellions and conflicts that were insurgencies is similar to today's threshold between conflicts to which Common Article 3 applies and situations of internal disturbances that are not governed by the laws of armed conflict.[109] The main difference is that today that line signifies the lowest threshold for the

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[103] Although it should be acknowledged that despite the attempt to base Common Article 3's application entirely on objective factors, in practice, the question of whether or not Common Article 3 should apply has frequently been politicized.

[104] ICRC Commentary to GCIII Common Article 3, *supra* note 11, p. 38:

> The time may come when, in accordance with the law of nations, the adversary may be bound by humanitarian obligations which go farther than the minimum requirement stated in Article 3. For instance, if one Party to a conflict is recognized by third parties as being a belligerent, that Party would then have to respect the Hague rules.

See also Schindler 1979a, p. 5: "According to Art. 3, common to all four Conventions, certain minimum rules of humanity apply to all "armed conflicts not of an international character", regardless of any recognition of belligerency".

[105] Lootsteen 2000; Cullen 2010, pp. 13–14.

[106] See discussion on insurgency in Sect. 5.2.2.

[107] ICRC Commentary to Article 4, *supra* note 11, p. 58.

[108] See *Boskoski* Trial Judgment, *supra* note 90, para 177.

[109] The term internal disturbances and tensions comes from APII, *supra* note 17, Article 1(2). It is also widely considered to apply to the lower threshold of Common Article 3.

application of the law of armed conflict, while previously, the boundary between 'war' and 'peace' was found at a higher threshold. Therefore, rather than replacing the doctrine of belligerency, a more compelling argument is that Common Article 3 introduced a legal framework for conflicts that, up until that point, had been considered insurgencies and regulated on a very *ad-hoc* basis.[110]

5.3.2 Recognition of Belligerency and Additional Protocol II

Additional Protocol II (APII) supplements Common Article 3,[111] incorporating more comprehensive guidelines for the protection of those not taking part in hostilities and including some rules on the conduct of hostilities.[112] Importantly, like Common Article 3, it does not provide POW status to prisoners. AP II has a higher threshold of applicability than Common Article 3.[113] This leads to the question of whether or not APII can be equated to the doctrine of belligerency.[114] APII requires that an organized armed group be 'under responsible command, [and] exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement th[e] Protocol'.[115] These criteria do indeed come closer to the conditions necessary for the recognition of belligerency than those found under Common Article 3. However, APII differs from the doctrine of belligerency in a number of its criteria. As a result, its threshold of applicability is lower than that required for a recognized belligerency.[116]

APII's conditions that an armed group must control territory certainly resembles the territorial control requirement for the recognition of belligerency discussed above.[117] The intensity criterion of APII could be interpreted as being

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[110] Another similarity between Common Article 3 and the recognition of insurgency can be found in the provision in Common Article 3 that the parties to the conflict can invoke more of the laws of armed conflict by special agreement on an *ad-hoc* basis. See Milanovic 2011.

[111] AP II, *supra* note 17, Article 1(1).

[112] Aldrich 2000, p. 60; Its provisions are still more minimal than those found in the laws of international armed conflict.

[113] Bothe et al. 1982, p. 625; Abi-Saab 1988, pp. 227, 233; Cullen 2010, pp. 94–96; Sandoz et al. 1987 §4453.

[114] Some commentators seem to associate APII's high threshold of applicability with that required for the recognition of belligerency; Aldrich 2000, p. 60.

[115] APII, *supra* note 17, Article 1.

[116] In addition, as pointed out by Lootsteen 2000, pp. 128–130, an argument could be made that even if APII did contain the same threshold as the concept of belligerency it would not necessarily render the recognition of belligerency irrelevant. This is because APII is not widely ratified, nor is it settled whether or not the whole convention is reflective of customary international law.

[117] Pejic 2007, pp. 87–88; Green 2008, p. 349; Provost 2002, p. 267; However, Lootsteen 2000, p. 130, considers that the territorial control requirement under belligerency is more strict than that found in APII.

similar to the requirement that a civil war exists. However, there are two main differences between the legal regimes. APII requires that an organized armed group has the ability to abide by the Protocol, while the doctrine of belligerency calls for compliance with the laws of armed conflict.[118] The latter is a stricter standard. Furthermore, and, as pointed out by Lootsteen, probably the key difference between the two legal regimes is the obligation under the doctrine of belligerency that an armed group possesses a government-like administration.[119] In contrast, APII requires that the armed group be organized, albeit to the degree that it can control territory and implement the Protocol.[120] In addition, the subjective requirement for recognition is deliberately absent from Article 1 APII.[121] A final difference between the two legal regimes is that the application of APII also has different consequences than the legal regime for the recognition of belligerency. That is, it does not trigger the entire body of laws applicable in international armed conflicts, and therefore importantly does not include POW status and combatancy status.[122] Thus, APII constitutes a category of conflict separate from one where belligerency is recognized.[123]

Some have posited that actually APII parallels the traditional notion of insurgency in its threshold.[124] Given the vagueness of the criteria traditionally required for the recognition of insurgency, it is not surprising that both APII and Common

[118] This requirement of APII, *supra* note 17, Article 1 can be interpreted in the plain meaning of the text: 'under responsible command, [and] exercise such control over a part of its territory as to *enable them* to carry out sustained and concerted military operations and *to implement th[e] Protocol'* (emphasis added); See Schmitt 2012, Footnote 68.

[119] Lootsteen 2000, p. 130:

> The substantive distinction lies in the fact that upon attaining the objective criteria of belligerency, the insurgents achieve many of the characteristics of an independent state – they become in effect a *de facto* state. This in turn justifies applying to them and to the conflict in which they are involved the body of rules meant to regulate international armed conflicts. On the other hand, the criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than stat-to-state warfare. It more closely resembles the status of insurgency previously described.

[120] Note, however, that a minority of people were of the view that that particular requirement of belligerency could be interpreted as simply requiring an entity that could control the fighting. See *supra* p. 126.

[121] Junod 1983, p. 33; Abi-Saab 1988, p. 227.

[122] While APII does contain some provisions for protection, these are by no means as detailed as those found in the international law of armed conflict for POWs and civilians. In addition, the rules on the conduct of hostilities found in APII are limited.

[123] Cullen 2010, p. 107.

[124] Lootsteen 2000, p. 130: "… the criteria established in Protocol II, while establishing a threshold that is considerably higher than mere civil unrest, is lower than state-to-state warfare. It more closely resembles the status of insurgency…"

Article 3—regulatory frameworks with different thresholds of applicability and different legal consequences—could correspond to the traditional category of insurgency.

5.3.3 *Additional Protocol I Article 1(4)*

Additional Protocol I (API) applies to international armed conflicts. It controversially allows armed groups to be party to the conflict under certain circumstances, in addition to States.[125] Article 1(4) API brings conflicts with national liberation movements within the scope of international armed conflicts. It applies to 'peoples … fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations'.[126] Some have claimed that the introduction of API Article 1(4) has replaced the doctrine of belligerency.[127]

[125] API, *supra* note 17, Article 1. On controversial elements of API, see for example, Michael Matheson remarks on the 'United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions', Matheson 1987.

[126] In particular, this provision refers to Article 1(1) UN Charter, United Nations, Charter of the United Nations, San Francisco, 24 October 1945, 1 United Nations Treaty Series XVI and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, United Nations, General Assembly, Resolution 2625 (XXV), 27 October 1970, http://www.unhcr.org/refworld/docid/3dda1f104.html, accessed 30 November 2012; A number of other UN General Assembly Resolutions related to the matter include: United Nations, General Assembly, Declaration on the granting of independence to colonial countries and peoples, Resolution 1514 (XV), 14 December 1960, http://www.unhcr.org/refworld/docid/3b00f06e2f.html, accessed 30 November 2012; United Nations, General Assembly, Implementation of the Declaration on the granting of independence to colonial countries and peoples, Resolution 2105 (XX), 20 December 1965, http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/218/68/IMG/NR021868.pdf?OpenElement, Accessed 30 November 2012; United Nations General Assembly, Programme of action for the full implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples, 12 October 1970, Resolution 2621 (XXV), A/RES/2621, http://www.unhcr.org/refworld/docid/3b00f0530.html, accessed 30 November 2012; and United Nations, General Assembly, Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist régimes, 12 December 1973, Resolution 3103 (XXVIII), A/RES/3103, http://www.unhcr.org/refworld/docid/3b00f1c955.html, accessed 30 November 2012. UN General Assembly Resolutions are not in and of themselves binding.

[127] Lootsteen 2000, p. 133 (although he himself does not agree with this premise).

However, this Article has far less relevance for the doctrine of belligerency than either Common Article 3 or APII. Its criteria differ considerably from those required for belligerency. Moreover, due to its controversial status[128] and lack of usage, the Article is often thought to have little relevance.

Article 1(4) API conflicts do have certain similarities with the doctrine of belligerency. Notably, unlike APII and Common Article 3, this type of conflict triggers the full laws of international armed conflict. The legal consequences of this type of conflict therefore more closely resembles the doctrine of belligerency than do the other two legal regimes. In addition, this Article reintroduces the subjective element of the recognition of belligerency that the drafters of APII and Common Article 3 attempted to remove, albeit in a slightly different form.[129] The question is when would an armed group qualify as 'peoples' that fulfill the criteria of Article 1(4). Some States have suggested that an armed group would need to be *recognized* by a regional organization or the UN as falling under Article 1(4) before the Article could apply.[130]

The similarities between Article 1(4) API and the recognition of belligerency end there. The criteria for Article 1(4) API to apply are different and can ultimately be seen as establishing a higher threshold for applicability than does the doctrine of belligerency. On the one hand, Article 1(4) API has less strict criteria than the recognition of belligerency and even APII in that it does not require the armed group to have territorial control,[131] nor does it raise any obligation that a certain intensity of violence be reached.[132] It would therefore seem to have a lower threshold of applicability than the recognition of belligerency. However, on the other hand, it is very difficult to fulfill the newly introduced, and very specific criteria that the armed group in question must be peoples fighting against colonial

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[128] This provision is widely considered to constitute law creation, rather than codification based on State practice. See, for example, Matheson 1987; and the Department of State Letter of Submittal to the President of the US, 13 December 1986, cited in Sassoli and Bouvier 2011:

> Certain provisions such as Article 1(4), which gives special status to "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination", would inject subjective and politically controversial standards into the issue of the applicability of humanitarian law.

[129] See Sandoz et al. 1987, §§ 67, 75. With the UN Charter's restriction of *jus ad bellum* to uses of force in self-defence or those authorized by the Security Council came a stricter separation between *jus ad bellum* and *jus in bello*. One side was invariably at fault, yet LOAC was seen to apply equally no matter who was at fault. Sassoli and Bouvoir 2011, p. 14; The criticism of Article 1(4) is that it brings in a subjective element to LOAC; Bothe et al. 1982, p. 40 "The criteria used were not objective but were based on the distinction between just and unjust wars…"; Moir 2002, p. 90, points out that API, Article 1(4) classifies the conflict based on the objective of the group.

[130] See, for example, the understandings of Belgium, Canada, Ireland and South Korea to API, *supra* note 17, Article 96; Glazier 2012, para 16.

[131] Lootsteen 2000, p. 132; Moir 2002, p. 349; The reason for this was the claim that the criterion for territorial control would not include guerrilla warfare; Abi-Saab 1972, p. 97.

[132] Lootsteen 2000, p. 132.

domination and alien occupation or against racist régimes; the conflict must be in the exercise of their right to self-determination; and this self-determination must be enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[133] It is widely considered that these criteria are so specific that they do not actually apply to many situations.[134] Therefore, as Lootsteen points out, even if one were to accept that conflicts of national liberation can trigger API, the circumstances in which this could occur are so limited that there would still be other situations where the doctrine of belligerency could apply.[135]

From the preceding analysis, it can be concluded that there is strong support for the continued relevance of the doctrine of belligerency. The three legal regimes discussed—Common Article 3, APII, and Article 1(4) API—have not rendered the doctrine of belligerency outdated. Rather, it remains an option to regulate conflicts with armed groups. The doctrine of belligerency is part of what has become a patchwork of legal regimes to regulate conflicts involving armed groups:

- *Internal disturbances*—the laws of armed conflict do not apply.
- *Common Article 3 conflicts*—a minimum set of rules apply to a wide range of conflicts.
- *APII conflicts*—a larger set of rules apply to a smaller amount of conflicts.
- *Article 1(4) API conflicts*—the full body of laws applicable to international armed conflicts applies should the conditions be met.
- *Recognition of Belligerency*—the full body of law applicable in international armed conflicts applies to a limited set of circumstances.[136]

5.4 The Recognition of Belligerency Today

Taking the view that the legal developments post-WWII have not rendered the doctrine of belligerency obsolete, what could the recognition of belligerency look like today? The current world is a very different place than pre-WWII—both legally and in terms of practical realities on the ground. There are three main areas

[133] Both the UN Charter and the UNGA Resolution in question (UNGA Res 2625 (XXV), *supra* note 126) see the right to self-determination in the context of a State's right to territorial integrity and political independence; UN Charter, *supra* note 126, Article 2(4).

[134] Conflicts of colonial domination are largely considered to be occurrences of the past; conflicts against racist regimes were included with particular reference to South Africa; and the notion of occupying powers is not very clear. However, some people claim that the situation in the Palestinian Territories could fulfill this latter criterion; Glazier 2012, paras 17–18.

[135] Lootsteen 2000, p. 133.

[136] See Sect. 5.4.1 for a discussion on the rules triggered.

to consider concerning the potential application of the doctrine of belligerency today. The first is determining where the recognition of belligerency would fit in today's system of conflict characterization and what set of rules would be triggered. The second issue concerns the objective criteria. The third, and probably more difficult question, is how would the subjective element be dealt with today?

5.4.1 Conflict Characterization and Rules Triggered

What category of conflict does the doctrine of belligerency fall under and what body of law applies when a belligerency is recognized today? Any assessment of the doctrine of belligerency must take into account the shift in paradigm that occurred in 1949 from 'war' to 'armed conflict'.[137] Specifically, the fact that the recognition of belligerency was developed and practised at a time when the legal concept of non-international armed conflicts did not exist has caused some lack of clarity both in the way the conflict should be categorized and in what rules are triggered.

The first question is whether a recognized belligerency is an international armed conflict, a non-international armed conflict, or a third category of conflict. Today, there are two categories of conflict under the law of armed conflict—international and non-international. To create a third category for the recognition of belligerency has not been suggested by anyone and would only complicate matters. Commentators have most commonly discussed the doctrine of belligerency under the rubric of non-international armed conflicts or civil wars.[138] This approach makes sense, since the classification of conflicts generally depends on the parties to the conflict—whether a party is a State or an armed group, rather than the body of law which is triggered.[139] In addition, inter-State conflicts automatically trigger the law applicable to international armed conflicts in full,[140] and any related body of law that applies with regard to the relations between States. This is not necessarily the case with a recognized belligerency. Most notably, the recognition of belligerency by a third State triggers the law of neutrality, but not necessarily the laws of armed conflict between the fighting State and the armed group.

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[137] Cullen 2010, pp. 21–22.

[138] See, for example, Schindler 1979b, p. 145; For example, during the drafting of the Geneva Conventions a discussion of the doctrine of belligerency arose in the context of Common Article 3, rather than Common Article 2. However, see Lauterpacht 1952, p. 370, Footnote 1, describing the recognition of belligerency as turning a non-international armed conflict into one 'of an *international* character'.

[139] Interview with Professor Michael N. Schmitt (2 October 2012). A possible exception to this are wars of national liberation.

[140] Although discussion exists concerning nuances of the threshold of IACs, these are beyond the scope of this chapter.

However, certain consequences may emanate from classifying the recognition of a belligerency as a non-international armed conflict. Perhaps most importantly, the law of neutrality is triggered (regardless of whether a belligerency is recognized by the State in conflict or a neutral State). Thus, one of the consequences of categorizing the recognition of belligerency as a type of non-international armed conflict is that it provides an example of the application of the law of neutrality to a non-international armed conflict. Yet, in general, the view that the law of neutrality extends to non-international armed conflicts is a contentious one.[141] Could the classification of the recognition of belligerency as a non-international armed conflict have implications for the development of the law in this area? This issue would not arise if the doctrine of belligerency were to fall under the category of international armed conflicts.

The next question is what rules apply now that the law of war has been superseded by the law of armed conflict? Would the recognition of belligerency trigger the rules found in Common Article 3, the full Geneva Conventions, any additional rules? It has been suggested by some commentators that if the doctrine of belligerency still applies post-World War II, the rules triggered would be those of Common Article 3, and not the full body of the Geneva Conventions.[142] The drafting history discussed above indicates that Common Article 3 was meant to apply to a separate type of conflict than a recognized belligerency.[143] Moreover, commentators, including those who wrote shortly after the creation of Common Article 3, considered that Common Article 3 applied 'primarily to civil wars in cases in which there ha[d] been no recognition of belligerency'.[144] Therefore, more support exists for the view that the law applicable to international armed conflicts applies to cases of recognized belligerency, at least when it is the fighting State that recognizes the situation as a belligerency (as opposed to a third State).[145]

A subsequent question then arises as to whether or not the relevant laws of international armed conflict that were applicable before 1949 are the same as those post-1949. It is accepted today that the laws of neutrality apply in cases of international armed conflict, in addition to declared war.[146] There does not appear to be an issue in applying the current body of law applicable in international armed

[141] See Bothe 2008, p. 579; see also Heintschel von Heinegg 2007, p. 560.

[142] See, for example, Moir 2002, pp. 40, 41.

[143] Moir pp. 20, 21. See also Sect. 5.3.1.

[144] Lauterpacht 1952, pp. 370–371, writing in 1952; See also Draper 1979, p. 86.

[145] This is not to say that Common Article 3 could not apply additionally in cases of recognized belligerencies.

[146] An analysis of exactly how the laws of neutrality are manifested today (due to the effect that the UN Charter and other changes in the legal structure over the past century may have had) is beyond the scope of this chapter. See, for example, Heintschel von Heinegg 2007; See also Petrochios 1998.

conflicts to a recognized belligerency.[147] Interestingly, Dinstein suggests that the law applicable when a belligerency is recognized may have a broader applicability than the Geneva Conventions, because it does not contain the nationality restriction found in Article 4 Geneva Convention IV (GCIV).[148] On the contrary, the doctrine of belligerency was intended to apply to nationals of the State at war.[149] This factor could mean that those who qualify only for a more limited regime of protection due to their nationality when in the hands of the enemy would actually get more protection in a recognized belligerency than in an inter-State conflict governed by the Geneva Conventions.[150]

5.4.2 Objective Elements

The four objective elements required by the recognition of belligerency have provided a basis from which the criteria for subsequent law (Common Article 3 and APII) have developed. This continuity means that in general there is not a great deal of difficulty in applying the objective elements traditionally required by the recognition of belligerency to conflicts today. It simply suggests that a much higher threshold must be met than is the case for Common Article 3 and APII. However, the cross-border nature of some high-intensity conflicts today may present challenges to the objective criteria. In particular, geography may affect the requirement that a civil war exist, and possibly the requirement of territorial control. The 2006 conflict between Israel and Hezbollah exemplified this. The traditional doctrine of belligerency was deeply embedded in the notion that conflicts that reached the degree of intensity to warrant State-like treatment were civil wars—conflicts between rebels and the legitimate government within a State. Could a belligerency be recognized in a conflict between an armed group and a State that does not take place *within* the territorial State? Would consent, or the

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[147] See, for example, Lauterpacht 1952, pp. 370, 371: "This means that once belligerency has been recognized the conflict becomes one of an *international* character with the result that the provisions of Article 2 apply".

[148] GCIV, *supra* note 17, Article 4, defines those who fall under its scope as those who are '… in the hands of a Party to the conflict or Occupying Power of which they are not nationals. … Nationals of a neutral State who find themselves in the territory of a belligerent State, and nationals of a co-belligerent State, shall not be regarded as protected persons while the State of which they are nationals has normal diplomatic representation in the State in whose hands they are.' Clearly, the recognition of belligerency, by its very nature, envisioned the protection of nationals of the State party to the conflict. The same nationality restrictions do not appear in API.

[149] Dinstein 2012, p. 408.

[150] Although the gap in the protection of those who have fallen into the hands of the enemy and who are not covered by GCIV due to their nationality has been filled to some degree by the fundamental guarantees of API, *supra* note 17, Article 75 (now considered to apply as a matter of customary international law in IACs), such individuals still do not receive the same treatment as others who do fulfil the Article 4 GCIV criteria.

lack thereof, impact on the application of the doctrine of belligerency in such cases?[151]

Part of the question lies in how the objective criterion of a civil war should be interpreted. Is it a requirement that is restricted to civil wars, thus limited geographically? Or, is the essence of the criterion a situation of high intensity violence, therefore reducing the geographical relevance? On the one hand, an argument can be made that it is the intensity of the conflict that matters. Recalling the indicators for a civil war, the focus was on the intensity of the conflict.[152] Elements regarded as important were the duration and the widespread nature of the violence. The underlying presumption was that the conflict had reached such proportions that it resembled one between two States, and therefore had wider-reaching effects that necessitated regulation. A conflict such as the 2006 war between Israel and Hezbollah could meet this standard of high intensity.[153] An additional argument can be made that the cross-border element would only increase the need for the recognition of belligerency. Traditionally, one of the purposes of recognizing an internal conflict as a belligerency was to safeguard trade interests with neutral third States. The fact that the conflict with an armed group takes place across borders could therefore increase the need to have the law of neutrality apply.

On the other hand, the State-centric nature of the law lends credence to a view that the requirement should be interpreted as occurring within a State. First of all, when seen in relation to the geographical scope of APII and Common Article 3, it becomes harder to argue for the expansion of the doctrine of belligerency's geographical reach to cross-border conflicts. Both APII and Common Article 3 include specific wording that limits their applicability to within the territory of a country.[154] Admittedly, the geographical reach of Common Article 3 is currently in a state of flux and is understood by many to have expanded beyond its original scope.[155] However, while this interpretation does seem to be the trend, it is not yet

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[151] NIACs occur today with increasing frequency where outside States play a large role in conflicts within another State with the consent of the territorial State's government. This was the case in the 2003 Iraq conflict during certain periods.

[152] See Sect. 5.2.3.1 above.

[153] Hezbollah could arguably fulfil the other three objective criteria. They had a government-like entity (although the fact that they were also in the government at the time complicates the example as it provides a link between Hezbollah and the country of Lebanon that goes beyond territorial control of a region); they were in control of territory; and arguably, they abided by the laws of armed conflict.

[154] The wording of APII, *supra* note 17, Article 1, specifically requires that the conflict 'take place *in* the territory of a High Contracting Party between *its* armed forces and dissident armed forces or other organized armed groups'; Common Article 3 states that it applies to 'armed conflict[s] not of an international character occurring *in the territory* of one of the High Contracting Parties'. Emphasis added.

[155] It is generally agreed that at the time of drafting Common Article 3 the types of conflicts envisioned were internal armed conflicts (see ICRC Commentary to Common Articles 3, 37; Cullen 2010, pp. 49–51. However, increasingly, today it is considered that the scope of Common Article 3 has expanded to include conflicts that are not international (for example US Supreme

a reflection of customary international law. The point here is that these two frameworks have lower thresholds of applicability than the doctrine of belligerency and trigger a more limited set of rules. Yet, even they require evidence of a shift in interpretation that explains the geographic extension of their applicability.

The requirement of territorial control, likewise, was assumed to mean that the armed group controlled territory *within* the State it was fighting. Would the control of territory by an armed group in a second State, such as Hezbollah in 2006, fulfill that criterion? Or, is the requirement constrained by the territorial boundaries of the State which is fighting? A reference to an underlying purpose of the doctrine of belligerency holds weight here as well. The doctrine was intended to apply when a conflict reached proportions that affected relations between States. Arguably, the fact that the armed group controls territory in a second State actually increases the international character and thus the need for more regulation.

The various interpretations of the scope of these two objective criteria—whether it is the intensity and/or geography that matter for the requirement of a civil war; and whether control of territory by an armed group is geographically restricted—can each be justified by State-centric concerns. In the absence of State practice and written law, this is left an unresolved matter.

5.4.3 Subjective Element: Recognition

Another area of difficulty lies in how to interpret the subjective requirement of recognition today. Several questions arise involving when a third State's interests are affected and the relevance of past indicators of tacit recognition, such as the institution of a blockade.

First, a precondition for a third State's recognition of belligerency is that its own interests are affected (otherwise the recognition could be perceived as an illegal intervention in the domestic affairs of another State). As mentioned earlier, in practice this prerequisite was mainly fulfilled during maritime conflicts,[156] probably because at the time the seas were the principle means of trading. Today, the world is extremely globalized and interconnected due to technological developments, such as aircraft and the Internet. Therefore, a State's interests could be affected far more extensively than in previous times. Would this lead to such a broad interpretation of affected interests that it would essentially render the subjective element useless?

(Footnote 155 continued)
Court in *Hamdan* held that "[t]he term "conflict not of an international character" is used here in contradistinction to a conflict between nations." Supreme Court of the United States, *Hamdan* v. *Rumsfeld*, 29 June 2006, 548 U.S. 557, http://www.supremecourt.gov/opinions/05pdf/05-184.pdf, para 67. Others, the minority, take a literal meaning of the 'in the territory of one of the High Contracting Parties' to exclude cross-border conflicts (Corn 2006).

[156] Moir 1998, p. 343.

Another issue related to the interests of third States is what role the UN Security Council might play in third State recognition. The doctrine of belligerency was developed prior to the creation of our modern UN system. Today, the UN Security Council has the primary responsibility for the maintenance of peace and security in the world.[157] As such, it can declare a situation as a threat to peace and security and bind States through its resolutions.[158] What might the role of the UN Security Council be in the recognition of belligerency? It seems that if the UN Security Council declares a situation to be a threat to world peace, one could argue that the situation must have reached such a level that it does affect the interests of third States. Moreover, there are several factors that support the view that the Security Council could fulfill this subjective criterion. First of all, at the time of drafting Common Article 3, before the decision was made to move away from the recognition of belligerency and broaden the types of conflicts to which only a few rules would apply, the drafters contemplated one of the criterion to be: '[t]hat the dispute has been admitted to the agenda of the Security Council or the General Assembly of the United Nations as being a threat to international peace, a breach of the peace, or an act of aggression'.[159] In addition, some States viewed the application of Article 1(4) API as having a subjective element, which could be fulfilled through recognition by regional organizations or the UN.[160] For this reason, it seems that an argument could be made in support of a UN Security Council Resolution taking the place of third State recognition of belligerency under certain circumstances. It must be emphasized, however, that the only time such a UN Security Council Resolution would be relevant to the doctrine of belligerency is if the Resolution recognized the armed group that is in opposition to a State. In other words, the recognition of, for example, armed groups in Iraq that were fighting on behalf of the Coalition or Iraqi Government would not be relevant to the doctrine of belligerency (as States have the right to assist other States in their internal affairs when requested). In the case of Libya, however, had the Libyan rebels fulfilled the stringent objective criteria for the recognition of belligerency, it is possible that Security Council Resolution 1970 could have constituted a recognition of belligerency.[161] Consequently, the body of laws applicable in international armed conflicts could govern the entire conflict.

However, UN involvement in third State recognition would generate a number of additional issues. For example, if the UN Security Council were to recognize a belligerency then would the four objective criteria need to be fulfilled? The answer is not clear. In addition, what States would be bound by the laws of neutrality? Would this mean *all* States? Finally, could a resolution by the General Assembly

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157 UN Charter, *supra* note 126, Article 24.

158 UN Charter, Ibid., Articles 34, 39.

159 *supra* note 89 and accompanying text.

160 *supra* note 130 and accompanying text.

161 Note that the recognition of belligerency is not to be confused with the recognition of the Libyan National Council as the legitimate government of Libya.

have the effect of recognition as well, or would it be limited to the Security Council? Arguably, the General Assembly should be able to have that effect since each Member State is represented and decisions are taken by majority vote.[162]

The other main issue with regard to the subjective requirement is whether or not some of the tacit indicators of belligerency continue to be relevant. Traditionally, two frequently resorted to signs of tacit recognition were blockades and declarations of neutrality. Increasingly, there has been a trend to expand the law applicable in non-international armed conflicts by analogy to international armed conflicts.[163] There has recently been a discussion of this with regard to blockades[164] and, to a much lesser degree in connection with parts of the law of neutrality.[165] It is clear that blockades and the law of neutrality do not apply to non-international armed conflicts as a matter of customary international law. However, given the role that both the institution of a blockade and the law of neutrality have played in determining whether or not a belligerency was recognized tacitly, it is worth examining the possible implications of an extension of these concepts to non-international armed conflicts for the recognition of belligerency today.[166]

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[162] UN Charter, *supra* note 126, Article 18.

[163] The degree to which this has occurred is debated. However, it can be seen in recent Conventions, in jurisprudence from and some statutes of international criminal tribunals, as well as in the ICRC Customary International Law Study (which considers that 147 of the 161 rules are applicable to both IACs and NIACs. Pejic, 'Status of Armed Conflicts' 79 and Henckaerts and Doswald-Beck 2005 generally). See for example: The Protocols to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, United Nations Treaty Series, Volume 1342, p. 137; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 26 March 1999, UNESCO Doc. HC/1999/7, Article 22; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, http://www.icrc.org/ihl.nsf/INTRO/580?OpenDocument; Several statutes from international criminal tribunals have broadened their reach to include crimes committed in non-international armed conflicts rendering certain acts committed in NIAC as war crimes. Some jurisprudence from international tribunals has loosened the distinction between the rules applicable in the two regimes by interpreting some of the laws of international armed conflicts to be applicable to situations of non-international armed conflict as well (*Tadić* Jurisdiction Appeal Decision, *supra* note 97, para 127; Meron 2000).

[164] See, for example, Heintschel von Heinegg 2012, pp. 227–229;
Turkel Commission 2010, para 44:

> However, it should be noted that given the degree of *de facto* control that the Hamas exercises over the Gaza Strip; the significant security threat that it presents; and its attempts to import weapons, ammunition and other military supplies, *inter alia*, by sea; the Commission would have considered applying the rules governing the imposition and enforcement of a naval blockade even if the conflict between Israel and the Gaza Strip had been classified as a non- international armed conflict.

[165] Geography of War Workshop 2012.

[166] Dinstein, one of the commentators who considers that the doctrine of belligerency continues to be relevant, seems to consider these indicators as remaining applicable today; Dinstein 2012, p. 410.

The question of whether or not a blockade remains an indicator of the recognition of belligerency is an inadvertent consequence of the recent debates surrounding the Gaza Flotilla incident. In those debates, there was a discussion centered on the legality of the Israeli blockade and whether or not a blockade can legally occur in non-international armed conflicts, as well as international armed conflicts. Because blockades have traditionally been limited to international armed conflicts, it was important to either determine that the conflict in Gaza was international in nature, or to establish that blockades can now legally occur in non-international armed conflicts. A majority view seems to be that the conflict between Israel and the Palestinians is international[167] and that blockades remain limited to international armed conflicts.[168] However, there is not consensus that the law of blockades is restricted to international armed conflicts.[169] If blockades are seen to apply to non-international armed conflicts, this could have an effect on the doctrine of belligerency. The reason that a blockade was traditionally considered to be a tacit recognition of belligerency was because blockades could only occur in international armed conflicts. Once blockades are no longer specific to international armed conflicts, then their value as an indicator for an international armed conflict would be lost.

The same line of reasoning would apply to declarations of neutrality, should this part of international law be considered to extend to non-international armed conflicts. The law of neutrality regulates relations between *States* (unless a belligerency is recognized), and therefore its application is restricted to international

[167] The categorization of the conflict between Israel and Hamas is contentious and fraught with difficulties. There are a number of ways of considering the conflict to be international in character. One view is that it is an occupation and therefore an international armed conflict (see for example Dinstein 2009, p. 276). The view advanced in the Israeli Supreme Court Decision opinion in the Public Committee Against Torture (HCJ 769/02 *Public Committee Against Torture v. Government* [2006] §18) is that the conflict is international because it crosses borders. Finally, the blockade could be seen as a tacit recognition of belligerency by the Israeli Government, triggering the application of the laws applicable in IACs. Although the Palmer Report 2011, para 73, does not state the basis for which it considers the conflict to be international, it does discuss blockades in the context of the recognition of belligerency at paras 19–23 of Appendix I: The Applicable International Legal Principles.

[168] Heintschel von Heinegg 2012, p. 228:

> … absent recognition of belligerency, the parties to a non-international armed conflict are not entitled to establish and enforce a naval or aerial blockade against foreign vessels or aircraft.

[169] See for example: Turkel Commission Report 2010, para 42:

> However, even if the conflict in the Gaza Strip were to be classified as a non-international armed conflict, it would appear that the rules of international humanitarian law regarding naval blockades would still be applicable…. … it is likely there will be a willingness on the part of courts and other bodies to recognize that the rules governing the imposition and enforcement of a naval blockade are applicable to non-international armed conflicts.

See also para 44 of the same report.

armed conflicts.[170] Recently, limited discussion has arisen suggesting extending certain aspects of the law of neutrality to non-international armed conflicts by analogy.[171] For example, this issue has surfaced in the context of the 'global war on Al Qaeda and its associates'. Some suggest that the law of neutrality may be used as a way for one State to cross a border in order to act against an armed group that is located in the territory of a second State (in the context of a non-international armed conflict with that armed group).[172] In this case, it is put forth that the second State has violated its neutrality by allowing an armed group to act on and from its territory, thus justifying the incursion on its territorial integrity.[173] Based on these limited discussions, it cannot be said that the law of neutrality has extended to non-international armed conflicts. However, should the law develop in this direction, it would raise a similar question to that brought up in the case of blockades. Namely, could a declaration of neutrality still remain an indicator for the recognition of belligerency by third States if the body of law also applies to non-international armed conflicts?[174]

No clear-cut answer is provided here as to how the applicable law, the objective criteria and the subjective requirement of the doctrine of belligerency may have been affected by a changed legal order and different realities on the ground. The minimal State practice, the lack of written law, and the fact that some of these changes are still in a state of flux, make definitive conclusions difficult. However, the point here is that the concept as it was employed some 60–100 years ago cannot simply be transplanted into today's environment without consideration for the legal developments discussed above, and any others that may emerge.

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[170] Bothe 2008, p. 579: "The application of the law of neutrality requires the existence of an international conflict. There is no neutrality in relation to non-international conflicts"; See also, Heintschel von Heinegg 2007, p. 560, stating the purpose of the law of neutrality.

[171] Geography of War Workshop 2012; Karl Chang also raised the issue of the law of neutrality carrying over to NIACs, albeit for a different reason, in Chang 2011. In this article, Chang argued that given the lack of law governing detention in NIACs, the law of neutrality should be turned to for guidance. While his argument does not reflect the existing law in any way, it did trigger some discussion on the matter.

[172] Discussions at the Geography of War Workshop 7–8 May 2012, Naval War College, Newport Rhode Island, Geography of War Workshop 2012.

[173] Interview with Professor Michael N. Schmitt (2 October 2012); Discussions at the Geography of War Workshop 7–8 May 2012, Naval War College, Newport Rhode Island, Geography of War Workshop 2012.

[174] In fact, should the law of neutrality extend to non-international armed conflicts, it could arguably have even more far-reaching consequences for the doctrine of belligerency. It could essentially remove one of the underlying reasons for the very existence of the doctrine. The two main purposes of the doctrine of belligerency are to trigger the law of neutrality when a conflict reaches such proportions as to affect the larger community of States; and to bring the full body of the laws of war into effect vis-à-vis the State and the armed group once the conflict has reached such a high intensity as to warrant more regulation. The first of these would essentially no longer be relevant if the law of neutrality were to extend to non-international armed conflicts generally.

5.5 Conclusion

In conclusion, the doctrine of belligerency has not been rendered obsolete by the Geneva Conventions and their Additional Protocols. Rather, it offers another option for the legal regulation of a very specific type of conflict that can exist in conjunction with the conflicts governed by Common Article 3, APII, and API Article 1(4). However, at the same time, hurdles exist in applying the doctrine today. Given the many other legal developments since 1949, the way in which the doctrine of belligerency applies in practice needs to be reassessed in order for it to remain relevant.

A conclusion could be reached that such an assessment would be a wasted effort, given the limited circumstances in which the criteria for the doctrine would be fulfilled and the difficulty in ascertaining the effect a changed legal environment might have on the doctrine. However, although not an easy task, it is worthwhile to at least consider how the doctrine of belligerency might be applied today in conjunction with these developments. The doctrine of belligerency demonstrates a balance between the interests of States and concerns of humanity. Its subjective element reflects the State-centric nature of the law, as does the high threshold of the objective criteria. The underlying premise that if a State's interests (a territorial or third State) are so affected that a need for more reciprocal relations arises also stems from the concerns of States. At the same time, the very fact that the doctrine provides a significant degree of protection, albeit in a limited set of circumstances, speaks to the humanization of armed conflict[175] that has occurred in the past half century. This aspect of the doctrine corresponds with one of the underlying purposes of the law of armed conflict—to attempt to minimize the scourges of war for all involved. It is true that States will likely be hesitant to apply the doctrine for fear that doing so may grant the appearance of legitimacy to armed groups. However, at a time when there is a trend to search for more legal regulation of conflicts involving armed groups through means such as using the law applicable to international armed conflicts by analogy or turning to human rights law, it is worthwhile to re-examine this body of law that is already part of the law of armed conflict.

References

Abi-Saab G (1972) Wars of national liberation and the laws of war. Annales d'Etudes Internationales 3:93

Abi-Saab G (1988) Non-international armed conflicts'. In: Henry Dunant Institute, Geneva, UNESCO, International dimensions of humanitarian law, pp 217–239

Aldrich G (2000) The laws of war on land. Am J Int Law 94:42–63

[175] On the trend to 'humanize' the law of armed conflict see Meron 2000.

Baxter R (1974) Ius in Bello Interno: the present and future law. In: Moore J (ed) Law and civil war in the modern world. Johns Hopkins University Press, Baltimore
Beale J (1896) The recognition of Cuban Belligerency. Harv Law Rev 9:407–419
Bothe M (2008) The law of neutrality. In: Fleck D (ed) The handbook of International Humanitarian Law, 2nd edn. Oxford University Press, New York, pp 571–601
Bothe M et al (1982) New rules for victims of armed conflicts: commentary on the two 1977 protocols additional to the Geneva Conventions of 1949. Martinus Nijhoff Publishers, The Hague
Bugnion F (2003) Jus ad Bellum, Jus in Bello and non-international armed conflicts. Yearb Int Humanit Law 6:167–198
Cassese A (2008) The Spanish Civil War and the development of customary law concerning internal armed conflicts. In: Cassesse A (ed) The human dimension of international law. Oxford University Press, Oxford
Castrén E (1966) Civil War. Suomalainen Tiedeakatemia, Helsinki
Chang K (2011) Enemy status and military detention in the war against Al-Qaeda. Texas J Int Law 47:1–73
Corn G (2006) Hamdan, Lebanon and the regulations of hostilities Hamdan, Lebanon, and the regulation of armed hostilities: the need to recognize a hybrid category of armed conflict. Vanderbilt J Transnatl Law 40:295–355
Cullen A (2010) The concept of non-international armed conflict in international humanitarian law. Cambridge University Press, Cambridge
Dinstein Y (2009) The international law of belligerent occupation. Cambridge University Press, Cambridge
Dinstein Y (2010) The conduct of hostilities under the law of international armed conflict, 2nd edn. Cambridge University Press, Cambridge
Dinstein Y (2012) Concluding remarks on non-international armed conflicts. In: Watkin K, Norris A (eds) Non-international armed conflict in the twenty-first century. Int Law Stud 88:399–421
Draper (1979) The implementation and enforcement of the Geneva Conventions of 1949 and of the two additional protocols of 1978. Recueil des Cours 164:1–54
Draper G (1983) Humanitarian law and internal armed conflicts. Ga J Int Comp Law 13:253–277
Falk R (1964) Janus Tormented: the international law of internal war. In: Rosenau J (ed) International aspects of civil strife. Princeton University Press, Princeton, pp 185–248
Final Record of the Diplomatic Conference of Geneva 1949, vol II B. Federal Political Department, Berne
Fleck D (2008a) The law of non-international armed conflicts. In: Fleck D (ed) The handbook of international humanitarian law, 2nd edn. Oxford University Press, New York, pp 605–629
Fleck D (2008b) The handbook of international humanitarian law, 2nd edn. Oxford University Press, New York
Francis Lieber Instructions (1863) Francis Lieber instructions for the government of armies of the United States in the field. http://www.icrc.org/ihl.nsf/FULL/110?OpenDocument
Geography of War Workshop (2012) Geography of war workshop 7–8 May, US Naval War College, Newport Rhode Island. http://www.usnwc.edu/GOW
Glazier D (2012) Wars of national liberation. In: Wolfrum R (ed) Max Plank encyclopedia of Public International Law. Oxford University Press. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e442&recno=1&author=Glazier
Green L (2008) The contemporary law of armed conflict, 3rd edn. Manchester University Press, Manchester
Greenwood C (1987) The concept of war in modern international law. Int Comp. Law Q 36:283–306
Henckaerts J-M, Doswald-Beck L (2005) Customary International Humanitarian Law, vol I. Cambridge University Press, Cambridge. http://www.icrc.org/customary-ihl/eng/docs/home
Heintschel von Heinegg W (2007) Benevolent third states in international armed conflicts: the Myth of the irrelevance of the law of neutrality. In: Schmitt M, Pejic J (eds) International law

and armed conflict: exploring the faultlines: essays in honour of Yoram Dinstein. Martinus Nijhoff Publishers, The Hague, pp 543–568
Heintschel von Heinegg W (2012) Methods and means of naval warfare. In: Watkin K, Norris A (eds) Non-international armed conflict in the twenty-first century. Int Law Stud 88:211–236
ICRC Opinion Paper (2008) How is the term 'Armed Conflict' defined in international humanitarian law? March 2008. http://www.icrc.org/eng/resources/documents/article/other/armed-conflict-article-170308.htm
ICRC (2011) 31st International conference of the Red Cross and Red Crescent Report. Strengthening legal protection for victims of armed conflicts. 28 Nov–1 Dec 2011. http://www.icrc.org/eng/resources/documents/red-cross-crescent-movement/31st-international-conference/31-international-conference-stengthening-ihl-2011-12-29.htm
Institute of International Law Resolution of 1900, Droits et devoirs des Puissances étrangères, au cas de mouvement insurrectionnel, envers les gouvernements établis et reconnus qui sont aux prises avec l'insurrection. http://www.idi-iil.org/idiF/navig_chron1893.html
Junod S (1983) Additional protocol II: history and scope. Am Univ Law Rev 33:29–40
Kalshoven F (2007) Reflections on the law of war collected essays. Martinus Nijhoff Publishers, Leiden
Kritsiotis D (2010) The Tremors of Tadic. Israel Law Rev 43:262–300
Kotzsch L (1956) The concept of war in contemporary history and international law. E. Droz, Geneva
Lacqueur W (1976) Guerrilla: a historical and critical study. Little Brown, Boston
Lauterpacht H (1952) Disputes, war and neutrality. Oppenheim International Law, vol II, 7th edn. Longman, London
Lauterpacht H (1948) Recognition in international law. Cambridge University Press, Cambridge
Lootsteen Y (2000) The concept of belligerency in international law. Mil Law Rev 166:109–141
Matheson M (1987) Remarks on remarks on the 'United States position on the relation of customary international law to the 1977 Protocols Additional to the 1949 Geneva Conventions'. http://usnwc.libguides.com/loader.php?type=d&id=473799
Meron T (2000) The humanization of humanitarian law. Am J Int Law 94:239–278
Menon P (1994) The law of recognition in international law: basic principles. Edwin Mellen Press, Lewiston
Milanovic M (2011) Palmer Committee report on the Mavi Marmara incident, EJIL analysis, 2 Sept 2011. www.ejiltalk.org/palmer-committee-report-on-the-mavi-marmara-incident/
Moir L (1998) The historical development of the application of humanitarian law in non-international armed conflicts to 1949. Int Comp Law Q 47:337–361
Moir L (2002) The law of internal armed conflict. Cambridge University Press, Cambridge
Neff S (2005) War and the law of nations. Cambridge University Press, Cambridge
Palmer Report (2011) UN Report of the secretary-general's panel of inquiry on the 21 May 2010 Flotilla Incident. http://www.un.org/News/dh/infocus/middle_east/Gaza_Flotilla_Panel_Report.pdf
Pejic J (2004) Terrorist acts and groups: a role for international law? British Yearb Int Law 75:71–100
Pejic J (2007) Status of armed conflicts. In: Wilmshurst E, Breau S (eds) Perspectives on the ICRC study on customary international law. Cambridge University Press, Cambridge, pp 77–100
Perna L (2006) The formation of the treaty law of non-international armed conflicts. Martinus Nijhoff Publishers, Leiden
Petrochios G (1998) Relevance of the concepts of war and armed conflict to the law of neutrality. Vanderbilt J Transnatl Law 31:575–616
Pictet J (1952–1960) The Geneva Conventions of 12 August 1949: commentary. ICRC, Geneva
Provost R (2002) International human rights and humanitarian law. Cambridge University Press, Cambridge
Riedel E (2000) Recognition of belligerency. In: Bernhardt R (ed) Max Planck encyclopaedia of Public International Law. Elsevier, Amsterdam

Rosas A (1976) The legal status of prisoners of war: a study in International Humanitarian Law applicable in armed conflicts. Suomalainen tiedeakatemia, Helsinki

Sandoz Y, Swinarski C, Zimmermann B (1987) Commentary on the additional protocols of 1977 to the Geneva Conventions of 1949. ICRC, Geneva

Sassoli M (2006) Transnational armed groups and international humanitarian law. Harvard Humanitarian Policy and Conflict Research. Occasional paper series 6. http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper6.pdf

Sassoli M, Bouvier A (2011) How does law protect in war, 3rd edn. ICRC, Geneva. http://www.icrc.org/eng/resources/documents/publication/p0739.htm

Schindler D (1979a) State of war, belligerency, armed conflict. In: Cassese A (ed) The new humanitarian law of armed conflict. Editoriale Scientifica, Napoli, pp 3–20

Schindler D (1979b) The different types of armed conflicts according to the Geneva Conventions and Protocols. Recueil des Cours 163:125–163

Schmitt M (2012) The status of opposition fighters in non-international armed conflict. In: Watkin K, Norris A (eds) Non-international armed conflict in the twenty-first century. International Law Studies, vol 88, Naval War College, Newport, Rhode Island

Tahzib-Lie B, Swaak-Goldman O (2004) Determining the threshold for the application of international humanitarian law. In: Lijnzaad L, Van Sambeek J, Tahzib-Lie B (eds) Making the voice of humanity heard. Martinus Nijhoff, Leiden, pp 239–253

Turkel Commission (2010) The Public Commission to examine the maritime incident of 31 May 2010. http://www.turkel-committee.com/files/wordocs//8707200211english.pdf

UK Ministry of Defence (2004) The manual of the law of armed conflict. Oxford University Press, Oxford

Vite S (2009) Typology of armed conflicts in International Humanitarian Law: legal concepts and actual situations. Int Rev Red Cross 91:69–94

Wilson H (1988) International law and the use of force by national liberation movements. Oxford University Press, Oxford

Wouters J, Verhoeven S (2011) Desuetudo. In: Wolfrum R (ed) Max Planck encyclopedia of Public International Law. Elsevier, Amsterdam. http://www.mpepil.com/subscriber_article?script=yes&id=/epil/entries/law-9780199231690-e1027&recno=1&author=Wouter

Part II
The Human Face by Topic

Chapter 6
In Search of a Human Face in the Middle East: Addressing Israeli Impunity for War Crimes

Jeff Handmaker

Abstract As a lawyer, Avril McDonald envisaged a world where humanitarian law would guide all states and their militaries; a world where combatants would be restrained and civilians protected. While her keen eye as a journalist recognised that the real world was infinitely more complex than the lawmakers had envisaged, she drew on both her intellect and her passion in her scholarly contributions towards a more just world. This essay addresses the response of Avril McDonald and others to one of the many conflicts Avril addressed her mind to, namely the behaviour of Israel's military during its 2006 bombing of Qana in Southern Lebanon, which was followed by further aggression in Gaza in 2008–2009. Recalling the responses of states to South Africa's military aggression in the 1980s, this short contribution reflects on Avril's scholarly contributions in order to find a 'human face' through advancing international humanitarian law order to restrain Israel's military and to protect civilians.

The author is Senior Lecturer in law, human rights and development at the International Institute of Social Studies (ISS) of Erasmus University and honorary senior research fellow at the School of Law, University of the Witwatersrand. The author wishes to acknowledge the professional journalists, correspondents and editors of www.ElectronicIntifada.net, where some of the material in this article was originally published, to Olivier Ribbelink and Marielle Matthee of the T.M.C. Asser Institute in The Hague as well as Marcel Brus of the University of Groningen who provided critical feedback on earlier drafts. Of course, all opinions, and any remaining mistakes and deficiencies are mine alone.

J. Handmaker (✉)
ISS, Erasmus University, Rotterdam, The Netherlands
e-mail: handmaker@iss.nl

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6.1 Introduction

Avril McDonald had a keen eye for the *humanitarian* aspect in international humanitarian law, otherwise known as the 'law of armed conflict'. Like similarly minded colleagues, she envisaged a world in which military forces would one day be guided, and indeed restrained, by IHL, for example by adopting a 'precautionary approach'.[1] As she wrote in relation to the conflict in Gaza in 2009:

> It would undeniably be desirable to characterise the situation in Gaza during the three weeks of Operation Cast Lead as an armed conflict, in order to ensure that the civilian population of Gaza could benefit from the widest possible protection of international law.[2]

Avril's humanitarian vision was not only reflected in her academic work, but also underpinned the training programmes she developed for military officers, departmental officials and others operating in official functions. She enjoyed working with the military, but she was also moved to condemn atrocities and wished to see the end of impunity for international crimes.

Reflecting on Avril's engaging intellect and adventurous spirit, in this article I offer some reflections of her scholarly efforts towards ending impunity, with particular reference to the Middle East and the contentious relationship between the State of Israel and its neighbours, as well as the impasse and conflict between Israel and the Palestinians. These are topics that only a small number of international lawyers have dared touch.[3] As in so many other polarized conflicts, some who have engaged in this topic have virtually reinvented IHL as political apologists. For example, writing in the very same *Yearbook on International Humanitarian Law* of which Avril was managing editor for some years, Laurie Blank enthusiastically defended Israel's actions in Operation Cast Lead, condemning the

[1] Kleffner et al. 2009.

[2] McDonald 2009b, p. 26.

[3] McDonald 2009a, in McDonald's presentation at the HILAC Event, she made a reference to a book by the Israeli historian, Eyal Weizmann, Weizmann 2007, which she noted had 'opened her eyes' to the impact of Israel's policies on the lives of Palestinians. Cf. Akram et al. 2011.

400-page *Goldstone Report*[4] and arguing, disingenuously, that "law must be agile enough to accommodate new challenges".[5]

Others, such as Schabas, have addressed the topic in a more even-handed way.[6] Nevertheless, most international lawyers simply avoid the topic, at best claiming that any comment on Israel's behaviour is *too political*. As a seasoned journalist and recognised scholar of IHL, Avril knew very well the futility of such a position; that *all* conflicts were political and that rigour and even-handedness in the application of law did not mean one had to remain ambivalent.[7] Law, indeed, was just one small part of the picture. And yet, as strong and eloquently argued as her views were, Avril openly welcomed the opportunity to engage with anyone, whatever their political perspective.

While there are many conflicts involving the Israeli military to which I could address my attention, including—at the time of writing—Israel's military aggression in Gaza in November 2012, this essay refers to the behaviour of Israel's military during its 2006 bombing of Qana in Southern Lebanon. Responding to allegations that war crimes had taken place, Avril addressed the behaviour of the Israeli military and of other armed combatants, and the need to stop such conflicts and hold states accountable when it was abundantly clear that civilians were by far the greatest casualties.[8]

Three themes emerge in the second section of this article, inspired by a short article that Avril and I co-wrote: first, the political responses that followed the actions of the Israeli military; second, concern over Israel's use of certain weaponry; and third, the importance of impartial investigations into allegations. I close this article with some comparative reflections with South Africa. In writing this contribution and making such comparisons, I do not imply that Avril would necessarily agree with everything I write here, nor do I suggest that all situations are the same. To the contrary, other commentators, including prominent South Africans who were actively involved in the anti-apartheid struggle, frequently point out that the situation in Israel and the Occupied Territories is far worse.[9] However, in assessing how states ought to respond to the impunity of any other state, it can be instructive to explore how states and international organizations responded to the South African government's behaviour in Southern Africa throughout the 1980s.

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[4] United Nations 2009.

[5] Blank 2010, p. 401.

[6] Schabas 2010.

[7] This was a view very much shared by Professor John Dugard, who has often expressed the view in public seminars that one cannot, and should not makes claims of neutrality, particularly from a Western standpoint, and especially when serious human rights and humanitarian law violations have allegedly taken place, and that it was imperative, as scholars, that one base their arguments on objectively verifiable facts and a rigorous interpretation of law. For an explanation of how most of the world views Israel's behaviour as compared to the West and, accordingly, why it is important to take this issue seriously, see Dugard 2007, pp. 733–734.

[8] Handmaker and McDonald 2006; McDonald 2009a, b.

[9] Achmat 2012.

6.2 Israel's 2006 Attack on Qana, Lebanon

In the early morning hours of 29 June 2006, Israeli military commanders ordered a massive bombardment of Qana, a village in southern Lebanon.[10] A few days earlier, the military had dropped leaflets from the air, warning that the entire area was a potential military target. The leaflets read:

> To all citizens south of the Litani River. Due to the terror activities being carried out against the State of Israel from within your villages and homes, the IDF is forced to respond immediately against these activities, even within your villages. For your safety! We call upon you to evacuate your villages and move north of the Litani River.[11]

At the same time as it was distributing leaflets, the Israeli military had already destroyed most of the surrounding roads and other civilian infrastructure, such as petrol stations, and continued to target certain vehicles, including minivans and pick-up trucks. For the few who were in possession of transport and fuel, it was an almost impossible choice: flee and risk being killed on the road or stay behind and risk being killed in their homes.[12] As the dust cleared, it was discovered that dozens of civilians, mostly women and children, who had stayed behind in Qana had perished as high-calibre rockets and missiles levelled the apartment buildings they were sheltering in. Describing these well-publicised events after its own research, Human Rights Watch unequivocally accused Israel of having committed war crimes through its indiscriminate bombing of civilians.[13]

6.2.1 Political Responses

The political responses to Israel's attack on such a densely populated civilian area were mixed. Similar public outrage had been expressed two decades earlier when Israel had attacked civilian areas during its invasion of Lebanon in 1982, including the village of Qana.[14] After what appeared to be another deliberate and disproportionate attack on Qana, well known to be densely populated by civilians who had been unable to escape Israel's relentless bombing campaign of Southern Lebanon, Avril McDonald and I wrote about the incident for the well-regarded online news journal that was then followed closely by tens of thousands of readers every month, *The Electronic Lebanon*.[15]

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[10] This section draws on and develops Handmaker and McDonald 2006.

[11] Israeli Ministry of Foreign Affairs 2006.

[12] Reuters 2006; Fattah 2006.

[13] Human Rights Watch 2006.

[14] Fisk 1990, pp. 660–690.

[15] This site has since been moved to: http://electronicintifada.net/lebanon, last Accessed on 23 April 2012.

In our article, we argued that international law, and in particular The Hague and Geneva Conventions, restrains the Israeli army in how it may respond to attacks on Israeli territory, including the types of weapons that can be used.[16] We furthermore argued that Israel should refrain from directly attacking civilians and engaging in indiscriminate attacks against civilian infrastructure. Finally, we observed that by occupying parts of southern Lebanon, Israel had to respect additional requirements, in particular to ensure that civilians were protected and had access to humanitarian assistance, and that the sick and wounded had access to medical assistance.[17]

Already a decade earlier, in 1996, the New York-based organisation Human Rights Watch had come out strongly against Israel's use of cluster bombs, which it argued were indiscriminate weapons.[18] Although cluster bombs were at that time not banned under international law, it was nevertheless illegal for any military to use weapons or tactics that did not make a distinction between civilian and military targets.[19] Israel's use of these weapons in an indiscriminate way in civilian areas led to Human Rights Watch and others to suggest that Israel might have committed war crimes.[20] Celebrating the success of the Cluster Bomb treaty that was adopted in 2008, but still not satisfied, Avril provided a rigorous argument in a paper, which later formed the basis of a book, that states also needed to focus their attention on banning the use of depleted uranium.[21]

In addition to the illegal targeting of civilian areas in Qana, Israel had also been accused of the illegal use of certain weapons, and in particular its indiscriminate use of white phosphorous as a weapon of war. Faced with a situation of impunity, Israel's military and political leadership prompted a massive escalation in its hostilities against Lebanon, and indeed occupied Gaza, the West Bank and elsewhere. As part of this escalation, Israel's war commanders made wide use of a vast and sophisticated arsenal of deadly weaponry, supplied through United States and European arms companies, and paid for with billions of dollars provided each year by the US taxpayer.[22]

On 9 August 2006, the International Peace Bureau (IPB) issued an urgent appeal. Referring to "countless" other reports from hospitals and journalists, the appeal claimed that "new and strange symptoms [had been] reported" that were

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[16] Handmaker and McDonald 2006. This section also drawn on Handmaker 2006.

[17] Handmaker and McDonald 2006.

[18] Human Rights Watch 1996; Cluster bombs release multiple 'bomblets', which do not distinguish between soldiers or resistance fighters (or 'combatants') and civilians.

[19] On 30 May 2008, the Diplomatic Conference for the Adoption of a Convention on Cluster Munitions agreed on the text of the Convention on Cluster Munitions, which came into force on 1 August 2010; Convention on Cluster Munitions, Dublin, 30 May 2008, C.N.776.2008.TREATIES-2 of 10 November 2008. For more information, see: http://www.clusterconvention.org, last Accessed on 1 November 2011.

[20] Human Rights Watch 2006.

[21] McDonald 2008; Kleffner et al. 2009.

[22] Mearsheimer and Walt 2008, pp. 23–48; Hartung and Berrigan 2002.

consistent with the use of banned weapons, including "chemical and/or biological agents".[23] Doctors in Gaza had also made similar allegations.[24]

White phosphorous as a substance is itself not (yet) banned in international law. However, like other incendiary devices, such as napalm, the use of any offensive weapon against civilians, or in circumstances where civilians are likely to be the victims of an attack is banned in international law.[25] As reported in a conference of the American Society of International Law, the renewed use of white phosphorous in Iraq has generated a worldwide debate, not only because of the indiscriminate (i.e., illegal) way in which it is used, but because of the particularly grievous nature of the injuries that it causes.[26]

Louise Arbour, then United Nations High Commissioner for Human Rights, and Jan Egeland, then head of the United Nations Organisation for the Co-ordination of Humanitarian Assistance (OCHA), came out with strong statements criticising the behaviour of both the Israeli military and Hezbollah fighters.[27] However, given the vastly superior capacity and sophisticated weaponry of Israel's military, it was unsurprising that Arbour and Egeland's criticisms mostly focused on Israel's violations. The United Nations Human Rights Council later also echoed their concerns.[28]

Meanwhile, the United States Secretary of State, Condoleeza Rice, failed to take up the concerns raised by the UN officials and dismissed Hezbollah as a terrorist organisation, while mildly urging Israel to "exercise restraint in exercising its right to self-defence".[29] Supported by the United States, President Olmert of Israel felt no apparent need to respond.

6.2.2 The Importance of Impartial Investigations, and the Need for Follow-Up

Avril McDonald and I concluded our short article on the 2006 attack on allegedly civilian targets in Qana by underlining the importance of impartial investigations in order to determine whether the Israeli military had committed war crimes and recommending that if so, the individuals concerned be held accountable.[30] We added:

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[23] Reported on the website of IPB-Italia, http://www.ipb-italia.org, last Accessed on 1 November 2011. The IPB won the Nobel Peace Prize in 1910.

[24] Halpin 2006.

[25] Human Rights Watch 1996.

[26] Fidler 2005.

[27] NPR 2006; Haartez 2006.

[28] United Nations 2006a.

[29] Holland 2006.

[30] This section partly draws on and develops Handmaker and McDonald 2006.

> The international community cannot continue to stand on the sidelines as Israel flagrantly violates international law and massacres civilians in their own homes. The United Nations, European Union and United States have a duty to hold Israel accountable, for example by way of sanctions, including an arms embargo, and insist upon an immediate and unconditional ceasefire.[31]

Faced with a lack of investigations, on 16 August 2006, the International Commission of Jurists, a well-respected international NGO with its headquarters in Geneva, announced that it had launched its own inquiry into violations of international law following the month-long conflict between Israeli forces and Hezbollah militants.[32]

On the 11th of August 2006, the United Nations Human Rights Council passed a Special Resolution that called upon "all parties" to respect international law, but was particularly critical of Israel's behaviour.[33] A call for impartial investigations followed soon thereafter.

Eventually another report emerged, albeit from another conflict. Between 2009 and 2010, considerable attention was paid to the *Goldstone Report*, the outcome of a United Nations Fact-Finding Mission to ascertain what occurred during Israel's military campaign in Gaza in 2008/09. The mission investigated war crimes similar to those that allegedly took place in Lebanon.[34] Led by a well-respected former South African judge and first prosecutor of the International Criminal Tribunal for the Former Yugoslavia, the *Goldstone Report* represented the most substantial effort on the part of the United Nations to date to try and determine whether war crimes had taken place on the part of the Israeli military and on the other (Palestinian) side.

The *Goldstone Report* concluded that there was considerable evidence that war crimes had taken place, predominantly by Israeli military, but also by Palestinian combatants, including the especially disturbing allegations of deliberate targeting by the Israeli military of civilians and civilian areas. Echoing the response of the Human Rights Council to the 2006 conflict in Lebanon, the Report called upon the Security Council to oversee an impartial investigation into these allegations by Israel and the Palestinian Authority, and, if this proved to be inadequate, to refer the matter to the International Criminal Court.

At the time of writing, while various United Nations agencies and Human Rights Watch determined the investigations by the Israeli military to be lacking in credibility,[35] neither the Security Council nor the International Criminal Court has taken action in relation to either conflict. Following the 'unsigning' of the Rome Statute by the USA and Israel in 2002, a Security Council Resolution would be the only way in which the Court would be mandated to investigate crimes committed

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[31] Ibid.

[32] International Commission of Jurists 2006.

[33] United Nations 2006b.

[34] United Nations 2009.

[35] Human Rights Watch 2009.

in the Gaza territory. It is not difficult to imagine that the United States, which has consistently defended Israel's atrocities, would veto any such resolution. Another possibility would be if 'Palestine' were to become a party to the Rome Statute, but on 3 April 2012, the ICC prosecutor determined Palestine *not* to be a state for the purposes of Article 12(3) of the Rome Statute.[36]

6.3 The International Challenge to End Impunity: A Comparative Perspective

When the laws of war are violated with impunity, the erosion of international law represents a critical challenge for states, international organisations and civil society organisations still committed to the rule of law. In another article written in the aftermath of Israel's 2006 bombing campaigns in Southern Lebanon and Gaza, Bangani Ngeleza and I reflected on Israel's impunity and apparent war of attrition in a comparative perspective, by also reflecting on the South African apartheid regime's efforts in the 1980s to gain supremacy in South Africa and the Southern African region and the then response of international organisations, civil society and governments.[37] In this article, we argued that it was imperative that critical voices be raised concerning Israel's impunity until war criminals were brought to justice and the Israeli regime was held accountable for decades of repression, dispossession and regional destabilisation.

Israel's bombing of Qana in 2006 was but one episode in Israel's use of overwhelming and disproportionate force, ostensibly in response to Hezbollah's attacks and the militant group's capture of two Israeli soldiers, whom they claimed to hold captive in return for the release of numerous Lebanese captives. Ignoring Hezbollah's demands for the release of their members, Israel's military forces proceeded to systematically destroy Lebanon's civilian infrastructure, which amounted to grave violations of Article 53 of the 1949 Geneva Convention.[38] In any other circumstances, Israel's initial, disproportionate response could have been considered to have been an act of aggression against a sovereign nation, expressly forbidden by Article 39 of the United Nations Charter.

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[36] ICC 2012. See also Quigley 2010a, b.

[37] This section draws on and develops Handmaker and Ngeleza 2006.

[38] Article 53 of Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, provides that 'Any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations'.

What Avril McDonald and I had not realised during our earlier article is that the aggression by Israel, which precipitated its military campaign in Lebanon, was something the government of Israel had planned at least a year in advance.[39] Following numerous conflicts since its establishment in 1948, the 2006 war in Lebanon was part of a decades-long effort on the part of Israel to gain supremacy in the region, whatever the cost.

As mentioned in the first part of this article, following its 2006 attacks in Qana, Gaza and elsewhere in southern Lebanon and the occupied Palestinian territories, Israel was accused by Human Rights Watch, Amnesty International and a string of senior United Nations officials of engaging in numerous acts involving disproportionate and indiscriminate force that recklessly led to hundreds of civilian deaths and hindered access to desperately needed humanitarian aid.[40]

The militant groups Hezbollah and Hamas, too, were criticised for hindering access to humanitarian agencies and for engaging in indiscriminate force, although Hezbollah's launching of rockets appeared to be more imprecise than indiscriminate.[41] The UK Charity *Save the Children* reported that 45 % of those killed in Israel's brutal 2006 war of attrition in Southern Lebanon had been children.[42]

The policy of Israel's government in response to all of these allegations has simply been to deny any wrongdoing. The Israeli ambassador to the United States, Daniel Ayalon, when questioned by reporters on the morning of 10 August, brazenly refused to acknowledge its military was using cluster bombs, targeting civilian areas or destroying civilian infrastructure.[43] At the same time, Ayalon accused Hezbollah of targeting civilians. Following a familiar pattern, Ayalon's comments were well supported by the United States and other members of the Security Council. The message that came through was that while Israeli civilians should be entitled to protection under international law, the same standards did not apparently apply to Lebanese and Palestinian civilians.

While, once again, it would not be prudent to compare Israel and South Africa on a one-on-one basis, Israel's justifications during the conflicts in both Southern Lebanon and Gaza were highly reminiscent of any regime that oppresses its own people, including efforts by the apartheid regime in South Africa to try and justify its oppression of its own people and the destabilisation of the Southern African region throughout the 1980s.[44] In 1989, a report by the Commonwealth characterized the apartheid regime's efforts at regional destabilisation as having reached "holocaust proportions", with a human cost of 1,500,000 dead through military

[39] Kalman 2006.

[40] Human Rights Watch 2007.

[41] Cook 2006.

[42] Tsalavouta et al. 2006.

[43] Democracy Now 2006.

[44] Adelman 1993, p. 92.

and economic actions. Most of the dead were children, while a further four million had been displaced.[45] The regime's support to right-wing Renamo militias fighting the armed forces of the Frelimo government in Mozambique was described as legitimate support to an indigenous "anti-communist resistance movement".[46] While the South African government provided similar support, weapons and even fought alongside right-wing Unita militias in Angola, in what became known as *Operation Savannah*, South Africa simply denied that any of its soldiers were in the country.[47]

Of further interest, during the period that South Africa was destabilizing the Southern African region, the government in Pretoria was collaborating closely with the government of Israel.[48] In line with these comparisons of South Africa, Israeli government officials have successfully fended off any serious response from the United Nations Security Council, which have produced only half-hearted diplomatic solutions that have served no one's interests other than Israel's. For example, according to the events mentioned above, Security Council Resolution 1701 of 2006 expressed "its utmost concern at the continuing escalation of hostilities in Lebanon", but reserved harsher criticism for Hezbollah regarding "its attack on Israel on 12 July 2006, which [had] already caused hundreds of deaths and injuries on both sides, extensive damage to civilian infrastructure and hundreds of thousands of internally displaced persons" and called on the "unconditional release of the abducted Israeli soldiers", and "a full cessation of hostilities".[49]

In the midst of this carnage, a few Israeli soldiers, having received orders to attack civilian targets, refused to carry them out. They stated that to do so would be not only a war crime, but also immoral and "harmful to Israel's interests".[50] Soldiers who had refused to carry out these orders were supported by organisations such as *Yesh Gvul* (which in Hebrew means 'there is a limit').

Once again, comparisons with South Africa, in this case hopeful ones, are instructive. The work done by *Yesh Gvul* could be compared to that of the End Conscription Campaign (ECC), which was formed in South Africa in 1983 in protest against compulsory military service for young white South African men.[51] Conscripts in apartheid South Africa provided the major component of the South African 'Defence Force', South Africa's national army, as well as the repressive South African Police. Many conscripts were sent to Angola (although not officially).

Just like the young white South Africans in Angola in the 1980s, young Israeli soldiers have been fighting in brutal wars that they seem unable to understand, yet naïvely believe they are capable of winning. Furthermore, as in South Africa,

[45] SAPA 1996.
[46] ANC 1996.
[47] Stiff 2001.
[48] Polakow-Suransky 2010.
[49] United Nations 2006c.
[50] Yesh Gvul 2011.
[51] Callister 2007.

conscientious objection to compulsory military conscription by young Israelis raises dilemmas. The consequences are often severe, from exclusion from the job market to possible imprisonment, which has even led to Israeli soldiers claiming refugee status abroad.[52] However, it is clear to these 'refuseniks' that *not* refusing to serve in a military that has a well-documented record of committing war crimes could have potentially more serious consequences, including possible prosecution for war crimes in a third country, such as the Netherlands.

6.4 In Search of a Human Face

During the 1960s, 1970s and 1980s, when both Israel and South Africa were embroiled in a seemingly endless cycle of violence and repression, most powerful states were unwilling to acknowledge the repression of either state. Israel occupied the Palestinian territory of the West Bank, Gaza and Golan in 1967, proceeded to construct illegal settlements in these territories, and pursued military campaigns in Lebanon. In South Africa, the apartheid security forces violently suppressed a demonstration in Sharpeville in 1960, an uprising in Soweto of mainly children in 1976, and pursued military campaigns throughout the southern African region. However, as the South African black consciousness leader Stephen Biko wrote at the time, it was still possible to find hope in the midst of desperate circumstances.

> We have set on a quest for true humanity, and somewhere on the distant horizon we can see the glittering prize. Let us march forth with courage and determination, drawing strength from our common plight and brotherhood. In time we shall be in a position to bestow upon South Africa the greatest gift possible – a more human face.[53]

While South Africa found its 'human face' a couple of decades later following democratic elections in 1994, Israel has not only continued to expand its illegal settlement of Palestinian territory, to subject Palestinians to military law, to commit numerous documented violations in the occupied Palestinian territories, southern Lebanon and elsewhere, but it has avoided serious scrutiny for all of this.

In light of this situation of impunity, it is worth noting the Advisory Opinion of the International Court of Justice in 2004, which confirmed existing binding law in relation to the duties of states "not to recognise the illegal situation" caused by Israel's violations of international law and "not to render aid or assistance" to Israel while it continues these violations.[54] Silence about Israel's war crimes breeds impunity; it also fuels feelings of revenge on the part of Palestinians and others it suppresses.[55]

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[52] Government of Canada 2009.

[53] Biko 1996, p. 98.

[54] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, General List No. 131, 9 July 2004, I.C.J. Reports 2004, p. 136.

[55] Nabulsi 2006.

Whether one is an international legal scholar, an official representing an international organization, a diplomat, or a conscientious citizen of Palestine, Israel or any other country, all have a role to play in the search for a more dignified world that respects human rights and international humanitarian law.

Certainly, not all situations are directly comparable, although it can be a source of inspiration to reflect on other regimes that have been held accountable and their brutality contained. As Avril herself demonstrated in a memorable contribution to a seminar in The Hague on the 2008-09 war in Gaza, the search for accountability and a sense of dignity and humanity "is something truly universal".[56]

References

Documents

Achmat Z (2012) Why i believe Israel is an apartheid state. Text of a speech delivered at the University of Cape Town on 6 March 2012. http://writingrights.nu.org.za/2012/03/08/why-i-believe-israel-is-an-apartheid-state-zackie-achmat/. Accessed 20 March 2012

ANC (1996) Statement to the Truth and Reconciliation Commission on Aug 1996, Section 4.7. http://www.anc.org.za/show.php?id=2639. Accessed 5 July 2011

Callister G (2007) Compliance, compulsion and contest aspects of military conscript in South Africa. MA thesis, University of Stellenbosch. http://scholar.sun.ac.za/handle/10019.1/2451. Accessed 13 July 2011

Cook J (2006) Hypocrisy and the Clamor against Hizbullah. Electronic Lebanon, Published on 9 Aug 2006. http://electronicintifada.net/content/hypocrisy-and-clamor-against-hizbullah/6315. Accessed 13 July 2011

Democracy Now (2006) Israeli Ambassador grilled on targeting of civilians, Use of cluster bombs and other war crimes in Lebanon. Report on 10 Aug 2006. http://www.democracynow.org/2006/8/10/israeli_ambassador_grilled_on_targeting_of. Accessed 20 March 2012

Fattah H (2006) To flee or to stay? Family chooses too late and pays dearly. New York Times, 24 July 2006. http://www.nytimes.com/2006/07/24/world/middleeast/24tyre.html?_r=1&ex=1311393600&en=1743b5dacfa42ee2&ei=5088&partner=rssnyt&emc=rss. Accessed 23 April 2006

Fidler D (2005) The use of white phosphorus munitions by U.S. Military Forces in Iraq. American Society of International Law, 6 Dec 2005. http://www.asil.org/insights051206.cfm. Accessed 5 July 2011

Government of Canada (2009) Israel: Sanctions for and consequences of avoiding military service or refusing to bear arms or to follow orders from officers, including in battle zones; possibility for soldiers to sue officers for improper conduct or wrong-minded orders, Immigration and Refugee Board, ISR103097.E, 11 March 2009. http://www.unhcr.org/refworld/docid/4a7040a4c.html. Accessed 20 March 2012

Haartez (2006) Egeland: Israel's late-stage shelling of Lebanon was immoral, Haaretz, 30 Aug 2006. http://www.haaretz.com/news/egeland-israel-s-late-stage-shelling-of-lebanon-was-immoral-1.196123. Accessed 12 June 2012

[56] McDonald 2009a.

Halpin D (2006), Are New Weapons Being Used in Gaza and Lebanon? The Electronic Intifada, 14 Aug 2006. http://electronicintifada.net/content/are-new-weapons-being-used-gaza-and-lebanon/6344. Accessed 5 July 2011

Handmaker J (2006) Silence breeds impunity - investigations are needed, Electronic Lebanon, 23 Aug 2006. http://electronicintifada.net/content/silence-breeds-impunity-investigations-are-needed/6380. Accessed 5 July 2011

Handmaker J, McDonald A (2006) Israel must be stopped, Electronic Lebanon, 31 July 2006. http://electronicintifada.net/content/israel-must-be-stopped/6267. Accessed 5 July 2011

Handmaker J, Ngeleza B (2006) In search of a true humanity, The Electronic Intifada, 12 Aug 2006. http://electronicintifada.net/content/search-true-humanity/6333. Accessed 5 July 2011

Holland S (2006) Rice Urges Israel to Exercise Restraint, Reuters, 15 July 2006

Human Rights Watch (1996) Civilian Pawns: Laws of War Violations and the Use of Weapons on the Israel-Lebanon Border, New York, May 1996. http://www.hrw.org/legacy/reports/1996/Israel.htm. Accessed 5 July 2011

Human Rights Watch (2006) Israel/Lebanon: Israel Responsible for Qana Attack: Indiscriminate Bombing in Lebanon a War Crime, New York, 29 July 2006. http://www.hrw.org/news/2006/07/29/israellebanon-israel-responsible-qana-attack. Accessed 26 Jan 2012

Human Rights Watch (2007) Why They Died: Civilian Casualties in Lebanon During the 2006 War, New York, 6 Sep 2007. http://www.hrw.org/news/2009/04/23/israelgaza-israeli-military-investigation-not-credible. Accessed 20 March 2012

Human Rights Watch (2009) Israel/Gaza: Israeli Military Investigation Not Credible: Israel and Hamas Should Cooperate With UN Investigation, New York, 23 April 2009. http://www.hrw.org/reports/2007/09/05/why-they-died. Accessed 20 March 2012

ICC (2012) Situation in Palestine, Press Release of the Office of the Prosecutor of the International Criminal Court, 3 April 2012. http://ww.icc-cpi.int/NR/rdonlyres/9B651B80-EC43-4945-BF5A-FAFF5F334B92/284387/SituationinPalestine030412ENG.pdf Accessed 19 Nov 2012

International Commission of Jurists (2006) Lebanon: ICJ expert legal inquiry into possible violations of international humanitarian law begins second stage of investigations, 10 Oct 2006. http://icj.concepto.ch/download/database/PR_LebELI_101006.pdf. Accessed 8 Nov 2012

Israeli Ministry of Foreign Affairs (2006) Incident in Kafr Qana, 30 July 2006. http://www.mfa.gov.il/MFA/Government/Communiques/2006/Incident+in+Qana+-+IDF+Spokesman+30-Jul-2006.htm. 23 April 2006

Kalman M (2006) Israel set war plan more than a year ago, San Francisco Chronicle, 21 July 2006. http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2006/07/21/MNG2QK396D1.DTL&hw=kalman&sn=001&sc=1000. Accessed 5 July 2011

McDonald A (2008) Depleted uranium weapons: the next target for disarmament? United Nations Institute for Disarmament Research, Geneva. http://www.unidir.org/files/publications/pdfs//uranium-weapons-en-328.pdf. Accessed 14 May 2013.

McDonald A (2009a) *Jus in bello*: Conduct of hostilities, Contribution to the Special HILAC Event (The Hague Initiative on Law and Armed Conflict) on 'International legal issues arising from the Gaza conflict (2008/2009)', held at the T.M.C Asser Institute on 26 March 2009

Nabulsi K (2006) The refugees fury will be felt for generations to come, The Electronic Intifada, 7 Aug 2006. http://electronicintifada.net/content/refugees-fury-will-be-felt-generations-come/6305. Accessed 13 July 2011

NPR (2006) Lebanon Conflict Watched for War Crimes, National Public Radio, 21 July 2006. http://www.npr.org/templates/story/story.php?storyId=5572468. Accessed 12 June 2012

Reuters (2006) Aid agencies hampered by Israeli strikes, Reuters News Agency, 20 July 2006

SAPA (1996) ANC calls for truth probe on apartheid destabilisation of neighbours, South African Press Association, 22 Aug 1996. http://www.justice.gov.za/trc/media/1996/9608/s960822i.htm. Accessed 7 Nov 2012

Tsalavouta M et al (2006) Children are paying the price in Lebanon, Letter to The Guardian, 2 Aug 2006. http://www.guardian.co.uk/world/2006/aug/02/syria.israelandthepalestinians1. Accessed 13 July 2011

United Nations (2006a) Implementation of General Assembly Resolution 60/251 of 15 March 2006 entitled 'Human Rights Council' - Report of the Commission of Inquiry on Lebanon pursuant to Human Rights Council Resolution S-2/1, 23 Nov 2006, A/HRC/3/2. http://www2.ohchr.org/english/bodies/hrcouncil/docs/specialsession/A.HRC.3.2.pdf. Accessed 8 Nov 2012

United Nations (2006b) The grave situation of human rights in Lebanon caused by Israeli military operations, Human Rights Council, Special session resolution S-2/1. http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/2/index.htm. Accessed 13 July 2011

United Nations (2006c) Resolution 1701 Adopted by the Security Council at its 5511th meeting on 11 Aug 2006, S/RES/1701. http://www.unhcr.org/refworld/docid/453786b30.html. Accessed 8 Nov 2012

United Nations (2009) Human rights in Palestine and other occupied Arab territories, Report of the United Nations Fact-Finding Mission on the Gaza, Human Rights Council, Twelfth Session, Agenda Item 7, 29 Sep 2009, A/HRC/12/48. http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm. Accessed 8 Nov 2012

Yesh Gvul (2011) About Yesh Gvul, Jerusalem. http://www.yeshgvul.org. Accessed 13 July 2011

Literature

Adelman S (1993) The politics of research on sanctions against South Africa. Can J Afr Stud 27(1):89–94

Akram S, Dumper M, Lynk M, Scobbie I (2011) International law and the Israeli-Palestinian conflict. Routledge, New York

Biko S (1996) I write what I like: a selection of his writings. Ravan Press, Randburg

Blank L (2010) The application of IHL in the Goldstone Report: a critical commentary. Yearb Int Humanit Law 12:347–402, 401

Dugard J (2007) The future of international law: a human rights perspective. In: Skouteris T, Vermeer-Künzli A (eds) The protection of the individual in international law. Cambridge University Press, Cambridge, pp 1–11

Fisk R (1990) Pity the nation: Lebanon at war. Oxford University Press, Oxford

Hartung W, Berrigan F (2002) U.S. Arms Transfers and Security Assistance to Israel. Arms Trade Resource Center, World Policy Institute, New York

Kleffner J, McDonald A, Toebes B (eds) (2009) Depleted uranium weapons under international law: a precautionary approach. T.M.C. Asser Press, The Hague

McDonald A (2009b) Operation cast lead: drawing the battle lines of the legal dispute. Hum Rights Brief 16:25 at p. 26

Mearsheimer J, Walt S (2008) The Israel Lobby and US Foreign Policy. Penguin, London

Polakow-Suransky S (2010) The unspoken alliance: Israel's secret relationship with apartheid. Pantheon, New York

Quigley J (2010a) The Statehood of Palestine: International Law in the Middle East Conflict. Cambridge University Press, Cambridge

Quigley J (2010b) Palestine is a State: a horse with black and white stripes is a zebra. Mich J Int Law 32:749–765

Schabas W (2010) Gaza, Goldstone, and lawfare. Case West Reserv J Int Law 43:307

Stiff P (2001) The silent war: South African recce operations 1969 to 1994. Galago, Alberton

Weizmann E (2007) Hollow Land: Israel's architecture of occupation. Verso, London

Chapter 7
Doctors in Arms: Exploring the Legal and Ethical Position of Military Medical Personnel in Armed Conflicts

Brigit Toebes

Abstract This contribution discusses the legal and ethical position of military medical personnel during armed conflicts. In such situations two difficult issues arise. Firstly, military health workers frequently become the object of an attack, which is a violation of their neutrality as medical personnel. Secondly, they themselves face difficult issues of 'dual loyalty': they need to navigate between the interests of the patient, on the one hand, and that of their employer, the military, on the other. This contribution attempts to clarify and strengthen the legal position of military medical personnel, in particular when it comes to providing medical services around the battlefield. To do so, a basis is sought in the intertwined areas of international humanitarian law (IHL), human rights law (HRL), and medical ethics. It is argued that insufficient attention has been paid to bringing these three discourses together conceptually. It will be shown that these three disciplines provide a somewhat incoherent yet compelling framework for medical personnel during armed conflicts. In a nutshell, this framework guarantees the inviolability and neutrality of medical personnel and it stipulates that medical considerations should prevail over military ones when it comes to priority setting between patients.

The author is lecturer in International Law, Department of International and Constitutional Law, University of Groningen, The Netherlands. The author wishes to thank Vincent Beyer, Mathilde Bos, and Mariëlle Matthee for their excellent feedback and support.

B. Toebes (✉)
Department of International and Constitutional Law, University of Groningen, Groningen, The Netherlands
e-mail: B.C.A.Toebes@rug.nl

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Contents

7.1 Introduction

Avril was a great scholar who inspired many others in the field of international humanitarian law and beyond. Unfortunately, the person who was least aware of her greatness was herself. Had she known that a whole book would be dedicated to her, she would have beamed her humorous and selfless smile. If only we could see that smile on her face today… and if only we could hear her views on the interesting topics that are addressed in this volume. Indeed, several times during the process of writing this Chapter I had an urgent wish to speak to Avril and to hear her views on the matter. An issue that we discussed on several occasions concerns the applicability of human rights law during armed conflicts. For example, for our book on depleted uranium weapons, we discussed whether economic, social, and cultural rights continue to apply during armed conflicts.[1] While this matter has now to some extent been addressed in the literature,[2] a next step would be to see how the legal framework so defined applies to the various parties involved in an armed conflict.

Given my background in health and human rights, in this contribution I focus on the position of medical personnel in armed conflicts, as a group that are in a vulnerable position when it comes to carrying out their professional duties. While it is a generally accepted principle of law and ethics that medical professionals should not be obstructed in the exercise of their duties, they frequently become the object of an attack. According to the International Committee of the Red Cross (ICRC), violence against healthcare workers is one of the most serious humanitarian challenges in the world today. The ICRC, in its study 'healthcare under attack', gives the following examples:

[1] McDonald et al. 2008, in particular Chapter 9, Toebes 2008.

[2] *Inter alia,* Mottershaw 2008; Lubell 2005 and also Toebes 2008.

> (…) urban fighting may prevent health-care personnel from reaching their places of work, first-aiders may be unnecessarily delayed at checkpoints, soldiers may forcibly enter a hospital to look for enemies or shield themselves from attack, and ambulances may be targeted or illegally used to carry out attacks. Whatever the context, poor security conditions in many parts of the world mean that the wounded and sick do not get the medical attention to which they are entitled.[3]

The specific focus in this contribution is on the position of *military* medical personnel. More than civilian medical personnel (and medical personnel working for aid organisations), military medical personnel faces dilemmas of 'dual loyalty', meaning that they may have to balance between the orders of their employer (the military) and their patients. As such, they often face tremendous moral dilemmas while carrying out their tasks in extremely complex and dangerous situations.[4] For example, as will be discussed more elaborately below, their employer may ask them to prioritize between patients on considerations that are not purely medical in nature, or they may be asked to declare military personnel 'fit to fight'. In such situations, the following question arises: how should the military health worker balance such interests, and based on which rules or principles?

Analyzing the position of military medical personnel challenges us to look into the interfaces between IHL and HRL, which was mentioned above as an important issue of scholarly debate. This can help us obtain a better understanding of how these different fields can be applied in an interrelated fashion, at a more practical level. A third interrelated discipline concerns medical ethics, the body of principles adopted by the medical profession regulating the ethical aspects of their profession. This body of principles includes, for example, the duty not to take considerations like age, ethnic origin, or gender to intervene between the professional's duty and the patient.[5] Importantly, the World Medical Association (WMA) has issued two sets of guidelines in relation to the position of medical personnel during armed conflicts.[6] These guidelines focus on the medical neutrality and the so-called 'dual loyalty' of doctors during armed conflicts, two concepts that will be discussed more elaborately below. Within medical-ethical circles it has been suggested that such matters are also human rights issues, and that the normative standards for doctors are also grounded in human rights law[7]:

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[3] ICRC 2012b.

[4] For an insightful and compelling insight see the ICRC video, ICRC 2012c.

[5] International Code of Medical Ethics (Declaration of Geneva), Adopted by the 2nd General Assembly of the World Medical Association (WMA), Geneva, Switzerland, September 1948. http://www.wma.net/en/30publications/10policies/g1/index.html. Accessed May 2012; Bloche et al. 2005, pp. 3–6.

[6] Regulations in Time of Armed Conflict, adopted by the 10th World Medical Assembly, Havana, Cuba, October 1956, last amended by the World Medical Association General Assembly, Tokyo, 2004, available at http://www.wma.net/en/30publications/10policies/a20/, accessed February 2013.

[7] International Dual-Loyalty Working Group 2002, pp. 15–38.

> (…), a human rights analysis enables the health professional to resolve these conflicts by reference to an agreed upon, universally applicable set of moral principles. In health care settings, considerations of human rights concerns, as elaborated through the various instruments, conventions and treaties discussed above, should be a requisite for resolving dual-loyalties conflicts.[8]

It is therefore of interest to explore how medical ethics, HRL, and IHL are intertwined when it comes to the legal position of military medical personnel, so as to clarify and strengthen their complex position. While these three disciplines contain similar standards in relation to the position of military medical personnel, their overlap and congruity, as well as the applicability of each specific field is still subject to a great deal of confusion.

Looking into the position of military medical personnel means looking into the law that applies during armed conflicts. This raises several complicated preliminary questions. A first complication is that not all conflicts are the same, and that different sets of rules of IHL apply to international armed conflicts (IACs), non-international armed conflicts (NIACs), and conflicts that do not reach the threshold of a NIAC. While this will be discussed more elaborately below, it is important to note as a starting point that HRL has the potential to fill a regulatory lacuna in situations where IHL only applies to a limited extent (NIACs) or not at all (riots and internal disturbances).

Secondly, we need to take into account that armed conflicts involve different types of actors that may have different positions and responsibilities under international law. For the purposes of this contribution, we can roughly make a distinction between three actors: states and non-state actors involved in the conflict, as well as military health workers. This raises many intricate questions, including whether the mentioned standards apply extraterritorially and whether non-state actors and health workers themselves are bound by the international standards.

7.2 Identification and Definition of the Problem

With the synonymous terms ‘medical personnel’ and ‘health workers’ in this contribution I refer to both physicians and nurses. A commonly accepted definition of ‘medical personnel’ can be found in Protocol I to the Geneva Conventions: persons assigned exclusively to the search for, collection, transportation, diagnosis, or treatment, including first-aid treatment, of the wounded, sick, and shipwrecked, and the prevention of disease, to the administration of medical units, or to the operation or administration of medical transports.[9] The Protocol makes a distinction between medical personnel of a party to the conflict, which can be

[8] International Dual-Loyalty Working Group 2002, p. 21.

[9] Article 8(3) in conjunction with 8 (5), Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 75; See also ICRC 2012a,

military or civilian, as well as medical personnel of national Red Cross Societies and other national voluntary aid societies.[10] The body of IHL and related principles of medical ethics provide for the protection of all these types of medical personnel during armed conflicts.[11]

As mentioned, the focus in this contribution is primarily on *military* medical personnel. Contrary to civilian medical personnel (and medical personnel working for aid organisations), military health workers are members of the armed forces.[12] In this position, they are not to participate in the armed conflict as a party of the fighting force but solely in their role of providing medical services.[13] If captured by the enemy in an international armed conflict, they do not receive the status of Prisoner of War (POW); however, they receive the same treatment.[14]

More than civilian medical personnel or medical personnel employed by aid societies, military medical personnel are likely to be confronted with so-called 'dual-loyalty' or 'mixed agency' conflicts: they need to navigate between their duty to preserve life and reduce suffering, on the one hand, and their professional duty toward their employer, the military, on the other.[15] While on many occasions

(Footnote 9 continued)
Customary International Law, Rule 25, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter7_rule25. According to the ICRC, this definition is widely used in State practice.

[10] Article 8(3) sub. (a) and (b) Additional Protocol I to the Geneva Conventions (applicable during IACs), Ibid.

[11] *Inter alia*, Articles 24–27 Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Articles 36, 37 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Article 33 Geneva Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75; Articles 12–16 Protocol I, *supra* note 9, (civilian medical personnel); Articles 9–11 Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125; See also ICRC 2012a, Rule 25 on Medical Personnel of the ICRC Rules on Customary IHL, available at http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter7_rule25. Accessed May 2012.

[12] The term 'civilian medical personnel' refers to medical personnel who are not members of the armed forces but who have been assigned by a party to the conflict exclusively to medical tasks. See ICRC 2012a, ICRC Customary IHL, Rule 25. http://www.icrc.org/customary-ihl/eng/docs/v1_cha_chapter7_rule25. Accessed May 2012; See also Frisina 2008, p. 49.

[13] While medical personnel are not allowed to take up arms so as to participate in the armed conflict, they may arm themselves with light individual weapons, as long as the weapons are only used in self-defence or the defence of the wounded in their charge. Article 22-1 Geneva Convention I, *supra* note 11, Article 13(2)(a) Additional Protocol I, *supra* note 9.

[14] Article 28 Geneva Convention I, *supra* note 11; See also Solis 2010, p. 192. They are then so-called 'retainees', which include medical personnel (surgeons, dentists, and other medical doctors) and chaplains. It should be noted that this category does not embrace medical orderlies or chaplains' assistants, as they are not considered 'permanent staff' and as these persons are armed and may lawfully directly participate in hostilities; See also Solis 2010, pp. 191, 192.

[15] See *inter alia*, International Dual-Loyalty Working Group 2002, pp. 31, 32.

there will be no conflict between these two objectives, situations may arise where they may be pressured to compromise their professional duty to attend to the sick and wounded for the sake of military objectives. While in some situations this pressure will be external (from their employer, the military), they may also feel an internal or personal tension, for example when they are faced with a need to offer services to the sick and wounded of the enemy.

A study by Physicians for Human Rights gives a number of examples of situations where the medical doctors' professional duty is compromised: they may be asked to attend first to soldiers with less severe wounds as a means to return them to battle, or they me be asked to declare an entire troop fit for engagement when they are not. They may be compelled to prepare a sick soldier as quickly as possible for a new battle situation. They may also be called to participate in the interrogation of suspects of terrorism, which may culminate in torture or cruel and inhuman and degrading treatment. Furthermore, they may be asked to prepare and be present at executions, and to administer pharmaceutical substances or vaccines to (their own or enemy) soldiers without medical justification. And by way of a final example, they may be called upon to participate in research into or experimentation with biological, chemical, or pharmaceutical substances on humans while foregoing medical-ethical principles.[16]

While all these issues are important and require further study, the focus in this chapter will be mainly on the delivery of healthcare on and around the battlefield. This raises in particular issues relating to the allocation of health resources by the armed forces, and the position of the medical personnel in that respect. It also engages the issue of triage, i.e., the process of determining the priority of patients' treatments. In relation to these matters, I will focus on the responsibilities of states and other belligerent parties, on the one hand, and on the position of military medical personnel, on the other. As mentioned, we will look into how IHL, HRL, and medical ethics regulate these issues.

7.3 Three Intertwined Disciplines, and Their Applicability During Armed Conflicts

IHL, also known as the law of armed conflict, consists of a set of rules that seek, for humanitarian reasons, to limit the effects of an armed conflict. It protects persons who are no longer participating in the hostilities and restricts the means and methods of warfare. IHL contains many provisions on the position of medical staff and the delivery of medical services.[17] It regulates the inviolability of medical services in situations of armed conflict. It purports to ensure the undisturbed and safe delivery of medical care during armed conflicts and it prescribes that

[16] International Dual-Loyalty Working Group 2002, p. 32.

[17] ICRC 2004.

individuals who do not participate directly in hostilities and who are *hors de combat* should be cared for without discrimination. An important feature of this body of the law is that the vast majority of the norms only apply during international armed conflicts, meaning a conflict between two states, while a limited set of rules apply in situations that can be characterized as non-international armed conflicts.[18] The applicable norms during such conflicts are, mostly, common Article 3 to the Geneva Conventions, as well as Additional Protocol II to the Geneva Conventions (if the threshold for the application of this Protocol has been met).[19]

With medical ethics, reference is made to a system of moral principles that apply to the practice of medicine, and tends to be understood as being concerned with professional ethics.[20] A core principle underlying medical ethics concerns the principle of medical neutrality. According to the British Medical Association (BMA), medical neutrality embraces two issues: while healthcare providers themselves should practice medicine impartially without regard to factors such as the nationality, class, sex, religion, or political beliefs of the patient, healthcare providers providing care impartially must not be attacked or persecuted for doing so.[21] This shows that medical neutrality has two dimensions: on the one hand, the doctor's duty to perform his work impartially and, on the other, the State's duty to ensure that this impartiality is not being infringed upon. These two dimensions will be addressed more elaborately below, where a distinction is made between the responsibilities of states and other belligerents, on the one hand, and of military medical personnel on the other. Medical-ethical principles do not differentiate between different types of armed conflicts, and as such we may assume that they fully apply during all types of conflicts, as has also been set out in the *Regulations in Time of Armed Conflict*. However, it must be observed that these are not legally binding norms and that hence their status may be less authoritative from a legal perspective.

HRL, thirdly, refers to the body of international law designed to promote and protect the rights of individuals. States that ratify human rights treaties commit themselves to respecting those rights for everyone residing on their territory. Important human rights in the context of medical professionals are the rights to life, privacy, and the prohibition of torture and inhuman and degrading treatment, as

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[18] Common Article 3 of the Geneva Conventions, *supra* note 11.

[19] According to Additional Protocol II, *supra* note 11, Article 1, this Convention does not apply to situations of international disturbances and tensions, but rather to internal conflicts in which the organized armed groups exercise such control over a part of the territory that they are able to carry out sustained and concerted military operations—a requirement that is not mentioned for 'common Article 3 - conflicts'.

[20] British Medical Association 2001, p. 15; Bioethics, which is closely connected to medical ethics, is generally more concerned with ethical questions brought about by advances in biology and medicine. As such, bioethics can be broader than medical ethics, addressing the philosophy of science and issues of biotechnology. Given the substantive overlap between the two fields, the terms are used interchangeably in this chapter. For the purposes of our research topic, it is important to note that medical ethics and bioethics have increasingly incorporated rights-based approaches and have drawn closer to the international framework of human rights.

[21] British Medical Association 2001, p. 241.

well as the right to the highest attainable standard of health, the right to food, and the right to shelter.[22] Given that HRL and IHL are both aimed at protecting the well-being of human beings, from a normative perspective they are closely intertwined. For example, as will be clarified below, both bodies of law embrace norms guaranteeing access to health services. However, there are also several distinctions. Roughly speaking, while IHL has a narrow scope containing a detailed set of provisions that primarily apply during armed conflicts, HRL has a broad scope, embracing a broad set of norms that apply primarily during peacetime, on a state's territory. Furthermore, while IHL regulates the actions of a belligerent state and of those parties it comes into contact with, both hostile and neutral, HRL is understood to primarily regulate the relationship between states and individuals.

A fourth (sub-)category consists of so-called 'patients' rights', which are often seen as an elaboration of human rights in the field of healthcare.[23] Human rights and patients' rights are increasingly overlapping, and there is an increasing congruence between the two fields. Patients' rights and human rights have a common and overlapping core, which is the state's duty to provide healthcare services. Beyond that, patients' rights are primarily focused on realizing a set of rights in the patient-doctor relationship, while human rights are more focused on the state's duty to respect and to guarantee a wide range of health-related rights. As in this contribution we will focus on the patient-doctor relationship on the battlefield, patients' rights have a potential role to play. While their role will not be discussed at length, some references will be made and it will be suggested that this area of the law has the potential to play a more substantial role when healthcare services are provided during armed conflicts.

7.4 Some Further Issues of Applicability

Above, three disciplines were identified in connection with the position of military medical personnel during armed conflicts. Before we can turn to the application of these norms in practice, we need to address a few preliminary questions that arise in particular in connection with the applicability of human rights norms during armed conflicts and to all the parties to the conflicts. For, as was mentioned above, human rights *primarily* bind states and they *primarily* apply during peacetime, on a state's territory.

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[22] Toebes 2012.

[23] Important instruments in this field are the UNESCO Universal Declaration on Bioethics and Human Rights, and the Council of Europe's Convention on Human Rights and Biomedicine. The UNESCO Universal Declaration on Bioethics and Human Rights, 19 October 2005. http://www.unesco.org/new/en/social-and-human-sciences/themes/bioethics/bioethics-and-human-rights/. Accessed 27 January 2013. The Council of Europe's Convention on Human Rights and Biomedicine, Oviedo, 4 April 1997 and Additional Protocols, Strasburg. http://conventions.coe.int/Treaty/en/Treaties/Html/164.htm and http://www.coe.int/t/dg3/healthbioethic/. Accessed 27 January 2013; For an account of the meaning and implications of patients' rights see Hartlev 2012.

7.4.1 IHL and HRL: lex specialis

The question arises how IHL and HRL relate to one another when it comes to their applicability during armed conflicts. Traditionally, the starting point has been that during armed conflicts, IHL functions as the *lex specialis* (more specific law) in relation to the more general human rights norms. In its Advisory Opinion concerning the Legality of the Threat or Use of Nuclear Weapons, the ICJ stated in relation to the interpretation of the right to life:

> The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities.[24]

However, eight years later the ICJ argued in favor of a more fluid approach in the Wall case:

> (…) 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.[25]

As stated by Lubell, this latter approach implies that where human rights law is more detailed in regulating a certain matter, it would be the primary source of law.[26] As will be more elaborately discussed below, HRL and patients' rights contain more detailed provisions in relation to certain matters, for example when it comes to the allocation of health resources and the regulation of the patient-doctor relationship. I therefore argue that in such situations these rights may function as the *lex specialis*, or as the norms that give more substance to the IHL norms.

7.4.2 Economic, Social, and Cultural Rights During Armed Conflicts

When it comes to providing medical services during armed conflicts, a key right is the human right to the 'highest attainable standard of health' (in short: the right to health).[27] It is important to point out that this right belongs to the category of economic, social, and cultural rights, which is usually distinguished from civil and political human rights. While the meaning and scope of the right to health will be more elaborately discussed below, a preliminary question that arises is whether

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[24] See for example ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, General List No. 95, 8 July 1996, I.C.J. Reports 1996, p. 8, para 25.

[25] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (hereinafter *Wall Case*), Advisory Opinion, General List No. 131, 9 July 2004, I.C.J. Reports 2004, para 106.

[26] Lubell 2005, p. 752.

[27] For a recent analysis see Toebes 2012.

economic, social, and cultural rights, including the right to health, apply during armed conflicts. Answering this question enables us to assess if and to what extent there is a human right to medical services during armed conflicts, and a correlative duty on the part of the belligerent forces and military medical personnel to provide such services.

Unlike the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) does not single out a set of non-derogable rights, i.e., rights which cannot be derogated from during armed conflicts and other situations of emergency.[28] Rather, the ICESCR contains two limitation clauses, neither of which specifically mentions war or any other type of emergency. While Article 2(1) ICESCR sets out a clause based on limitations of available resources, Article 4 ICESCR contains a general clause, which allows for limitations if 'determined by law, compatible with the nature of rights, and solely for the purpose of protecting the general welfare in a democratic society'. As mentioned, notions of emergency and armed conflict do not appear in these clauses, and as such it is unclear if and to what extent these limitation clauses apply during armed conflicts. However, it has been argued on several occasions that there is a minimum level of protection inherent in economic, social, and cultural rights that should remain intact under all circumstances, including armed conflicts.[29] The UN has consolidated this approach through the definition of a minimum core in economic, social, and cultural rights: the idea that there is a minimum set of obligations inherent in these rights which should be guaranteed under all circumstances, including armed conflicts.[30] Along these lines, General Comment 14 on the right to health defines a set of core obligations, i.e., minimum entitlements flowing from the right to health that exist under all circumstances.[31] While all these obligations have potential relevance to situations of armed conflicts, the following obligations are of particular importance during such situations:

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[28] International Covenant on Civil and Political Rights (ICCPR), New York, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171 and vol. 1057, p. 407. http://www2.ohchr.org/english/law/ccpr.htm. Accessed 27 January 2013; International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3. http://www2.ohchr.org/english/law/cescr.htm. Accessed 27 January 2013; ICCPR and ICESCR, both adopted within the framework of the UN on 16 December 1966 (entry into force 1976). Derogation clause in the ICCPR: Article 4-2 ICCPR.

[29] Committee on Economic, Social and Cultural Rights 1990, General Comments 3 and 14, paras 10 and 43, 44 respectively; The 'Limburg Principles' claim in para 4 that limitations on rights should not affect the 'subsistence or survival' of the individual or integrity of the person (para 47); Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights, June 1986, Maastricht University, the Netherlands, E/C.12/2000/13, p. 3. http://www.unhchr.ch/tbs/doc.nsf/0/6b748989d76d2bb8c125699700500e17/$FILE/G0044704.pdf. Accessed May 2012; See also Toebes 2008, pp. 209–210.

[30] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, paras 43 and 44 and more generally, Committee on Economic, Social and Cultural Rights 1990, General Comment 3, para 10.

[31] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, paras 43–44.

- To ensure the right of access to health facilities, goods, and services on a non-discriminatory basis, especially for vulnerable or marginalized groups;
- To ensure access to basic shelter, housing, and sanitation, and an adequate supply of safe and potable water;
- To provide essential drugs, as from time to time defined under the WHO Action Programme on Essential Drugs;
- To ensure equitable distribution of all health facilities, goods, and services;
- To provide appropriate training for health personnel, including education on health and human rights.[32]

This overview of core obligations also illustrates that a minimum right to health is not only about providing access to healthcare services, but also about securing a number of underlying determinants of health (e.g. access to clean water and shelter). Altogether, based on these notions, we may conclude that during all types of armed conflicts, States parties have a duty to secure access to, *inter alia*, minimum health services and basic healthy conditions, at the very least on a State's own territory and extending to where it exercises its jurisdiction. This leads to the conclusion that during armed conflicts of all natures combatants and civilians have a minimum right to a limited set of health-related services, based on the internationally guaranteed 'right to health', and supported by IHL.[33]

7.4.3 HRL's Extraterritorial Applicability

A further complication is that, in principle, human rights apply only territorially, that is to say within a State's national borders.[34] This implies that during IACs, States in principle do not have to realize the rights of individuals on the territory of the adversary. However, this narrow interpretation of HRL is eroding. Without discussing this in detail, there is by now a considerable amount of case law supporting the extraterritorial applicability of human rights law.[35] A decisive factor is whether the State exercises 'effective control' over a territory or a certain public power in the territory concerned.[36] This implies that in situations where the belligerent state is the occupying power, it has to respect the human rights of the individuals living in the occupied territory.

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[32] Ibid.

[33] See also Toebes 2008, pp. 209–214.

[34] See, *inter alia*, Article 2-1 ICCPR, *supra* note 28.

[35] *Inter alia*, ECtHR, *Loizidou v. Turkey (Preliminary Objections)*, No. 40/1993/435/514, 23 February 1995, and more recently *Al-Skeini and Others v. UK,* No. 55721/07, decision of 7 July 2002, available at http://hudoc.echr.coe.int. Accessed February 2013, and HRC, *Lopez Burgos*, UN Doc. A/36/40, Communication No. 52/1979, 29 July 1981, para 12.3, available at http://www2.ohchr.org/english/bodies/hrc/HRCommitteeCaseLaw.htm. Accessed February 2013; See also Lubell 2005, pp. 739–741.

[36] See the above-mentioned case law and *inter alia* Lubell 2005, pp. 739–741.

When it comes to economic, social, and cultural rights more specifically, the situation is less clear, as the ICESCR does not contain a provision on its scope of application.[37] In its Advisory Opinion concerning the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (the Wall case), the ICJ explains that this is because

> (…) this Covenant contains rights which are essentially territorial. However, it is not to be excluded that it applies both to territories over which a State party has sovereignty and to those over which that State exercises territorial jurisdiction.[38]

In the Wall case, the ICJ concluded that Israel is bound by the provisions of the ICESCR and that it is under an obligation not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.[39] The ICJ took this position with reference to a similar position taken by the Committee on Economic, Social, and Cultural Rights (CESCR) within the framework of its state reporting procedure.[40] In relation to Israel's position in the Occupied Palestinian Territories, this Committee stated that the State party's obligations under the Covenant apply to all territories and populations under its effective control.[41]

For the purposes of our analysis, this means that states exercising effective control over foreign territory have obligations under the ICESCR in that territory. The question arises how far such obligations should stretch, and whether this would also amount to a 'positive' duty to provide minimum health services in occupied territories. Coomans observes that an analysis by the Committee of the different types of obligations of occupying states is still lacking.[42] Based on the notion of 'minimum core obligations' (see above), I would argue that there are strong reasons to assume that also occupying states not only have negative obligations to respect the rights, but that they also have positive duties to realize the core elements of economic, social, and cultural rights. This implies that they have duties to provide minimum socioeconomic services to residents in territories under their occupation. For the right to health in Article 12 ICESCR specifically, this means that occupying states do not only have obligations to respect the undisturbed delivery of healthcare services, but that they also have positive obligations to provide essential health services in the territories that fall under their occupation (see further in Sect. 7.5.1).

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[37] Article 2-1 ICESCR, *supra* note 28, does not mention territory or jurisdiction, as opposed to Article 2-1 ICCPR, *supra* note 28.

[38] *Wall case*, *supra* note 25, para 112.

[39] *Wall case*, Ibid.

[40] For the state reporting procedure, see Articles 16–17 ICESCR, *supra* note 28.

[41] Committee on Economic, Social and Cultural Rights 2003, paras 15 and 31; See also Committee on Economic, Social and Cultural Rights 2001 and Coomans 2011, pp. 13–16.

[42] Coomans 2011, p. 15.

7.4.4 HRL and Non-State Actors

Furthermore, we need to address the question whether human rights norms can bind armed opposition groups (as participants in the armed conflict). It should be noted that this issue arises in particular in situations of NIACs, in which usually one or more non-state actors are involved.

Whether non-state actors are bound by HRL is a matter that has been the subject of intense debate. An important starting point is that HRL primarily binds States and that any form of third-party applicability should never undermine the primary responsibility of States as the entities that have ratified the human rights treaties. At the same time it cannot be ignored that human rights violations often take place in situations where blame cannot be directly placed on States only. Some actors, such as for example multinational corporations, have obtained such wealth, and such influence and power over the dignity, well-being, and health of individuals that there are strong reasons to argue in favor of some form of responsibility for human rights violations.[43] Along the same lines it could be argued that armed opposition groups are an important and powerful force during an armed conflict and that their activities can have a detrimental impact on the lives and health of persons engaged in and affected by the conflict. According to Bellal et al. an important factor for them to be bound by human rights law will be whether they exercise an element of governmental functions and whether they have *de facto* authority over a population.[44]

Secondly, the question arises whether military medical professionals may also have responsibilities in relation to human rights, as important non-state actors in this field. First and foremost, they may have certain indirect responsibilities in relation to the direct responsibilities of belligerent forces. This is because they are often at the forefront of situations where human rights violations by the belligerent forces are committed. This means that they may acquire important information about human rights violations that may be important to report. In addition, however, their responsibility may also be more direct, as in fulfilling their professional duties they may become complicit in human rights violations. As such the question arises whether they can also be bound directly by the human rights norms. As *military* medical personnel, they are directly employed by the armed forces, which is an organ of the state; and as such they are state agents.[45] It can be argued that in this position, they bear direct responsibilities under human rights law.

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[43] *Inter alia*, Jägers 2002 and Letnar Černič 2010; To support this claim, reference is often made to the Preamble to the Universal Declaration of Human Rights, which refers to the human rights responsibilities of 'all actors in society'.

[44] Bellal et al. 2001, p. 23.

[45] See Article 4(2) of the Draft Principles on State Responsibility: Responsibility of States for Internationally Wrongful Acts, United Nations, General Assembly, Resolution A/RES/56/83, adopted 28 January 2002. http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_6_2001.pdf. Accessed February 2013.

7.5 Military Medical Personnel Under International Law

7.5.1 Obligations of the Belligerent Parties

Having addressed a few preliminary questions, we can now look into the applicability of the available norms. We will first look at the obligations of belligerent forces in relation to military medical personnel. This will be analyzed against the backdrop of increasing reports about attacks on medical personnel by belligerent forces during armed conflicts. Rubenstein and Bittle have made a thorough analysis of such violations. In their analysis they make a distinction between four types of attacks: attacks on wounded and sick individuals; on medical personnel; on medical facilities and transports; and the improper use of facilities and emblems. Based on this analysis, they observe that (1) attacks on medical functions are part of a broad assault on civilians; (2) assaults on medical functions are used to achieve a military advantage, and (3) combatants do not respect the ethical duty of health professionals to provide care to patients irrespective of affiliation.[46] This leads to the conclusion that there is a compelling need to reinforce available standards that set out the responsibility of the belligerent forces in relation to (military) medical personnel.

As was mentioned above, for the applicability of IHL, we need to make a distinction between international and non-international armed conflicts (IACs and NIACs). But there are also several rules of customary international law that apply during both types of conflict. According to the ICRC, state practice establishes the following rule as a norm of customary international law:

> Medical personnel exclusively assigned to medical duties must be respected and protected in all circumstances. (…)[47]

This rule, which goes back to the 1864 Geneva Convention, is currently laid down in Geneva Conventions I, II, and IV, and Additional Protocol I, which apply during international armed conflicts (IACs).[48] These provisions also stipulate, *inter alia*, that if medical personnel fall into the hands of the enemy they shall receive the same treatment as prisoners of war, that transports of the wounded and sick shall be respected and protected, and that medical aircraft shall not be attacked.[49] The Statute of the International Criminal Court reinforces these rules by considering it a war crime to:

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[46] Rubenstein and Bittle 2010, pp. 329–340.

[47] ICRC 2012a, Rules of CIL, Rule 25.

[48] Geneva Convention I, *supra* note 11, Articles 24–26; Geneva Convention II, *supra* note 11, Article 36; Geneva Convention IV, *supra* note 11, Article 20; Additional Protocol I, *supra* note 9, Article 15.

[49] *Inter alia*. Articles 14–23 Geneva Convention I, *supra* note 11; Articles 7 and 12–40 Geneva Convention II, *supra* note 11; Article 33 Geneva Convention III, *supra* note 11; Articles 13–26 Geneva Convention IV, *supra* note 11; Articles 8–30 Additional Protocol I, *supra* note 9.

> (…) intentionally directing attacks against buildings, material, medical units and transport, and personnel using the distinctive emblems of the Geneva Conventions in conformity with international law.[50]

As medical personnel are entitled to wear the distinctive emblems of the Geneva Convention, they fall under this protection. Furthermore, it is worth mentioning that another basis for the inviolability of medical personnel is provided by many domestic military manuals.[51]

During non-international armed conflicts (NIACs), the above-mentioned rule of customary international law also applies. Furthermore, the main rule that applies during NIACs is 'common Article 3' of the Geneva Conventions, which contains a set of minimum rules for the protection of those who do not take an active part in the hostilities, including the wounded and sick.[52] According to the ICRC, we may assume that this provision embraces the protection of medical personnel, as it can be seen as a subsidiary form of protection granted to ensure that the wounded and sick receive medical care.[53] Furthermore, Additional Protocol II, which applies during NIACs of a certain intensity,[54] contains an explicit rule that medical personnel must be respected and protected.[55] In addition, the above-mentioned Stature of the ICC applies, as well as many domestic military manuals that equally apply during NIACs.

Similar standards can be found in the framework of medical ethics. The *Regulations in Times of Armed Conflict*, adopted by the World Medical Association (WMA) in 1956, make several references to the obligations of governments and armed forces in connection with the undisturbed delivery of healthcare.[56] With reference to the Geneva Conventions, Article 5 of these *Regulations* states that these parties to the conflict should ensure that physicians and other healthcare professionals are able to provide care to everyone in need in situations of armed conflict, including an obligation to 'protect health care personnel'. Physicians must be granted access to patients, medical facilities and equipment, and the protection needed to carry out their professional activities freely (Article 12).

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[50] International Criminal Court (ICC), Rome Statute of the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 8(2) (b) (xxiv). http://untreaty.un.org/cod/icc/statute/romefra.htm. Accessed 27 January 2013.

[51] See also ICRC 2012a, ICRC Commentary in relation to Rule 25.

[52] Common Article 3 to Geneva Conventions I, II, III and IV, *supra* note 11.

[53] ICRC 2012a, ICRC Commentary to Rule 25.

[54] According to Article 1 Additional Protocol II, *supra* note 11, applies to all armed conflicts which are not covered by Additional Protocol I and which take place in the territory of a Member State between its armed forces and dissident armed forces or other organized armed groups which, under 'responsible command', exercise such control over a part of its territory as to enable them to carry out 'sustained and concerted military operations' and to implement this Protocol.

[55] Articles 9–11 Additional Protocol II, *supra* note 11.

[56] World Medical Association (WMA) 1956. Available at http://www.wma.net/en/30publications/10policies/a20/. Accessed June 2012.

As mentioned, these medical-ethical rules and the body of international humanitarian law are very much intertwined. Additional Protocol II to the Geneva Conventions explicitly refers to medical ethics:

> Under no circumstances shall any person be punished for having carried out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.[57]

Thus affirming medical ethics as an important discipline during armed conflicts.

Altogether, both IHL and medical ethics clearly state the duty of belligerent parties to safeguard the undisturbed delivery of healthcare services as well as the duty to ensure that medical personnel can perform its duties in a neutral fashion. How is this regulated under HRL? While it was discussed above that the applicability of human rights law during armed conflicts is by no means straightforward, we will now look at the normative scope of protection that the human rights standards have to offer.

We should take as a starting point that *all* human rights can have relevance for the protection of individuals during armed conflicts. In other words, we should not focus too rigidly on a selection of rights. However, as was also mentioned above, some human rights are of particular importance when it comes to armed conflicts, including the right to life, the prohibition of torture, and inhuman and degrading treatment, as well as the rights to health, food, clothing, and shelter. The most appropriate standard to look at the context of providing healthcare, the allocation of health resources and triage is the 'right to the highest attainable standard of health' which is set out in, *inter alia*, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).[58] In short, this norm grants a right to healthcare and to a set of underlying conditions for health to *vis-à-vis* their governments. The scope of this norm, commonly addressed as the 'right to health', has been clarified in General Comment 14, an explanatory document to Article 12 ICESCR, adopted by the Committee on Economic, Social and Cultural Rights

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[57] Article 10 para 1 Additional Protocol II (applicable during non-international armed conflicts), *supra* note 11.

[58] The first instrument to lay down a right to health was the Constitution of the World Health Organization (WHO, adopted 1946). Furthermore, the right to health can be found in Article 25 of the Universal Declaration of Human Rights (UDHR, 1948), as mentioned, Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR, 1966), *supra* note 28, Article 12 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW, 1979) and Article 24 of the Convention on the Rights of the Child (CRC, 1989), and 9, 25 and 26 of the Convention on the Rights of Persons with Disabilities (CRPD, 2006), as well as several other UN conventions. Furthermore, the right to health can be found in several regional human rights conventions. For example, Article 11 of the European Social Charter (ESC, 1965) stipulates a 'right to protection of health', and we find the right to health (care) in Article 35 of the European Charter on Fundamental Rights (EU). We also find the right to health in Article XI American Declaration of the Rights and Duties of Man (ADHR, 1948) and Article 10 of the 'Protocol of San Salvador' (Additional Protocol to the American Convention on Human Rights, 1988); Article 16 of the African Charter on Human and Peoples' Rights (1981); Article XVIII of the Universal Islamic Declaration of Human Rights (1981).

(CESCR) in 2000.[59] Although General Comments are in principle not legally binding, they provide an authoritative explanation of the human rights norms under the ICESCR.

Based on the right to health, States and potentially belligerent forces have duties in relation to patients and medical personnel. The right to health stipulates a duty on the part of states to grant healthcare services and to guarantee a range of underlying conditions for health to its residents.[60] In Sect. 7.4.2 it was argued that during armed conflicts, based on human rights, States and potentially other actors have at the very minimum a duty to ensure the safe delivery of medical services and other health-related services such as safe drinking water and adequate sanitation facilities.[61] Furthermore, based on the General Comment, these health-related services should be provided on the basis of the principles of 'availability, accessibility, acceptability and quality', generally addressed as the so-called 'AAAQ'.[62] Accessibility has four overlapping dimensions: non-discrimination, economic accessibility, geographic accessibility, and information accessibility.[63] Combining these two notions, here are some examples of what this may entail during armed conflicts:

Availability: ensuring the availability of health resources necessary to treat the wounded and injured;

Accessibility:

Non-discrimination: equal treatment of all individuals involved in the armed conflict, e.g., not favoring one's own forces above those of the belligerent party;

Economic accessibility: affordability of necessary medical services for the treatment of the wounded and sick, if possible free of charge to all parties involved in the conflict;

Geographic accessibility: providing necessary medical services close to where the conflict takes place;

Information accessibility: providing adequate information about the necessary medical services;

Acceptability: respecting the different cultural backgrounds of patients, creating an environment where medical ethics can be respected;

Quality: ensuring the quality of necessary medical services, including adequate training for medical staff.[64]

Furthermore, under human rights law, a distinction is often made between three types of obligations: (state) obligations to respect, to protect, and to fulfill human rights. This so-called 'tripartite typology of State obligations' was first introduced

[59] Committee on Economic, Social and Cultural Rights 2000.

[60] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, para 4.

[61] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, paras 44, 45 defines a set of minimum core obligations (see also above).

[62] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, para 12.

[63] Ibid.

[64] Ibid.

in the early 1980s, and subsequently introduced into the UN human rights regime.[65] It is most frequently applied to economic, social, and cultural rights, and is intended to create clarity over the types of legal commitments that States and other actors are required to make in relation to the rights. The duty to *respect* the rights implies a negative duty to refrain from infringing the core value that is protected by the right concerned (e.g. privacy, health, or housing). The duty to protect the right concerned implies an obligation on the part of the duty holder to protect the interest concerned against the unlawful acts of third parties (e.g., multinational corporations, healthcare institutions, or armed opposition groups). Lastly, the duty to fulfill is a positive duty on the part of the duty holder to take measures to ensure the availability of necessary services (e.g., medical care, housing, and adequate nutrition, but also access to legal recourse).

Based on this typology, States and potentially other parties have 'negative' obligations to respect the right to health (or not to harm health), as well as positive obligations to 'protect' the health of individuals in relation to others, and positive obligations to 'fulfil' health, i.e., providing or ensuring the availability of necessary health services. Altogether based on the right to health we can identify the following minimum obligations for States and other belligerent parties:

- Respect:
  - Respect the undisturbed and safe delivery of necessary medical services;
  - Respect the medical neutrality of medical personnel;
  - Refrain from limiting access to necessary medical services as a punitive measure[66]
- Protect:
  - Protect medical personnel and patients from attacks by third parties;
- Fulfill:
  - Provide necessary medical services, including medical equipment and adequately trained medical personnel;
  - Secure access to the underlying determinants of health, in particular safe drinking water, adequate sanitation and shelter.

This framework of the right to health may apply to state parties in an NIAC or during situations that do not qualify as an IAC or a NIAC; and it may apply outside a state's national borders as long as States exercise 'effective control' over a certain territory. Furthermore, when it comes to NIACs, this framework may apply to the state party involved in the conflict, and potentially to non-state actors

[65] Shue 1980; Van Hoof 1984; Eide 2001.

[66] This obligation to 'respect' is explicitly mentioned in Committee on Economic, Social and Cultural Rights 2000, General Comment 14, para 34.

involved in the conflict, in particular if they exercise a certain amount of governmental control over a population.

Everything taken together, we see that IHL, medical-ethical standards, and the right to health oblige States and potentially other belligerent forces to respect the duty of care of military medical personnel and to support medical personnel in fulfilling their tasks. Clearly, HRL reinforces the duties that exist under IHL; and where IHL has limited applicability (i.e., during NIACs), HRL may provide an important additional framework of protection.

7.5.2 Obligations of Military Medical Personnel

As to the position of military medical personnel, the primary standards to look at are medical-ethical ones. An important point of departure for analyzing the duty of medical personnel is the Declaration of Geneva, the modern equivalent of the Hippocratic Oath, which asks physicians to pledge that the health of their patients will be their first consideration and that they will not permit:

> considerations of age, disease or disability, creed, ethnic origin, gender, nationality, political affiliation, race, sexual orientation, social standing or any other factor to intervene between my duty and my patient.[67]

However, in medical-ethical circles there is much disagreement as to whether these and other standards should apply unconditionally during armed conflicts. Some authors have pointed out that military medical practice is by its very nature unethical, and that it is unavoidable that military medical professionals subjugate their ethical concerns to military ones.[68] As was pointed out by Rascona:

> Line officers, who have far greater expertise and information than military physicians regarding the needs of the military mission, ultimately determine the ethical priorities military physicians must follow. If, for example, soldiers are ill but can fight, line officers (having been informed by military physicians regarding these soldiers' health) decide whether they still should fight under these conditions. This is what should occur. Those who are most capable of deciding what is necessary to best prevent such horrors as global genocide should be the ones to do so. The only other option would be to let persons with less expertise, such as physicians, make these decisions.[69]

Other groups have argued in favor of applying general medical-ethical standards unconditionally during armed conflicts. In 1965, the World Medical Association (WMA) adopted the above-mentioned *Regulations in Time of Armed Conflict*.[70] Article 1 of this document states that:

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[67] WMA Declaration of Geneva 1948, *supra* note 5.

[68] See, for example, Howe 2003; Madden and Carter 2003 and Gross 2006.

[69] See the reaction by D. R. Rascona to the views of Sidel and Levy 2003, p. 313.

[70] WMA Regulations in Times of Armed Conflict 1956, *supra* note 56.

> Medical ethics in times of armed conflict is identical to medical ethics in times of peace, as stated in the International Code of Medical Ethics of the WMA. If, in performing their professional duty, physicians have conflicting loyalties, their primary obligation is to their patients; in all their professional activities, physicians should adhere to international conventions on human rights, international humanitarian law and WMA declarations on medical ethics.[71]

Furthermore, the *Regulations* state that during an armed conflict, standard ethical norms apply, not only in regard to treatment but also to all other interventions (Article 3). As such, medical ethics standards in relation to doctors do not create a specific set of rules for health professionals that operate in an armed conflict; rather, the same ethical standards apply.

In addition, more specifically in relation to armed conflicts, it is deemed unethical to:

a. Give advice or perform prophylactic, diagnostic, or therapeutic procedures that are not justifiable for the patients' health care.
b. Weaken the physical or mental strength of a human being without therapeutic justification.
c. Employ scientific knowledge to imperil health or destroy life.
d. Employ personal health information to facilitate interrogation.[72]

And doctors have duties to:

- Treat people with humanity and respect applies to all patients and give the required care impartially and without discrimination[73];
- Preserve medical confidentiality (in circumstances where a patient poses a significant risk to other people physicians will need to weigh their obligation to the patient against their obligation to other individuals threatened)[74];
- Not use privileges and facilities afforded to them for other than healthcare purposes.[75]

Interestingly, the Regulations also contain a number of duties for physicians in relation to governments and other authorities to ensure that these:

– Provide the infrastructure that is a prerequisite to health, including potable water, adequate food and shelter; and
– Are planning for the repair of the public health infrastructure in the immediate post-conflict period.[76]

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[71] WMA 1956, *supra* note 56, Regulation 1.
[72] WMA 1956, Ibid., Regulation 2.
[73] WMA 1956, Ibid., Regulation 4.
[74] WMA 1956, Ibid., Regulation 6.
[75] WMA 1956, Ibid., Regulation 7.
[76] WMA 1956, Ibid., Regulations 9 and 10.

This shows that the WMA is of the opinion that doctors also have professional duties in relation to governments and other authorities. So in addition to medical neutrality what is also required is a certain amount of 'political activism' (i.e., reporting on human rights abuses).[77]

Another group that has more recently argued in favor of the unconditional application of medical-ethical standards is the Dual Loyalty Working Group, a joint initiative by Physicians for Human Rights and the University of Cape Town.[78] The Group proposes a set of ten guidelines in total, seven of which are relevant for providing medical services on the battlefield:

- 1. The military health professional's first and overruling identity and priority is that of a health professional.
- 2. Civilian medical ethics apply to military health professionals as they do to civilian practitioners.
- 3. The military health professional should adhere to the principle of confidentiality in a manner consistent with practice in civil society.
- 4. The military health professional is a member of the national and international health professionals' community.
- 5. The military health professional should treat the sick and wounded according to the rules of medical needs and triage.
- 9. Military health professionals should report violations of human rights that interfere with their ability to comply with their duty of loyalty to patients to appropriate authorities and report human rights violations perpetrated by their own troops as well as by others.[79]

Like the Regulations of the WMA, these guidelines stress that general medical-ethical standards apply during armed conflicts. There is also a duty to respect confidentiality, and a similar duty to report human rights violations. As was already observed in the introduction, it is interesting to note that the Dual Loyalty Working Group stresses the importance of the protection of human rights by medical professionals.

The next step is to see how these medical-ethical principles are reflected by IHL and HRL. IHL is not so much directed at regulating the conduct of medical personnel in relation to the wounded and sick directly: rather it provides for their protection in the exercise of their duties. Nonetheless, as state agents, military medical personnel have to respect the rules that have been set out for the belligerent parties. Article 10 of Additional Protocol I states that the wounded and sick

[77] See also List 2008, p. 243.

[78] International Dual Loyalty Working Group 2002, in Allhoff 2008, pp. 33–37; See also London et al. 2006.

[79] International Dual Loyalty Working Group 2002, in Allhoff 2008, pp. 33–37; The other guidelines concern the issues of chemical weapons, torture, capital punishment, and human experimentation, issues that are left aside in this contribution. ICRC 2012a, Customary IHL, Rule 25.

of any party to the conflict 'shall be respected and protected'. We may assume that this duty to protect the wounded and sick and of all the parties to the conflict also falls upon military medical personnel, as employees of the armed forces.[80]

When it comes to HRL, we see that human rights are increasingly mentioned as an important framework for medical professionals.[81] It provides the health professional with an agreed upon, legally binding and universally applicable set of rules on the basis of which he can weigh his ethical dilemmas.[82] Human rights norms, in particular the right to health, should therefore obtain a more solid role when it comes to solving the moral difficulties that arise during armed conflicts.

Above I have suggested that military medical personnel may bear direct responsibilities under a 'right to health'. Based on this assumption, I argue that the notion of a 'right to health' can have some important implications for military medical personnel. The above-mentioned 'AAAQ', stipulating the principles of availability, accessibility, and acceptability under the right to health, can also be of specific importance in the patient-doctor relationship. The principle of 'non-discrimination' under 'accessibility' implies a duty on the part of medical personnel to treat everyone equally, and not to discriminate between patients on criteria other than medical ones. Also the principle of 'acceptability' can be of some guidance during battlefield situations. Acceptability means that health services must be respectful of medical ethics and culturally appropriate. 'Respectful of medical ethics' includes, according to General Comment 14, respecting the confidentiality of patients.[83] By referring to patients' rights, the General Comment establishes a link between the right to health and patients' rights as established under various instruments. Patients' rights involve the important notion of informed consent, i.e., the duty on the part of medical professionals to ask for the consent of patients and to inform them about their conditions.[84]

Furthermore, in relation to the belligerent forces, a distinction was made between three types of human rights obligations: obligations to respect, to protect, and to fulfill human rights. I argue that similar obligations can be defined in

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[80] Article 10 Additional Protocol I, *supra* note 9; See also Article 11, Additional Protocol I, *supra* note 9, which prohibits physical mutilations, the carrying out of medical experimentations, and the removal of tissue or organs for transplantation.

[81] *Inter alia*, Rubenstein 2009.

[82] International Dual Loyalty Working Group 2002, see the quote in the intro.

[83] Committee on Economic, Social and Cultural Rights 2000, General Comment 14, para 12.

[84] *Inter alia,* Article 6 Universal Declaration on Bioethics and Human Rights (UNESCO, 2005), *supra* note 23, and Articles 5–9 Convention on Human Rights and Biomedicine (Oviedo Convention, 1997; Council of Europe), *supra* note 23.

relation to military medical professionals. Based on the above military medical personnel have the following human rights obligations:

- Respect:
  - Respect for equal access to available medical services;
  - Refrain from discrimination between patients;
  - Refrain from prioritizing between patients on considerations other than medical ones;
- Protect:
  - Protect patients from attacks by third parties;
  - Protect the confidentiality of patients;
- Fulfill:
  - Provide medical services ('duty of care');
  - Report allegations of and human rights abuses revealed during the clinical encounter;
  - Maintain a dialogue with the employer and governments to ensure that they provide the necessary health infrastructure, also during the post-conflict period.

7.6 Conclusions

This contribution has touched upon an important aspect of the overall theme of this volume, i.e., the 'human face' of armed conflicts. If we want to 'humanize' armed conflict, we need to strengthen and consolidate the position of those who work with the wounded and sick. I have attempted to demonstrate how the interconnected fields of IHL, medical ethics, and human rights come together when it comes to the regulation of the position of military medical personnel. The core principle underlying this framework is the principle of 'medical neutrality', which defines the position of all health workers, including military medical personnel. Generally speaking, all norms emphasize the importance of an undisturbed, fair, and equal distribution of health-related services, as well as the duty to treat patients equally, and not to give priority to military considerations when deciding which patient to treat first.

Everything taken together, we can identify two dimensions in connection with these norms: (1) duties on the part of the belligerent forces to allocate health services in an appropriate and fair manner, while respecting the undisturbed delivery of military medical personnel and their medical neutrality; and (2) duties on the part of military medical personnel to provide medical services in a neutral fashion, respectful of medical ethics, and giving priority to medical considerations above military ones.

While these are important starting points, the practical realities are still very much removed from these positions. Governments, non-state actors, and the military medical profession should therefore make a stronger commitment to the framework so defined. This commitment should lead to a strong affirmation and articulation of the importance of these standards, making it clear that they should be adhered to by everyone involved in the conflict. It should be stressed that these standards are legally binding and that non-compliance can lead to accountability under IHL and HRL. In addition, this commitment should result in the training of the military forces as well as in investigations of alleged violations.[85] International organizations can play an important role in strengthening the role and position of military medical professionals. It is therefore promising that the ICRC has placed the matter firmly on its agenda,[86] while there is also potential at the WHO to explore this issue further.[87]

References

Documents

Committee on Economic, Social and Cultural Rights (1990) The nature of States Parties Obligations, 14 Jan 1990, General Comment 3., UN Doc. E/1991/23, Article 2, para 1. http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument. Accessed June 2012

Committee on Economic, Social and Cultural Rights (2000) The right to the highest attainable standard of health, 11 Aug 2000, UN General Comment No. 14, UN Doc. E/C12/200/4. http://www.unhchr.ch/tbs/doc.nsf/%28symbol%29/E.C.12.2000.4.En. Accessed June 2012

Committee on Economic, Social and Cultural Rights (2001) Concluding observations on the additional information submitted by Israel, 31 Aug 2001, UN Doc. E/C.12/Add.69. http://www.unhchr.ch/tbs/doc.nsf/%28Symbol%29/19b934142bfa843ac1256abc003095cb?Opendocument. Accessed June 2012

Committee on Economic, Social and Cultural Rights (2003) Concluding observations on the second periodic report of Israel, 23 May 2003, UN Doc. E/C.12/1/Add. 90. http://www.unhchr.ch/tbs/doc.nsf/0/b313a3503107f1e6c1256d33002cea38?Opendocument. Accessed June 2012

ICRC (2004) What is International Humanitarian Law? Advisory Service on International Humanitarian Law. http://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf. Accessed Feb 2011

ICRC (2011) Health care in danger: making the case, ICRC Resource Centre. http://www.icrc.org/eng/resources/documents/publication/p4072.htm. Accessed June 2012

ICRC (2012a) Customary International Law (updated version of the Study on Customary International Humanitarian Law conducted by the International Committee of the Red Cross

[85] See also Rubenstein and Bittle 2010, p. 337.

[86] ICRC 2011.

[87] Rubenstein and Bittle 2010, p. 337; See WHO, Health Action in Crisis unit, at http://www.who.int/hac/en/. Accessed 27 January 2013.

(ICRC) and originally published by Cambridge University Press). http://www.icrc.org/customary-ihl/eng/docs. Accessed June 2012
ICRC (2012b) Health care in danger: questions and answers, ICRC Resource Centre. http://www.icrc.org/eng/resources/documents/faq/health-care-in-danger-faq-2011-08-05.htm. Accessed May 2012
ICRC (2012c) Video Series. http://www.icrc.org/eng/what-we-do/safeguarding-health-care/index.jsp. Accessed May 2012
Sidel V, Levy B (2003) Physician-soldier: a moral dilemma? In: Military medical ethics, vol 1. Borden Institute, US Army Medical Department. http://www.bordeninstitute.army.mil/published_volumes/ethicsVol1/ethicsVol1.html. Accessed June 2012

Literature

Allhoff F (2008) Physicians at war: the dual-loyalties challenge. International library of ethics, law, and the new medicine, vol 41. Springer, Dordrecht
Beam T, Spracino L (2003) Military medical ethics, vol I. Office of the Surgeon General, Falls Church
Bellal A, Giacca G, Stuart C-M (2001) International law and armed non-state actors in Afghanistan. Int Rev Red Cross 93(881):1–33
British Medical Association (2001) The medical profession and human rights. Handbook for a changing agenda. Zed Books, London
Bloche M, Gregg and Marks JH (2005) When doctors go to war. N Engl J Med 352(1):3–6
Coomans F (2011) The extraterritorial scope of the international covenant on economic, social and cultural rights in the work of the United Nations Committee on Economic, Social and Cultural Rights. Hum Rights Law Rev 11(1):1–35
Eide A (2001) Economic, social and cultural rights as human rights. In: Eide A, Krause C, Rosas A (eds) Economic, social and cultural rights: a textbook. Martinus Nijhoff Publishers, Dordrecht/Boston/London, pp 21–41
Frisina M (2008) Guidelines to prevent malevolent use of physicians at war. In: Allhoff F (ed) Physicians at war: the dual-loyalties challenge. International Library of Ethics, Law, and the New Medicine, vol 41. Springer, Dordrect, pp 39–52
Gross M (2006) Bioethics and armed conflict: moral dilemmas of medicine and war. MIT Press, Cambridge
Hartlev M (2012) Patients' rights. In: Toebes B, Hartlev M, Hendriks A, Rothmar Herrmann J (eds) Health and human rights in Europe. Intersentia/Hart, Cambridge/Antwerp/Portland, pp 111–144
Howe E (2003) Mixed agency in military medicine: ethical roles in conflict. In: Beam T, Spracino L (eds) Military medical ethics, vol I. Office of the Surgeon General, Falls Church, pp 331–365
International Dual-Loyalty Working group (2002) Dual-loyalty and human rights in health professional practice: proposed guidelines and institutional mechanisms, physicians for human rights. Washington/University of Cape Town. https://s3.amazonaws.com/PHR_Reports/dualloyalties-2002-report.pdf. Accessed Feb 2013. Also in Allhoff (2008), pp 15–38
Jägers N (2002) Corporate human rights obligations: in search of accountability. Intersentia, Antwerp
Letnar Černič J (2010) Human rights law and business. Europa Law Publishing, Groningen
List J (2008) Medical neutrality and political activism: physicians' roles in conflict situations. In: Allhoff F (ed) Physicians at war: the dual-loyalties challenge. International Library of Ethics, Law, and the New Medicine, vol 41. Springer, Dordrect, pp 237–255

London L, Rubenstein L, Baldwin-Ragaven L, Van Es A (2006) Dual loyalty among military health professionals: Human rights and ethics in times of armed conflict. Cambr Q Healthc Ethics 15:381–39

Lubell N (2005) Challenges to applying human rights law to armed conflict. Int Rev Red Cross 87(860):737–754

Madden W, Carter B (2003) Physician-soldier: a moral profession. In: Beam T, Spracino L (eds) Military medical ethics, vol I. Office of the Surgeon General, Falls Church, pp 269–291

McDonald A, Kleffner J, Toebes B (eds) (2008) Depleted Uranium Weapons and international law. T.M.C. Asser Press, The Hague

Mottershaw E (2008) Economic, social and cultural rights in armed conflict: International Human Rights Law and International Humanitarial Law. Int J Hum Rights 12(3):449–470

Rubenstein L (2009) Physicians and the right to health. In: Clapham A, Robinson M (eds) Realizing the right to health, Swiss Human Rights Book, vol 3. Rüffer & Rub, Zürich, pp 381–392

Rubenstein L, Bittle M (2010) Responsibility for protection of medical workers and facilities in armed conflict. The Lancet 375:329–340

Shue H (1980) Basic rights: subsistence, affluence and U.S. Foreign Policy. Princeton University Press, Princeton

Solis G (2010) The law of armed conflict. Cambridge University Press, Cambridge

Toebes B (2008) The use of depleted uranium as a potential violation of human rights. In: McDonald A, Kleffner J, Toebes B (eds) Depleted uranium weapons and international law. T.M.C. Asser Press, The Hague, pp 187–216

Toebes B (2012) The right to health and other health-related rights. In: Toebes B, Hartlev M, Hendriks A, Rothmar Herrmann J (eds) Health and human rights in Europe. Intersentia, Cambridge, pp 83–110

Toebes B, Hartlev M, Hendriks A, Rothmar Herrmann J (eds) (2012) Health and human rights in Europe. Intersentia, Cambridge

van Hoof G (1984) The legal nature of economic, social and cultural rights: a rebuttal of some traditional views. In: Alston P, Tomaševski K (eds) The right to food. SIM, Utrecht, pp 97–111

World Medical Association (WMA) Regulations in time of armed conflict, adopted by the 10th World Medical Assembly, Havana, Cuba, Oct 1956, last amended by the World Medical Association General Assembly, Tokyo, 2004. http://www.wma.net/en/30publications/10policies/a20/. Accessed Feb 2013

Chapter 8
Saving the Past, Present and Future. Thoughts on Mobilising International Protection for Cultural Property During Armed Conflict

Pita J. C. Schimmelpenninck van der Oije

Abstract In this chapter, contemporary threats to cultural property during armed conflict as well as the obstacles hindering protection are discussed. Throughout the text, examples are taken from Libya where the so-called 'Arab Spring' revolt of 2011 developed into an armed conflict. The focus is on the control system of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict because it offers warring parties, as well as states parties to the Convention, the option of mobilising protection during armed conflict. In practice, it has mainly been UNESCO that has undertaken cultural initiatives during armed conflict but the organisation is better suited for peacetime action. The 1999 Second Protocol to the 1954 Convention raised hopes that a supplemented control system would be more effective. In the case of Libya, however, neither the states parties nor the newly set up Intergovernmental Committee opted for combined protection efforts even though Libya hosts a wealth of cultural property and is a state party to the Second Protocol. UNESCO did undertake various protection activities and was joined by other actors in the cultural heritage field, such as the Blue Shield network. It is to be hoped that the Blue Shield network can raise its profile and resources, and combine flexibility of action with humanitarian professionalism. New developments in the area of information technology can also help in strengthening international protection efforts. The fact that a 'Red Cross for cultural property' is still urgently needed is an important lesson from the case of Libya. Whatever form future protection efforts will take, they should be based on the current framework offered by international humanitarian law. This will enhance transparency, uniformity of action and increase security for cultural property protectors during armed conflict.

The author has worked for the International Criminal Tribunal for the former Yugoslavia, Amnesty International, the Netherlands Red Cross and the International Committee of the Red Cross at home and abroad. She is currently an academic researcher, a background journalist and an editor on a freelance basis.

P. J. C. Schimmelpenninck van der Oije (✉)
Gouderak, The Netherlands
e-mail: pitaschimmelpenninck@yahoo.com

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Contents

We challenge the international agencies
to come with fact-finding committees.
It's open for them. All the doors
are open. In every place, we will
enable them to know the truth.
Colonel Muammar Gaddafi, 2 March 2011[1]

8.1 Introduction

The importance of protecting cultural property is often marginalised, especially in the heat of humanitarian disasters and violent crises.[2] Who cares for stones and paper when witnessing large-scale human suffering? At a time when we are hearing about the daily escalation of violence against the civilian population in Syria, it appears even obscene to worry about the country's cultural property.[3] Yet this is exactly the moment to do so. Every humanitarian tragedy has a cultural dimension. When the civilian population is in danger, so is its cultural heritage and

[1] http://www.telegraph.co.uk/news/worldnews/africaandindianocean/libya/8357313/Libya-Gaddafis-speech-in-quotes.html. Accessed 3 December 2011

[2] In the context of this article, cultural property is meant to be tangible, movable material—such as valuable historic and cultural objects—or immovable cultural heritage—such as historical monuments, art or architecture, whether religious or secular, museums, libraries, archives, archaeological sites and cultural and human landscapes. Cultural property includes the officially designated World Heritage as well as the heritage of local communities, and religious as well as secular heritage.

[3] Demonstrations against the regime started on 15 March 2011. The government of President Bashar al –Assad responded with heavy-handed force and demonstrations quickly spread across much of the country. In June 2012 a UN representative characterised the Syrian conflict as a civil war, a term that was also used in July by the International Committee of the Red Cross.

shared future. Concern for cultural property is more than a matter of loving art or history, it is of importance for us all. By ratifying the Convention for the Protection of Cultural Property in the Event of Armed Conflict (hereinafter the 1954 Convention),[4] states acknowledged that the Convention covers issues extending beyond national jurisdiction. They declared themselves to be 'convinced that the damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind', and that 'the preservation of the cultural heritage is of great importance for all peoples of the world and (…) should receive international protection'.[5]

What puts cultural property mostly at risk is the lack of respect for the physical evidence of cultural heritage and the refusal of fighting parties to comply with international humanitarian law.[6] A more contemporary threat, that was not envisaged by the 1954 Hague Convention, is the organised theft of cultural property by private actors.[7] It fuels the illegal trade in cultural artefacts on a global scale.

The states parties to the 1954 Convention can opt for non-coercive protection efforts during international armed conflict on the basis of the so-called *control system* of the 1954 Hague Convention. The United Nations Educational, Scientific and Cultural Organisation (UNESCO) has been given a leading role in assisting states to do so, during international as well as non-international armed conflict. The 1954 control system was supplemented in 1999 through the Second Protocol to the Hague Convention (hereinafter the Second Protocol).[8] It strengthened the protective regime of 1954, including the control system, in various ways.

In this contribution to the liber amicorum for our distinguished colleague and dearly missed friend Dr. Avril McDonald, the aim is to analyse this specific aspect of cultural property protection during armed conflict, namely the international mobilisation of non-coercive and non-military efforts. The situation in Libya during the so-called 'Arab Spring' revolt of 2011 will serve as a case study. Libya hosts internationally acclaimed and protected cultural heritage and is a party to the

[4] Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague 14 May 1954, United Nations Treaty Series, Volume Number 249, http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf.

[5] Preamble to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict.

[6] Boylan 1993, pp. 7–18. See also UNESCO 1983, p. 12, where it stated that the ineffectiveness of the Convention was due to a lack of political will to apply protective measures.

[7] O'Keefe 2006, p. 2.

[8] Second Protocol to the 1954 Convention, The Hague, 26 March 1999, United Nations Treaty Series, Volume Number 2253.

1954 Hague Convention, its two Protocols and the World Heritage Convention.[9] In the first part of this chapter, several threats to cultural property that presented themselves during the conflict in Libya will be analysed. These threats are inherent in most present-day armed conflicts. In the second part of this chapter, the focus will be on what international protective action was undertaken for Libyan cultural property by UNESCO and the states parties to the 1954 Convention and Second Protocol, as well as the main weaknesses of the current system. In the third and last part, recommendations will be made in order to come to a more effective international mobilisation within the framework of international humanitarian law.

8.2 The 'Arab Spring' in Libya and the Threats to Cultural Property

In December 2010, anti-regime protests started in Tunisia. They soon spread over the rest of the country. Subsequently, during 2011, national protests could be witnessed in countries as diverse as Algeria, Morocco, Egypt, Libya, Syria, Saudi Arabia, Yemen, Bahrain and Oman. The media referred to this political wave as the 'Arab Spring'. So far, events have led to a regime change in Tunisia, Egypt and Libya.

In Libya, popular protests started on 15 February 2011.[10] The regime of Colonel Muammar Gaddafi reacted to the protests by using force, which meant the start of a six-month uprising. It soon developed into a fully-fledged armed conflict, with both international and non-international dimensions.[11] Pro-Gaddafi forces were confronted with a variety of non-state armed actors, more or less unified under the umbrella of the 'National Transitional Council'.

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[9] Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, United Nations Treaty Series, Volume Number 1037, http://treaties.un.org/doc/Publication/UNTS/Volume%201037/volume-1037-I-15511-English.pdf. The five Libyan World Heritage List sites are: the Old Town of Ghadames, the Rock-Art sites of Tadrart Acacus, and the Archaeological Sites of Cyrene, Leptis Magna and Sabratha. Libya is also a party to the First Protocol to the 1954 Hague Convention (The Hague, 14 May 1954, United Nations Treaty Series Volume Number 249), as well as to the four Geneva Conventions of 1949 (Geneva, 12 August 1949, United Treaty Series Volume Number 75) and its First Additional Protocol of 1977 (Protocol (I) Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts, Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125) and the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property (Paris, 14 November 1970, United Nations Treaty Series, Volume Number 823). All these international treaties contain obligations with regard to cultural property protection during armed conflict.

[10] "Libya: the revolt that brought down Gaddafi" by Chris Arsenault of 27 December 2011, Chronological report Al Jazeera http://Aljazeera.com/indepth/spotlight/aljazeeratop102011/2011/12/201112261140236965 28.html. Accessed 5 October 2012.

[11] ICRC 2011a, p. 6.

The UN Security Council determined that the situation in Libya constituted a threat to international peace and security, and authorised in its Resolution 1973 of 17 March 2011 inter alia the taking of "all necessary measures" in order to implement a No-Fly Zone and to "protect civilians and civilian populated areas under threat of attack in the Libyan Arab Jamahiriya".The resolution would be enforced primarily by NATO, with logistical support from several Arab countries, including Qatar and the United Arab Emirates. Ten of the fifteen UN Security Council members voted in favour, while Russia, China, India, Germany and Brazil abstained. On 19 May 2011 military forces from France, the UK and the USA began attacks from air and sea, while other states offered assistance. From 31 March 2011 onwards, NATO launched 'Operation Unified Protector' and took command of all offensive operations while coordinating actions with Libyan fighters on the ground. Gaddafi's military advance was halted in mid-March 2011.

On 16 September 2011, the UN Security Council decided to ease sanctions against Libya, including against its national oil company and central bank. The UN General Assembly in its turn approved a request to accredit interim government envoys as Libya's sole representatives at the UN, thereby effectively recognising the National Transitional Council as the new authority. On 20 October, Colonel Muammar Gaddafi was killed. The National Transitional Council declared Libya to be liberated on 24 October 2011, thereby ending the 42-year long autocratic regime of Colonel Gaddafi. On 31 October NATO formally concluded its operation.

Libya's first freely elected government faces many challenges, of which imposing law and order is a major one. Various militias gained power during the conflict and are not willing to give up their position or weapons. The government needs to hold together a country divided by regional, sectarian and clan divisions, to rebuild the economy and create functioning institutions. The security situation in Libya seems to change on a daily basis.[12] The 2011 conflict in Libya has also had a destabilising influence on the entire Sahara region including Mali, Burkina Faso, Niger, Algeria, Chad and Sudan.[13] The area is allegedly home to bandits, drugs and human traffickers and religious extremists. All these facts make it a challenge to reactivate the pre-conflict system of cultural property protection that in most places broke down during the conflict.

[12] "Libya's militias clash in central Tripoli" in The Guardian at http://www.guardian.co.uk/world/2012/nov/04/libya-militia-fire-central-tripoli of 4 November 2012. Accessed 5 November 2012.

[13] "Het jaar van de Arabische Lente, deel vijf: Libië" in NRC Handelsblad at http://www.nrc.nl/nieuws/2011/12/30/het-jaar-van-de-arabische-lente-deel-vijf-libie/ of 30 December 2011 and "Sahara ontwricht door oorlog Libië" in NRC Handelsblad at http://www.nrc.nl/nieuws/2011/12/03/sahara-ontwricht-door-oorlog-libie/ of 3 December 2011. Both accessed 3 June 2012.

8.2.1 Indiscriminate and Disproportionate Attacks Against Civilians[14]

Asymmetric and urbanised warfare were important features of the armed conflict in Libya, posing a grave danger for civilians and cultural property. In this regard, Libya was not an exception to the rule. Since the adoption of the Hague Convention in 1954, the majority of armed conflicts worldwide have been non-international, characterised by asymmetric and urban warfare. This type of warfare has been typical for the situation in Afghanistan and Iraq during the past decade, as well as during the conflict in Libya and currently in Syria. In asymmetric conflicts, well equipped national military forces tend to face insurgent groups fighting internal, guerrilla-like wars. The latter blend back into the civilian population, using cities as their stronghold. As a reaction, government forces employ means and methods of warfare designed for use on an open battlefield, such as air power, artillery and shelling. Such indiscriminate weapons cause death and injuries among civilians and severe damage to infrastructures.

In Libya, the initially poorly trained armed opposition groups used the eastern city of Benghazi as their base to launch attacks against strongholds held by well trained pro-Gaddafi forces in the rest of the country. Gaddafi threatened to hunt down the protestors "alley by alley, house to house".[15] The city of Misrata was under siege for over three months, between March and May 2011, when Gaddafi forces fought in the centre of the town which dates back more than 700 years and the old harbour which was already present in phoenician times.[16] Unlike other areas, the civilian population was not evacuated and found itself trapped inside the city. Indiscriminate shelling and sniping continued until August 2011. NATO began bombing the city in late April, while rebels began their counter-offensive and pushed their way through the city. During the 2011 Libyan war, many other cities were turned into battlefields, such as Tripoli, Sabha, Sirtre and Bani Walid.

During the conflict, indiscriminate attacks on civilians and civilian objects, including protected objects "such as mosques, buildings of cultural significance and hospitals (…)" were carried out by Government as well as anti-Gaddafi forces.[17] Government forces failed to take precautionary steps to minimise damage to

[14] Main sources for this paragraph ICRC 2011b, pp. 5–6 and Mancini 2011, pp. 3–4.

[15] "Battle for Libya: Key moments. Timeline of decisive battles and political developments in Libya's uprising against Muammar Gaddafi", Al Jazeera at http://www.aljazeera.com/indepth/spotlight/libya/2011/08/201182191273034 32.html last modified 23 August 2011. Accessed 6 July 2012. See also "Frappes aériennes ou pas, Kadhafi menace Benghazi" in L'Express of 17 March 2011 at http://www.lexpress.fr/actualite/monde/frappes-arerienne s-ou-pas-kadhafi-menace-benghazi_973573.html?xtor=x. Accessed 6 October 2011.

[16] UN Human Rights Council International Commission of Inquiry 2012, p. 1. This is the report of the International Commission of Inquiry that was set up by the UN Human Rights Council to investigate "all alleged violations of international human rights law in the Libyan Arab Jamahiriya". The Commission also looked at allegations of international humanitarian law.

[17] UN Human Rights Council International Commission of Inquiry 2012, pp. 14–16.

civilian and protected objects and committed many serious violations of international humanitarian law that amounted to "war crimes". They intentionally directed attacks against protected persons and targets, such as civilian structures. In Sirtre, for example, almost every building exhibited damage. Although some of the buildings were likely used by Gaddafi forces and were therefore legitimate targets for attack, damage was so widespread as to be clearly indiscriminate in nature.

The many unexploded shells, ammunition and mines—known collectively as explosive remnants of war—formed another threat to civilian life during the Libyan conflict up to the present. Many cities as well as remote farmlands are littered with them.[18] These explosive remnants can also hinder economic development. Archaeological sites that are for example contaminated by unexploded ordnance obstruct cultural tourism. This was becoming the fate of the vast and world-famous site of Leptis Magna, where Gaddafi militia tried several times to take over the grounds. Through careful negotiations and with the help of the local population, the Chief Archaeologist in charge and his museum staff could avoid this from happening.[19] They invited herders to stay on the site with their cattle, something which would normally be strictly prohibited. The herders reported on movements taking place and their presence prevented warring factions from laying landmines and booby traps.

NATO bombs formed another threat to Libyan cultural property. Fragile cultural sites and several of the recognised World Heritage sites found themselves in the middle of combat zones.[20] Pro-Gaddafi forces were allegedly hiding troops, rockets and munitions among the ruins of the World Heritage Site and in the ancient city of Leptis Magna, using it as an 'archaeological shield' against the NATO air attacks.[21] Allegations of collateral damage caused by the NATO bombardments could be heard as well, such as damage to the Coptic orthodox church of Saint Mark's in Tripoli.[22]

NATO itself described its air campaign as "one of the most successful (…) in the history of the Alliance" and stated that it was a major achievement that the

[18] ICRC 2012a, b.

[19] ANCBS and IMCuRWG 2011b.

[20] "Blue Shield 2nd Statement on Libya" of 21 June 2011 at http://www.blueshield-international.org/cms/images/21-06-2011_blueshield_statement_Libya_en.pdf. Accessed 6 October 2011.

[21] "Archaeological Institute of America (AIA) Calls on U.S. and Libya to Protect World Heritage Sites" of 16 June 2011 at http://www.archaeological.org/news/aianews/5325. Accessed 28 November 2011.

[22] Amnesty International 2011, p. 15. See also: Human Rights Watch 2011, and "UN chief condemns ongoing use of force in western Libya" UN News Centre of 23 March 2011, and Teijgeler 2011, p. 3.

campaign was carried out without serious damage to Libya's ancient heritage.[23] It applied a standard of "zero expectation" of death or injury to civilians, undertook various precautionary measures and used precision-guided munitions on an "unprecedented scale"—thereby "dramatically" reducing collateral damage.[24]

8.2.2 *Identity-Based Violence*

Since the Second World War, many conflicts have initially been fought along inter-tribal, religious or ethnic lines, using identity as a form of political mobilisation.[25] Such 'identity-based violence' has formed a major threat to cultural property. When religious or ethnic identity becomes a focal point in violent conflicts, civilians belonging to 'the other' group are seen as the enemy.[26] They have been attacked physically as well as through cultural property symbolising their identity. Especially during the wars in the former Yugoslavia, the targeted destruction of cultural property was taken to professional depths. It became the symbol for the total failure of the international legal protection regime.

Identity-based violence is likely to erupt where a power vacuum emerges after a period of strong state control, especially in a society that is divided along sectarian, religious or other lines. Libya was such a society. Ethnic and tribal-related violence indeed took place during 2011 and continues to form a basis for violence.[27] Some tribes were favoured during Gaddafi's reign while others had to suffer, forming cause for destabilisation and destruction. Overall, however, the religious-based destruction of cultural property did not take place, albeit there were sporadic incidents of ransacking and war damage. The few remaining Jewish religious sites continue to be under threat of demolition, as was already the case before the

[23] "Protecting Libya's heritage" NATO press release of 4 January 2012 at: http://www.nato.int/cps/en/natolive/news_82441.htm?selectedLocale=en, visited 29 March 2012 accessed 29 March 2012.

[24] UN Human Rights Council International Commission of Inquiry 2012, pp. 30 and 32 (attached letter of NATO of 23 January 2012 OLA (2012)006). See also p. 21 of the Commission report: "NATO conducted a highly precise campaign with a demonstrable determination to avoid civilian casualties. For the most part they succeeded. On some limited occasions the Commission confirmed civilian casualties and found targets that showed no evidence of military utility. The Commission was unable to draw conclusions in such instances on the basis of the information provided by NATO and recommends further investigations".

[25] Jacobus and Kostylo 2008; van der Auwera 2010, p. 5.

[26] Toman 2010, pp. 10, 11.

[27] War crimes and other violations were allegedly committed by the Thuwar (anti-Gadaffi forces) in particular against the Tawergha. Violations included pillaging, looting and the destruction of houses and public buildings, see UN Human Rights Council International commission of Inquiry 2012, pp. 1 and 11–13 under 'Targeted communities'.

conflict started.[28] Fear also exists of post-war anti-Western sentiments and the effect of the growing influence of Islamic fundamentalists.[29]

8.2.3 Shadow Economies and Criminal Networks

Situations of armed conflict facilitate the commercial looting of cultural property, which nowadays forms a major threat to its preservation.[30] In many armed conflicts the initial ideological rationale behind the fighting becomes mixed up with economically motivated interests. This has led to the emergence of shadow economies.[31] The traffic in 'blood' diamonds or other gems, as well as drugs, tropical timber, endangered animals or arms is a case in point.[32] The trade in these commodities benefits the participants and prolongs conflicts. In many lasting crises situations, direct clashes between fragmented armed groups and governmental forces tend to be occasional.[33] Instead, brutal violence is targeted primarily at civilians with the aim of ensuring control or obtaining new recruits. This has allowed the development of environments where organised looting and trafficking in cultural property, extortion, corruption, money laundering and kidnapping have become profitable strategies.[34] In Afghanistan and Cambodia it was ascertained that the evolving erosion of state power led to an expansion in the illicit trade in cultural property as a result of the large-scale plundering of archaeological sites. The resources raised through this trade funded armed groups.[35] Looting and illegal trade can also be linked to the seizure, appropriation or export of cultural objects during a forced occupation.

During the crisis in Libya, the fear of looting and the destruction of archaeological sites and museums was generally felt by the international cultural heritage community.[36] As was already apparent in February 2011, during the very early

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[28] Teijgeler 2011, pp. 4, 5.

[29] "ICOMOS Statement on Intentional Destruction of Cultural Heritage in Libya" of 25 September 2012 where the intentional destruction of Sufi shrines and libraries in Zliten, Misrata and Tripoli is condemned at http://www.icomos.org/en/what-we-do/image-what-we-do/171-risk-management/510-icomos-statement-on-intentional-destruction-of-cultural-heritage-in-libya. Accessed 30 September 2012.

[30] Gerstenblith 2008, p. 617.

[31] van der Auwera 2010, p. 5; Chernick 2005, pp. 204–205.

[32] See e.g. World Wildlife Fund 2012, pp. 13–14.

[33] ICRC 2011a, pp. 6–7.

[34] Brodie et al. 2000, p. 16.

[35] Brodie and Walker Tubb 2002, pp. 6–7; Bogdanos 2005, pp. 477–526.

[36] "Director-General urges measures to protect Libya's cultural heritage through period of transition" UNESCOPRESS 25 August 2011 at http://www.unesco.org/new/en/media-services/single-view/news/director_general_urges_measures_to_protect_libyas_cultural_heritage_through_period_of_transition/. Accessed 30 September 2011.

days of the Libyan revolution when anti-Gaddafi forces took over Benghazi, a collection of some 8,000 bronze, silver and gold coins and other precious Roman and Hellenistic objects were professionally looted from a vault in the city's commercial bank. This priceless 'Benghazi treasure' is now being hunted by Interpol. Few records of the treasure survived, making it more difficult to determine the exact content. According to Paul Bennett—the head of a British mission called "The Society for Libyan Studies"—this illegal trade in cultural artefacts "(…) remains the fourth or fifth biggest criminal industry in the world (…). It is certain that there are organized bands of antiquities thieves going across the border into Egypt".[37] Bennett indicated reports of grave robbing in Libya. Due to the revolution, Egypt is not the country in the best position to help Libya with tracing lost treasure and patrolling borders, as it has to deal with similar problems. The looting of cultural property is most often fuelled by the poverty of local populations and the demand for cultural artefacts in Western Europe, the United States and Asia. Illegally obtained cultural property is widely transferred through *licit* markets, such as online auctions.

The violence is often sustained by national, regional and international interests, and has led to entire regions being beyond the reach of state security forces.[38] Weapons from Libya and the return of heavily armed and trained Tuareg mercenaries from Gaddafi's army, have influenced the course of events in Mali where recently a regime overthrow took place. Tuareg rebels overran and looted centres containing thousands of ancient books and documents that bear testimony to the city's extraordinary history, such as Timbuktu's Ahmed Baba Institute of Higher Islamic Studies and Research.[39]

Summing up, the Libyan case has served to point out some of the main threats to cultural property during contemporary armed conflict. It is still difficult to determine the actual damage done to Libya's cultural heritage. Not all places can be reached and assessed, and in some areas documentation, archiving and cataloguing has never been carried out. This makes it difficult to estimate possible losses. The theft from the Benghazi bank vault was perhaps the worst case of

[37] The Society promotes and coordinates the activities of scholars working on the archaeology, history, linguistics and natural history of Libya. Bennett is cited in: "Looting of Libyan treasure highlights illicit antiquities trade" by Laura Allsop of 11 November 2011 http://edition.cnn.com/2011/11/11/world/europe/looted-treasure-libya/index.html. Accessed 29 December 2011. See also "WCO (World Customs Organization, PS) calls for increased border vigilance to protect Libya's cultural heritage" Press Release 8 September 2011 http://www.wcoomd.org/en/media/newsroom/2011/september/wco-calls-for-increased-border-vigilance-to-protect-libyas-cultural-heritage.aspx. Accessed 30 September 2011.

[38] ICRC 2011a, pp. 6, 7; O'Keefe 2006, p. 361.

[39] "UNESCO Director-General appeals for concerted action to prevent loss or destruction of Timbuktu's documentary heritage" UNESCOPRESS 15 April 2012. http://www.unesco.org/new/en/media-services/single-view/news/unesco_director_general_appeals_for_concerted_action_to_prevent_loss_or_destruction_of_timbuktus_documentary_heritage/. Accessed 30 April 2012.

looting during the conflict, but, overall, damage seems to be limited. Most of Libya's sites emerged largely unscathed.[40] It also appears that Libya has avoided the kind of cultural looting and vandalism that occurred after the invasion of Iraq in 2003. The situation in Libya remains explosive in all respects, however, hindering cultural property protection. UNESCO has resumed its cooperation with Libya but, due to security reasons, many foreign archaeologists who are needed to help develop Libya's archaeological capacity cannot return.[41]

8.3 International Protection of Libyan Heritage Within the 1954 Framework

In this part attention will be paid to international efforts to protect Libyan cultural property undertaken in 2011 by UNESCO and the states parties to the 1954 Convention and Second Protocol. The focus is on the action undertaken internationally within the framework of the 1954 Hague Convention, as this instrument forms the basic, historic core of the international law protecting cultural property during war.[42] It was adopted as a reaction to the large-scale destruction of cultural property during the Second World War (1939–1945) and to the systematic pillage by the Nazis of the occupied territories.[43] Together with its Regulations and First Protocol, the Convention was called the 'Red Cross Charter for cultural property'.[44]

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[40] UNESCO 2012a, pp. 3–4 where it is stated that according to the report of the UNESCO mission that took place from 16 to 23 December 2011 no site had been destroyed or severely damaged.

[41] "Revolution offers chance for Libyan archaeology. Change of government presents opportunities for, and threats to, the country's heritage" Declan Butler, 18 November 2011 Nature News at http://www.nature.com/news/revolution-offers-chance-for-libyan-archaeology-1.9396. Accessed 1 December 2011. Note also the fact that the World Heritage Site of the Old Town of Ghadamès in the Sahara was allegedly attacked twice—during the conflict in 2011 but also in 2012 undergoing rocket attacks. See "The Director-General calls for the protection of the Old Town of Ghadamès" UNESCOPRESS 14 June 2011 http://www.unesco.org/new/en/media-services/single-view/news/the_director_general_calls_for_the_protection_of_the_old_town_of_ghadames and "Director-General concerned about attacks on World Heritage Site of Ghadamès UNESCOPRESS 23 May 2012 at http://www.unesco.org/new/en/media-services/single-view/news/director_general_concerned_about_attacks_on_world_heritage_site_of_ghadames_libya/. Both Accessed 1 June 2012.

[42] Toman 2009, p. 21. These were the first international legal instruments aimed solely at protecting cultural heritage in wartime. At present, 125 states are party to the 1954 Hague Convention, including the major political powers—with the exception of Great Britain.

[43] Boylan 2003, p. 4.

[44] Toman 1996, p. 24. See the 'Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict' and 'Protocol to the Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954'.

8.3.1 The System of Control and the States Parties to the Convention

In the framework of the 1954 Convention, a system of control has been set up with which the states parties can exercise control over the implementation of the Convention by third states. It is aimed at avoiding and stopping damage to cultural property during battle.[45] The working of the control system in practice has already been extensively discussed by several authors, among whom is Roger O'Keefe.[46]

The system has three distinct but complementary elements, that are all triggered upon the outbreak of hostilities. First, the result is supposed to be that each party to the conflict has its own representative for cultural property—if appropriate also in occupied territory—to deal with all matters concerning the Convention. Second, the states involved in an armed conflict can have accredited to it delegates of the Protecting Power of each opposing party. A third state can be accepted as a Protecting Power, but also an organisation such as the International Committee of the Red Cross (ICRC). During the two World Wars, Protecting Powers carried out valuable humanitarian work.[47] In the Geneva Conventions of 1949 the control system of the Protecting Powers had therefore been codified and became most obvious in the case of the protection of prisoners of war and civilian internees.[48] Under the 1954 Convention the delegates of the Protecting Powers look after the interests of the cultural property of the belligerent party to which they are appointed. They can mediate, make proposals, investigate alleged violations of the Convention with the approval of the Party to which they have been accredited and make representations locally to secure the cessation of such violations.[49] Third, a Commissioner-General for Cultural Property was intended to have supreme responsibility for control and was therefore a central feature of the control system. Any representation that he or she would deem useful, could be made, varying from ordering or conducting an investigation, appointing inspectors for cultural property with special missions, making representations, reporting to the parties to the conflict and their Protecting Powers.[50]

During the conflict in Libya, no action was undertaken by the states parties to the Convention to assist in protecting Libya's cultural heritage, and neither did this occur after the conflict had formally ended. During the regular meeting of states

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[45] Embodied in Chapter VII of the 1954 Hague Convention—Articles 21 and 22—and in the Regulations Chapter I on 'Control': Articles 1–10. Toman 1996, pp. 224, 247.

[46] O'Keefe 2006, pp. 165–188, 288–294, and 294–301.

[47] Toman 1996, p. 223.

[48] Articles 8/8/8/9 respectively of the four Geneva Conventions of 1949. Article 21 of the 1954 Hague Convention about the Protecting Powers was based for an important part on these texts. See also Article 5 Additional Protocol I of 1977.

[49] 1954 Convention Article 22 and Regulations for the Execution of the Convention for the Protection of Cultural Property in the Event of Armed Conflict Articles 3–6, 8, 11, 17.

[50] Toman 1996, p. 241.

parties in December 2011, the referral to the topic of cultural property protection in the Libyan conflict did not stretch further than an overview of recent actions undertaken by UNESCO.[51] Libya as a state party could have invoked the elements of control during the international conflict that was fought within its territory. This did not happen, as was the case in general during practically all international armed conflicts that took place since the adoption of the Convention. The control system failed in practice because states were—and are—extremely hesitant to admit being involved in armed conflicts and opening the door to interventions in sovereign matters.[52] What also made the control system weak was the fact that the appointment of Commissioners-General and Protecting Powers had been made dependent on the agreement and financing of the parties to the conflict. Next to that, procedures were complex and often resulted in lengthy negotiations. Moreover, the elements of control did not apply in cases of irregular internal wars which have increasingly taken place since the adoption of the Convention. The political situation of the Cold War also paralysed the control system. During the 1960s the Convention itself became politicised and created tension among groups of states. The tension related to Israel, many Arab States and the USA over Jerusalem and the Occupied Territories during and after the 1967 Israeli-Arab War. UNESCO was attempting to apply the 1954 Convention to the conflicts but was criticised for doing so. Problems also arose with socialist states in relation to Indochina. True efforts to mobilise and coordinate international help were undertaken on a few occasions, for example in the case of Cambodia, Afghanistan and Iraq.[53] Such efforts were however a reaction to disasters that had already taken place and generally came too late.[54]

8.3.2 The System of Control and UNESCO

As part of a broader post-Second World War humanitarian movement, UNESCO was founded on 16 November 1945. The organisation was appointed as the sole UN agency with a specific mandate in the cultural sphere, and as the Secretariat of the world's principal cultural conventions. Contrary to the initial idea of setting up a permanent international 'Red Cross for cultural property', the power of UNESCO to take independent action for the defence of cultural property in armed

[51] UNESCO 2012b.

[52] UNESCO 1993, Annex, p. 5. See also Toman 1996, p. 227; Boylan 1993, pp. 84–88; Hladik 2001.

[53] Examples are the International Coordinating Committees (ICC) for Angkor in Cambodia (1993 onwards), for Afghanistan's cultural heritage (2002 onwards) and for Iraqi cultural heritage during and after the occupation of Bagdad in April 2003. Within the ICC UNESCO's most important task was to strengthen and improve the international cooperation during and shortly after armed conflict. van der Auwera 2011, pp. 12, 13.

[54] van der Auwera 2012, Bijlage III: Bespreking casussen pp. 34–37.

conflict was kept limited.[55] UNESCO is prohibited from intervening in matters which are essentially within the domestic jurisdiction of its member states.[56] As will be described hereafter, UNESCO can also take the initiative and offer its services to member states. In practice, however, authorities in most cases refused to make use of the organisation's services and left it at declarations of intent to respect their legal obligations. As a governmental organisation, there will always be the risk that UNESCO's actions are seen as political interference and preference instead of as a rescue mission for the world's cultural heritage.[57] The defensive attitude of states crippled the rest of the control system. At times, the organisation nevertheless managed to apply its mandate successfully within the institutional limits and the political minefield of armed conflict. As O'Keefe observes, UNESCO established a routine practice of communicating with the hostile parties on the outbreak of an armed conflict falling within the scope of the Convention.[58] UNESCO also provided assistance publicly or through quiet diplomacy by appealing to the warring parties and sending missions to conflict areas with observers, experts and personal representatives.

UNESCO could do so on the basis of Articles 19(3) and 23 of the 1954 Convention, and also through its Constitution. Article 19(3) of the 1954 Convention, dealing with conflicts of a non-international character, provides that UNESCO 'may offer its services to the parties to the conflict'. The provision was modelled on the ICRC's right to initiative under Article 3 common to the Geneva Conventions. UNESCO used Article 19(3) as a basis to send out appeals, offer its services and send out missions. On the basis of Article 23, a state party to the Convention can request purely non-financial, i.e. technical, assistance from UNESCO. Article 23 has also been referred to as the 'fourth element of control'.[59] It must ensure the adequate protection of cultural property and prevent its deterioration, destruction or looting. The Article has an open-textured formulation and can be invoked in peacetime as well as during international armed conflict. Action based on Article 23 often took on the form of public appeals to ensure protection, but it could also entail offering personnel, material or knowledge to cultural and humanitarian organizations.

Action was undertaken outside the context of the 1954 Convention as well, based on UNESCO's Constitution. The general mandate of UNESCO to take a cultural initiative for the protection of the world's cultural property is formulated

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[55] Toman 1996, pp. 228–230; UNESCO 1961, p. 219, para 1138.

[56] Article 1(3) of the UNESCO Constitution: "With a view to preserving the independence, integrity and fruitful diversity of the cultures and educational systems of the States Members of the Organization, the Organisation is prohibited from intervening in matters which are essentially within their domestic jurisdiction".

[57] Boylan 1993, pp. 125–126.

[58] O'Keefe 2006, p. 178.

[59] 1954 Convention Articles 19 and 23—Assistance of UNESCO. Toman 1996, pp. 255–269.

in Article 1(2)(c).[60] It provides UNESCO with the opportunity to offer its services, make proposals, recommendations and give advice during armed conflict as well as political crises and natural disasters. Sometimes action has been undertaken jointly with the UN, or with the Committee of the UNESCO World Heritage Convention. Emergency assistance for example 'may be requested to address ascertained or potential threats facing properties included on the List of World Heritage in Danger and the World Heritage List which have suffered severe damage or are in imminent danger of severe damage due to sudden, unexpected phenomena. Such phenomena may include (…) war'.[61]

With regard to Libya, UNESCO made use of many available options.[62] The organisation proudly claims that it took the lead "to mobilize the international community to safeguard the cultural heritage of countries in the throes of revolutionary change", resulting in containing the damage to cultural heritage in Egypt, Tunisia and Libya.[63] Among other things, in March 2011 Libyan forces as well as the Coalition members implementing the no-fly zone over the country were reminded of the fact that "UNESCO, in keeping with Article 23 of the Convention, stands ready to play its part concerning the protection of cultural property".[64] NATO troops were reminded of individual international obligations under the Convention and two Protocols, as well as under customary international humanitarian law and were warned against illicit traffic in cultural property.[65] The Coalition forces were to keep military operations away from cultural sites and refrain from any act of hostility directed against Libya's cultural property.

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[60] Constitution of the United Nations Educational, Scientific and Cultural Organization adopted in London on 16 November 1945. See http://portal.unesco.org/en/ev.php-URL_ID=15244&URL_DO=DO_TOPIC&URL_SECTION=201.html. UNESCO's Constitution gives the organisation in Article 1 (c) a general mandate to: "Maintain, increase and diffuse knowledge." It can do so "By assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science and recommending to the nations concerned the necessary interventions".

[61] Operational Guidelines for the Implementation of the World Heritage Convention WHC.12/01 July 2012 UNESCO, World Heritage Centre, Paris.

[62] Example, "Emergency actions in Libya" referring to activities undertaken by UNESCO http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/illicit-traffic-of-cultural-property/emergency-actions/emergency-actions-in-libya/#c353639. Accessed 22 September 2012.

[63] UNESCO 2011c, pp. 10–14. See also UNESCO 2012a, pp. 3, 4; UNESCO 2012b—overview of activities: UNESCO organised two international expert meetings on Libyan cultural heritage, had contacts with the UN Secretary-General, the Secretary-General of NATO, Interpol and several non-governmental organisations such as ICOM (museums) and ICOMOS (monuments and sites) in mobilising knowledge and support to safeguard cultural sites, prevent illicit trafficking, protect museums and strengthen cultural institutions.

[64] "Director-General urges military forces engaged in Libya to refrain from endangering cultural heritage", UNESCO press release of 23 March 2011 http://www.unesco.org/new/en/media-services/single-view/news/director_general_urges_military_forces_engaged_in_libya_to_refrain_from_endangering_cultural_heritage/. Accessed 1 April 2011.

[65] UNESCO 2011b, p. 2.

Together with a network called the Blue Shield, which will be discussed later, UNESCO provided the members of the Coalition with geographic coordinates and detailed cartographic documents to situate major collections and historic monuments, including the country's five World Heritage sites.[66] A comprehensive list of Libyan museums turned out not to be available, which is why in April 2011 the International Council of Museums (ICOM)—with which UNESCO works closely—provided a detailed museums "Watch List" containing many contact data and coordinates.[67]

The direct effects of these initiatives are difficult to verify. Libyan cultural property seems to have survived the bombings well, but NATO did not officially confirm that cultural property protection or UNESCO actions played a decisive role in the process of target selection. Whether or not one agrees with the fact that NATO "rigorously implemented international humanitarian law to a standard exceeding what was required",[68] it is a fact that cultural property benefits from a better protection of the civilian population. According to NATO, the reason for rigorously implementing the law was the essential military objective of the campaign—namely to protect civilians and civilian areas from attack or a threat of attack. The political rationale behind a military operation is however completely irrelevant when it comes to the application of international humanitarian law. The combating parties are, moreover, legally obliged to respect and protect all persons who do not take part in the fighting, including civilians.[69]

UNESCO was unable to intervene directly during the conflict, "Due to the suspension of co-operation with the government of Colonel Gaddafi and the dangerous military situation in this country".[70] Opportunities to mobilise international action were indeed strongly diminished due to the lack of security and reliable information on the ground, as was confirmed during an emergency meeting convened by UNESCO in March 2011 with stakeholders and experts in cultural preservation.[71] Numerous reports of destruction, damage and theft from museums, archaeological sites and libraries had been heard. However, most information could

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[66] ANCBS and IMCuRWG 2011c, pp. 3, 4; UNESCO 2011c, pp. 10–14.

[67] See Item 7.1. of ICOM's General Report on Countries, Advisory Committee Meeting 6 June 2011, Paris, 75th Session, p. 3 under 'Libya'. http://archives.icom.museum/download/june2011/en/110518_ICOM_Actions_EmergencySituations_EN.pdf accessed 10 December 2011.

[68] "Protecting Libya's heritage" NATO Press release of 4 January 2012 at: http://www.nato.int/cps/en/natolive/news_82441.htm?selectedLocale=en. Accessed 29 March 2012.

[69] Pommier 2011, p. 1072.

[70] UNESCO 2012a, pp. 3–4. The UNESCO mission took place shortly after the meeting of the states parties to the 1954 Convention, from 16 to 23 December 2011 and was organised in partnership with the Italian authorities. The mission undertook a survey of imminent threats and opportunities related to planned heritage projects throughout the country and funded by Italy. It identified, in consultation with the Libyan Department of Antiquities, emergency security measures to prevent further illicit trafficking. According to the report, no site had been destroyed or severely damaged as had been feared.

[71] "UNESCO mobilizes experts and civil society partners to safeguard heritage in Tunisia, Egypt and Libya", UNESCOPRESS 16 March 2011 at http://www.unesco.org/new/en/media-services/

not be verified. Contact persons could no longer be reached, access became difficult, assessments were impossible to make, cooperation projects were halted and foreign staff called home. In addition, rapidly deteriorating and changing security conditions formed a major obstacle to access. Many (inter)national cultural heritage organisations simply do not have the experience and means to work under such circumstances. Other specialised UN agencies as well as regional bodies such as the Council of Europe were also hindered in making assessments and safely delivering assistance. Even well experienced humanitarian organisations such as the ICRC were increasingly hindered in accessing affected areas.[72] It was only in December 2011, two months after the fighting had formally ended, that UNESCO sent an expert mission to Libya. The situation has improved during the still explosive post-war period, but the danger of further destabilisation in the region and a professionalisation of criminal activities is real.

With regard to the looting and trafficking of cultural property, UNESCO sent out international alerts to Algeria, Chad, Egypt, Niger, Sudan and Tunisia and to intergovernmental organisations and non-governmental organisations such as INTERPOL, the World Customs Organization and ICOM. UNESCO is still collaborating with the Italian authorities and INTERPOL to retrieve the 'Benghazi Treasure'. Such initiatives have meanwhile become part of UNESCO's routine practice of cultural property protection during armed conflict. Others shared UNESCO's plight, calling on all parties to protect Libyan cultural heritage, stating that "looting, theft and the illicit trafficking of cultural property are manifestly in contravention of the relevant provisions of UNESCO's 1970 Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property".[73] The 1970 Convention is one of several legal instruments that strengthen the wartime protection regime. It is aimed at outlawing the widespread trafficking in both smuggled and stolen works of art and other cultural property.[74] Because of the growing problem, UNESCO is increasing cooperation so as to combat the illegal trafficking of cultural property and to repatriate and restitute stolen property.[75]

(Footnote 71 continued)
single-view/news/unesco_mobilizes_experts_and_civil_society_partners_to_safeguard_heritage_in_tunisia_egypt_and_libya/. Accessed 30 April 2012.

[72] ICRC 2011a, pp. 5–7.

[73] "WCO calls for increased border vigilance to protect Libya's cultural heritage" Press Release of 8 September 2011 at http://www.wcoomd.org/en/media/newsroom/2011/september/wco-calls-for-increased-border-vigilance-to-protect-libyas-cultural-heritage.aspx. See also "Archaeological Institute of America (AIA) Calls on U.S. and Libya to Protect World Heritage Sites" 16 June 2011 at http://www.archaeological.org/news/aianews/5325. Both accessed 30 September 2012.

[74] The Convention entered into force 24 April 1972. Currently 123 states are parties to the Convention.

[75] UN Economic and Social Council 2010b, pp. 7–8 and 12 and paras 1–13 of the Note by the Secretariat—Background. See also UN Economic and Social Council 2010a as well as UN Office on Drugs and Crime 2010.

8.3.3 The System of Control and the Second Protocol

In addition to the 1954 Convention, Libya is also a state party to its 1999 Second Protocol.[76] The Protocol introduced new opportunities for the international mobilisation of protection efforts during armed conflict. It established an Intergovernmental Committee, to be assisted by the UNESCO Secretariat.[77] This 'Intergovernmental Committee for the Protection of Cultural Property in the Event of Armed Conflict' consists of twelve rotating states with one permanent member.[78] The Committee has various tasks, of which an obvious one is to monitor and supervise the implementation of the Second Protocol and de facto of the Convention. The control element of the Protecting Powers, meant to act as a communication channel between the hostile powers, was maintained in the Second Protocol.[79] Now, also the Committee can take on that role, for example by proposing meetings with the parties to a conflict. Those parties engaged in an international armed conflict that are not willing to entrust this task to the Committee can still ask the help of third parties. As an alternative, the Director-General of UNESCO may lend his or her good offices to warring parties, similar to the 1954 system.

Importantly, the Committee may play a less formal role as a negotiating forum, facilitating background negotiations.[80] Experience shows that background negotiations and patient dialogue are more effective—at least, at the beginning of the conflict—than public accusations and finger pointing.

In addition, the Committee may grant international assistance, if necessary during armed conflict and other emergencies.[81] This creates possibilities for technical, material, legal, administrative or consultative forms of help. One of the ways to grant financial assistance is through a newly established 'Fund for the Protection of Cultural Property in the Event of Armed Conflict'.[82] Requests may be granted without the consent of the states parties to the Second Protocol. In other words, the Intergovernmental Committee has been granted the option to initiate a dialogue between warring parties, to bring actual threats to cultural property to the attention of states

[76] The Protocol entered into force 9 March 2004. The number of states parties as per 15 November 2012 is 64, not including several important political powers such as the permanent members of the UN Security Council.

[77] Second Protocol Articles 24–27, 29, 32 and 33—Assistance of UNESCO. Complementary to Article 23 of the 1954 Convention. Guideline numbers 19, 20, 108–154. For technical assistance, see Guideline 26. See also O'Keefe 2008, pp. 290–291.

[78] Second Protocol Article 32.

[79] Second Protocol Articles 34–36.

[80] Hladik 2001, p. 430.

[81] Rule 9 of the Rules of Procedure of the Committee for the Protection of Cultural Property in the Event of Armed Conflict, UNESCO, Paris, April 2010 CLT-2010/WS/5 CLD-4625.9, pp. 126–140: "(…) the Committee shall have the following functions: (…) e) to receive and consider requests for international assistance under Article 32 of the Second Protocol".

[82] Chapter 6, Article 24(1) Second Protocol. Article 29 established the Fund which has been operational since 24 November 2009. See UNESCO 2009b.

parties, to assist warring parties in various other ways, and to provide financial support. The Committee can also generate support for others, such as acknowledged cultural heritage organisations, so that they can undertake swift action.

It is therefore interesting to know whether protective action was initiated with regard to Libya within this relatively new legal framework. This is not the case. The Intergovernmental Committee of the Second Protocol did not formally undertake any specific action with regard to Libya, nor was it asked to do. Libya was not on the agenda of any relevant meetings.[83] This is even more surprising, as the Netherlands and Belgium were members of the Committee at the time of the armed conflict in Libya, while their governments contributed to the NATO air campaign. Moreover, of the ten states that made up the NATO Coalition conducting the campaign, five were a party to the Second Protocol and eight to the Convention.[84] During the December 2011 Committee meeting that took place after the conflict had ended, the apparently successful implementation of the Hague Convention during the Libyan war was reiterated, and that was all. Through the Fund, financial support for the protection of Libyan cultural property might have been given, but has so far only been requested and received by El Salvador.

In their turn, the states parties to the Second Protocol could have played an important role in protecting Libyan cultural property. In the Protocol, they are encouraged to give assistance bilaterally or multilaterally and to mobilise international support for the protection of cultural property. This can be done through the Committee, UNESCO and also directly.[85] Assistance can be of a technical, preventive, emergency or recovery nature to those belligerent parties which have

[83] The last Committee meeting before the start of the Libyan uprising was the Fifth Meeting of the Committee on 22–25 November 2010. The next one was in December 2011 after the conflict had ended, see UNESCO 2012c. Between both meetings, no extraordinary meeting of the Committee was held. Since its first session on 26 October 2006, the Committee has convened only one extraordinary meeting, in September 2009. The main purpose was to finalise institutional and administrative matters, see UNESCO 2011a. Another extraordinary meeting could have been convened, but this was apparently not deemed necessary. See Article 24 (2) of the Second Protocol and Rules 2 (1) to 2 (5) of the Rules of Procedure of the Committee. A Round Table meeting did take place on 29 April 2011, more than a month after NATO began its air campaign over Libya, but the topic of discussion was the system of enhanced protection under the Second Protocol. See UNESCO 2011b.

[84] Coalition partners were Belgium, Canada, Denmark, France, Italy, Qatar, Spain, the United Arab Emirates, the United Kingdom and the United States of America. Those which are also party to the Second Protocol are: Belgium, Canada, Italy, Qatar and Spain. Party to the 1954 Convention are: Belgium, Canada, Denmark, France, Italy, Qatar, Spain and the USA.

[85] See Article 32 (1) and (4) Second Protocol: "Parties are encouraged to give technical assistance of all kinds, through the Committee, to those Parties or parties to the conflict who request it". See also Article 33 (1): "A Party may call upon UNESCO for technical assistance in organizing the protection of its cultural property, such as preparatory action to safeguard cultural property, preventive and organizational measures for emergency situations and compilation of national inventories of cultural property, or in connection with any other problem arising out of the application of this Protocol (…) and (2): "Parties are encouraged to provide technical assistance at bilateral or multilateral level", as well as (3): "UNESCO is authorized to make, on its own initiative, proposals on these matters to the Parties". For the application of the provisions

requested it. The Second Protocol also provides for a Biennial Meeting of the Parties, during which states can try to initiate better conditions for cultural property in wartime, for example by discussing problems related to the application of the Protocol and to make recommendations.[86] This article seems to be relevant, as it gives states the possibility to pay attention to urgent matters and keep them on the agenda even when a general agreement cannot be reached. Libya, apparently, was not a cause for action.[87] The states parties to the Protocol did not call on the warring parties to comply with the Convention and Protocol and neither did they choose to make a public denunciation. They also did not formally ask the Intergovernmental Committee to undertake action and neither did Libya.

The same can be said with regard to options available under the system of the World Heritage Convention. Libya did not request for help even though it hosts five World Heritage properties. The recent example of Mali shows that this was a missed chance. When World Heritage properties in the northern parts of Mali were subjected to destructive attacks and occupation by armed rebel groups in April 2012 and after, Mali did request for international assistance.[88] The next month, the Director-General of UNESCO send a high level mission into study emergency measures. The World Heritage Sites of Timbuktu and the Tomb of Askia in Gao were inscribed on the List of World Heritage in Danger and an appeal was launched to the frontier States Parties to Mali (Algeria, Burkina Faso, Cote d'Ivoire, Guinea, Mauritania, Niger, Senegal)—among other things to combat the illicit traffic of cultural objects. Via a Special Fund, quickly established by the World Heritage Committee, the international community could financially support Mali's efforts to safeguard its World Heritage Sites.[89]

With regard to Libya it can be said that, even though UNESCO did initiate various useful activities, the possibilities for assistance decreased drastically during the conflict. It would have been worth trying to establish contacts with the new officials in charge, as the National Transitional Council had set up a Department of

(Footnote 85 continued)
of the 1999 Protocol to all parties to a conflict of a non-international character (including non-State armed groups) see Henckaerts 2010, pp. 83–85.

[86] Second Protocol Article 23 (3) (e).

[87] UNESCO 2011a. Their previous meeting had been in November 2009. There had not been a particular reason to discuss the situation in Libya at the time, see UNESCO 2009c. Since November 2009 no meeting had been convened. During the December 2011 meeting, UNESCO underscored the continuing relevance of the Second Protocol in a world marked by a number of ongoing armed conflicts. Administrative and institutional matters were discussed. In between the 2009 and 2011 meetings, the states parties could have chosen to meet for an extraordinary meeting on Libya "to discuss any problem related to the application of this Protocol, and to make recommendations, as appropriate" (Article 23 (3) and (4) of the Second Protocol), but it did not happen.

[88] UNESCO 2012d, Decision 36 COM 7B.106.

[89] 'Creation of a Special Fund for the Safeguarding of Mali's World Heritage Sites' press release by the World Heritage Committee of UNESCO of 25 July 2012 at http://whc.unesco.org/en/news/913. Accessed 3 September 2012.

Archaeology.[90] Analogous to the Convention, UNESCO has the mandate to offer its services to non-state actors taking part in a conflict.[91] As an intergovernmental organisation UNESCO is however not in the best position to seek contact with non-state armed actors and deliver assistance in regions outside state control—even if such action is badly needed.[92]

In practice, UNESCO's role in offering assistance during armed conflict has not been made stronger under the Second Protocol. The tasks grew, but not the capacity to deal with them. The Secretariat of UNESCO is now also responsible for implementing the decisions of the Committee, assisting the Committee administratively and it will have to act as the portal through which all assistance flows, playing a key role in monitoring, coordinating and evaluating assistance.[93] Especially during emergency situations, UNESCO should be able to perform this task well. One would therefore expect the Committee to have been given strong secretarial support but, contrary to original attempts, and in line with the situation under the Convention, this is not the case. The Intergovernmental Committee of the Second Protocol has indicated that one of its present tasks is to reinforce the human and financial resources of the Secretariat.[94]

8.3.4 Blue Shield and the Libyan Missions

The Blue Shield network—a fairly new player in the field of cultural property protection—started in 1996 with the establishment of the International Committee of the Blue Shield (ICBS). The ICBS was founded by the four organisations that

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[90] ANCBS and IMCuRWG 2011c.

[91] 1954 Convention Article 19(3). Second Protocol Article 33—if offered in accordance with Article 22(7).

[92] van der Auwera 2011, pp. 5, 7, 9.

[93] Second Protocol Article 28, Rules of Procedure 15 and Guideline 25.

[94] Message of the Chairperson of the Committee Mr. Nout van Woudenberg (The Netherlands) http://www.unesco.org/new/en/culture/themes/movable-heritage-and-museums/armed-conflict-and-heritage/intergovernmental-committee/. Accessed 1 September 2012. See also the Resolution of the Fourth Meeting of the Parties to the Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict of 12 December 2011, point 9 where the Fourth Meeting "Invites Parties and other potential donors to provide extra-budgetary resources to assist the Secretariat in reinforcing its financial and human resources". See also UNESCO 2009a, p. 3 under (v) and in the same report the Adopted Recommendations under 2 where UNESCO's Director-General is recommended to provide sufficient human and financial resources in order to ensure the assistance by the Secretariat of UNESCO in the implementation of the Convention and its 1954 Protocol, and under 5 where the High Contracting Parties are encouraged to make voluntary contributions to enhance the implementation of the Convention and its 1954 Protocol. See also UNESCO 2011b, Appendix p. 2 for the opinion of the Secretary General of ICA David Leitch in its contribution of 6 June 2011 to the Informal Meeting of the Bureau of the Committee.

represent the areas of cultural property protected by the Hague Convention—museums, archives, monuments and sites and libraries.[95] Later, an international organisation protecting audiovisual materials also joined this 'Red Cross for cultural heritage protection'.[96] The respective organisations have been working for the protection of cultural property during man-made and natural disasters since decades and cooperate closely with UNESCO. In the Second Protocol, the Blue Shield Committee was recognised as an 'eminent' body and was granted an advisory role for the Intergovernmental Committee.[97] The ICBS was supposed to act as a standing emergency coordination and response committee that would support the control system more effectively and provide additional assistance to UNESCO.[98] If UNESCO's involvement turned out to be politically difficult, this body would be in a position to actually do something, making use of a network of cultural emergency aid experts. These ambitious ideas were clearly a reaction to the lack of effective protective intervention since 1954.

Although its founding ideas sounded hopeful, the effectiveness of the ICBS remains modest due to a lack of financial resources and international visibility.[99] Cooperation and solidarity between the five professional bodies and the ICBS does not seem to take place. On paper it acts as one organization, but in practice the independent bodies mostly continue to work separately in their respective areas of expertise.[100]

Meanwhile, National Blue Shield Committees have been set up in various countries and this process continues. To improve the efficiency of the expanding network, the International Blue Shield Association was established in 2008. So far it has 'observed and reacted to many (…) crises, like the earthquakes in Chile,

[95] The four international cultural heritage organisations that are recognised by UNESCO and represent the four areas of cultural property protected by the Hague Convention are: Museums (International Council of Museums or ICOM) Monuments (International Council of Monuments or ICOMOS), Archives (International Council of Archives or ICA) and Libraries (International Federation of Libraries or IFLA).

[96] The Coordinating Council of Audiovisual Archives Associations (CCAAA).

[97] The Committee "shall co-operate with international and national governmental and non-governmental organizations (…). To assist in the implementation of its functions, the Committee may invite to its meetings, in an advisory capacity, eminent professional organizations such as those which have formal relations with UNESCO, including ICBS and its constituent bodies (…)". Second Protocol Articles 11 (3) and 27 (3): An 'eminent' body such as the ICBS may also recommend specific cultural property to the Committee for Enhanced Protection. See also Rule 6 'Organisations attending in an advisory capacity', Rule 12 (2) 'Provisional Agenda' and Rule 37 (2) 'Secretariat of the Committee' of the Rules of Procedure for the Committee for the protection of Cultural Property in the Event of Armed Conflict. See Guidelines no. 24.

[98] Boylan 1993, p. 12; Toman 1996, pp. 255–269.

[99] van der Auwera 2012, pp. 162–164, 207.

[100] Example, ICOM's position at the Round table Meeting of the 1954 Convention Committee at p. 1 of the Annex to UNESCO 2011b where the ICOM representative stressed the need for a more inclusive collaboration with ICBS so that ICOM can improve its ability to offer an adequate, effective and rapid response following any disaster situation.

Italy or New Zealand, the war in Georgia and the Gaza Strip, and others'.[101] It was with the help of the Blue Shield Association that the two missions to Libya took place. While the high number of security-related incidents in Libya had restricted the movements of UN staff and many others, a group under the auspices of the Blue Shield managed to go into the country twice during 2011—following a mission to Egypt.[102] The aim of these 'civil-military assessment missions' was, inter alia, to raise awareness for the protection of cultural property and to demonstrate international concern and solidarity. The timing of both visits was risky. Travel warnings had been issued and most embassies and foreigners were evacuated. During the first visit to Libya an armed conflict was still taking place. During the second visit, tensions among various groups remained, resulting in armed confrontations and deaths at different locations.

The group actively used its network, was willing to act swiftly and take security risks. The information obtained through the missions was welcomed by the international community of cultural heritage experts. Overall, however, the endeavour lacked formal support and professionalism.[103] Of all the international organisations that make up the Blue Shield Committee, it was mostly ICOM that actively contributed to the mission—through its Disaster Relief Museum Task Force. It should be stressed as well that the missions took place because of the personal persistence of a few persons involved—not because they were broadly supported.

Summing up, the legal options for the mobilisation of international protection efforts were not used either by Libya, the states parties to the Convention and Second Protocol, or the newly established Intergovernmental Committee. UNESCO undertook various initiatives—the new representative of Libya considered them to be an example of future action in armed conflict and Sudan even regarded them as a pioneering act.[104] Nevertheless, the course of action undertaken fell within the organisation's usual range of available options and activities. All factors combined hindered speedy and effective action by UNESCO, other organisations and experts working in the field of cultural heritage protection. What did seem to

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[101] Editorial by the President of the Association of National Committees of the Blue Shield (ANCBS), Karl von Habsburg-Lothringen, of 1 January 2012 at http://www.ancbs.org/. Accessed 24 February 2012.

[102] In September and November 2011. See ANCBS and IMCuRWG 2011b, c. The same organisations had worked together before, going on a 'Civil-Military Assessment Mission for Egyptian Heritage' that took place from 12 to 16 February 2011, see ANCBS and IMCuRWG 2011a. They describe their Egyptian mission as the first independent heritage assessment team in Egypt after the revolution began. For the travel restrictions on UN staff, see p. 5 of Annex I of UN Human Rights Council International Commission of Inquiry 2012.

[103] The International Military Cultural Resources Working Group (IMCuRWG) and ANCBS did request the Director-General for Culture of UNESCO and the Director of the UNESCO World Heritage Centre to send or support the mission to Egypt. Confirmation of the request was received on 4 February 2011. A week later, the team decided independently to go on their 'Civil-Military Assessment Mission for Egyptian Heritage'. See Kila 2012, p. 51.

[104] UNESCO 2012b.

make the Libyan case rather unique was the quantity, rather than the type of the action. Libya hosts a wealth of world-famous cultural property and this guided everyone's focus—as well as media attention. What also contributed to the momentum was the fact that international political support for military intervention in Libya reached a critical level. New were the assessment missions undertaken under the auspices of the Blue Shield, and, last but not least, Libyans themselves have been credited with doing much to protect their treasures during the fighting.[105]

8.4 Obstacles and Solutions

The overall conclusion is that the same obstacles to international protection presented themselves in Libya as in other contemporary armed conflicts. These obstacles hindered the effective use of the control system, as well as protection efforts undertaken within the wider range of the Conventional system and UNESCO's competence. UNESCO's ability to send help during armed conflict and to communicate with different armed actors proves inadequate in practice.[106] The Second Protocol did not significantly change this situation. This is not only typical for UNESCO but for the international community in general. An 'early-warning system for cultural heritage' is still lacking. There are procedures in place, but as long as national requests stay out, the system is paralysed. International action therefore continues to be of a reactive, ad hoc nature. Other seemingly insurmountable obstacles are the lack of security and of reliable information—inherent to any conflict and crises situation.

8.4.1 Solutions

What is needed is, inter alia, an organisation or network that can act swiftly and autonomously during armed conflict—without being fully dependent on the willingness and cooperation of the states parties to the 1954 Convention and Protocols. At present, there are civilian organisations undertaking cultural property rescue efforts in conflict areas, but there are not many of them and they mostly have a limited focus.[107] No wheels need to be reinvented. Lessons can be learned from humanitarian organisations offering protection and assistance during conflict

[105] Paul Bennett, head of the British mission "The Society for Libyan studies" in: "Looting of Libyan treasure highlights illicit antiquities trade" by Laura Allsop of 11 November 2011 at http://edition.cnn.com/2011/11/11/world/europe/looted-treasure-libya/index.html. See also ANCBS and IMCuRWG 2011b.

[106] Example, Toman 2009, p. 499.

[107] See Kila 2012, p. 50 for examples from Iraq.

and crises, such as the ICRC. Throughout the entire period of air operations in Libya, the ICRC was able to conduct its activities in areas controlled by the government, as well as those in the hands of the NTC.[108]

At present, the Blue Shield Network seems to be in the best position to take the lead as an independent cultural emergency aid provider in armed conflicts and other disasters. The Blue Shield Committee has already been called the cultural equivalent of the Red Cross, which is a powerful way of explaining, in just a few words, exactly what it stands for. Nonetheless, its legal position differs structurally from that of the ICRC.[109] In the Geneva Conventions, states granted the ICRC the right of humanitarian initiative in the event of international as well as non-international armed conflict. On the basis of this right, the organisation undertakes various protection-related activities.[110] The ICRC's legal structure makes it possible to work independently in performing these (Geneva) Conventional activities. Correspondingly, the ICRC has a greater obligation to remain faithful to the principles that have governed the organisation's activities throughout its history, in particular impartiality, neutrality and independence.[111]

The ICBS has not been given the right to take a cultural initiative during situations falling under the—in the case of Blue Shield—1954 Convention and Additional Protocols. It has also not been granted the right to act as a Protective Power and is not obliged to work on the basis of impartiality and humanity, the two legal requirements for humanitarian action that can be found in the Geneva Conventions of 1949 and their Additional Protocols.[112] At the same time, the non-governmental nature of the ICBS, as well as of its Association, gives it more freedom to act than UNESCO.

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[108] Pommier 2011, p. 1081.

[109] ICRC 2009 where it is explained that the ICRC is neither an intergovernmental nor non-governmental organisation, but a private, Swiss association possessing legal personality. It is governed by Article 60 et seq. of the Swiss Civil Code, whilst having been granted an international mandate under public international law. The special nature of the ICRC was recognised by the International Conferences of the International Red Cross and Red Crescent and in the Geneva Conventions. Its role is confirmed in the Statutes of the Red Cross and the Red Crescent Movement and in resolutions adopted by the International Conference. The Statutes form the mandate for action by the ICRC in situations falling short of the threshold of a full-scale armed conflict, such as in Syria during 2011 until the early summer of 2012 (Statute Article 5). The States parties to the Geneva Conventions normally meet representatives from the components of the Movement (the ICRC, the Federation and the National Societies) once every four years within the framework of the International Conference. The latter is competent to amend the Statutes of the Movement (which define the ICRC's role) and can assign mandates to the various components, but it cannot modify the ICRC or Federation statutes or take any decisions contrary to these statutes (Article 11.6 of the Statutes of the Movement).

[110] Example, Toman 1996, pp. 256–259; Toman 2009, p. 649. Examples of rights of the ICRC: visiting prisoners of war or civilian internees and providing them with relief supplies, and operating the Central Tracing Agency (see Articles 73, 122, 123 and 126, Geneva Convention III, and Articles 76, 109, 137, 140 and 143, Geneva Convention IV). The ICRC's right of initiative: Article 3 and Articles 9/9/9/10 common to the four Geneva Conventions.

[111] Sandoz 1979, p. 362.

[112] Pommier 2011, p. 1077.

Blue Shield could choose to work on the basis of the humanitarian approach. While staying impartial, neutral and independent, it could seek the agreement of the parties concerned. Rushing into a conflict zone without any formal agreement and support can compromise security. A member of the Blue Shield Association mission to Egypt in February 2011 explained that, due to the chaotic situation at the time, they could not decide whether to present themselves as "tourists, civil-military experts or scientists".[113] The whole point of security guarantees, however, is that they are based on the factual situation. The flexibility of action is key, but should not compromise transparency. That could seriously jeopardise the team's safety, as well as future missions. The ICRC underlines that it enters into contact and continues a regular security dialogue with all those who have the capability of potentially disrupting humanitarian operations.[114] In present-day conflicts, a constant adjustment of networking strategies is necessary. Keeping a close reference to international humanitarian law and a safe distance from any political or military connotation also prove to be necessary ingredients for effective humanitarian action.[115]

The humanitarian approach also has much added value when authorities prefer independent professionals instead of (inter)governmental representatives. It helps to build acceptance among the population and other parties, and increases the chances for access, improved security and protection. Another future task of Blue Shield could be to monitor (potential) crises over a longer period of time, in close cooperation with national (Blue Shield) networks. By doing so, Blue Shield could assess the probability of intentional cultural property destruction and plundering, objectively determine and arrange for emergency measures, as well as assist in regions outside state control.[116] To be able to do so, it is adamant that more cultural heritage organisations, including UNESCO and the organisations that make up Blue Shield, actively support Blue Shield initiatives so that it can raise its profile and funding.

For the ICRC, other elements that are key to continued access and security are its widespread and often long-standing presence, as well as its proximity to populations.[117] Acceptance is also strongly influenced by the perceived quality and relevance of ICRC activities. A more recent approach to acceptance is the enhanced commitment to emergency response, as well as building up essential partnerships with National Societies. In Libya, for example, one of the contributing factors to the ICRC's successful intervention was the mobilisation of the National Society medical and surgical teams. Blue Shield could start with encouraging the establishment of National Committees in the 'Arab Spring' countries.

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[113] Kila 2012, p. 205. In the end, the situation in Egypt became more clear just before the team members arrived making it opportune to present themselves as cultural civil-military experts.

[114] ICRC 2011b, p. 23.

[115] ICRC 2011b, pp. 5, 6.

[116] "UNESCO participation in UN post-crises coordination mechanisms", statement by UNESCO at http://www.unesco.org/new/en/unesco/themes/pcpd/post-crisis-coordination-mechanisms/. Accessed a September 2012. See also van der Auwera 2011, pp. 15, 16.

[117] ICRC 2011a, pp. 5–7.

Libya offered more examples for future action. The care undertaken by locals for the archaeological site of Leptis Magna was already recalled above. The museum staff managed to keep the vast grounds out of the hands of the warring parties and clear of explosive remnants of war. They furthermore established contact with Gaddafi militia members whom they trusted and prepared them for site protection. When the regime fell, several of them showed up with their weapons to protect the perimeters. By doing so, they more or less rehabilitated themselves in the eyes of the local population. There are also the accounts of the guards of Cyrene who continued to work unpaid and away from their families, and of the government controller who witnessed armed robbers stealing an antique torso on the site and tried to defend it with his life. These are just some of the many examples of people who, during hopeless situations, tried to save paper and stones not even personally belonging to them.

Individual accounts of cultural property protection in war-torn countries indeed offer a much-needed opportunity to understand the complex and often dangerous circumstances under which people try to do their work. Local staff can be threatened and targeted, often because of (the status of) their profession or their perceived links with the ruling authorities. Images and personal stories can make people realise how much is at stake. They not only offer interesting news items but also have the power to explain to a broad audience the importance of cultural property and its protection. Many people still remember the images of Egyptians protecting the National Museum in Cairo and the Library of Alexandria against looting, and of locals in Cairo braving the flames to save the precious collection of the Institut d'Egypt.[118] Which cultural heritage organization will be the first to strategically use such powerful images and stories?

In addition, local networks can be used for setting up powerful protection systems. Especially in culturally rich countries such as Libya, Egypt and Syria where archaeologists and other international experts have often been working for many years, opportunities present themselves. Foreign experts can enlist local citizens in advance and prepare them for disaster, realising longer term protection together.[119] The idea is not, of course, that local citizens put their lives in danger in the heat of battle, but that the destruction and looting of cultural property can be

[118] Blue Shield Statements on Egypt of 31 January 2011 at http://icom.museum/press-releases/press-release/article/blue-shield-statement-on-egypt-31-january-2011/ and of 20 December 2011 at http://www.ifla.org/news/blue-shield-2nd-statement-on-egypt. Both accessed 1 April 2012. See also: "UNESCO mobilises experts and civil society partners to safeguard heritage in Tunisia, Egypt and Libya" UNESCOPRESS 16 March 2011 at http://www.unesco.org/new/en/media-services/single-view/news/unesco_mobilizes_experts_and_civil_society_partners_to_safeguard_heritage_in_tunesia_egypt_and_libya. Also: "Alexandria's youth 'protecting library from looters'". Director of Bibliotheca Alexandria issues message of thanks to young people he says are defending building from 'thugs' 1 February 2011 by Benedict Page at http://www.guardian.co.uk/books/2011/feb/01/alexandria-youth-protecting-library. Accessed 4 March 2011.

[119] "Protecting cultural heritage: the Burnham Plan", blog of 3 September 2012 by L. Rothfield visited at "The Punching Bag—Thoughts on cultural heritage, cultural economics, and cultural politics" on http://larryrothfield.blogspot.com. Accessed 22 October 2012.

prevented or minimised when cultural property is better secured from the very outbreak of hostilities. Preparing for such direct action is a combined task of national heritage officials and foreign experts working in the respective countries. An international network such as Blue Shield could choose to contribute to such important efforts by sharing good practices, lobby for support or coordinating them.

Another way of making use of 'national contingency networks' is to have locally trained experts pass on data to the outside world. They could fill the current information gap during armed conflict and crises. In Egypt, for example, the need for information led to new ways of obtaining it, through the Internet. This was not a new phenomenon, but it reached new heights of intensive use during the 'mobile revolutions' of the Arab Spring.[120] Not because everyone had access to social networks such as Facebook and Twitter or even a computer—most people did not—but stories could reach the independent media and international press through social networks. They were important to expose abuses uncensored, such as the torture cases videoed with mobile phones at police stations. The surge of social networks, user-generated content and micro-blogging enables all Internet users to become public communicators. Traditional news media are increasingly using materials contributed by non-professional 'citizen journalists'.

The mobile phone can also be used to spread information. Worldwide, most people do not have access to the Internet but the mobile telephone business is growing. According to UNESCO, 5.3 billion people had a mobile phone subscription in 2010, among which 3.9 billion were from developing countries.[121] Mobile telephone networks can also open up possibilities for protection, as was the case in Haiti. Within three days after the earthquake of January 2010, self-made mobile phone charging stations appeared in many locations.[122] These mobile technologies, combined with social media platforms visited by traditional media and 'civil journalists', turned out to be an important source of information for humanitarian organizations. Information obtained through the mobile media was used to make geographical maps that indicated the various humanitarian needs. According to the Red Cross, they could reach almost a thousand percent more people with lesser resources than before. Caution is obviously needed with regard to verifying and prioritising the vast streams of information. Still, it does not

[120] "Oren en ogen van de opstand" NRC Handelsblad Thomas Erdbrink 13 May 2011; Abu Hijleh 2011, pp. 11–12 and UNESCO and World Press Freedom Committee 2012, p. 3 where it is stated that in 2011 an estimated two billion persons were using the Internet close to real time, producing 156 million public blogs.

[121] International Communication Union 2010, p. 1.

[122] Headdowneyesopen.blogspot.com, blog of 27 January and 18 November 2011 about technology and humanitarian aid by Paul Conneally, at the time of writing Media and External Communications Manager for the International Federation of Red Cross and Red Crescent Societies. See also Conneally's TedX Geneva presentation of 6 December 2010 about new digital tools in disaster response and the Harvard Humanitarian Initiative—a research project that also focuses on the implications of technology for the future of humanitarian aid.

mitigate the fact that "Haiti was a game changer" (…). The power of technology to empower (people) is an issue that is becoming clear in political circles, slightly better understood in the corporate world and just about gaining attention in the aid and humanitarian sectors".[123] This might be the right time for a cultural emergency hotline.

Information technology already contributes to the protection of cultural property. In the field of archaeology, private spy satellites are used as early warning and threat detection systems for archaeological sites.[124] According to UNESCO, satellite imaging provides an innovative way to observe threats to World Heritage Sites and to understand their impact.[125] Satellites enable archaeologists to look out for looting, disasters and other calamities at some of the most endangered sites of human history.[126]

Information that is generated from space as well as locally can help to fill the information gap that is now felt by organisations trying to deliver aid, but implications stretch much further.[127] Satellite monitoring and other new technologies have opened up the possibility of proactive, wide-area monitoring, alongside traditional after-the-fact documentation. Much media attention was given to George Clooney's Satellite Sentinel Project that claims to monitor the border between Sudan and South Sudan to assess the human security situation, identify potential threats to civilians, and detect, deter and document war crimes and crimes against humanity.[128] Amnesty International now uses geospatial

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[123] Paul Conneally, headdowneyesopen.blogspot.com of 27 January and 18 November 2011 at http://headdowneyesopen.blogspot.com/. Accessed 23 January 2012.

[124] "Spy satellites watch ancient ruins" updated 23 April 2011, Dan Vergano USA TODAY at http://usatoday30.usatoday.com/tech/science/columnist/vergano/2011-04-15-archeology-satellites_N.htm. Accessed 1 September 2012.

[125] "From Space to Place: an Image Atlas of World Heritage Sites on the 'In Danger' List. A joint UNESCO/USGS project" at: http://www.unesco.org/new/en/natural-sciences/science-technology/space-activities/space-for-heritage/activities/open-initiative-projects/satellite-image-atlas-heritage-in-danger/. Accessed 6 March 2012. In November 2011, UNESCO launched an image atlas presenting detailed satellite photos of the thirty-one sites on the World Heritage List in Danger, produced in cooperation with the US Geological Survey.

[126] According to Jeff Morgan of the Global Heritage Fund (GHF), a Californian non-profit organization dedicated to the preservation of World Heritage Sites. GHF launched the Global Heritage Network in cooperation with Google Earth and private imaging satellite firm DigitalGlobe, a Californian-based non-profit organization dedicated to the preservation of World Heritage Sites.

[127] "Protecting cultural heritage: the Burnham Plan", blog of 3 September 2012 by L. Rothfield at "The Punching Bag—Thoughts on cultural heritage, cultural economics, and cultural politics" on http://larryrothfield.blogspot.com. Accessed 22 October 2012. See also Sulik and Edwards 2010, pp. 2521–2533.

[128] "George Clooney's Satellites Build a Case Against an Alleged War Criminal", 3 December 2011 by Mark Benjam in Time World at http://www.time.com/time/world/article/0,8599,2101425,00.html. See also "Clooney's 'Antigenocide Paparazzi': Watching Sudan", 28 December 2010 by Mark Benjamin in Time World at http://www.time.com/time/magazine/article/0,9171,2040211,00.html. Both sites accessed 4 September 2012.

technologies like satellite imagery for human rights monitoring and conflict prevention. The organisation claims that it can now access previously inaccessible conflict zones, provide compelling visual evidence and present information in a new and engaging way—for example, on Syria.[129]

For organisations working for the protection of cultural property during armed conflict, it is necessary to consider the relationship of such data use with the 1954 Convention and Protocols. Aid can easily be manipulated or become a political instrument—thereby jeopardising protection efforts that were undertaken on purely humanitarian grounds. It is therefore encouraging that ICOMOS (the International Council of Monuments and Sites) has proposed to develop a code of ethics for intervening in cultural heritage operations. Likewise, it should be encouraged that participants in courses offered by ICCROM (International Centre for the Study and Preservation and Restoration of Cultural Property) critically examine the applicability of international legal instruments, and of conservation ethics and principles in times of conflict. The outcomes of such efforts need to be shared and discussed within larger forums such as UNESCO and the meeting of states parties to the Convention and Protocols.

A final recommendation, often heard and badly needed, is to rapidly improve cooperation within the cultural heritage sector, as well as within larger forums such as Interpol, the UN and NATO. So far, true and effective combined efforts to cooperate have not easily taken place. Exceptional situations have sometimes caused exceptional reactions but most of the time help has come too little and too late. Cultural heritage organisations mostly work next to each other, sometimes even against each other, but rarely together.[130] When cooperation takes place, it is often because of individual initiatives. UNESCO has made it clear that it cannot reinforce the protection of cultural property during hostilities alone—it is a shared responsibility for all.[131] As a very minimum states should institute effective national and international efforts to prevent trafficking in cultural material from war zones.[132]

UNESCO is much better suited to diplomatic action. Conventional armies continue to be engaged in violations against cultural property and UNESCO is in the position to urge their governments to stop. Above all, UNESCO has added value as a coordinator and facilitator of protection activities before and after armed conflict.[133] The organisation has built up considerable experience in preventive,

[129] http://www.eyesonsyria.org/ by Amnesty International USA is “an interactive platform that maps cases, presents research on human rights abuses in Syria and prompts concerned individuals to take action”. Accessed 1 November 2012.

[130] van der Auwera 2012, p. 162.

[131] Hladik 2004, p. 101.

[132] Boylan 1993, p. 101. See also Chapter 7 of Mackenzie 2005 where he recommends measures to better regulate the international market in illicit antiquities.

[133] van der Auwera 2011, p. 14.

early recovery and reconstruction activities, including in Libya as was pointed out earlier.[134]

When one considers the potential of the combined power of the respective Blue Shield member organisations, the present situation seems a sad one. It has been argued that the heritage community has a major responsibility to engage with Blue Shield to ensure that it receives better funding and to raise its profile.[135] The key actors of the Second Protocol—the states parties, the Committee, the Meeting of the states parties and UNESCO—are all encouraged to ensure the participation of a wide variety of stakeholders such as Blue Shield.[136] The respective organisations that make up Blue Shield have their distinct areas of expertise but through the Blue Shield network they can bundle their forces and complement existing activities, such as the Disaster Relief for Museums Task Force (DRTF) of ICOM.[137] It was created to provide assistance to museums damaged by the 2004 Tsunami, but has since extended its missions worldwide. Blue Shield, UNESCO and the ICRC can cooperate and complement each other in many ways. The ICRC and UNESCO have already done so in recent years.[138] Only through better cooperation can Blue Shield become the flexible protection and action-oriented organisation that was once envisaged.

8.5 Conclusion

The purpose of this chapter was to come to recommendations for a more effective international mobilisation of cultural property protection during armed conflict within the framework of international humanitarian law. Examples of contemporary threats and obstacles to protection were taken from Libya during the armed conflict in 2011. Although in Libya irreplaceable damage to cultural property in especially urban areas took place, it was spared from the fate of the large-scale targeted destruction and looting of cultural property that is common to contemporary warfare. This was partly due to action undertaken for Libyan cultural property by UNESCO and a few other actors. Nevertheless, the control system of the 1954 Hague Convention and its 1999 Second Protocol have so far failed, also in the case of Libya. Effective, large-scale international cooperation is rare.

As an intergovernmental organisation with limited mandate and resources, UNESCO's added value mostly lies in the period before and after conflict. The two

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134 Bouchenaki 2008, pp. 210–217.

135 Stone and Farchakh Bajjaly 2008, p. 6.

136 Number 13 of the Guidelines to the Second Protocol.

137 See http://icom.museum/the-committees/technical-committees/standing-committee/disaster-relief-task-force/ and UNESCO 2011b, Annex "ICOM's position at the Round Table Meeting of the 1954 Convention Committee", p. 3.

138 Toman 2009, p. 161; UNESCO 2011b, pp. 4, 6.

assessment missions to Libya under the auspices of Blue Shield provided hope for more effective wartime protection activities in the future, but so far Blue Shield has failed to play the role of an independent cultural property protector. Moreover, the international community continues to react to crisis situations and lacks an 'early-warning system for cultural heritage'.

The Intergovernmental Committee of the Second Protocol, UNESCO and the Blue Shield network must develop a more effective cooperation in practice and fill in the gaps in the current protection system. Blue Shield has the potential to undertake and coordinate protection initiatives for cultural property in crisis situations on a professional scale. Active support from its affiliated organisations is key. Examples from 'Arab Spring' countries such as Libya also show that new data technologies together with local networks can be used to increase possibilities for receiving information, awareness and security. It is thereby paramount that protection initiatives have a firm basis in the 1954 Convention and Protocols. Without it, cultural property protection can be easily manipulated. Although the legal mandate and position of the ICRC cannot be compared to that of UNESCO or Blue Shield, lessons can be learned from the ICRC's humanitarian approach which is firmly based on international humanitarian law.

It is hopeful that: "During the past year, Libyans have shown their unfailing commitment to the protection of their cultural heritage, demonstrating that such heritage cannot be held hostage to local or international dissent and conflict."[139] The Libyan initiatives serve as an example. Protecting stones and paper is so much more than protecting the past. It also helps to understand the present and preserve the future. Moreover, a better protection of cultural property inherently leads to a better protection of the civilian population. That this is much needed, can be sadly witnessed in every contemporary armed conflict. A combined effort to protect our common cultural heritage is therefore very much worth the effort—especially during armed conflict when threats and obstacles multiply.

References

Documents

Amnesty International (6 May 2011) Libya: Misrata - under siege and under fire. http://www.amnesty.org/en/library/info/MDE19/019/2011/en. Accessed 1 Sept 2012

Association of National Committees of the Blue Shield (ANCBS) and International Military Cultural Resources Work Group (IMCuRWG) (2011a) Civil-Military Assessment Mission for Egyptian Heritage. http://www.blueshield.at/egypt_2011/mission_report_egypt_02_2011.pdf

[139] Quote of the Director-General of UNESCO in: "Director-General concerned about attacks on World Heritage site of Ghadamès (Libya)" UNESCOPRESS 23 May 2012 at http://www.unesco.org/new/en/media-services/single-view/news/director_general_concerned_about_attacks_on_world_heritage_site_of_ghadames_libya/. Accessed 1 June 2012.

Association of National Committees of the Blue Shield (ANCBS) and International Military Cultural Resources Work Group (IMCuRWG) (2011b) Mission Report Civil-Military Assessment Mission for Libyan Heritage. http://www.blueshield.at/libya_2011/09-2011/mission_report_libya_09-2011.pdf. Accessed 10 Oct 2011

Association of National Committees of the Blue Shield (ANCBS) and International Military Cultural Resources Work Group (IMCuRWG) (2011c) Mission Report. 2nd Civil-Military Assessment Mission for Libyan Heritage November 12 to 16, 2011, which can be found at: http://www.blueshield.at/libya_2011/11-2011/mission_report_libya_11-2011.pdf. Accessed 28 Oct 2012

Human Rights Watch (9 may 2011) Libya: end indiscriminate attacks in Western Town. http://www.hrw.org/en/news/2011/05/09/libya-end-indiscriminate-attacks-western-mountaintowns. Accessed 10 June 2012

ICRC (2011a) Overview of the ICRC's operations in 2012. Report of 8 Dec 2011. http://www.icrc.org/eng/resources/documents/report/appeals-2012-overview-2011-12-08.htm. Accessed 17 Feb 2012

ICRC (2011b) International humanitarian law and the challenges of contemporary armed conflicts. Report of 31 October 2011 and official working document of the 31st international conference of the Red Cross and Red Crescent, ICRC, Geneva, 31IC/11/5.1.2

ICRC (2012a) Libya: hardship and danger remain. ICRC Operational update No. 12/01 of 16 Feb 2012. http://www.icrc.org/eng/resources/documents/update/2012/libya-update-2012-02-16.htm. Accessed 29 Oct 2012

ICRC (2012b) Libya: war's unexploded remnants still threaten, ICRC text and photo gallery of 23 Aug 2012. http://www.icrc.org/eng/resources/documents/photo-gallery/2012/libya-wec-photo-gallery-2012-07-05.htm. Accessed 29 Oct 2012

International Telecommunication Union (2010) The world in 2010, Geneva. http://www.itu.int/ITU-D/ict/material/FactsFigures2010.pdf. Accessed 4 April 2012

Teijgeler R. (2011) Threats to cultural heritage in Libya—present status, Culture in Development. http://www.cultureindevelopment.nl/Publications_Culture_in_Development/books_and_reports. Accessed 12 Dec 2011

UNESCO (1961) Intergovernmental conference on the protection of cultural property in the event of armed conflict. Records of the conference convened by the United Nations Educational, Scientific and Cultural Organization and held at The Hague from 21 April to 14 May 1954 (Government of the Netherlands Staatdrukkerij en Uitgeverijbedrijf), 464 pp

UNESCO (1983) Meeting of legal experts on the 1954 Convention for the protection of cultural property in the event of armed conflict, Paris, CLT-83/CONF.641/1

UNESCO (2009a) Eight meeting of the high contracting parties to the convention for the protection of cultural property in the event of armed conflict, Paris 23 Nov 2009. Final Report, CLT-09/CONF/218/3 REV

UNESCO (2009b) Guidelines concerning the use of the fund for the protection of cultural property in the event of armed conflict Paris, 24 Nov 2009, CLT-09/CONF/219/4 REV

UNESCO (2009c) Third Meeting of the parties to the second protocol to The Hague Convention of 1954 for the protection of cultural property in the event of armed conflict—final report, CLT-09/CONF/219/5 REV

UNESCO (2011a) Fourth meeting of the parties to the 1999 second protocol. Final Report, Paris, CLT-11/CONF/210/3

UNESCO (2011b) Final report of the round table discussion of the Committee for the protection of cultural property in the event of armed conflict (including annexes), Paris, CLT-11/CONF/211/INF.1

UNESCO (2011c) Annual report, Paris. http://unesdoc.unesco.org/images/0021/002155/215520e.pdf. Accessed 1 June 2012

UNESCO (2012a) Report of the World Heritage Centre on its activities and the implementation of the World Heritage Committee's Decisions, World Heritage Committee, Paris, WHC-12/36.COM/INF.5A.1
UNESCO (2012b) Final report of the ninth meeting of the high contracting parties to the 1954 Hague Convention for the protection of cultural property in the event of armed conflict, Paris, 12 Dec 2011, CLT-11/CONF/209/3
UNESCO (2012c) Final report of the sixth meeting of the committee for the protection of cultural property in the event of armed conflict, 23 March 2012, Paris, CLT-11/CONF/211/7
UNESCO (2012d) Decisions adopted by the World Heritage Committee, Thirty-sixth session 24 June–6 July 2012, Saint-Petersburg, World Heritage 36 COM WHC-12/36.COM/19 UNESCO
UNESCO and World Press Freedom Committee (2012) The Media World after Wiki Leaks and News of the World. Minutes of the conference, 16–17 Feb 2012, Paris. http://www.unesco.org/new/fileadmin/MULTIMEDIA/HQ/CI/CI/pdf/Events/wikileaks_minutes_meeting_16_17_february_2012.pdf. Accessed 1 Sept 2012
UN Economic and Social Council - Commission on Crime Prevention and Criminal Justice (2010a) Recommendations of the expert group on protection against trafficking in cultural property, UN Economic and Social Council, 17–21 May 2010, Vienna, E/CN.15/2010/5. http://www.unodc.org/documents/commissions/CCPCJ_session19/ECN152010_5eV0989121.pdf. Accessed 3 Sept 2012
UN Economic and Social Council - Commission on Crime Prevention and Criminal Justice (2010b) Discussion guide for the thematic discussion on protection against trafficking in cultural property, UN Economic and Social Council, 17–21 May 2010, Vienna, E/CN.15/2010/6. http://www.unodc.org/documents/commissions/CCPCJ_session19/ECN152010_6eV1051437.pdf. Accessed 3 Sept 2012
UNESCO Executive Board (1993) Report by the director-general on the reinforcement of UNESCO's action for the protection of the world cultural and natural heritage, 142 EX/15
UN Human Rights Council International Commission of Inquiry (2012) Report of the International Commission of Inquiry on Libya. Advance unedited version of 8 March 2012, reference number A/HRC/19/68. http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session19/A.HRC.19.68.pdf. Accessed 10 July 2012
UN Office on Drugs and Crime (2010) Report on the meeting of the expert group on protection against trafficking in cultural property, 24–26 Nov 2009, Vienna, UNODC and UNESCO, UNODC/CCPCJ/EG.1/2009/2. http://www.unodc.org/documents/organized-crime/UNODC_CCPCJ_EG.1_2012/UNODC_CCPCJ_EG.1_2009_2_E.pdf. Accessed 24 Jan 2012
World Wildlife Fund (2012) Wildlife crime scoreboard. Assessing compliance with and enforcement of CITES commitments for tigers, rhinos and elephants. Report 2012. http://assets.wnf.nl/downloads/wwf_wildlife_crime_scorecard_report.pdf. Accessed 5 Oct 2012

Literature

Abu Hijleh K (2011) Mobile revolution. UNESCO Courier, July–September, pp 11–12
Bogdanos M (2005) The causalities of war: the truth about the Iraq Museum. Am J Archaeol 109(3):477–526
Bouchenaki M (2008) UNESCO and the safeguarding of cultural heritage in postconflict situations. Efforts at UNESCO to establish an intergovernmental fund for the protection of cultural property in times of armed conflict. In: Rothfield L (ed) Antiquities under siege. Cultural heritage protection after the Iraq War. Altamira Press, Lanham, pp 207–218
Boylan PJ (1993) Review of the convention for the protection of cultural property in the event of armed conflict, UNESCO, Paris, CLT-93/WS/12. http://unesdoc.unesco.org/images/0010/001001/100159eo.pdf. Accessed 2 Jan 2012

Boylan PJ (2003) The 1954 Hague Convention on the protection of cultural property in the event of armed conflict and its 1954 and 1999 Protocols. In: Koch C (ed) A Blue shield for the protection of our endangered cultural heritage. International preservation Issues, No. 4, pp 4–15

Brodie N, Doole J, Watson P (2000) Stealing history: the illicit trade in cultural material. McDonald Institute for Archeological Research, Cambridge

Brodie N, Walker Tubb K (eds) (2002) Illicit antiquities: the theft of culture and the extinction of archaeology. One World Archaeology, London

Chernick M (2005) Economic resources and internal armed conflicts: lessons from the Colombian case. In: Arnson CJ, Zartman IW (eds) Rethinking the economics of war. The intersection of need, creed and greed. Woodrow Wilson Center Press, Washington, DC, pp 178–205

Gerstenblith P (2008) Art, cultural heritage, and the law. Cases and materials. Carolina Academic Press, Durham

Henckaerts JM (2010) The protection of cultural property in non-international armed conflicts. In: Woudenberg N, Lijnzaad L (eds) Protecting cultural property in armed conflict. An insight into the 1999 Second Protocol to the Hague convention of 1954 for the protection of cultural property in the event of armed conflict. Martinus Nijhoff Publishers, Leiden, pp 81–94

Hladik J (2001) The control system under the Hague Convention for the protection of cultural property in the event of armed conflict 1954 and its second protocol. Yearb Int Humanit Law 4:419–431

Hladik J (2004) Introduction to the 2nd Protocol to the Hague Convention for the protection of cultural property in the event of armed conflict 1954 and UNESCO's experience in co-operation with international and national non-governmental organisation. In: Pavlov Z et al (eds) Urgent regional workshop. Cultural heritage at risk in the event of armed conflicts. Macedonian National Committee of ICOMOS, Skopje, pp 98–101

ICRC (2009) Reports and documents. The International Committee of the Red Cross (ICRC) its mission and work. International Review of the Red Cross 91(874):399–413

Jacobus M, Kostylo J (2008) Culture wars: heritage and armed conflict in the 21st century. Review of conference of 11 December 2008. University of Cambridge, Cambridge

Kila J (2012) Heritage under siege. Military implementation of the convention for the protection of cultural property in the event of armed conflict. University of Amsterdam, Amsterdam

Mackenzie S (2005) Going, going, gone: regulating the market in illicit antiquities. Institute of Art and Law, Leicester

Mancini M (2011) Report of the conference "New conflicts and the challenge of the protection of the civilian population". International Institute of Humanitarian Law, San Remo

O' Keefe R (2006) The protection of cultural property in armed conflict. Cambridge University Press, Cambridge

Pommier B (2011) The use of force to protect civilians and humanitarian action: the case of Libya and beyond. Int Rev Red Cross 93(884):1063–1083

Sandoz Y (1979) Le droit d'initiative du Comité international de la Croix-Rouge. Ger Yearb Int Law 22:352–373

Stone PD, Farchakh Bajjaly J (eds) (2008) Introduction: the destruction of cultural heritage in Iraq. The Boydell press, Woodbridge, pp 1–17

Sulik JJ, Edwards S (2010) Feature extraction for Darfur: geospatial applications in the documentation of human rights abuses. Int J Remote Sens 31(10):2521–2533. http://dx.doi.org/10.1080/01431161003698369

Toman J (1996) The protection of cultural property in the event of armed conflict. Dartmouth Publishing Company Limited and UNESCO, Aldershot and Paris

Toman J (2009) Cultural property in war: improvement in protection. Commentary on the 1999 Second Protocol to the Hague Convention of 1954 for the Protection of cultural property in the event of armed conflict, UNESCO, Paris

Toman J (2010) The road to the 1999 second protocol. In: Woudenberg N, Lijnzaad L (eds) Protecting cultural property in armed conflict. An insight into the 1999 Second Protocol to the Hague convention of 1954 for the protection of cultural property in the event of armed conflict. Martinus Nijhoff Publishers, Leiden, pp. 1–19

van der Auwera S (2010) Peace operations and the protection of cultural property during and after armed conflict. Int Peacekeeping 17(1):3–16. http://dx.doi.org/10.1080/13533311003589124

van der Auwera S (2011) UNESCO and the protection of cultural property during armed conflict. Int J Cult Policy:1–19. http://dx.doi.org/10.1080/10286632.2011.625415

van der Auwera S (2012) De bescherming van culturele goederen tijdens en na gewapende conflicten: naar een integrale preventiestrategie. Universiteit van Antwerpen, Antwerpen

Chapter 9
Watching the Human Rights Watchers

Roelof Haveman

Abstract In its reports about human rights in Rwanda, Human Rights Watch makes factual mistakes; it assumes almost per definition that governmental decisions are taken with bad intentions; it insinuates and speculates about what might be, even when it is still 'too early to tell' or when deemed 'highly unlikely'; it generalises on the basis of only a few individual opinions; it embraces individual opinions as the direct basis for its own judgement without any reflection on the personal background of individual opinions, on the necessity of the measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society, a balance between individual and societal interests or whatever other considerations; everything in a, at times, disrespectful tone. Assuming that Human Rights Watch does not do this on purpose, an explanation is needed. Explanations can be found in a confusion of insider opinions and outsider judgements; neglecting that perceptions, rumours and stereotypes may replace reality in Rwanda; and in the position as a single-sector human rights NGO on the sidelines, choosing for confrontation rather than a critical partnership with the government and the country in general. But how can this happen without anybody correcting these factual mistakes, misinterpretations, speculations and tone? The reason seems to be a lack of internal and external accountability.

The author is a Policy Advisor Rule of Law in the ministry of Foreign Affairs of the Netherlands. This article was finalised 1 June 2012, six months before Haveman joined the ministry of Foreign Affairs; the article only reflects the author's opinion, not that of the ministry of Foreign Affairs. During the writing of the article, Roelof Haveman was an independent rule of law consultant, working in Rwanda, Côte d'Ivoire and South Sudan.

R. Haveman (✉)
Netherlands Ministry of Foreign Affairs, The Hague, The Netherlands
e-mail: roelof.haveman@gmail.com

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> *We surely welcome constructive criticism as we work toward building a modern, developed justice system, but reports which characterize Gacaca as a formal legal institution, applying a strict procedural framework to the community-based courts and western legal concepts to an emerging justice sector are not, in fact, constructive. We trust you can find a way to balance informed and insightful criticisms with a respect for the enormity of the challenges Rwanda faced in the aftermath of genocide, where we determined that our main aim, above much else, was the rebuilding of our society that had been completely torn apart.*[1]

9.1 Introduction

In 2011, Human Rights Watch published a concluding report on the *gacaca*,[2] the popular tribunals that tried about 2 million genocide-related cases in Rwanda between 2002 and 2012.[3] The title of the report is 'Justice Compromised'. In the view of Human Rights Watch, compromises made in adapting the customary community-based practice to try grave criminal offences "led to significant due process violations being built into the system and a degree of disappointment on the part of many Rwandans".[4] "Our concerns relate primarily to the absence of fair trial safeguards and limitations on the ability of accused persons to defend themselves effectively", followed by a list of wrongs documented in various cases.[5]

[1] The Rwandan Minister of Justice/Attorney General, Tharcisse Karugarama, in response to criticism of the *gacaca* ventured by Human Rights Watch in 2011, pp. 137–143, at 143.

[2] Human Rights Watch 2011.

[3] Repubulika Y'U Rwanda National Service of Gacaca Courts 2012.

[4] Human Rights Watch 2011, p. 130.

[5] Ibid., p. 134.

Reading this report made me feel uncomfortable. I realised that this was not the first time I felt uncomfortable when international human rights organisations criticise post-genocide Rwanda, which many do. Not because of the critique as such. Many things go wrong in Rwanda, as in every other country in the world, although in Rwanda because of its recent history maybe a bit more sensitive and consequential. There is no reason to hide or deny the wrongs. True, the *gacaca,* for example, were certainly not perfect. With regard to reconciliation or ethnic division in the country other choices could have been made, there is no doubt about that. The judiciary is very young and inexperienced and takes decisions that are sometimes difficult to understand.

But there is something wrong with the way Human Rights Watch reports about the wrongs in post-genocide Rwanda. Sometimes the tone in which the critique is expressed is too high pitched and the moment to ventilate the critique is extremely disrespectfully chosen. The criticism in its reports seems sound at first glance, but like with articles in newspapers, when you know more than average about a certain issue—in this case Rwanda—you realise how superficial and not seldom erroneous these newspaper articles and human rights reports are.[6] One would expect better from the organisation that, together with Amnesty International, is considered to be the uncontested leader of the human rights movement. One would expect a different, more responsible and better informed position of international human rights organisations, if only because those organisations accuse countries of the worst crimes a country can commit: violations of human rights.[7] But the reality is that they investigate, accuse and judge at the same time, not always based on facts. In light of this, it is even more troublesome that international human rights organisations such as Human Rights Watch are not accountable to anybody.[8]

In this essay, I will analyse the role of international human rights organisations, in particular Human Rights Watch, in the case of Rwanda. After giving some examples of distorted reality, I will try to find an explanation for the role Human Rights Watch has chosen. The result seems to be a combination of mistaking and misinterpreting facts, not distinguishing between individual opinions of people directly involved and an outsider evaluation, and a choice for confrontation instead of critical partnership with the government.

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[6] Similarly for scholarly work: Haveman 2008, pp. 357–398, in particular pp. 380–398. Also, Haveman and Muleefu 2010, pp. 219–244, Ndahinda and Muleefu 2012, pp. 149–173.

[7] On the Internet, criticism about the way of working of Human Rights Watch and Amnesty International is circulating, in particular about their biased position in various conflicts such as the Israel-Palestine conflict, but because of a lack of further background information I cannot assess its value, therefore I will not make use of this critique.

[8] See e.g. Slim 2002.

9.2 Watching Human Rights

Human rights in Africa are the topic of an on-going debate. Development aid by European countries is linked to human rights. That China refuses to do the same is heavily criticised.[9] Human rights organisations criticise every step a developing country makes, 24/7. In a negative way, of course—one wonders who ever told human rights organisations never to be positive. This is no different with regard to Rwanda. One report tumbles over the other, with irritation and annoyance on the Rwandan side as a result. The annoyance, however, has certainly not only to do with the fact as such that the issue of human rights is raised, but also, and maybe even more so, with the way the criticism is presented. At times it seems as if there are no limits to criticism by human rights organisations. This regards the tone in which the critique is presented, the facts, the interpretation of facts, as well as the research methodology.

9.2.1 Tone

Human rights organisations put fingers on many souring issues. That is what they should do; that is what they are paid for; that is their mandate. And there are plenty of sore spots in Rwanda. Freedom of the press, freedom of expression, political space, are all issues of concern.[10] No doubt about that. However, there are several ways to approach these concerns. One seemingly popular way is to denounce bluntly and in all openness what the human rights activist believes is wrong.

An extremely blunt example is the open letter by the executive director of Human Rights Watch, entitled *The power of horror in Rwanda*, published on the occasion of the 15th commemoration of the genocide.[11] In that letter, Human Rights Watch accused the Government of Rwanda of exploiting the genocide for personal gain, with the possibility of a new genocide as a result. “The best way to prevent another genocide is to insist that Kagame stop manipulating the last one”. Even if it were true that President Kagame manipulates the genocide, and if the conclusion that a new genocide would be the result were credible, still the time to ventilate this criticism was shockingly badly chosen.

The title of the final report on the *gacaca* by Human Rights Watch, *Justice Compromised*, raised a great deal of criticism both within and outside Rwanda.[12]

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[9] See for the role of China in Africa: Brautigam 2009.

[10] See Haveman 2012.

[11] Roth 2009.

[12] See for a report on the presentation by HRW of the report in Kigali, Mazimpaka 2011a; HRW’s response to this report: Mazimpaka 2011b. Similar comments were raised during the presentation of the report at the Grotius Centre for International Legal Studies, The Hague, The Netherlands.

Although defended by Human Rights Watch as meaning that *gacaca* is a—neutral—compromise between state justice and traditional justice, it was felt as a strong denunciation of the justice rendered by the *gacaca*, and as a final blow in the face of Rwanda. This interpretation of the title is justified, in light of the continuous negative opinion of Human Rights Watch about "Rwanda's highly discredited *gacaca* courts",[13] as well as the pejorative use of the word 'compromised' in the text.[14]

9.2.2 Facts

However, it is not only *le ton qui fait la musique*. Whatever tone and moment is chosen to vent criticism, this does not mean that the criticising organisation can say everything that comes to its mind. The *power of horror* statement is no more than just another opinion without any factual basis. The least one can demand from criticising organisations is that they base themselves on facts. However, in particular those organisations that are not active in rebuilding the country but criticise the situation in the country as mere outsiders—Human Rights Watch being the main example—create an image that is not only based on facts but also on assumptions, insinuations, speculations and uncontrollable statements by individuals. A striking example is the way Human Rights Watch reported about the *gacaca* trials of rape and sexual torture cases.

In 2008, when Rwanda was in the process of speeding up the trials before *gacaca* courts of the remaining about 8,000 genocidal rape and sexual torture cases,[15] Human Rights Watch reported a "dramatic accumulation of rape cases" when citing the Minister of Justice who told them that "some 90 % of the accused awaiting trial for category one offenses would be charged with rape, an estimate repeated on several occasions by the Executive Secretary of the National Service of Gacaca Jurisdictions".[16] As far as I can read from Human Rights Watch's report, the only explanation for its amazement about the perceived "dramatic accumulation of rape cases" can be that it missed the 2007 *gacaca* law, amending previous laws in the sense that the majority of the approximately 80,000 first

[13] Human Rights Watch 2009a, comparing Guantanamo Bay trials with "Rwanda's highly discredited *gacaca* courts", when writing about hearsay evidence presented before lay judges.

[14] Ibid., for example p. 117: "While the procedure compromised the right of an accused (…)"; Ibid., p. 131: "(…) *gacaca's* structural and systemic weaknesses that compromised its suitability to provide fair and impartial trials (…)"; Ibid., p. 134 (letter to the Minister of Justice): "(…) a number of human rights concerns, as well as irregularities and violations of due process – all of which have resulted in certain compromises in the delivery of justice for the genocide". Some weeks after the presentation of the report in Kigali: "(…) the report also explains how justice has been compromised in many cases, including limitations on accused persons' ability to effectively defend themselves (…)"; See Human Rights Watch Firm on its Gacaca report, Mazimpaka 2011b.

[15] See Kaitesi and Haveman 2011, pp. 387–412.

[16] Human Rights Watch 2008, pp. 48, 49.

category cases were shifted to the second category, leaving in the first category an estimated 10,000 suspects of whom about 8,000 were suspected of sexual torture and rape, and the remaining ones those who committed crimes as high-ranking officials within religious or state institutions or in militia, or incited the committing of such crimes.[17] What initially formed about 10 % of the cases, became 'some 90 percent' of the total number of cases left after the shift of the majority of cases to the second category. Not an "accumulation of cases", nor "dramatic".

One year later Human Rights Watch again had trouble with numbers. In its *World Report 2010; Events of 2009* it mentions a total number of 1.6 million cases tried by the *gacaca*,[18] whereas the official number at that time was less than 1.2 million cases, a difference of at least 400,000 cases.

Too often, a sound factual scientific basis is lacking for certain statements. For that reason, the judge in a British extradition case unceremoniously set aside quite a few arguments by Human Rights Watch.[19] For example, concerning the independence of the judiciary: "only anecdotal evidence"[20]; about barristers who were threatened and fled Rwanda: "what was not stated, however, is who was responsible for the threats"[21]; about the executive influencing the judiciary: "what had been lacking is hard evidence"[22]; concluding: "the conclusions reached do not justify the reliance placed on [the amicus curiae brief of HRW]".[23] Similarly, by the way, the judge considered statements by Paul Rusesabagina to be totally unbelievable,[24] the same man who is well-known by the general public as the hero

[17] Organic Law N°10/2007 of 01/03/2007. Before, the 1st category entailed also those who distinguished themselves by the zealousness or excessive wickedness with which they took part in the genocide, and violators of corpses. As at the end of the information phase of the *gacaca*, this category turned out to be too large—about 70,000–80,000 suspects—to be tried by the regular courts within a reasonable time (as 1st category cases were); the 1st category was diminished, and these two groups were shifted to the 2nd category, leaving only about 10,000 cases in the 1st category. Since 2007, the 2nd category entails those who distinguished themselves by the zealousness or excessive wickedness with which they took part in the genocide, torturers, violators of corpses, those who 'just' killed someone else, those who acted with the intention to kill but did not succeed, and other criminal acts against persons without the intention to kill. The 3rd category is formed by those who committed acts against property.

[18] Human Rights Watch 2010, p. 148.

[19] Anthony Evans, Designated District Judge, City of Westminster Magistrates' Court, 6th June 2008, between the Government of the Republic of Rwanda v. Vincent Bajinya, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja. The decision was overturned on appeal; The High Court of Justice Divisional Court on Appeal from the City of Westminster Magistrates Court, between Vincent Bajinya, Charles Munyaneza, Emmanuel Nteziryayo, Celestin Ugirashebuja, and the Government of Rwanda and the Secretary of State for the Home Department, CO/8862/2008, 8 April 2009, http://www.bailii.org/ew/cases/EWHC/Admin/2009/770.html.

[20] District judge, City of Westminster Magistrates' Court, 6th June 2008, Ibid., para 477.

[21] Ibid., para 501.

[22] Ibid., para 521.

[23] Ibid., para 536.

[24] Ibid., paras 388–429.

from the feature film Hotel Rwanda, but at the same time a somewhat controversial voice of those who minimise the 1994 genocide.[25]

An example of a somewhat different character: Amnesty International published a press release on Rwanda at the end of 2007, calling on countries worldwide not to extradite genocide suspects to Rwanda, stating that there is no fair trial in Rwanda.[26] When, two months later, Amnesty International was invited to speak during an international conference in Kigali in 2008 on developments in the justice sector, it declined the offer with as the reason that it had too little information about the topic. It seriously makes one wonder what the factual basis was for its denunciation of Rwanda shortly before this.[27]

9.2.3 Interpretations

However, it seems that it is not the facts that are the biggest problem. In general, observers agree about the facts, except for obvious mistakes such as mentioned above. More troublesome is the interpretation of facts.[28] In general, public statements by authorities are interpreted entirely out of context. Incidents are presented as structural problems. Examples from many years ago are cited to illustrate the situation in recent years, as if nothing has changed since. Almost per definition governmental decisions are presumed to be taken with bad intentions.

In the previously mentioned case of Human Rights Watch being amazed about the "dramatic accumulation of rape cases", it unfortunately does not stop after this non-fact. Next it started speculating about "possible explanations for the sudden plethora of rape accusations".[29] "The first is that the prosecutor's office has deliberately delayed prosecution of rape cases until virtually all other cases have been judged. This is highly unlikely (…)".[30] 'Highly unlikely', good, one would say, so this speculation is off the table. 'Highly unlikely', so one would even wonder why this should have been mentioned as an explanation anyhow.

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[25] See for example Keith Harmon Snow interviewing Paul Rusesabagina for Toward Freedom, entitled The Grinding Machine: Terror and Genocide in Rwanda, making similar statements as later in court, Snow 2007.

[26] Amnesty International 2007.

[27] See for another interesting discussion about facts, the discussion between Human Rights Watch and the Chief Prosecutor of the ICTR, Hassan Jallow, about the prosecution of RPF crimes in general and the Kabgayi trial more in particular, Human Rights Watch 2009b. Followed by Human Rights Watch 2009c. In response ICTR 2009. In response again, Human Rights Watch 2009d.

[28] See for example the District judge, City of Westminster Magistrates' Court, 6th June 2008, *supra* note 20, paras 453, 454: "it does not say that they have influenced the Bench", para 457: "none of these matters appertain to the presumption of innocence in court".

[29] Human Rights Watch 2008, p. 49.

[30] Ibid.

However, "(…) if it were to be true, [this 'highly unlikely' explanation] would seem to indicate a conscious discrimination against rape victims, a discrimination that would be all the more tragic given that some were exposed to HIV/AIDS as a consequence of the crime and may have a shorter life expectancy than victims of other crimes". We are far removed from reality now: speculation on the basis of a 'highly unlikely' speculation, on the basis of a mistaken 'fact'.

The second speculation—"explanation" in the words of Human Rights Watch—for the perceived "plethora of rape accusations" is that "the accusations are motivated by some purpose other than simple law enforcement, such as to enhance the possibility of other convictions. In a number of cases there are grounds for believing that rape charges (which do not fit the facts) may be being used to undertake prosecution where other charges cannot be successfully brought or are unlike to secure conviction".[31] Note again that these speculations are based on the wrongful perception that the number of rape cases had dramatically accumulated.

Similar are speculations about possible future developments per definition negative, even if there is nothing to say yet. Human Rights Watch, when, for example, in 2001 writing about the then recently established Rwandan Human Rights Commission, expressed that it was "too early to tell whether the Rwandan commission will function independently enough to help improve the human rights situation". Too early to tell, so little to say, positive or negative, one would conclude. But Human Rights Watch continued: "Given the strong governmental links of the majority of its members, the Rwandan commission may prefer to work through personal contacts behind the scenes rather than through public criticism of abuses. While this may help to resolve individual cases, it will do little towards developing an institutional culture of respect for human rights in Rwanda".[32] 'It may be', certainly, nothing is impossible in this world, but the opposite could also be true. "Too early to tell."

Another example. The way Human Rights Watch in its *World Report 2010; Events of 2009* wrote about a possible criminalisation of homosexuality in Rwanda was outright insinuation and unfair. "Criminalizing homosexuality would place Rwanda in violation of its obligations under the International Covenant on Civil and Political Rights (ICCPR)".[33] Very true, something one could write about any state in the world, even the Netherlands. But Human Rights Watch knew very well at that time—its (Dutch) Advocacy Director concerning Lesbian, Gay, Bisexual and Transgender Rights in New York was in touch about this issue with the Dutch ambassador in Kigali—that the government would not support a proposal of parliamentarians to criminalise homosexuality, at various moments clearly expressed by the Minister of Justice, lastly that year during the final debate in Parliament about the new Penal Code, just before Christmas 2009, so clearly an

[31] Ibid.

[32] Human Rights Watch 2001.

[33] Human Rights Watch 2010, p. 151.

'event of 2009'. In the East African region, where almost every country criminalises homosexuality, Rwanda deserved, and deserves, better than the easy remark that criminalising homosexuality would violate the ICCPR.

9.2.4 Methodology

A difficult question, but from a methodological perspective very interesting, is to what extent interviews can serve as a sound basis for a judgement by an international human rights organisation. The first issue in this respect is the number of respondents as a basis for a judgement. Every scholar knows that, in order to draw conclusions on the basis of interviews, one needs a representative sample of the population concerned. This general rule seems to be neglected by Human Rights Watch. In its final report about the *gacaca*, Human Rights Watch mentions the problems with the trials by *gacaca* of the rape and sexual torture cases.[34] Statements about these trials are based upon "more than 20 interviews with rape victims, as well as judges and trauma counselors around the country, who were involved in *gacaca* hearings. Human Rights Watch also spoke with women's and genocide survivors' groups that provided counselling to rape victims whose cases were tried by *gacaca*".[35] The small number of individuals interviewed raises serious concerns about the conclusions drawn. For sure, the conclusion in the *World Report 2010; Events of 2009*, published about one year before the final *gacaca* report, that "[r]ape victims uniformly expressed disappointment at having to appear in *gacaca* rather than conventional courts, as *gacaca* proceedings—even behind closed doors— failed to protect their privacy",[36] seems in no way justified when based on those 20+ interviews from a total of 8,000 cases.[37]

These kinds of generalised conclusions on the basis of a few individual opinions run the risk, moreover, that opposite opinions are neglected. This is a risk facing any organisation that pretends to speak on behalf of a particular group without being in close contact with that group and its members, nor officially being considered as representatives. A telling example is Amnesty International's 2007 press release urging countries not to extradite suspects to Rwanda, until, *inter alia*, "all victims and witnesses will receive effective support and protection from threats, intimidation and attack".[38] This led to many comments, including from a

[34] Human Rights Watch 2011, pp. 112–118.

[35] Ibid., p. 112. It is not clear from the text whether the "more than 20 interviews" concerned rape victims only, or also included interviews with judges and trauma counsellors.

[36] Human Rights Watch 2010, p. 149.

[37] I assume that the basis of the 2010 statement is the same or maybe an even smaller number of interviews than the 2011 statements.

[38] Amnesty International 2007.

Rwandan author[39] and, herself a genocide survivor, the founder of an NGO, Yolande Mukagasana, who in an open letter asked Amnesty International to refrain from representing her ever again:

> « En tout cas, moi je vous demande une chose, c'est de ne plus jamais me suivre sur ma route de lutte contre la mort des hommes par les mains des autres. C'est de ne plus mettre les pieds là où je vais témoigner du génocide tant que la mort ne veut pas de moi. Attendez lorsque je ne serai plus là et faites ce que vous êtes habitués de faire. Ne me poursuivez plus. Tout homme peut tomber, l'essentiel est de pouvoir se relever. Vous aussi, faites votre examen de conscience. Arrêtez de faire la politique destructrice, faite une politique plus humaine. » [40]

It shows the gap between abstract notions of an outsider human rights organisation and the concrete opinions and needs of the individuals these human rights organisations pretend to represent: the persons directly involved.

A similar methodological issue pertains to the direct translation of an individual opinion into the opinion of the human rights organisation, without reflecting on the context of the individual opinion or of the measure criticised. Victims of rape and sexual torture interviewed by Human Rights Watch expressed a fear of speaking in *gacaca* about their rape; they feared a lack of confidentiality; expressed a lack of confidence in a fair and impartial hearing considering the judges' ties within the community; feared corruption; criticised the leniency of sentences; expressed frustration at not having received monetary compensation; withdrew their case fearing renewed trauma or that their spouses would know about the sexual violence. The list of critical remarks from victims of rape and sexual torture is long.[41] Extremely important and interesting information about the opinion of individuals directly involved in these trials, certainly not to be taken for granted.

However, using them as the direct basis for a judgement about the entire process disregards the personal background of individual opinions. Without any reflection on the individual background of the opinion, the necessity of the measures taken, alternatives for choices made, the complexity of political decisions in a post-conflict society or on whatever other considerations, Human Rights Watch embraces the individual victim's judgement as its own judgement.

First: the answers of the interviewees might have been different if they had been informed, for example, that if not tried by the *gacaca*, it would have taken many more years before their cases would have been tried in a regular state court; informed about the training that *Inyangamugayo,* who were selected to judge the rape and sexual torture cases, had previously received in particular on the way to approach victims of rape and sexual torture; informed about the special provisions

[39] See e.g. La mort ne veut pas de moi, 1997; N'aie pas peur de savoir. Rwanda: une rescapée tutsi raconte, 1999; Les blessures du silence. Témoignages du génocide au Rwanda, 2001; De bouche à oreille, 2003.

[40] Open letter by Yolande Mukagasana in response to the press release by Amnesty International, 2 November 2007; a copy is available upon request.

[41] Human Rights Watch 2011, pp. 113–118.

in the law to safeguard confidentiality and informed about the decisive role given to victims in cases of rape and sexual torture to lodge a complaint.[42]

Secondly, and more seriously: Human Rights Watch should have placed these personal victims' statements in a wider perspective before judging the *gacaca*. For example, by indicating that the remarks of victims about the *gacaca* procedure might also apply to state court procedures. Corruption, the leniency of sentences, stopping procedures out of fear of renewed trauma, a fear of spouses and relatives being made aware of the rape, the *in camera* procedure, the lack of confidentiality in court and outside, the non-appearance of witnesses, the emotional difficulties of testifying in court, judges asking 'bad' or insensitive questions, the consequences of pursuing a case and threats from the accused,[43] are all well-known issues in conventional courts also. Hence, not so much criticism of the *gacaca* courts in particular, but of the trials in general, in whatever form.

For one, indeed extremely obvious case, Human Rights Watch mentions in a footnote that "The same result would have occurred in the conventional courts": the disappointment of victims that their case would not be tried because either the accused was not known or had died.[44] But when mentioning, for example, the frustration of "a third of the rape victims interviewed (…) with the fact that they had received no monetary compensation after the accused was convicted", Human Rights Watch writes that under statutory law a rape victim in the conventional courts is entitled to civil damages, but without mentioning whether they also would receive civil damages in practice.[45] Troublesome, lastly, is the mentioning of allegations of false accusations of rape without further comments,[46] not the least considering the Rwandan culture of the stigma and the reputation of Rwandan women when it becomes known that they have been raped.

9.3 Explaining Human Rights Watch's Position

How can one explain the rude tone, the factual mistakes and the unjustified and speculative conclusions of Human Rights Watch as described in the previous section? There appear to be four possible explanations. The first is that Human

[42] See Kaitesi and Haveman 2011, in particular pp. 398–406. It is interesting to note that HRW does not mention anywhere the training in rape and sexual torture cases given to *Inyangamugayo* by SNJG lawyers and trauma counsellors, immediately before the trials started in 2008.

[43] All mentioned regarding trial by *gacaca*, Human Rights Watch 2011, pp. 113–118.

[44] Human Rights Watch 2011, p. 116, Footnote 569.

[45] Human Rights Watch 2011, p. 115; In two more cases HRW mentions the conventional courts. Human Rights Watch 2011, p. 117, a written victim statement presented to the court instead of appearing in person would not have been possible in the conventional courts. Human Rights Watch 2011, p. 117, Footnote 580: "The woman said she would have felt able to provide more information on what happened to her in the conventional courts".

[46] Human Rights Watch 2011, pp. 114–115.

Rights Watch 'deliberately' distorts reality and that the accusations are motivated by some purpose other than a simple improvement of the human rights situation, for example the interests of its own organisation. However, this is of course a somewhat silly and 'highly unlikely' insinuation and it therefore needs no further speculation, in order not to damage the reputation of Human Rights Watch unnecessarily and unjustifiedly, and should not even have been mentioned here anyhow.

The first serious explanation regards the distinction between insider opinions and outsider judgements. A second explanation is that Human Rights Watch too easily neglects the difficulties of truth finding in Rwanda: stereotypes replace reality, both with respect to what is happening in reality and the intentions behind what is happening. But that does not explain the full issue. A third explanation may be found in the fact that other international human rights organisations seem to take a remarkably different approach, focusing on collaboration rather than confrontation.

9.3.1 Insider/Outsider Judgements

I am the last to argue that outsiders do not have the right to judge the situation in a particular country. I am an outsider myself. However, an outsider should always realise that there is a difference between the inside and the outside, that the two should be clearly distinguished. That, for example, the personal emotions of individuals who lived through the genocide are not the same as rational arguments justifying a judgement by an outsider organisation.

A close friend of mine, a *rescapé*, a survivor of the genocide, points out many wrongs in the government's policy regarding reconciliation, ethnicity, the release of prisoners, the prosecution of *génocidaires*, et cetera. This is not always based on facts; perceptions of what happens play an equally important role; incidents become general reality. Her judgement about the *gacaca* is to an important extent based on one experience as a participant in the *gacaca* in the neighbourhood where she lived during the genocide. When a *rescapé* challenged the accusation against a certain woman from the neighbourhood and asked the *Inyangamugayo* to present evidence, one of the *Inyangamugayo*, a man who had returned from the diaspora in Uganda after the genocide, asked the said *rescapé*: "tell us, why were you not killed during the genocide?", challenging, in the perception of my friend, that she was a real *rescapé*. Immediately that *rescapé* and all other survivors present left the *gacaca*, never to return again. Of course, this experience strongly colours my friend's opinion about the *gacaca*, she herself being a *rescapé*. Her judgement is clear: it is wrong. Expressed with a lot of emotion, sometimes outspoken disgust. She is not willing to look beyond her personal experience, and to reflect, for example, on the necessity of the measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society or whatever consideration guides a choice for a certain policy measure.

However, her criticism and the emotional way she expresses it certainly does not bother me as much as the criticism of international human rights organisations. Not that I take her opinion for granted, on the contrary, her experience and feelings about what is happening in Rwanda is important. But it is the prerogative of someone who survived three months of deadly persecution, who saw people being killed, and escaped death several times herself, to criticise whatever is happening, without consideration for the broader picture behind the decisions taken.

Personal judgements by people inside differ from outsider judgements in yet another way. Several times I have experienced a very split opinion within one person, with seemingly both the situation in 2012 and 1994 serving as the context. The reality of 1994 being so strong that it comes back as 'the' reality at any unexpected moment. For example, a colleague, a sole survivor of his family, who when sober says that of course Tutsi will share power with Hutu, as the Tutsi will never be able to rule the country without power-sharing. But when drunk he swears that the Tutsi will never, never, share power, as they will never allow the Hutu to kill them again. He is serious at both moments, of that there is no doubt, but speaking from different times and contexts. Out of reason or out of fear; out of mercy or out of hatred; out of hope or out of despair; out of whatever mood. It is obvious that this leads to strong and sometimes opposing opinions, even within one person changing according to time, context and topic, and not always based on facts nor is it always the result of a thorough reflection on the political and societal circumstances in the country.

One cannot blame those who lived through the genocide for interpreting what happened and happens in their own individual time and context. One cannot blame the son of a convicted *génocidaire*, himself too young to know what happened at the time, for giving his own interpretation of reality. Again, this is the prerogative of those who experienced the genocide. Expecting otherwise would be expecting the superhuman.

However, that does not apply to international human rights organisations when analysing the situation from an outsider's perspective. It is definitely not the prerogative of international human rights organisations not to reflect on the background of individual opinions, the necessity of the measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society, weighing the interests of individuals and society as a whole, or whatever other consideration. Still, that is exactly what Human Rights Watch seems to do, and one of the reasons for my uncomfortable feelings when reading their critical reports on Rwanda.

9.3.2 Reality Versus Rumours, Perceptions and Stereotypes

The truth in Rwanda is difficult to determine, for at least three reasons. Firstly, Rwanda is a country of many rumours, some entirely unbelievable, some without

doubt true, with a vast grey area in between. Some rumours are harmless, others more dangerous. At the same time it should not be forgotten that what people think is true is true in its consequences, meaning that perceptions direct people in what they are doing. Individuals convinced of a rumour being the truth will act accordingly as a consequence. Similar to Human Rights Watch that tried to find "possible explanations" for the wrongfully perceived "sudden plethora of rape accusations", as mentioned above.

Here are some examples of perceptions directing people in what they do from the past seven years in Rwanda: thousands of people fled the country as a result of rumours that the government was in the process of buying a huge grinding machine in order to kill all the Hutu involved in the genocide; some women refused to eat during a reconciliation meeting as the rumour went around that the government had mixed food for the participants with the ground bones of genocide victims; some Tutsi avoided taking a motor-taxi during the night as the rumour circulated that drivers brought their Tutsi clients to remote areas in town to be killed; Dutch parliamentarians asked the Minister of Development Cooperation for information about the rumour that the Rwandan government had taken 466 prisoners from the '*élite Hutu*' from the central prison in Kigali, brought them in lorries to a remote place in the eastern part of the country and killed all of them, except three who had escaped. Some of these rumours, such as the latter one, can be traced back to the diaspora, disseminating rumours in order to destabilise the country. It shows the importance of distinguishing between facts and perceptions. What interviewees take for facts could just as well be perceptions, though being very real for them.

Secondly, the situation in Rwanda changes very quickly, much quicker than in stable societies like in Europe where one is inclined to think in time periods and generations of 20–30 years. In Rwanda, even a four-year period may be too long as a sound and solid basis for drawing conclusions. This shows how difficult it is to interpret certain events within their time and context, as this time and context may have changed dramatically since the decision was taken or the event occurred, leaving the benefit of hindsight as an easy but cheap way to prove why the government was wrong and the observer right. Rwanda has taken huge steps forward since it came out of the war and the genocide in 1994. For a long time, Rwanda was regarded as a post-conflict society, struggling to overcome the aftermath of the genocide. This implies that policy measures by the government had and maybe still have to be evaluated in this specific context. At the same time, it should be noted that increasingly one can hear government officials say that Rwanda has grown beyond the post-conflict state of affairs, and as a consequence should be assessed—and should be willing to be assessed—as an ordinary state. It means that conclusions may have to be reconsidered every other year.

The fairness of the justice system is a telling example. Where, in 2008, most observers concluded that the Rwandan justice system was not deemed fair and

genocide suspects should not be extradited to stand trial in Rwanda,[47] since 2011 the ICTR,[48] the European Court of Human Rights[49] as well as various national courts[50] have decided that thanks to the many improvements[51] there were no longer objections against the extradition of genocide suspects to Rwanda.

Lastly, a situation has grown in which perceived—most often negative—intentions replace what is actually happening. Whatever the government does is presumed to be inspired by bad intentions, and if one may believe sources in the diaspora: in particular evil intentions of the devil incarnate, the new Hitler of our times, President Paul Kagame. The person replaces the message. The way Human Rights Watch criticises Rwanda has undoubtedly had a chilling effect on the relationship between human rights organisations and the Rwandan government. Within the Rwandan government, the idea has been rooted that for international

[47] For example the ICTR: *Prosecutor v. Yussuf Munyakazi*, Case No. ICTR-97-36-R11bis, Trial Chamber III, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 28 May 2008. http://www.unictr.org/Portals/0/Case%5CEnglish%5CMunyakazi%5Cdecisions%5C080528.pdf. Accessed 6 May 2012 (Appeals Chamber Decision, 8 October 2008); *Prosecutor v. Gaspard Kanyarukiga*, Case No. ICTR-2002-78-R11bis, Trial Chamber Designated under Rule 11 Bis, Decision on Prosecutor's Request for Referral of Case to the Republic of Rwanda, 6 June 2008. http://www.unictr.org/Portals/0/Case%5CEnglish%5CKanyarukiga%5Cdicisions%5C080606.pdf. Accessed 6 May 2012 (Appeals Chamber Decision 30 October 2008); *Prosecutor v. Ildephonse Hategekimana*, Case No. ICTR-2000-55B-R11bis, Trial Chamber Designated Pursuant Rule 11 Bis, Decision on Prosecutor's Request for Referral of the Case of Ildephonse Hategekimana to Rwanda, 19 June 2008. http://www.unictr.org/Portals/0/Case/English/Hategekimana/decisions/080619.pdf. Accessed 6 May 2012 (Appeals Chamber Decision 4 December 2008); *Prosecutor v. Jean Baptiste Gatete*, Case No. ICTR-2000-61-R11bis, Trial Chamber Designated under Rule 11 Bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, 17 November 2008. http://www.unictr.org/Portals/0/Case/English/Gatete/decisions/081117.pdf. Accessed 6 May 2012; *Prosecutor v. Fulgence Kayishema*, Case No. ICTR-2001-67-R11bis, Trial Chamber III, Decision on the Prosecutor's Request for Referral of Case to the Republic of Rwanda, 16 December 2008. http://www.unictr.org/Portals/0/Case/English/kayishema/trail%20chamber/081216.pdf. Accessed 6 May 2012.

[48] ICTR, *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-R11bis, Decision on Prosecutor's Request for Referral to the Republic of Rwanda, Referral Chamber Designated under Rule 11 Bis, 28 June 2011. http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/110628.pdf. Accessed 6 May 2012; ICTR, *Prosecutor v. Jean Uwinkindi*, Case No. ICTR-2001-75-AR11bis, Decision on Uwinkindi's Appeal against the Referral of his Case to Rwanda and related Motions, 16 December 2011. http://www.unictr.org/Portals/0/Case/English/Uwinkindi/decisions/111216.pdf. Accessed 6 May 2012.

[49] ECrtHR, *Ahorugeze v. Sweden*, Application no. 37075/09, Judgement of 27 October 2011. http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-107183. Accessed 6 May 2012.

[50] For example, extraditions from Norway, Sweden, the UK, Canada.

[51] Rwanda abolished the death penalty in 2007, guaranteed that the sentences of extradited persons do not include life imprisonment with special provisions in 2008, opened a special unit in the Mpanga Prison for transferred and extradited suspects/convicts so that the prison conforms to international standards, adopted a special transfer law in 2007 concerning the transfer of cases to Rwanda from the ICTR and third States, provided for the immunity of witnesses, installed video-linking for the hearing of witnesses abroad, established a witness protection unit at the Supreme Court, and introduced the possibility of including foreign judges on the bench.

human rights organisations government actors are 'damned when they do and are damned when they don't'. It is fair to say that the Rwandan Government in its turn is very sensitive to criticism, and ready to assume negative intentions on the side of opponents. The government of Rwanda responds to any criticism in a strong way: 'when you are not for us you are against us'. These positions have led to a situation where it has become very difficult to criticise Rwandan policy, even in a constructive manner. Perceived intentions on both sides seem sometimes to have taken a more important role than what actually happens on the ground. Thinking in stereotypes—human rights organisations whose main ambition is to destroy the future of Rwanda versus the Tutsi-dominated donor darling government that hides its ethnic intentions—dominates the debate instead of the facts relating to what is actually happening.

This leads to a situation where nuances about what is happening disappear and are replaced by a black and white picture. Usually in reports on the human rights situation in a specific country, especially reports from human rights organisations, violations of human rights dominate the pages. This is not strange insofar as adherence to human rights norms is (or should be) the rule, and violations of human rights are (or should be) the exception. However, this also makes one easily forget that big steps forward may have been made. For example, in Rwanda the abolition of the death penalty and positive measures taken with respect to the fairness of the penal system are easily overshadowed by—without any doubt condemnable—cases of unlawful detention. In particular, when a transitional period following a large-scale conflict or dictatorial regime is regarded as a process, one can and should not neglect positive developments and trends as part of that process.

Let me give an example with regard to the contentious issue of the freedom of expression in Rwanda. Although an issue of concern, it certainly is not non-existent in Rwanda, less than often assumed, however, hidden behind a language or a culture we do not fully understand. The 'Public Policy Dialogues' organised by the Rwanda Civil Society Platform is an example of an attempt to gain more space for free expression. Dialogues were held about the *gacaca*, the UN Mapping Report on the Congo wars, on political space in Rwanda and respect for human rights in general, and the freedom of expression and freedom of the press in particular. Broadcast in Kinyarwanda live on national radio and television. The minutes (in English) give an interesting impression of a somewhat ambiguous situation, where all the major issues at stake regarding human rights are openly discussed.[52]

[52] Rwanda Civil Society Platform 2010, The Public Policy Dialogue on Political Space and Human Rights in Rwanda, 14 December 2010, "Interventions and issues discussed in the dialogue". All quotes in the following paragraph are from this document (minutes are in possession of the author; available on request). See about the public policy dialogues in general: http://www.rcsprwanda.org/spip.php?article49. Accessed 27 May 2012.

About the "repression of political parties", one participant mentioned

> one incident where the Green Party was organizing a constituting Assembly to collect sufficient signatures for registering the party, individuals with pistols stormed the room and started throwing chairs at the audience. (…) This happened as the police stood by and did nothing to stop the troublemakers.
>
> Other political parties do not have space to voice their views, provide any alternative to citizens and recruit new members. Local authorities incite people to vote for the RPF. Authorities have the habit of declaring in public that their constituencies will vote 100% for the RPF.

About "Jailing opposition leaders", it was noted that

> [p]olitical space is simply not there! Every time a political party wanted to register its leaders faced serious repression! For example: Pasteur BIZIMUNGU was jailed for more than 5 years, His colleagues are still in jail, for trying to register PDI-Ubuyanja; one member was killed, another is in exile for trying to register the Green Party; Me. NTAGANDA is still in jail as we speak for trying to register PS-Imberakuri party. Even when your documents are in order, the MINALOC refuses to register your party.

On "Shutting down the media" it was discussed that

> independent news papers that have been critical to the government have been shut down, more than 10 journalists have fled the country in just one year; A journalist has just been murdered. The remaining news papers are being monitored and journalists intimidated; Things cannot go on like this!

Under the heading: "Journalists should not be intimidated!" it is reported that

> [d]uring the meeting, Gatsimbazi, the Editor of Umusingi Newspaper accused the government of frustrating press freedom, citing the banning of Umuseso and Umuvugizi, the murder of journalist Jean Leonard Rugambage and the threatening of the City Radio Sports presenter by the Minister of Sports and Culture.

Then an interesting incident occurs.

> Strongly reacting to his comments, Gen. Richard RUTATINA, the President's advisor on security, threatened the Journalist, saying that he was not independent. 'We have information that you are being used by other people, who are giving you money to tarnish the image of the government; don't come here to lie to people, don't think there is anything protecting you…
>
> The behaviour of the General, not only confirmed the allegations of the Journalist, but also was against the dialogue's purpose of 'a dialogue devoid of intimidation, fear or insults to individuals or institutions' and hindered the mutual respect, tolerance and non-threatening attitude, as agreed at the beginning of the dialogue.
>
> Referring to the incident in his concluding remarks, the Civil Society [Spokesperson], urged Rwandans to learn how to behave in such forums and respect each other's opinions.

This example shows the ambiguity of the human rights debate within Rwanda.[53] This ambiguity is not easy to explain. In part it will be the result of

[53] Another example of what can be seen as experiments creating more space for free expression in Rwanda are the activities undertaken by the *Institut de Recherche et de Dialogue pour la Paix*

seeking to secure political power. Without any doubt, this is politics, and is politics, at its very heart, not all about power? At the same time it is my strong impression—difficult to prove, however, as will be the opposite—that it also has to do with a fear among the ruling elite that the situation runs out of control. Every step, whether with regard to reconciliation activities, land politics, legal aid, the media or whatever other issue, is strongly 'guided' by the government. Closely related is—again, my impression and difficult to prove—a strong distrust towards foreign interference, in particular when foreigners try to tell Rwandans what they have to do. Call it frustration about having been abandoned by those foreigners when the genocide started, call it pride, whatever, but it is undeniably a factor. "Considering the necessity for the Rwandan Society to find by itself, solutions to the genocide problems and its consequences", as for example the preamble to the law establishing the *gacaca* reads.[54]

It is interesting to note that international human rights organisations which act in a similar way and say similar things about human rights violations are not very welcome in Rwanda. This is not surprising. As mentioned, Rwanda seems to be allergic to outsiders telling the country what to do. But even more important seems to be that, again, those international human rights organisations act as if they are insider participants to the discussion, with all the prerogatives of those insiders. Instead of as an outsider observer commenting on the situation in a nuanced and well-considered manner, reflecting, for example, on the necessity of the measures taken, on alternatives for choices made or on the complexity of political decisions in a post-conflict society.

9.3.3 Confrontation or Critical Partnership

Although the above may explain part of the tone and content of Human Rights Watch's criticism, it does not explain everything. A third explanation may be found when comparing Human Rights Watch with other international human rights organisations. Not all international human rights organisations react in a similar way as Human Rights Watch does. They rather seem to try to find a middle ground in commenting on the human rights situation in the country. Human rights organisations actively involved in rebuilding the country—such as *Avocats sans*

(Footnote 53 continued)
(IRDP), including the so-called *Fora Urubuga* (free spaces for debate). See the IRDP website: http://www.irdp.rw/ (accessed 25 May 2011).

[54] Preamble to the Organic Law N° 16/2004 of 19/6/2004, Establishing the Organisation, Competence and Functioning of Gacaca Courts Charged With Prosecuting and Trying the Perpetrators of the Crime of Genocide and Other Crimes Against Humanity, Committed Between Oct. 1, 1990 and Dec. 31, 1994.

Frontière,[55] RCN-*Justice & Démocratie* and PRI-Penal Reform International[56]—are considerably more nuanced and fact-based in their statements about Rwanda, and willing to embark on a discussion with the Rwandan government about the pros and cons of the Rwandan policy. They, too, have criticised and continue to criticise the country's policy, at times quite strongly, but they usually know how to put this in the context of the place and time, and how to give this criticism a constructive turn. They seem to be interested in the question whether progress with regard to respect for human rights can be seen from year to year, rather than whether the country has reached the ideal and absolute human rights standard here and now.

It seems, therefore, that a division exists between, on the one hand, human rights defenders in an ideal world and those who try to materialise human rights in a difficult reality. How can one explain this division?

A convincing effort to explain this division is made by Anuradha Chakravarty, writing about divisions within the human rights community in how human rights organisations approach *gacaca* in Rwanda.[57] She distinguishes between single-sector NGOs such as Human Rights Watch and Amnesty International, that focus solely on human rights, and multi-sector NGOs such as *Avocats sans Frontières*, that are also engaged in other sectors such as legal aid, reconstruction, legal training and technical assistance.

> (…) [O]rganizations at the intersection of sectors tend to be more flexible and innovative in their responses to complex post-conflict situations than organizations that are solely focused on human rights. Promoting multiple agendas requires making difficult choices and encourages innovative solutions.[58]

In order to influence the improvement of the human rights situation in a country, multi-sector NGOs engage in a critical partnership with the State: "a daily, complex negotiation with the state as they simultaneously partner with and critique it".[59] This position is in its ultimate sense, it seems to me, best presented by Search for Common Ground, whose working methodology is characterised by "having respect for all voices and for everyone's humanity", "becoming immersed in the local culture", "building relationships over time", "engaging and empowering the local community", "engaging in the situation", "being a social entrepreneur" and "developing an integrated, multifaceted approach".[60]

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[55] Regarding the *gacaca*: see e.g. Avocats sans Frontières 2010 (and various previous reports, available at http://www.asf.be/en/node/9#RwandaPublicationsFR (last visited 13 May 2011)).

[56] Regarding the *gacaca*: see e.g. Penal Reform International 2010a, b.

[57] Chakravarty 2006, pp. 132–145.

[58] Ibid., pp. 140–141.

[59] Ibid., pp. 141–142.

[60] Meyers et al. 2005, pp. 173–187; Also the website of SFCG: http://www.sfcg.org/ (last visited 11 May 2012).

Single-sector NGOs on the contrary,

> have no other major goals at stake and are presumably more inflexible toward institutions that fall short of international standards. Single-sector human rights NGOs instead prefer to focus their attention on exposing and critiquing rights violations. In this respect, Amnesty International and Human Rights Watch are unburdened by the need to build working relationships with governments.[61]

Single-sector NGOs seek confrontation with the State: "the state is perpetually an object of critique as human rights advocates exercise external vigilance against the state's expanding sphere of control".[62] They keep on a distance instead of seeking a relationship with the State.

In this way, the single-sector human rights organisations have manoeuvred themselves far away from the discussion platform. They have nothing to lose in terms of a good working relationship with the government, therefore do not have to engage into a serious dialogue with the government about its decisions and policies, different from those organisations who seek a critical partnership, for whom dialogue is primordial.

Worse, by a lack of members or a constituency to whom it is accountable, an organisation like Human Rights Watch does not even have to engage in a meaningful dialogue with those it says it represents.[63] For the outsider organisations there is no need to reflect on the background of individual opinions, on the necessity of the measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society or whatever other consideration. They can freely criticise what they like. This is different again from international multi-sector NGOs which in their daily work have to ascertain local support in order not to lose their working relationship with their partners.

Chakravarty argues that behind these different strategies hides a different view of human rights. The single-sector NGOs seem to view human rights "as essentially negative freedoms", with the State interfering with rights.[64] The multi-sector organisations "operate from the premise that fundamental human rights are best secured through the state and are jeopardized if the state is indifferent or weak".[65] The state as a violator of human rights versus the state as a protector of human rights. This may also explain differences in the assessment of the State organising legal aid through, for example, *Maisons d'Accès à la Justice* (access to justice offices) and *Abunzi* (mediators) in Rwanda: as a way to further control the population or as a way to ascertain the right of access to justice of each and every citizen. Or with regard to *gacaca*: the *gacaca* as a means for the state to further

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[61] Chakravarty 2006, p. 141.

[62] Ibid.

[63] Interviewing people and presenting this in reports is a very weak form of representation of those individuals and the groups these individuals belong to, and does not constitute accountability or legitimacy. See on accountability and legitimacy for example, Slim 2002.

[64] Chakravarty 2006, p. 141.

[65] Ibid.

control the population versus the *gacaca* as a means to provide access to justice to the population. It certainly influences the opinion on restrictions of freedom of expression by, for example, the criminalisation of genocidal ideology, discrimination and divisionism.[66]

This is an interesting analysis and indeed seems to be an accurate reflection of the way in which various human rights organisations work in Rwanda. Gready, in his study about civil society in Rwanda, although not targeting single-sector NGOs, in fact confirms this by further distinguishing within the group of multi-sector NGOs. He was

> "immediately struck by something of a paradox in the different attitude of human rights and development INGOs to partnership. Many human rights INGOs were reticent about partnership per se and were hesitant to enter into partnerships on the grounds that local human rights NGOs lacked independence". In the accompanying note he remarks that "[t]his distancing process worked in both directions: one of the local NGOs stated that they had withdrawn from their international counterparts so as to better collaborate with government". To continue in the text "(…) In contrast to the self-positioning of human rights INGOs, development INGOs, particularly those adopting a rights-based approach, forged partnerships with local human rights NGOs to build capacity, including in relation to the gacaca process (…). In part, this different approach was about a partnership ethos that privileged sustainability and local ownership. There was a greater emphasis on local context, caution about judging partners, and a belief that independence is not simply about confrontation with governments but also requires a relational, cooperative dimension".[67]

Chakravarty's analysis explains the extremely tense relationship between the government and in particular Human Rights Watch, compared to multi-sector NGOs, whose relationship with the government is, it has to be admitted, also not too relaxed, but at least it exists. Constructive criticism of people and organisations involved in rebuilding the country is welcome. Those engaging in a critical partnership with the government realise that something must be done, and contribute to finding solutions.

However, criticism because of criticism can count on little understanding. The single-sector organisations can stress with great dedication the faults and failures of the State, without explaining what should, but even more importantly, what could happen instead in everyday reality. It is not always easy to find acceptable and realistic alternatives, sometimes virtually impossible. That makes the critique at the same time easy, hollow, empty and meaningless. That kind of criticism quickly leads to the feeling that nothing is good. It is criticised that prisons are over-crowded; it is criticised when tens of thousands of prisoners are released. 'You're damned if you do, you're damned if you don't'.

Personally, I remember the time when we organised the training of 18,000 *Inyangamugayo*, *gacaca* judges, who had to try 8,000 persons accused of rape and sexual torture during the 1994 genocide. We joked that we could ourselves write at

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[66] This gap may be further widened by the difference in opinion about restrictions on freedom of expression in the USA and Europe.

[67] Gready 2001, pp. 87–100, at 88.

that very moment the critique by human rights organisations such as Human Rights Watch.[68] We thoroughly discussed all weaknesses and failures, and we chose to continue, we made a choice for the optimal, that is: the best possible within what was feasible within the current financial and temporal circumstances. We knew this choice was not ideal, but reality puts limits to ideals; that is the annoying, but at the same time challenging, thing about reality. A human rights organisation refused to co-organise the training for *gacaca* judges because it did not want to lose its freedom to subsequently criticise the training and the way the judges tried those cases. Maybe understandable from their perspective, but if nothing had been done, there would have been even more reason to criticise the trials of rape and sexual torture cases.

9.4 Epilogue: Accountability by Organising Criticism

In its reports about human rights in Rwanda, Human Rights Watch makes factual mistakes; it interprets public statements by authorities entirely out of context; it presents incidents as structural problems; it cites examples from many years ago to illustrate the situation in recent years, as if nothing has changed since then; it assumes almost per definition that governmental decisions are taken with bad intentions; it insinuates and speculates about what might be, even when it is still 'too early to tell' or when deemed 'highly unlikely'; it generalises on the basis of only a few individual opinions; it embraces individual opinions as the direct basis for its own judgement without any reflection on the personal background of individual opinions, on the necessity of the measures taken, on alternatives for choices made, on the complexity of political decisions in a post-conflict society, a balance between individual and societal interests, or whatever other considerations; everything in a, at times, disrespectful tone.

Assuming that Human Rights Watch does not do this on purpose, a further explanation is needed. A first serious explanation concerns the methodological confusion of insider opinions and outsider judgements, taking individual opinions as a general truth. A second explanation is that Human Rights Watch too easily neglects the difficulties of reality in Rwanda: perceptions, rumours and stereotypes replacing reality, both with respect to what is happening in reality and the intentions behind what is happening. But that does not explain the full issue. A third explanation is found in the chosen position as a single-sector human rights NGO on the sidelines, choosing for confrontation rather than a critical partnership with the government and the country in general.

[68] During those days I worked as the vice rector of academic affairs at the Institute of Legal Practice and Development—ILPD, the post-graduate training institute for the legal sector in Rwanda; See about the training Kaitesi and Haveman 2011.

Without doubt there are other explanations for distorted reality, such as expectations not being fulfilled, leading to disappointment and critique; wrongful interpretation frameworks, for example mixing up adversarial and inquisitorial penal systems; using theory as leading reality instead of as an explanatory framework for reality; taking post-conflict approaches as blueprints for all situations instead of tailor-made measures and an overly rigid opinion about how to render justice for international crimes.[69]

The issue is not that there is no criticism of the human rights situation in Rwanda possible. There certainly is. The issue is the way the critique is presented. Rwanda generally reacts strongly to non-obliging criticism, which is often understood as disrespect for human rights. However, it shows less about contempt for human rights than it shows about disrespect on the side of the Rwandan government for the easy and non-obliging way those human rights organisations plead their case out of their ivory towers in downtown Manhattan, far away from the real world and taking no responsibility for what is happening in that real world.

True, a country, not being a human being with emotions, may be expected to respond in a somewhat more dignified and mature manner than Rwanda does at times.[70] But it is fair to say that, if it does not matter what you do or do not do, and this is expressed in a disrespectful and blunt manner, it may be better to choose confrontation, similar to what Human Rights Watch does, or, another option, simply to shut your ears, or at best friendly nod 'yes', however doing 'no'. Which again leads to new accusations that apparently the country does not care about human rights. The tragic thing is that in this way human rights are not really being promoted. Respect for human rights grows despite, rather than thanks to those human rights organisations' critique.

The question remains how this can happen. The aforementioned explanations together show why mistakes and speculations are easily made, in a sometimes disrespectful tone. But how can this happen without anybody correcting these factual mistakes, misinterpretations, speculations and tone?

The reason seems to be a lack of accountability. Human Rights Watch acts as an investigator, prosecutor and judge at the same time. Usually, the process of a suspicion until a judgement is characterised by a gradual 'factualisation', distinguishing between uncontested and contested suspicions and facts, ending in a judgement based on facts which are deemed proven. However, the tone and content of Human Rights Watch's judgement is that of an investigator: mixing ripe and green, suspicions, presuppositions, accusations, possibilities and facts. Apparently, there is no internal mechanism—through an internal and impartial 'judge'—that filters facts from non-facts, warns against unjustified speculations, et cetera. Apparently, as otherwise it would mean that Human Rights Watch works in this way on purpose, which, as said, I do not assume. This is a serious problem,

[69] See for these and other examples in the case of scholarly work on *gacaca*, Haveman 2008.

[70] Famous are President Kagame's public speeches denouncing anyone criticising Rwanda from the outside.

knowing that the accusation and judgement at the same time concerns the most serious crimes: violations of human rights.

Except for this apparent lack of internal control, there is also a lack of external accountability.

- Human Rights Watch has no members[71] nor is it elected by voters who can vote with their feet.
- Human Rights Watch is not paid with taxpayers money, hence it is not accountable to the tax-paying population in general. This is an interesting issue, as this is seen, on the one hand, as safeguarding independence—"Human Rights Watch is an independent, nongovernmental organization, supported by contributions from private individuals and foundations worldwide. It accepts no government funds, directly or indirectly"[72]—but it can also be seen as an accountability gap. Compare the discussion about efficiency and necessity of taxpayers' money spent on development cooperation, leading to development cooperation organisations having to account for what they are doing and the results achieved. It is interesting to note that Human Rights Watch does not have to account for the efficacy and efficiency of what it is doing, despite spending millions of euros.
- Human Rights Watch, by taking an outsider's position, not participating closely and on a day to day basis in the development of the country together with the local population, is also not accountable to those it claims to work for.

Combined with a high moral legitimacy as a human rights defender, this leads to a situation where criticism of its working methods does not come through or is countered with speculation that the person criticising is apparently less interested in the defence of human rights than in the defence of the human rights violating country. A situation in which the critique at best is taken for granted, instead of as a serious issue which, if necessary, must lead to improving the way of working.

Whoever wants to criticise a country concerning human rights violations would be well advised to have a good case, that is: based on facts and a sound, methodologically correct, argumentation. Such a case is more difficult to ignore than a judgement on the basis of perceptions, presumptions, speculations and other distortions of reality. For years, Human Rights Watch has been the leader of the human rights movement, together with Amnesty International. As a good leader, it would be well advised to better organise its own criticism. A good reputation comes on foot but leaves by horse.

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[71] Different from Amnesty International, which also involves its members and the population at large in its activities.

[72] Human Rights Watch 2012, http://www.hrw.org/financials (last visited 20 May 2012).

References

Documents

Amnesty International (2007) Rwanda: Genocide suspects must not be transferred until fair trial conditions met, Press Release 2 Nov 2007. http://www.amnesty.org/en/library/info/AFR47/014/2007/en. Accessed 11 May 2012

Avocats sans Frontières (2010) Monitoring des Juridictions Gacaca, Phase de Jugement, Rapport Analytique no. 5, janvier 2008-mars 2010. http://www.asf.be/wp-content/publications/Rwanda_MonitoringGacaca_RapportAnalytique5_Light.pdf. Accessed 27 May 2012

Chakravarty A (2006) Gacaca Courts in Rwanda: explaining divisions within the human rights community. Yale J Int Aff 32(Winter/Spring 2006):132–145. http://yalejournal.org/wp-content/uploads/2011/01/061211chakravarty.pdf. Accessed 27 May 2012

Haveman R (2012) Rule of Law Quick Scan Rwanda—The Rule of Law in Rwanda: prospects and challenges, HiiL. http://www.hiil.org/data/sitemanagement/media/Quickscan_RuleofLaw_Rwanda_digitaal_130812.pdf. Accessed 21 May 2012

Human Rights Watch (2001) Protectors or pretenders? Government Human Rights Commissions in Africa (Examining the Record in Africa: 1999 Rwanda). http://www.hrw.org/reports/2001/africa/. Accessed 27 May 2012

Human Rights Watch (2008) Rwanda, law and reality: progress in judicial reform in Rwanda, July 2008, pp 48, 49. http://www.hrw.org/sites/default/files/reports/rwanda0708webwcover.pdf. Accessed 21 May 2012

Human Rights Watch (2009a) US: Revival of Guantanamo Military Commissions a blow to justice, New York, 15 May 2009. http://www.hrw.org/news/2009/05/15/us-revival-guantanamo-military-commissions-blow-justice. Accessed 27 May 2012

Human Rights Watch (2009b) Letter to the prosecutor of the ICTR regarding the prosecution of RPF Crimes, 26 May 2009. http://www.hrw.org/news/2009/05/26/letter-prosecutor-international-criminal-tribunal-rwanda-regarding-prosecution-rpf-c. Accessed 27 May 2012

Human Rights Watch (2009c) Rwanda: Tribunal risks supporting 'Victor's Justice', Press Release 1 June 2009. http://www.hrw.org/news/2009/06/01/rwanda-tribunal-risks-supporting-victor-s-justice. Accessed 27 May 2012

Human Rights Watch (2009d) Letter to ICTR Chief Prosecutor Hassan Jallow in response to his letter on the prosecution of RPF crimes, 14 Aug 2009. http://www.hrw.org/news/2009/08/14/letter-ictr-chief-prosecutor-hassan-jallow-response-his-letter-prosecution-rpf-crime. Accessed 27 May 2012

Human Rights Watch (2010) World Report 2010: events of 2009, 20 Jan 2010. http://www.hrw.org/reports/2010/01/20/world-report-2010. Accessed 27 May 2012

Human Rights Watch (2011) Justice compromised, The legacy of Rwanda's community-based Gacaca Courts. http://www.hrw.org/node/99189. Accessed 21 May 2012

Human Rights Watch (2012) Financials, 11 Feb 2012. http://www.hrw.org/financials. Accessed 27 May 2012

ICTR (2009) Letter of the Chief Prosecutor to Mr. Kenneth Roth, Executive Director Human Rights Watch, 22 June 2009, Ref. OTP/2009/P/084. http://www.hrw.org/sites/default/files/related_material/2009_06_Rwanda_Jallow_Response.pdf. Accessed 27 May 2012

Mazimpaka M (2011a) Human Rights Watch under scrutiny over controversial Gacaca report. The Independent, 11 June 2011. http://www.independent.co.ug/News/regional-news/4269-human-rights-watch-under-scrutiny-over-controversial-gacaca-report. Accessed 19 May 2012

Mazimpaka M (2011b) Human rights watch firm on its Gacaca report. The Independent, 17 June 2011. http://www.independent.co.ug/news/regional-news/4288-human-rights-watch-firm-on-its-gacaca-report. Accessed 19 May 2012

Penal Reform International (2010a) Final monitoring and research report on the Gacaca process—the contribution of the Gacaca jurisdictions to resolving cases arising from the genocide: contributions, limitations and expectations of the post-Gacaca phase. http://www.penalreform.org/publications/final-monitoring-and-research-report-gacaca-process. Accessed 27 May 2012

Penal Reform International (2010b) Eight years on, a record of Gacaca monitoring in Rwanda. http://www.penalreform.org/publications/eight-years-ona-record-gacaca-monitoring-rwanda. Accessed 27 May 2012

Roth K (2009) The power of horror in Rwanda. Los Angeles Times, 11 April 2009. http://www.latimes.com/news/opinion/la-oe-roth11-2009apr11,0,5732620.story. Accessed 21 May 2012

Rwanda Civil Society Platform (2010) The public policy dialogue on political space and human rights in Rwanda, Dec 2010 (in possession of the author, available on request)

Slim H (2002) By what authority? The legitimacy and accountability of non-governmental organisations. International Council on Human Rights Policy. http://www.gdrc.org/ngo/accountability/by-what-authority.html. Accessed 21 May 2012

Snow K (2007) The Grinding Machine: Terror and Genocide in Rwanda, Keith Harmon Snow talks with Paul Rusesabagina, the ordinary man who inspired the film Hotel Rwanda. http://www.editions-sources-du-nil.com/article-the-grinding-machine-terror-and-genocide-in-rwanda-86393071.html. Accessed 27 May 2012

Literature

Brautigam D (2009) The Dragon's gift: the real story of China in Africa. Oxford University Press, Oxford

Gready P (2001) Beyond "You're with us or against us": civil society and policymaking in post-genocide Rwanda. In: Straus S, Waldorf L (eds) Remaking Rwanda: state building and human rights after mass violence. The University of Wisconsin Press, Madison, pp 87–100, at 88

Haveman R (2008) Doing justice to Gacaca. In: Smeulers A, Haveman R (eds) Supranational criminology: towards a criminology of international crimes. Intersentia, Antwerp, pp 357–398, in particular pp. 380–398

Haveman R, Muleefu A (2010) Gacaca and fair trial. In: Rothe D, Mullins C, Bassiouni M (eds) State crimes. Rutgers University Press, New Brunswick, pp 219–244

Kaitesi U, Haveman R (2011) Prosecution of genocidal rape and sexual torture before the Gacaca Tribunals in Rwanda. In: Letschert R, Haveman R, de Brouwer A-M, Pemberton A (eds) Victimological approaches to international crimes: Africa. Intersentia, Antwerp, pp 387–412

Meyers G, McIlwain M, Hertz S (2005) The common ground approach : a case study of an NGO. In: Muldoon J, Sullivan E, Aviel J, Reitano R (eds) Multilateral diplomacy and the United Nations Today. Westview Press, Boulder (Colorado), pp 173–187

Ndahinda F, Muleefu A (2012) Revisiting the legal and socio-political foundations and (Western) criticisms of *gacaca* courts. In: Bennett T, Brems E, Corradi G, Nijzink L, Schotsmans M (eds) African perspectives on tradition and justice. Intersentia, Antwerp, pp 149–173

Mukagasana Y (1997) La mort ne veut pas de moi. Fixot, Paris

Mukagasana Y (1999) N'aie pas peur de savoir. Rwanda: une rescapée tutsi raconte. J'ai lu, Paris

Mukagasana Y (2001) Les blessures du silence. Témoignages du génocide au Rwanda. Actes Sud et Médecins sans frontières, Arles

Mukagasana Y (2003) De bouche à oreille. Editions Menaibuc, Paris

Repubulika Y'U Rwanda National Service of Gacaca Courts (2012) Summary of the report presented at the closing of Gacaca courts activities [in Kinyarwanda, English and French], Kigali, June 2012

Part III
Making it Real: In Search of Ways to Apply Justice

Chapter 10
Armed Conflict and Law Enforcement: Is There a Legal Divide?

Charles Garraway

Abstract The division between peace and war has become increasingly blurred in factual terms in recent decades. Similarly, the law has progressed in a manner that has not necessarily been consistent. The author reviews how the laws covering the use of force in both peace and war have developed separately under the respective headings of the laws of war (also known as the law of armed conflict or international humanitarian law) and human rights law. The increasing overlap between these two bodies of public international law has led to tensions particularly in relation to the conduct of hostilities. The author suggests a way forward to ensure the applicability of the highest standards of protection whilst still enabling military operations to be carried out efficiently within a legal framework.

Contents

The author is a former Stockton Professor of International Law at the United States Naval War College, Newport Rhode Island. He is currently a Fellow of the Human Rights Centre, University of Essex.

C. Garraway (✉)
Human Rights Centre, University of Essex, Essex, UK
e-mail: charlesgarraway@hotmail.com

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10.1 Introduction

Avril McDonald was a bright star in an illustrious firmament of international lawyers. But it was not just her intellectual capacity, great though that was, that made her so influential. Wherever she was, there was laughter. Excellent company, she brought together disparate groups and taught them to look for what they had in common rather than what divided them, beginning with humour. She had a remarkable prescience for identifying the issues of tomorrow today, whether it was direct participation in hostilities or the effects of depleted uranium. Her driving force encouraged research into these issues. Whilst the International Committee of the Red Cross (ICRC) Interpretive Guidance on the Notion of Direct Participation in Hostilities[1] has gained the publicity, it should not be forgotten that the Expert Meetings that debated the topic and provided the impetus (if not necessarily the content) of the Interpretive Guidance were co-hosted by the Asser Institute where Avril played a key role. She indeed was one of those intimately involved in those meetings, not just as the representative of the Asser Institute but as an expert in her own right.

Whilst many scholars and practitioners have been focussed for the last ten years on the growing convergence of the laws relating to international and non-international armed conflict, Avril realised at an early stage that the real issue was the blurring of the lines between armed conflict and law enforcement. The legal regimes that covered armed conflict and law enforcement were developing differently though in a converging direction and this would inevitably create tensions. Her prescience here has been vindicated by the problems created by the 'War on Terror', conducted by the United States against Al Qaeda and its affiliates, and the growing overlap between the two frameworks of international humanitarian law, otherwise known as the law of armed conflict or the laws of war, and human rights law. A series of judgements by the International Court of Justice and, most notably, by the European Court of Human Rights, have highlighted that the relationship between these two great bodies of international law is not straightforward.

This piece will seek to examine how this convergence of laws has developed, particularly over the last fifty years. It will look at how the two strands of the law of armed conflict, 'Hague law' dealing with the conduct of hostilities and 'Geneva law' dealing with the protection of victims, have merged and become known

[1] ICRC 2008.

jointly as international humanitarian law. This convergence in itself has caused tension due to the differing philosophies that governed the two interdependent strands. The development of human rights law will also be examined together with the changing character of armed conflict itself. As 'war' and 'peace' increasingly morph into a spectrum of violence where, like a rainbow, it is difficult to identify the boundaries between the various levels of violence, there has been a battle for legal supremacy between those from the international humanitarian law end who wish to see the definition of 'armed conflict' extended down to as low a level of violence as possible so as to extend the protections given by 'Geneva law' as widely as possible, and those from the human rights perspective who insist that human rights is the foundational law, the *lex generalis*, and that international humanitarian law, as the *lex specialis*, must be secondary. With each of these bodies of law claiming priority, what happens when they disagree? There is a need to seek a common framework, which provides a coherent and consistent set of guidance to security forces acting across the spectrum of violence. But is it possible to reach such a framework?

10.2 How International Humanitarian Law Developed

The seeds of the current clash of legal philosophies lie back in history. Whilst the ICRC claim to be the 'guardians' of international humanitarian law,[2] what does that phrase involve? What is 'international humanitarian law'? The laws of war developed in two separate strands. The first was state-centric and dealt with the conduct of hostilities. It used to be known as 'Hague law' and of course the two great Hague Peace Conferences of 1899 and 1907 contributed hugely to this body of law. However, it went back further with the St Petersburg Declaration of 1868[3] laying down the foundations of the philosophy of this body of law. Whilst states agreed that "the progress of civilization should have the effect of alleviating as much as possible the calamities of war",[4] they also recognized their own interests in being able to conduct war. Thus they recognised the need "to conciliate the necessities of war with the laws of humanity".[5] This balance—this 'Faustian pact'—was to govern 'Hague law' for 100 years.

But there was another strand of the laws of war which grew out of Henry Dunant's experience when he found himself caught up in the aftermath of the Battle of Solferino in 1859. He saw the suffering on that battlefield—suffering of

[2] ICRC 2010.

[3] Declaration Renouncing the Use in Time of War of Explosive Projectiles Under 400 Grammes Weight (Hereinafter St. Petersburg Declaration 1868), Saint Petersburg, 29 November/11 December 1868, Roberts and Guelff 2000, p. 54.

[4] St. Petersburg Declaration 1868, Ibid., Roberts and Guelff 2000, p. 55.

[5] Ibid.

soldiers—and determined to take action.[6] From this grew the ICRC and the first Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, of 22 August 1864.[7] This strand, which became known as 'Geneva law', is the true 'international humanitarian law', concentrating as it does on the protection of victims of war. As it developed, its scope expanded to include not just the wounded on the battlefield on land, but the sick, wounded and shipwrecked at sea, prisoners of war and finally, in 1949, certain aspects of the civilian populations affected by war. This strand of law was, perhaps, the forerunner of human rights law and was different from 'Hague law' in that, whilst it was still states that drafted and ratified the treaties, the process was influenced heavily by the ICRC who presented drafts to the various conferences. Whilst the system thus remained state-centric in accordance with the basic tenets of the formulation of international law, 'Geneva law' concentrated on the principle of humanity. The victims had rights and these could only be overridden in very specific circumstances. The starting point therefore was those rights of the victim, whereas in 'Hague law' the concentration was much more on the right of the state to conduct war. Obviously, there was considerable correlation between the two strands and indeed transfer of subjects. The treatment of prisoners of war was originally dealt with under 'Hague law' but transferred to 'Geneva law' in 1929.[8]

10.3 War and Armed Conflict

The key to the applicability of this law was the definition of 'war'. This was a legal term involving conflict between states. There were legal provisions on how war should be initiated and how concluded. This clearly came under 'Hague law' as it was a matter covering the relationships between states. Internal conflicts were not recognised as regulated by international law at all. They were purely a matter for the state concerned and governed by the appropriate domestic law. The ICRC realised quite early on in the twentieth century that this led to a major gap in protection, exemplified by the Spanish civil war of 1936–1939.

The ICRC had had a role in international armed conflict since their formation in 1863. This role had been recognised by states in the various Geneva Conventions from 1864 onwards where the ICRC was granted rights of access to victims of war, particularly prisoners of war as well as certain other privileges. The first discussion of the role of the ICRC in non-international armed conflict had occurred at the

[6] Dunant 1986.

[7] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, Schindler and Toman 2004, p. 365.

[8] Convention Relative to the Treatment of Prisoners of War, Geneva, 27 July 1929, 118 L.N.T.S. 343.

Ninth International Conference of the Red Cross as far back as 1912.[9] However, it was fully recognized that there was no international legal framework governing such conflicts and thus the ICRC were compelled during a number of non-international armed conflicts early in the twentieth century, as well as in the Spanish Civil War itself, to fall back upon attempts to gain formal pledges by both sides that they would uphold the basic principles of the laws of war.[10] The Sixteenth International Conference of the Red Cross in London in 1938 saw a draft of a legal framework for non-international armed conflicts,[11] but the Conference merely asked the ICRC to "continue the general study of the problems raised by civil war as regards the Red Cross, and to submit the results of its study to the next International Red Cross Conference".[12] However, the war clouds were already gathering.

The Second World War was a catalyst for a number of events. First, the inadequacies of the existing legal framework were laid bare, even in international armed conflict. There were arguments over the applicability of treaties to particular circumstances based on narrow legal definitions and, whilst the Nuremberg Tribunal and its sister, the Tokyo Tribunal, took a broad brush approach to such issues, there was a clear need to get away from legal niceties as to what was a 'war' and what was not. Furthermore, the ICRC saw the opportunity given by the need to strengthen the 'Geneva law' strand and sought to extend the applicability of that law down into non-international armed conflict, as they had wanted to do in 1938. They failed in that, but did manage to have inserted into all four of the 1949 Geneva Conventions a single clause covering non-international armed conflict—the famous Common Article 3.[13] Common Article 3 outlined a number of basic foundational protections which should apply to all "persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention or any other cause". The ICRC was permitted to "offer its services to the Parties to the conflict", though they were not given a right of intervention as they had in international armed conflict.

A key issue was the level at which Common Article 3 was to come into force. What amounts to an 'armed conflict' for these purposes? No definition was included in the Geneva Conventions and indeed the ICRC Commentary explained that this was deliberate. It stated:

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[9] Bugnion 2003, p. 248.

[10] Ibid., p. 268.

[11] Ibid., p. 284.

[12] Resolution XIV, Sixteenth International Red Cross Conference, London, June 1938, Bugnion 2003, p. 285.

[13] Common Article 3 to the four Geneva Conventions of 12 August 1949, Roberts and Guelff 2000, pp. 198, 223, 245 and 302 respectively.

> That [the definition of armed conflict] was the burning question which arose again and again at the Diplomatic Conference. The expression was so general, so vague, that many of the delegations feared that it might be taken to cover any act committed by force of arms—any form of anarchy, rebellion or even plain banditry. For example, if a handful of individuals were to rise in rebellion against the State and attack a police station, would that suffice to bring into being an armed conflict within the meaning of the Article? In order to reply to questions of this sort, it was suggested that the term 'conflict' should be defined or, which would come to the same thing, that a certain number of conditions for the application of the Convention should be enumerated. The idea was finally abandoned—wisely, we think.[14]

Despite this, the Commentary itself went on to outline a number of conditions which might be thought to provide 'convenient criteria'.

Later, the Commentary states:

> We think … that the Article should be applied as widely as possible. There can be no reason against this. For, contrary to what may have been thought, the Article in its reduced form does not in any way limit the right of a State to put down rebellion. Nor does it increase in the slightest the authority of the rebel party. It merely demands respect for certain rules, which were already recognized as essential in all civilized countries, and enacted in the municipal law of the States in question, long before the Convention was signed.[15]

From the point of view of the ICRC, the extension of 'Geneva law' into non-international armed conflict was a necessary step. Furthermore, it was also necessary to lower the threshold as far down the spectrum of violence as possible to ensure that the protections of 'Geneva law' were applicable in as many circumstances as possible. Without Common Article 3, there was no international law that provided any protection to nationals of a state against their own government in situations of violence. The 'conditions', outlined in the Commentary, were derived from proposals put forward by states at the Diplomatic Conference, but the ICRC were concerned that even they might prove too restrictive. That is why the ICRC did not want too legalistic an approach to be taken, as had applied to the definition of 'war' in earlier times. The ICRC thus concluded that flexibility was important and that "the Article should be applied as widely as possible".

10.4 Human Rights Law

Common Article 3 has been described as a 'mini-human rights convention' and indeed there is much in it which is entirely consistent with this then nascent field of international law. At the same time as the ICRC were trying to extend 'Geneva law' into non-international armed conflict, the United Nations was also looking at

[14] Pictet 1952, p. 49.

[15] Ibid., p. 50.

the relationship between a state and its citizens and how that relationship should be governed. This was the birth of modern day human rights law.

The United Nations, in its early days, had an ambivalent attitude to the laws of war. How could an organisation, pledged "to save succeeding generations from the scourge of war, which twice in our lifetime has brought untold sorrow to mankind",[16] work on rules to regulate the very activity it was pledged to abolish? Furthermore, the advent of the Cold War meant that attempts to renegotiate the laws on the conduct of hostilities, 'Hague law', were probably doomed to failure. The United Nations therefore were content to leave it to the ICRC to lead on the development of 'Geneva law', outside the framework of the new UN system. Instead, they concentrated on the 'laws of peace' and particularly, the relationship of a state with its own citizens. The Universal Declaration of Human Rights, adopted by the General Assembly in 1948, sought to proclaim:

> [A] common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.[17]

The Declaration was not binding and it was not until 1966 that it was followed by the two great International Covenants, on Civil and Political Rights,[18] and on Economic, Social and Cultural Rights.[19] In the meantime, Europe, still seeking to protect itself from the ravages of the first half of the twentieth century, had already introduced the European Convention for the Protection of Human Rights.[20] In the Universal Declaration and the International Covenants, there is a noticeable absence of the word 'war', except in Article 20 of the Covenant on Civil and Political Rights which provides that "[a]ny propaganda for war shall be prohibited by law".[21] This reinforced the view that human rights formed part of the law of peace. However, the European Convention was different. Article 15, the derogation clause, specifically provided that "[i]n time of war or other public emergency threatening the life of the nation", certain derogations could be made.[22] The implication was that, without derogation, the Convention continued to operate, even in time of war. Of course, in 1950, when the Convention was adopted, 'war'

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[16] Preamble, Charter of the United Nations, San Francisco, 26 June 1945, Brownlie 2002, p. 2.

[17] Universal Declaration of Human Rights, Paris, 10 December 1948, Brownlie 2002, p. 193.

[18] International Covenant on Civil and Political Rights (hereinafter ICCPR), New York, 16 December 1966, Brownlie 2002, p. 205.

[19] International Covenant on Economic, Social and Cultural Rights, New York, 16 December 1966, Brownlie 2002, p. 197.

[20] European Convention for the Protection of Human Rights (hereinafter ECHR), Rome, 4 November 1950, Brownlie 2002, p. 245. The ECHR entered into force on 3 September 1953.

[21] ICCPR, *supra* note 18, Brownlie 2002, p. 212.

[22] ECHR, *supra* note 20, Brownlie 2002, p. 249, Article 15.

would still be looked upon as inter-state war, international armed conflict. Non-international conflict would be 'other public emergency'. However, it was clear for Europeans from an early stage that human rights law continued to have some applicability in times of armed conflict, both international and non-international.

It followed that by the time of the Diplomatic Conference that was convened between 1974 and 1977 and which lead to the adoption of the two Additional Protocols to the 1949 Geneva Conventions, the international legal framework in times of violence was already becoming fragmented. At the bottom end, human rights law was clearly applicable in time of 'peace'. But what was 'peace'? If contrasted with 'war' in its traditional meaning, international armed conflict, human rights law extended at least to the threshold of international armed conflict, thus including within its ambit, non-international armed conflict. However, for the Europeans, the wording of the European Convention made it plain that human rights law, even in derogable form, still had some applicability in times of international armed conflict. But what of the International Covenants? Were they limited to 'peacetime' or were they applicable in some form also during 'war', international armed conflict?

These questions were to come to the fore much later as the borderline between 'war' and 'peace' became blurred. The deliberate decision taken in 1949 not to have a lower threshold between 'armed conflict', to which international humanitarian law applied, and internal disturbances and tensions, to which it did not, meant that it was inevitable that there would be occasions when the applicability of the laws of armed conflict would be unclear. Human rights law, on the other hand, would be applicable in any event. The two legal systems, like two tectonic plates, were beginning to slide together. As they did so, it was inevitable that there would be areas of uncertainty and even overlap. At first, the problem was disguised, because 'Geneva law' and human rights law both had the same philosophy: the protection of victims. As such, whilst the two systems had developed independently and therefore there were differences in detail, the two were in essence compatible and could work together. The problems were essentially with 'Hague law' and they would not become apparent for some time.

10.5 The 1977 Additional Protocols

From the point of view of the laws of armed conflict, the 'Hague law' on the conduct of hostilities was still limited, certainly in treaty form, to international armed conflicts. 'Geneva law', in relation to non-international armed conflict, was limited only to Common Article 3, although, as we have seen, the ICRC had succeeded in persuading states not to set a threshold for its application so that "the scope of application of the article must be as wide as possible".[23] However, the

[23] Pictet 1952, p. 49.

ICRC was still not satisfied and the 1977 Additional Protocols moved the laws of armed conflict in two new directions. First, they sought to merge the two strands of 'Hague' and 'Geneva' law. Whereas the Conventions themselves had essentially been about the protection of victims of war, Additional Protocol I, dealing with international armed conflict, went much further.[24] It included much of what would traditionally be regarded as 'Hague law', with extensive provisions on the conduct of hostilities. The principle of proportionality was codified for the first time and detailed provisions covered precautions in attack.

Secondly, the ICRC again worked to bring together the differing legal regimes applicable in international and non-international armed conflict and tried hard to ensure that Additional Protocol II, covering non-international armed conflict, was as close as possible in content to its international brother.[25] Again they failed. At the last minute, Additional Protocol II was emasculated so that it was almost entirely limited to 'Geneva law' provisions and, even then, it was subject to a high threshold in that it only applied to conflicts:

> [W]hich take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[26]

A minimum threshold was also inserted ensuring that the "Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".[27]

Again the ICRC sought to explain this during the first session of the Conference of Government Experts in 1971 that preceded the adoption of the Additional Protocols:

> This [lower threshold] involves situations in which there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence. These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order. The high number of victims has made necessary the application of a minimum of humanitarian rules.[28]

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[24] Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (hereinafter AP I), Geneva, 8 June 1977, Roberts and Guelff 2000, p. 422.

[25] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter AP II), Geneva, 8 June 1977, Roberts and Guelff 2000, p. 483.

[26] AP II, Ibid., Roberts and Guelff 2000, p. 484, Article 1(1).

[27] AP II, Ibid., Article 1(2).

[28] Sandoz et al. 1987, p. 1354.

The ICRC Commentary to the Additional Protocols subsequently sought to provide some definition of the term 'internal tensions', but pointed out that this definition was not law but "part of ICRC doctrine".[29] It followed that it was still open to states to make their own interpretation as to when the threshold of 'armed conflict' had been reached.

Thus at the close of the negotiations, whilst there had been a bringing together of 'Hague law' and 'Geneva law' in international armed conflict, the position on the general applicability of the laws of armed conflict in non-international armed conflict remained much the same as before, with low intensity non-international armed conflicts governed by Common Article 3, and Additional Protocol II, even in its emasculated form, only applying to high intensity non-international armed conflicts. That was as far as states were prepared to go.

The bringing together of 'Hague' and 'Geneva' law in 1977 was the start of a major upheaval in the laws of armed conflict. The ICRC now saw themselves as the guardians not only of traditional 'Geneva law' but also of 'Hague law'. Both were now incorporated in the new terminology 'international humanitarian law' and this led to an increasing concentration on the humanity side of the balance. The United Nations, now perhaps somewhat more realistic than in the halcyon days immediately after the Second World War, moved into the 'Hague law' field with a concentration on weaponry. Whilst the initial United Nations focus was on weapons of mass destruction, it soon turned to conventional weapons, leading to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW),[30] with its original three Protocols on non-detectable fragments, mines and incendiary weapons.[31] Whilst the CCW process continues to the present day—and two further Protocols have been added on blinding laser weapons[32] and explosive remnants or war,[33] and one existing Protocol, mines, updated[34]—the process has been too slow for some (and too much subject to military requirements) so that a number of states, mostly those not directly involved in military operations, moved

[29] Ibid., p. 1355.

[30] Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (CCW), Geneva, 10 October 1980, Roberts and Guelff 2000, p. 520.

[31] Protocol on Non-Detectable Fragments (Protocol I), Geneva, 10 October 1980, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva, 10 October 1980 and Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), Geneva, 10 October 1980, Roberts and Guelff 2000, pp. 527, 528 and 533 respectively.

[32] Protocol on Blinding Laser Weapons (Protocol IV), 13 October 1995, Roberts and Guelff 2000, p. 535.

[33] Protocol on Explosive Remnants of War (Protocol V), 28 November 2003, www.icrc.org/ihl.nsf/FULL/610?OpenDocument. Accessed 23 December 2011.

[34] Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), 3 May 1996, Roberts and Guelff 2000, p. 536.

outside the process. The result was two further treaties, the Ottawa Convention on anti-personnel landmines[35] and the Oslo Convention on cluster munitions,[36] where whole weapons systems were banned completely rather than regulated. Even though it was argued that it was possible to use these weapons systems in accordance with the fundamental principles of international humanitarian law, the risk of misuse was so high that humanitarian considerations overrode any question of military necessity. Instead of conciliating "the necessities of war with the laws of humanity",[37] the concentration now was on fixing "the technical limits at which the necessities of war ought to yield to the requirements of humanity".[38] The principles that had always governed 'Geneva law' were now spilling over into 'Hague law', which had always been much more concerned with maintaining the balance.

10.6 The Growth of International Criminal Justice

The major shift in the role of international law in the governance of armed conflict was, however, the result of two other factors. The first was the resurrection of the concept of international criminal justice and the second was the effect of the attacks on New York and Washington on 11 September 2001 ('9/11').

International criminal justice had lain effectively dormant since Nuremburg. The horrors of the Balkan wars and the savagery of the genocide in Rwanda led the United Nations to establish the ad hoc Tribunals for the Former Yugoslavia (ICTY)[39] and for Rwanda (ICTR).[40] It also kick started the moribund process, established after Nuremburg, to create an International Criminal Court.

The ICTY soon found that one of its major problems was identifying the nature of the mosaic of conflicts that had broken out in the Balkans. Were they international or non-international, or even 'armed conflicts' at all? Had they mutated at various stages from one category to another? In the first case before the Tribunal it sought to develop a definition of 'armed conflict'. The Tribunal held:

> …an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the

[35] Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, Oslo, 18 September 1997, opened for signature on 3 December 1997, Roberts and Guelff 2000, p. 648.

[36] Convention on Cluster Munitions, Dublin, 30 May 2008, opened for signature on 3 December 2008. www.icrc.org/ihl.nsf/FULL/620?OpenDocument. Accessed 23 December 2011.

[37] St. Petersburg Declaration, *supra* note 3, Roberts and Guelff 2000, p. 55.

[38] Ibid., p. 54.

[39] See United Nations Security Council, Resolution 827, 25 May 1993, U.N. Doc. S/RES/827 (1993).

[40] See United Nations Security Council, Resolution 955, 8 November 1994, U.N. Doc. S/RES/955 (1994).

> initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[41]

However, there remained the issue of the division between international and non-international armed conflict.

Here, the Tribunal sought to tackle the matter head on. Accepting the view of the International Court of Justice that Common Article 3 constituted a "minimum yard stick"[42] applicable to all armed conflicts, the Tribunal began by applying Common Article 3 across the whole spectrum of conflict. But whilst that provided a foundation for a common application of 'Geneva law', it did not resolve the issue of the application of 'Hague law'. It was here that the Tribunal took a very progressive stance. The Appeals Chamber stated:

> Notwithstanding these limitations, it cannot be denied that customary rules have developed to govern internal strife. These rules… cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects, in particular cultural property, protection of all those who do not (or no longer) take active part in hostilities, as well as prohibition of means of warfare proscribed in international armed conflicts and ban of certain methods of conducting hostilities.[43]

The extension of the law on the conduct of hostilities, 'Hague law', to non-international armed conflict had begun.

This process was continued in jurisprudential terms with the Rome Statute of the International Criminal Court of 1998, where, although the crimes relating to non-international armed conflict were fewer in number than those applicable in international armed conflict, the list contained a number of Hague-type provisions.[44] However, the major impetus was probably the Study on Customary International Humanitarian Law published by the ICRC in 2005.[45] This study was established because of the view of the ICRC that treaty law, in itself, was increasingly inadequate to meet the requirements of modern day conflict for two reasons. First, apart from the 1949 Geneva Conventions, most treaties fell far short of universal acceptance. Thus there was a legal patchwork, with different states being bound by different treaty obligations. Secondly, in respect of non-

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[41] ICTY, *Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Appeals Chamber, Case No. IT-94-1, 2 October 1995, 105 International Law Reports, p. 488, para 70.

[42] ICJ, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), 27 June 1986, I.C.J. Reports 1986, p. 14, para 218.

[43] ICTY, *Prosecutor v. Tadic*, Decision on Jurisdiction, Appeals Chamber, Case No. T-94-1-A, 15 July 1999, 105 International Law Reports, p. 520, para 127.

[44] Rome Statute of the International Criminal Court, Rome, 17 July 1998, Roberts and Guelff 2000, p. 675, Article 8.

[45] Henckaerts and Doswald-Beck 2005.

international armed conflict in particular, the law fell "far short of meeting the protection needs arising from these conflicts".[46] The ICRC therefore looked at custom to see whether there had now emerged a series of rules which would supplement the various treaty regimes and provide a foundation for conduct in armed conflict. In the Study, the ICRC found 161 'rules' of customary international law relating to armed conflict, of which 159 applied to international armed conflict and 2 were only applicable to non-international armed conflict. However, of the 159, 147 of these rules were applicable across the board to international and non-international armed conflict alike.[47] Essentially, in so far as the conduct of hostilities was concerned, the rules were the same. A similar line was taken by the San Remo Manual on the Law of Non-International Armed Conflict.[48]

This consolidated the developments foreshadowed by the ICTY in the Tadic case and thus the unwillingness of states to accept such radical conclusions in 1949 or more recently in 1977 was overcome by a combination of judicial activism and interpretation of customary law.

10.7 The Clash of Philosophies

What appeared to have been overlooked in all these initiatives was the full effect of this increased merger of international and non-international rules. The underlying philosophy of 'Hague' and 'Geneva' law was different. Whilst 'Geneva law' approached matters from the point of view of the 'rights' of the victim, 'Hague law' was much more balanced. Under 'Hague law', it was accepted that in war, people—even innocent people—get killed and things get broken. 'Hague law' therefore accepted the principle of proportionality whereby civilians could be killed within the law provided that the expected "incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof" was not "excessive in relation to the concrete and direct military advantage anticipated".[49] Similarly, targeting was accepted as by status: combatants and those civilians who had lost their protection from attack by and whilst taking a direct part in hostilities. It mattered not what was the specific threat posed by the target at the time. Were these 'concessions' also to be transferred across into non-international armed conflict and, if so, how did they fit with the growing influence of human rights law?

As we have seen, there was never any doubt under the European Convention on Human Rights that the Convention applied, at least to some extent, in time of war. The position under the International Covenants was soon also clarified by the

[46] Ibid., foreword by Dr. Jacob Kellenberger, xvi.

[47] Henckaerts 2006.

[48] Dinstein et al. 2006.

[49] AP I, *supra* note 24, Roberts and Guelff 2000, p. 449, Article 51(5)(b).

International Court of Justice. In the Nuclear Weapons Advisory Opinion, the Court stated:

> The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in time of armed conflict. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life, contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[50]

In the Barrier Advisory Opinion, the Court went further and said:

> 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.[51]

It was now clear that the two legal frameworks, human rights and international humanitarian law, overlapped. However, what the Court did not say was where the dividing lines were. This would inevitably lead to disputes as to the applicability of each and legal conflict in areas where international humanitarian law and human rights law were in contradiction. The seeds of legal uncertainty were being sown.

By tradition, states were reluctant to admit that they were involved in a non-international armed conflict on their own territory. Thus through 30 years of 'The Troubles' in Northern Ireland, the United Kingdom consistently denied the application of Common Article 3, insisting that the matter was one of law enforcement. The deployment of thousands of military personnel was "military aid to the civil power"[52] and the paramilitary groups on all sides were criminals and dealt with as such.

This had a number of effects. The most important was that security forces were limited in their actions by law enforcement rules on the use of force and detention. There could be no 'shoot to kill' policy, targeting on the basis of status, and all uses of force by security forces had to be justified under domestic law, which in itself was subject to human rights law. Soldiers could be, and indeed were, charged with murder in cases where, had 'Hague law' been applicable, they might well

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[50] ICJ, *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, 8 July 1996, I.C.J. Reports 1996, p. 240.

[51] ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 9 July 2004, 43 ILM 1009, p. 1048.

[52] See for example, Statement on the Defence Estimates 1996 (HC 215), paras 205–213.

have been justified in their actions.[53] Similarly, detention had to be based on criminal standards, subject to any derogation from the European Convention of Human Rights. Even then, when a derogation was applicable, the measures adopted had to be "strictly required by the exigencies of the situation".[54]

When faced with this reluctance to accept the existence of armed conflict, courts were minded to bow to the views of governments. Thus the European Court of Human Rights pronounced that in relation to the situation in Chechnya:

> [N]o martial law and no state of emergency has been declared in Chechnya and no derogation has been made under Article 15 of the Convention … [t]he operation in question therefore has to be judged against a normal legal background…. The massive use of indiscriminate weapons … cannot be considered compatible with the standard of care prerequisite to an operation of this kind involving the use of force by State agents.[55]

This was despite what would appear, as a matter of fact, to be indisputably an armed conflict, even if one of a non-international character. However, '9/11' was to challenge even the accepted distinctions between armed conflict and law enforcement.

10.8 Terrorism

The attacks on the World Trade Centre and the Pentagon by Al Qaeda were terrorist attacks carried out by non-state agents. Yet the effect on the American psyche resembled that caused by the attack on Pearl Harbour some sixty years before. The country was 'at war'. But at war with what? The answer appeared to be 'a War on Terror', but so far as President Bush was concerned, this 'war' extended beyond Al Qaeda, beyond even Afghanistan. As the President said in an address to Congress on September 20, 2001, "Our war on terror begins with al-Qaida, but it does not end there. It will not end until every terrorist group of global reach has been found, stopped, and defeated".[56]

Terrorism has been with us since the dawn of civilisation. However, there is no firm definition and the phenomenon is often best described in the old adage "one man's terrorist is another man's freedom fighter". Easier to describe are acts of terrorism. Terrorism grew from the methods used by non-state actors to make their points against the all-powerful state, the epitome of asymmetry. As early as 1937,

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[53] See for example, House of Lords, *R. v. Clegg*, 1 (1995) All England Reports p. 334.

[54] ECHR, *supra* note 20, Brownlie 2002, p. 249, Article 15.

[55] European Court of Human Rights, *Isayeva v. Russia*, Application No. 57950/00, 24 February 2005, para 191, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-68381#{"itemid":["001-68381"]}.

[56] President's Address to Joint Session of Congress on the United States Response to the Terrorist attacks of September 11. http://georgewbush-whitehouse.archives.gov/news/releases/2001/09/20010920-8.html. Accessed 23 December 2011.

an attempt was made to define terrorism in the Convention for the Prevention and Punishment of Terrorism. This definition defined it as: "[a]ll criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons or a group of persons or the general public".[57] However, no consensus could be obtained on such a definition and attempts to agree on were then abandoned. As weaponry increased and the major military powers became more powerful, terrorism spread across into armed conflict. It was clear that acts of terror could be committed in both peace and armed conflict. However, when the United Nations returned to the fray and sought again to tackle the subject, the same problem over definition arose. Attempts to derive a generic definition failed and so a series of Conventions were adopted, each identifying specific acts of terrorism on which international consensus could be achieved.[58]

These Conventions have one thing in common with the 1937 draft Convention—acts of terrorism are treated as 'criminal acts'. They thus fall within the law enforcement paradigm, although it was accepted that acts of terrorism could be committed in time of armed conflict. "Measures of … terrorism" are prohibited by Article 33 of the Fourth Geneva Convention.[59] "Acts or threats of violence the primary purpose of which is to spread terror among the civilian population" are prohibited by Article 51(2) of Additional Protocol I[60] and "acts of terrorism" by Article 4(2)(d) of Additional Protocol II.[61] These references did not change the primary status of the acts themselves—criminal, not acts of war.

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[57] Convention for the Prevention and Punishment of Terrorism, 19 League of Nations O.J. 23 (1938) (never entered into force), Article 2(1).

[58] These include: 1963 Convention on Offences and Certain Other Acts Committed on Board Aircraft, 2 ILM 1042 (1963); 1970 Convention for the Suppression of Unlawful Seizure of Aircraft, 10 ILM 133 (1971); 1971 Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, 10 ILM 1151 (1971); 1973 Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 13 ILM 41 (1974); 1979 International Convention against the Taking of Hostages, 18 ILM 1456 (1979); The Convention on the Physical Protection of Nuclear Material, INFCIRC/274/Rev.1, May 1980. www.iaea.org/Publications/Documents/Infcircs/Others/inf274r1.shtml. Accessed 23 December 2011; 1988 Protocol for the Suppression of Unlawful Acts against the Safety of Fixed Platforms Located on the Continental Shelf, 27 ILM 685 (1988); 1988 Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation, 27 ILM 672 (1988); 1991 Convention on the Marking of Plastic Explosives for the Purpose of Detection, 30 ILM 721 (1991); 1997 International Convention for the Suppression of Terrorist Bombings, U.N. Doc. A/RES/52/164; 1999 International Convention for the Suppression of the Financing of Terrorism, 39 ILM 270 (2000); 2005 International Convention for the Suppression of Acts of Nuclear Terrorism, U.N. Doc A/RES/59/290 (2005); and 2010 Convention on the Suppression of Unlawful Acts Relating to International Civil Aviation, 10 September 2010. http://legacy.icao.int/DCAS2010/restr/docs/beijing_convention_multi.pdf. Accessed 23 December 2011.

[59] Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, Roberts and Guelff 2000, p. 312, Article 33.

[60] AP I, *supra* note 24, Roberts and Guelff 2000, p. 448, Article 51(2).

[61] AP II, *supra* note 25, Roberts and Guelff 2000, p. 485, Article 4(2)(d).

This point was made by Madelaine Albright, the United States Secretary of State, when, on 17 April 2000, she said in a speech to the University of World Economy and Diplomacy at Tashkent in Uzbekistan:

> Terrorism is a criminal act and should be treated accordingly – and that means applying the law fairly and consistently. We have found, through experience around the world, that the best way to defeat terrorist threats is to increase law enforcement capabilities while at the same time promoting democracy and human rights.[62]

The same point was made by the United Kingdom, who, when ratifying Additional Protocol I in 1998, had made a specific statement of understanding in the following terms:

> It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.[63]

Yet both these statements seem to run entirely counter to the position of the United States after '9/11' where acts of terrorism amounted to acts of war and a 'War on Terror' invoked the laws of war. Was terrorism a matter to be dealt with by law enforcement means or by the laws of war?

The problem lay perhaps in the indisputable fact that the United States was the only remaining superpower. How it reacted would inevitably colour the language of debate. This is what happened. Whilst much of the rest of the world continued to talk of terrorism as a law enforcement problem, their voices were drowned by the language of war emanating from the United States. Whilst the United Kingdom authorities, in the case of the London bombings on 9 July 2005, and the Spanish authorities, in relation to the Madrid bombings of 11 March 2004, responded with law enforcement mechanisms, this was negated by the warlike rhetoric coming from Washington. And yet, why was this? Why did the United States seek to invoke the laws of war rather than relying on a law enforcement paradigm?

It should be noted that the United States did not rely entirely on the war paradigm. A number of cases had been and continued to be dealt with by the ordinary courts under the criminal law.[64] However, the emphasis was now firmly on the war paradigm. The reasons for this are complex and to a large extent seem to be buried deep in United States constitutional law. The doctrine of separation of powers gives the President, as Commander-in-Chief, specific powers in time of war. Some members of the Bush Administration saw this as a way to free the President from the fetters of Congress and the Judiciary. The debate within the Administration itself was strong as is made clear by the leaked memoranda that have now reached the public domain.[65] State Department lawyers, taking a traditional line, argued that the conflict in Afghanistan was an international armed

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[62] Cited in Bingham 2010, p. 133.

[63] United Kingdom statement (d) on ratification of API, Roberts and Guelff 2000, p. 510.

[64] See for example, New York Times 2003.

[65] Greenberg and Dratel 2005.

conflict within the terms of the 1949 Geneva Conventions. They saw no need to go further and develop new forms of conflict. Others, particularly from the Justice Department and within the White House itself, saw this as a 'new paradigm' outwith the traditional 'Geneva law'. This led to the bifurcation of the conflict so that the President decided:

> 1. Our recent extensive discussions regarding the status of al Qaeda and Taliban detainees confirm that the application of Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949, (Geneva) to the conflict with al Qaeda and the Taliban involves complex legal questions. By its terms, Geneva applies to conflicts involving "High Contracting Parties," which can only be states. Moreover, it assumes the existence of "regular" armed forces fighting on behalf of states. However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.
>
> 2. …
>
> a. I accept the legal conclusion of the Department of Justice and determine that none of the provisions of Geneva apply to our conflict with al Qaeda in Afghanistan or elsewhere throughout the world because, among other reasons, al Qaeda is not a High Contracting Party to Geneva.
>
> b. … I determine that the provisions of Geneva will apply to our present conflict with the Taliban. …
>
> c. I also accept the legal conclusion of the Department of Justice and determine that common Article 3 of Geneva does not apply to either al Qaeda or Taliban detainees, because, among other reasons, the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character.[66]

The reference to 'Geneva' may be seen as misleading. The matter at issue was whether or not Taliban and Al Qaeda personnel came within the protections of the Third Geneva Convention on the Treatment of Prisoners of War—'Geneva law'. There is no mention of 'Hague law' because the position of the Administration was that, in so far as the Taliban were concerned, this was an international armed conflict and thus 'Hague law' applied in any event. In so far as Al Qaeda were concerned, the argument was that, as Al Qaeda were not a state, there was no treaty law that applied, either 'Hague' or 'Geneva'. The Administration did not accept at this stage that Common Article 3 was in any way relevant or applicable because "the relevant conflicts are international in scope and common Article 3 applies only to 'armed conflict not of an international character'".

This fateful decision was to govern the United States approach to terrorism for the next ten years and probably for some time into the future. Although the Obama Administration has pulled back to some extent from that position in that the 'War on Terror' is now replaced by "an armed conflict with al-Qaeda, the Taliban and associated forces",[67] we are still in the war paradigm.

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[66] Ibid., pp. 134, 135. This latter position was subsequently overruled by the Supreme Court in Hamdan v. Rumsfeld, (2006) 548 U.S. 557.

[67] Koh 2010.

10.9 The Effects of the 'War on Terror'

It is not my purpose here to go into the debate as to whether the war paradigm is justified or not. My concern is with the effect that this has had on the international law framework as a whole, and in particular on the relationship between human rights law and the laws of armed conflict, international humanitarian law. Whilst prior to '9/11', there was overlap, it was thought that the two legal systems could prove to be complementary. However, the United States have taken a different position in rejecting any overlap. The position of successive Administrations has been that human rights law does not apply in armed conflict as it is replaced by international humanitarian law. In addition, the United States has consistently argued that their human rights obligations do not apply outside their own territory. The attempt by the United States to move the definition of armed conflict so that it includes an area that was long regarded as within the realm of law enforcement, and thus human rights law, and the firm contention, based on the above arguments, that the actions of the United States in this field are thus excluded from the scrutiny of human rights bodies,[68] has put the two legal frameworks on a collision course which is to nobody's advantage.

The differences between the two legal systems are most apparent, as we have seen, in relation to the conduct of hostilities, and in particular, in relation to the use of force. The attempt to extend combat rules on the use of force into terrorism has already led to a substantial push back by those in the human rights community who see this as a diminution of the rights of those involved.

Even the ICRC found itself involved in dispute in relation to their recent report entitled "Interpretive Guidance on the Notion of Direct Participation in Hostilities".[69] The principle of distinction has long been at the heart of international humanitarian war. In international armed conflict, combatants must be distinguished from 'civilians'. Combatants, principally members of the armed forces, can be targeted at any time on the basis of their status. Civilians are protected and may not be targeted unless they take a direct part in hostilities.[70] A similar provision applies in non-international armed conflict.[71] However, there is no definition of 'civilian' in non-international armed conflict. The ICRC called a series of expert meetings in order to assist them in developing guidelines on the concept of direct participation, but soon found itself in a dilemma in relation to non-

[68] "The United States is engaged in an armed conflict with al Qaida, the Taliban, and their supporters. As part of this conflict, the United States captures and detains enemy combatants, and is entitled under the law of war to hold until the end of hostilities. The law of war, and not the Covenant, is the applicable legal framework governing these detentions.", Comments by the Government of the United States of America on the concluding observations of the Human Rights Committee, CCPR/C/USA/CO/3/Rev.1/Add.1 dated 12 February 2008, p. 3, accessed at http://www.unhcr.org/refworld/type,CONCOBSCOMMENTS,,USA,47bbf3662,0.html.

[69] ICRC 2008.

[70] AP I, *supra* note 24, Roberts and Guelff 2000, p. 448, Article 51(3).

[71] AP II, *supra* note 25, Roberts and Guelff 2000, p. 490, Article 13(3).

international armed conflict. If they were to accept that 'Hague law' now extended into non-international armed conflict, what were the rules on targeting in such conflicts? As it was generally agreed that 'combatant' status only applied in international armed conflict—was the effect of this to rule out status-based targeting so that all targeting in non-international armed conflict had to be conducted on a law enforcement threat-based assessment? On the other hand, if status-based targeting was to apply, what would be the criteria?

The solution put forward by the ICRC was novel and, as with all compromises, satisfied few. First, it was accepted that the definition of 'civilian' used in international armed conflict, effectively anybody who was not a combatant, could only apply by analogy in non-international armed conflict. As a result, members of regular armed forces were excluded from the definition, but so were members of armed groups, defined as those with a "continuous combat function".[72] Whilst there could of course still be disagreement on what amounted to 'continuous combat function', this recognised that it was impossible to conduct high intensity military operations, even in a non-international armed conflict, on the basis of law enforcement targeting rules. However, it made no attempt to distinguish between those high intensity armed conflicts and low intensity armed conflicts where it could be argued that the law enforcement paradigm on the use of force was more appropriate.

A possible solution would have been to examine the threshold brought in by Article 1(1) of Additional Protocol II[73] and to have examined whether that might have been of assistance in distinguishing between high intensity and low intensity armed conflicts. However, this would have gone against the long-established opposition of the ICRC to that threshold. The ICRC therefore adopted a different approach, resurrecting a concept first proposed by Jean Pictet in 1985. He argued that:

> If we can put a soldier out of action by capturing him, we should not wound him; if we can obtain the same result by wounding him, we must not kill him. If there are two means to achieve the same military advantage, we must choose the one which causes the lesser evil.[74]

However, at the expert meetings, "it was generally recognized that the approach proposed by Pictet is unlikely to be operable in classic battlefield situations involving large-scale confrontations".[75] For this reason, it was argued that this could not be a general rule of law. The ICRC, however incorporated it in the Interpretive Guidance as follows:

> In addition to the restraints imposed by international humanitarian law on specific means and methods of warfare, and without prejudice to further restrictions that may arise under

[72] ICRC 2008, p. 995.

[73] AP II, *supra* note 26, Article 1(1).

[74] Pictet 1985, p. 75.

[75] ICRC 2008, p. 1044.

> other applicable branches of international law, the kind and degree of force which is permissible against persons not entitled to protection against direct attack must not exceed what is actually necessary to accomplish a legitimate military purpose in the prevailing circumstances.[76]

This poses two difficulties. First, there is a linguistic problem in the use of the word 'actually'. If somebody approaches me with a gun raised, I may decide to shoot him before he shoots me. On the other hand, if it turns out that the gun had no ammunition, was it 'actually' necessary for me to shoot him? It may have been reasonable, but as an objective matter it would not appear to have been 'actually' necessary. As written, the text seems to go far beyond even the domestic rules on self-defence to be found in most countries.

However, more seriously, the wording goes far beyond the subject matter of the Interpretive Guidance extending to cover all 'persons not entitled to protection against direct attack'. This would include not only civilians taking a direct part in hostilities but also those excluded from the definition of 'civilians', including combatants in international armed conflict. Whilst the ICRC argues strongly that it does not introduce a responsibility to capture rather than kill,[77] it certainly seems to put the onus on the attacker to justify the level of force used, and is thus much more akin to the human rights law enforcement paradigm.

This Guidance has therefore unfortunately muddied the waters still more by introducing human rights standards into a critical area of international humanitarian law. It remains to be seen whether these standards are workable in all forms of armed conflict. The view taken by many military experts is that they are not.[78]

I have already outlined above how human rights bodies, particularly the European Court of Human Rights, tend to apply the law enforcement paradigm even in cases where it is indisputable that an armed conflict is occurring.[79] The ICRC position would seem to add credence to the argument that human rights provides the foundation for the law applicable in all situations and international humanitarian law is only applicable as the *lex specialis* where it adds to the protection provided by human rights law and is not incompatible with it. This subservience of international humanitarian law to human rights law could see the end of international humanitarian law as a separate body of law and its acceptance as a part of human rights law.

There is a further difficulty caused by the United States response to '9/11'. The merger of terrorism as both a crime and an 'act of war' has led to increased attempts to have 'terrorism' defined and declared an international crime. Whilst there is nothing new in this, and, as has already been noted, attempts have been

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[76] Ibid., p. 1040.

[77] Melzer 2010, pp. 899–890.

[78] See for example, Hays Parks, *Part IX of the ICRC "Direct Participation in Hostilities" Study: No Mandate. No Expertise, and Legally Incorrect*, 42 NYU J Int'l L & Pol 769, at p. 778.

[79] See *supra* note 55.

made to define terrorism since at least 1937,[80] the current confusion has led to a tendency to describe all non-state actors opposed to governments as 'terrorists', regardless of their modus operandi. Thus acts of terrorism may include not only attacks on civilians and civilian objects but also attacks on military personnel and military objectives, attacks which might be perfectly legitimate under the laws of armed conflict.

It is difficult enough to persuade non-state actors that it is in their interests to comply with international humanitarian law. Unlike regular armed forces who, in international armed conflict, have what is sometimes described as 'combatant immunity' for actions such as killing and destruction of property that would otherwise be illegal under criminal law, there is no such immunity offered to non-state actors under domestic law in non-international armed conflict. They remain rebels and liable to the full force of domestic law, including, where applicable the death penalty. However, provided that they comply with international humanitarian law, both 'Hague' and 'Geneva' law, they will not be committing international crimes. Thus they will be safe from international criminal justice. It is noteworthy that Article 6(5) of Additional Protocol II states:

> At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained.[81]

This has always been interpreted as not applying to those guilty of international crimes.

If the current trend is confirmed and 'terrorism' is defined to include acts which under international humanitarian law would be lawful, the relevance of international humanitarian law to non-state actors will be increasingly called into question. If, whatever they do, they remain criminals both on the national and international stage, what incentive is there for non-state actors to comply with laws that are increasingly seen as designed by states for the benefit of states?

10.10 Conclusion

The ancient Chinese curse was "May you live in interesting times!" We certainly do and perhaps we are approaching a critical point in the legal balance between war and peace. The advantage of the laws of armed conflict, 'Hague law' in particular, is that it accepts the reality of armed conflict and is designed to alleviate "as much as possible the calamities of war"[82] without making military operations impossible. Human rights law approaches armed conflict from a totally different

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[80] See *supra* note 57.

[81] AP II, *supra* note 25, Roberts and Guelff 2000, p. 488, Article 6(5).

[82] St. Petersburg Declaration, *supra* note 3.

angle. It is the exception, not the norm, and any deviation from the norm must be justified as absolutely necessary. The problem is that armed conflict is showing no signs of going away and unless human rights law is interpreted in a manner that recognises this, then the two legal systems will prove increasingly incompatible.

An example can be found in current operations in Afghanistan. There are understandable human rights concerns about the ability of the Afghan authorities to comply with European human rights standards in relation to detainees. As a result, a number of legal attempts have been made to prohibit ISAF forces from handing detainees over to the Afghan authorities.[83] Whilst this is laudable in itself, it does not resolve the issue of what should be done with detainees if they cannot be handed over to the Afghan authorities. ISAF is present in Afghanistan, with the consent of those authorities, to assist them in fighting a non-international armed conflict. It follows that it is the Afghan authorities who have the ultimate power to detain under national law. ISAF only has power to detain temporarily pending handover, unless specific authorisation for longer detention is given to them under a Security Council Resolution passed under Chapter VII of the United Nations Charter. There is no wish for such powers and, indeed, the granting of any such powers could be seen as imposing burdens on troop-contributing nations by requiring them to establish long-term detention policies, which are human rights compliant, in the territory of another state. Such burdens would act as a disincentive to states to contribute forces and indeed could be unacceptable to the Afghan authorities themselves. For example, what would be the position when a national contingent withdrew from Afghanistan?

But if ISAF forces cannot hand over detainees to the Afghan authorities, nor can they operate long term detention facilities of their own, what are the alternatives other than release? If a soldier sees one of his mates killed by a sniper, who is then apprehended but released, what will be his reaction? He will soon consider that apprehension is a waste of time and take the law into his own hands. Whilst this cannot be condoned, it is perhaps understandable, particularly bearing in mind that he may be the next victim of that sniper.

The great divide between war and peace which was recognised by Grotius, Oppenheim and others, has disintegrated to the extent that we operate increasingly in a twilight zone between war and peace. The lawyers have not helped, with both international humanitarian lawyers and human rights lawyers seeking to claim the ground for their own. This has thrown up the inconsistencies between the two branches of law. What seems clear, though it is not fully accepted by either side, is that to apply the laws of armed conflict alone, particularly 'Hague law' down to the lowest level of armed conflict, is to encourage states to escalate 'internal disturbances and tensions' so that they may take advantage of the looser controls on the use of force to be found in the laws of armed conflict. On the other hand to try to

[83] See *R. (on the application of Maya Evans) v. Secretary of State for Defence*, 25 June 2010, [2010] EWHC 1445 (Admin), http://www.judiciary.gov.uk/media/judgments/2010/r-maya-evans-sec-state-defence.

use human rights law alone to control high intensity armed conflict is unrealistic and will not be accepted by states on whom the burden will predominantly rest, particularly in non-international armed conflict. Threat-based targeting will be seen as a suicide pact by soldiers in the front line in such conflicts.

What is needed is concerted efforts from lawyers on both sides of the divide to seek out a *modus vivendi* where there is an agreed legal framework covering the whole spectrum of violence, recognising the interests of both existing frameworks. How this can be done is the challenge of the next ten years. A possibility might be to accept that the two systems overlap but that in high intensity conflicts, both international and non-international, the law of armed conflict takes precedence with human rights law applying where it is not incompatible. This would allow the use of status-based targeting in such situations. However, in low intensity conflicts—which would include some situations where the laws relating to international armed conflict would currently be considered applicable such as occupations with low resistance—human rights law, and thus threat-based targeting, should apply, with the law of armed conflict applicable where it in turn is not incompatible.

This is a very general approach and would require considerable finessing to make it workable. There would still be grey areas, but the principle would ensure that the highest practical standards of protection were applicable, whilst still enabling military operations to be carried out efficiently within a legal framework. This is the challenge that Avril Macdonald identified when she first aligned with the ICRC to look at the issue of direct participation in hostilities. It is still a challenge and one that she would relish the opportunity to tackle. However, it is now for those of us who cherish her memory to pick up the baton.

References

Documents

ICRC (2008) Interpretive guidance on the notion of direct participation in hostilities under International Humanitarian Law. Adopted by the Assembly of the International Committee of the Red Cross on 26 Feb 2009, 90 IRRC, No. 872 (Dec 2008), pp 991–1047

ICRC (2010) War and International Humanitarian Law, Overview, 29 Oct 2010. www.icrc.org/eng/war-and-law/overview-war-and-law.htm. Accessed 23 Dec 2011

Koh H (2010) The Obama administration and international law. Annual meeting of the American Society of International Law, Washington, DC, March 25, 2010. www.state.gov/s/l/releases/remarks/139119.htm. Accessed 23 Dec 2011

New York Times (2003) Threats and responses: the bomb plot: unrepentant shoe bomber is given a life sentence for trying to blow up jet. New York Times, 31 Jan 2003. www.nytimes.com/2003/01/31/us/threats-responses-bomb-plot-unrepentant-shoe-bomber-given-life-sentence-for.html?pagewanted=1. Accessed 23 Dec 2011

Literature

Bingham T (2010) The rule of law. Allen Lane, London
Brownlie I (2002) Basic documents in international law. Oxford University Press, Oxford
Bugnion F (2003) The International Committee of the Red Cross and the protection of war victims. ICRC, Geneva
Dinstein Y, Garraway C, Schmitt M et al (2006) Manual on the law of non-international armed conflict. IIHL, San Remo
Dunant H (1986) A memory of Solferino. ICRC, Geneva
Greenberg K, Dratel J (2005) The torture papers: the road to Abu Ghraib. Cambridge University Press, New York
Henckaerts J-M, Doswald-Beck L (2005) Customary international humanitarian law. Cambridge University Press, Cambridge
Henckaerts J-M (2006) The ICRC study on customary international humanitarian law: an assessment. In: Maybee L, Chakka B (eds) Custom as a source of international humanitarian law. ICRC, Geneva, pp 43–52
Melzer N (2010) Keeping the balance between military necessity and humanity: a response to four critiques of the ICRC's interpretive guidance on the notion of direct participation in hostilities. NYU J Int'l L & Pol 42:831
Pictet J (1952) Commentary to the first Geneva Convention for the amelioration of the condition of the wounded and sick in the armed forces in the field. ICRC, Geneva
Pictet J (1985) Development and principles of international humanitarian law. Martinus Nijhoff, Dordrecht
Roberts A, Guelff R (2000) Documents on the laws of war. Oxford University Press, Oxford
Sandoz Y et al (1987) Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Martinus Nijhoff, Geneva
Schindler D, Toman J (2004) The laws of armed conflicts. Brill, Leiden

Chapter 11
Friend or Foe? On the Protective Reach of the Law of Armed Conflict

A Note on the SCSL Trial Chamber's Judgment in the Case of *Prosecutor v. Sesay, Kallon and Gbao*

Jann K. Kleffner

Abstract In its 2009 judgment in the case of *Prosecutor v Sesay, Kallon and Gbao,* the Special Court for Sierra Leone asserted that "the killing of a member of an armed group by another member of the same group does not constitute a war crime". The current chapter subjects that categorical assertion to critical examination. It concludes that the reasoning of the Special Court for Sierra Leone is unconvincing and displays a misapprehension of the protective reach of the law of armed conflict.

Contents

J. Kleffner, Ph.D., LL.M., is Head of the International Law Centre, Associate Professor of International Law, Swedish National Defence College. He would like to thank Karl Jacobson for his assistance.

J. K. Kleffner (✉)
International Law Centre, Swedish National Defence College, Stockholm, Sweden
e-mail: jann.kleffner@fhs.se

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11.1 Prescript

To prelude this contribution with some personal words about Avril is challenging, because it would require quite a lengthy exposé if I wanted to do justice to what she meant to me professionally and personally. I met Avril for the first time in 1998 when I was a student interning at the TMC Asser Institute for a project that was, to put it mildly, a far cry from exciting. I bumped into her in the corridors of the Institute. A colleague introduced us. We started talking and, as was quite characteristic of conversations with Avril, it was not a 1-min chat. At the end of our talk, Avril offered me an internship to assist her in the work on the Yearbook of International Humanitarian Law. What started as a professional relationship soon grew into a lasting friendship.

In the following years, we co-operated on the production of the Yearbook of International Humanitarian Law and on a number of research and teaching projects. It was due to Avril that I could take the first steps in the area of international humanitarian law beyond studying it at university. I benefited immensely from Avril putting a great deal of trust in people, encouraging them to take the initiative, to develop their own projects and to take responsibility.

And as friends, we shared the experiences of quite a few great (jazz) concerts and festivals, dinners, parties, pub crawls, trips in the Netherlands and abroad and long conversations.

If one tried to capture all of these memories and experiences in one word, it would probably have to be 'extreme'. Avril was extremely committed to the subject she worked in, extremely open and interested, extremely supportive, helpful, modest and warm. She was extremely genuine. It was foreign to her to play games with people and impossible to hide her feelings and opinions. Avril could be extremely happy and joyful, and sometimes also extremely sad; extremely enthused and extremely bored; extremely funny; with an extreme wit. She was also an extremely rapid speaker and loved extreme shoes! Avril was never middle of the road. She stood out. One could not fail to notice her presence and be touched by her personality. Avril was bigger than life. I miss her … extremely!

11.2 Introduction

On 2 March 2009, Trial Chamber I of the Special Court for Sierra Leone ('SCSL'), composed of Judges Boutet, Mutanga Itoe and Thompson, rendered its long (awaited) judgment in *Prosecutor v. Sesay, Kallon and Gbao,* the so-called 'Revolutionary United Front ('RUF') case'.[1] In its more than 800 pages, the

[1] SCSL, *Prosecutor v. Sesay, Kallon and Gbao*, Case No. SCSL-04-15-T, Trial Chamber 1, Judgment, 2 March 2009, available at http://www.sc-sl.org/CASES/ProsecutorvsSesayKallonandGbaoRUFCase/TrialChamberJudgment/tabid/215/Default.aspx.

Judgment provides a detailed analysis of the charges laid against the three accused, which included a litany of crimes against humanity and war crimes under Articles 2–4 of the SCSL's Statute. Several findings of the Trial Chamber are worthy of analysis, not least those in relation to the crime of intentionally directing attacks against personnel involved in a humanitarian or a peacekeeping mission[2] on which the Judgment is the first that has ever been rendered. However, a comprehensive examination of all those aspects are beyond the purview of the present note. Rather, the focus here will be on the Trial Chamber's assertion that "the killing of a member of an armed group by another member of the same group does not constitute a war crime",[3] a finding that was not appealed and therefore continues to stand irrespective of the subsequent Appeals Chamber Judgment of 26 October 2009. The part of the judgment which led the Trial Chamber to that conclusion is relatively short and does not seem to have attracted much attention in comparison to other aspects. The Trial Chamber's finding is prone to be overlooked. Yet, it concerns an issue of fundamental importance: the protective reach of the law of armed conflict. As such, it touches upon a basic precept of the law of armed conflict and goes far beyond the specific case of convicting the RUF accused of yet another set of war crimes. An examination of the Trial Chamber's finding will help to elucidate one of the central questions of the law of armed conflict: who enjoys protection and who does not? In considering that question, I will first briefly recount the factual background to the Trial Chamber's findings (Sect. 11.3) and its legal findings (Sect. 11.4), before turning to a *critique* of its legal findings (Sect. 11.5).

11.3 The Factual Background to the Trial Chamber's Finding

Under count 5 of the Indictment the three Accused had been charged with violence to life, health and physical or mental well-being of persons, in particular murder, as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II. The charges included the unlawful killing of "an unknown number of civilians" in locations in Kailahun District, including Kailahun Town in the period between 14 February and 30 June 1998.[4] That period followed the intervention by forces of the Economic Community of West African States Monitoring Group ('ECOMOG').

The ECOMOG forces acted on behalf of President Ahmad Tejan Kabbah, whose government had been overthrown on 25 May 1997 by a military *coup d'état* led by a group of soldiers of the 1st Battalion of the Sierra Leone Army ('SLA'),

[2] Ibid., paras 213–235, 1749–1969.

[3] Ibid., para 1455, see also paras 1451, 1457.

[4] Ibid., Indictment at para 49.

who called themselves the Armed Forces Revolutionary Council ('AFRC'). Under the leadership of Major Johnny Paul Koroma, the AFRC formed an alliance with the RUF, an organised armed group led by Foday Sankoh that had been founded in the late 1980s and had fought against several Sierra-Leonean governments, including the one of President Ahmad Tejan Kabbah. The governing body of the Junta regime which was installed as a consequence of the 1997 *coup d'état*, the Supreme Council, possessed exclusive *de facto* executive and legislative powers in Sierra Leone and was composed of members of both the AFRC and the RUF.[5] While the relationship between the AFRC and the RUF was not free of mutual suspicions and rising tensions, the alliance between the two groups held, by and large, for the period between 14 February until 30 June 1998, which concerns us here.[6] During that post-intervention period, the armed conflict in Sierra Leone thus saw the AFRC/RUF alliance pitted against a coalition between ECOMOG forces and militias loyal to President Ahmad Tejan Kabbah, known as the Civil Defence Forces ('CDF'), the latter organised in regional groups (Kamajors in the East and the South, the Donsos in the remote East, the Gbettis or Kapras in the North and the Tamboros in the far North of the country).[7]

11.3.1 The Killing of Charles Kayioko

Following the ECOMOG Intervention, there was widespread anxiety within the RUF leadership about possible Kamajor infiltrators among the civilian population. Sam 'Mosquito' Bockarie, one of the most senior RUF leaders, ordered that suspected Kamajors were to be arrested for an investigation in Kailahun Town by Gbao, the RUF Overall Security Commander.[8]

As ordered by Bockarie, a group of Military Police ('MP')[9] led by Kailahun District MP Commander John Aruna Duawo arrested 110 individuals suspected of being Kamajors.[10] These suspected Kamajors were divided into two groups.[11] Amongst the second group was Charles Kayioko, an AFRC fighter who had come

[5] Ibid., paras 21–22, 747–754.

[6] For an overview of the developments during and subsequent to the ECOMOG intervention until the end of the armed conflict, see Ibid., paras 28–44.

[7] Ibid., paras 16, 28.

[8] Ibid., para 1387.

[9] The MP unit handled complaints from both fighters and civilians and was responsible for enforcing discipline within the RUF. The MP unit carried out arrests and detentions, assisted in investigations and punished individuals who had been found guilty of transgressions. In 1998, the MP were also responsible for issuing civilians with travel passes. Punishments administered by the MP included forced labour, flogging and detention. RUF members who committed serious crimes, such as rape, could be executed; Ibid., paras 690, 691.

[10] Ibid., para 1388.

[11] Ibid., para 1389.

from Daru and was arrested by MP officials for not carrying an RUF travel pass.[12] While the first group of men were released after having been investigated, members of the second group were released on parole so that they were allowed some freedom of movement around Kailahun Town under the supervision of the MPs during the day, while being required to report back to the MP office, where they were confined at night.[13]

On 19 February 1998, Bockarie came to Kailahun along with other senior officers. Irate upon discovering that the first group of prisoners had been released, he ordered the second group of prisoners who had been released on parole to be re-arrested and killed. That order was carried out and all detainees, including the AFRC fighter Charles Kaiyoko, were shot except one.[14]

11.3.2 The Killing of Fonti Kanu in Pendembu

Sometime in April 1998, Fonti Kanu, a senior AFRC fighter, was arrested by the RUF border security in Nyandehun Mambabu on allegations that he had been trying to escape to Liberia. He was taken to and detained in Kailahun upon the order of Bockarie. Fonti Kanu was subsequently released but ordered to remain in Kailahun Town. In June 1998, Fonti Kanu attempted to escape and was again caught by border guards, this time in Bomaru, and was subsequently taken to the MP Commander in Baiwala. The MP Commander reported the matter to Bockarie. Fonti Kanu was collected from the Liberian border and later killed in Pendembu upon the orders of Bockarie, because he was considered a security threat to the RUF. According to the Accused Sesay, execution was the standard punishment for those RUF who connived with the enemy.[15]

11.3.3 The Killing of Foday Kallon in Buedu

ECOMOG forces pushed out AFRC fighters based in the eastern town of Daru who subsequently fled to Monrovia, Liberia. Foday Kallon was the leader of these AFRC fighters and he was ordered by Sesay, Bockarie and Charles Taylor to mobilise the fighters and return with them to Sierra Leone. About 300 fighters returned to Sierra Leone and were deployed to various areas while Foday Kallon remained at the RUF Headquarters at Buedu. Under the orders of Bockarie and Sesay, Foday Kallon travelled on two other occasions to Liberia to assemble the

[12] Ibid.

[13] Ibid., para 1391.

[14] Ibid., paras 1392–1397.

[15] Ibid., paras 1398–1399.

remaining fighters. On the third trip, Foday Kallon delayed his return and a dispute arose over the money he had been provided and his sharing of RUF information in Liberia. Upon his return to RUF Headquarters in Buedu, Foday Kallon was summarily executed. Subsequently, a radio message was sent to the front lines informing them of Foday Kallon's death and warning fighters against committing acts of betrayal or sabotage.[16]

11.4 The Trial Chamber's Legal Findings

The Trial Chamber found none of the Accused guilty in relation to the three killings of Charles Kayioko, Fonti Kanu and Foday Kallon. In relation to Charles Kayioko, it found that he was *hors de combat* but no war crime had been committed because, in its view, "the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces".[17] In a noteworthy passage that deserves to be quoted in full, it then turned to the law of international armed conflict to substantiate its finding:

> The law of international armed conflict regulates the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities. In this respect, we recall that the field of application of the Third Geneva Convention is restricted to persons 'who have fallen into the power of the enemy'. It is trite law that an armed group cannot hold its own members as prisoners of war. The law of international armed conflict was never intended to criminalise acts of violence committed by one member of an armed group against another, such conduct remaining first and foremost the province of the criminal law of the State of the armed group concerned and human rights law. In our view, a different approach would constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law. We are not prepared to embark on such an exercise.[18]

The Trial Chamber referred to this finding when equally rejecting the war crime charge of violence to life, as charged in Count 5 of the Indictment, in relation to Fonti Kanu, whom it equally determined to be *hors de combat* at the time of the killing.[19] The Trial Chamber also repeated that Foday Kallon was not a member of the armed forces opposing the RUF, and hence, in its view, "his killing does not constitute a war crime".[20] In the following critique of these legal findings of the Trial Chamber, we presume the underlying facts as determined by the Trial Chamber.

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[16] Ibid., paras 1400–1402.

[17] Ibid., para 1451.

[18] Ibid., paras 1452–1453, footnotes omitted.

[19] Ibid., para 1455.

[20] Ibid., para 1457.

11.5 A Critique of the Trial Chamber's Legal Findings

The rather cursory reasoning of the Trial Chamber leaves one with some dissatisfaction. If one contrasts the explanation given for the conclusion that "the law of armed conflict does not protect members of armed groups from acts of violence directed against them by their own forces" does not amount to war crimes, on the one hand, with the Trial Chamber's analysis of the crime of intentionally directing attacks against personnel involved in a humanitarian or a peacekeeping mission,[21] for example, it seems fair to conclude that the former issue has been given only light treatment *en passant.* Admittedly, if matters were as clear as suggested, there would hardly be a need to enter into a meticulous analysis of the underlying issues. However, the reasoning of the Trial Chamber falls short of convincingly showing whether and how a different approach would indeed "constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law", as asserted by the Trial Chamber. In particular, its sweeping and unqualified assertion that the law of international armed conflict "regulates the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* who do not belong to any of the armed groups participating in the hostilities" is open to criticism (Sect. 11.5.1). Even more fundamentally, however, the Trial Chamber seems to conflate the law of international armed conflict and the law of non-international armed conflict to an extent that it disregards crucial differences between the protective reach of the two (Sect. 11.5.2).

11.5.1 The Protective Reach of the Law of International Armed Conflict

The underlying assumption that dominates much of the overall structure of the law of international armed conflict is that States as sovereign equals, with their territory, government and armed forces, and populations, have reciprocal interests in regulating situations in which they confront one another by means of armed force. Notwithstanding significant developments which have qualified it as a central structural feature of the law of armed conflict,[22] the paradigm of reciprocity remains pivotal in understanding that the main concern of the law of international armed conflict has been, and to a significant extent remains, to regulate the conduct of one State party to an armed conflict *vis-à-vis* its adversary and civilians. As such, the regulation of conduct of combatants *vis-à-vis* their adversaries is a central part of the law of international armed conflict. The treatment of prisoners of war, i.e. combatants who fall within the power of an *adverse* Party, falls squarely into

[21] Ibid., paras 213–235, 1749–1969.

[22] For an overview of these developments, see Meron 2000, pp. 247–251.

this paradigm. In that regard, it is indeed "trite law that an armed group cannot hold its own members as prisoners of war".[23] It is not difficult to add other areas of the law of international armed conflict which clearly epitomize that an important part of the law of international armed conflict aims at regulating the conduct of (members of) one party to an armed conflict *vis-à-vis* (members of) the adverse party. Thus, the generic principle prohibiting the employment of weapons, projectiles and Materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering[24] is clearly limited to the employment of such methods and means against an adversary. For, only members of the armed forces of that adversary (together with civilians directly participating in hostilities) are legitimate military targets as far as persons are concerned.

The same assumption that the prime concern of the law of international armed conflict is to regulate the conduct of one State party to an armed conflict vis-à-vis another underlies the protective regime for 'protected persons' as defined in Article 4 of the Fourth Geneva Convention, as it is also limited to the relationship between one party to an armed conflict, on the one hand, and nationals other than its own. The provision defines such persons as "those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a Party to the conflict or Occupying Power of which they are not nationals".[25] Although some developments suggest that this nationality requirement has been loosened so that the definition of 'protected persons' hinges on substantial relations more than on formal bonds,[26] it is the allegiance owed to the party other than the one in whose hands the person concerned finds him/herself which is determinative.[27]

It is also not suggested here that the Trial Chamber erred in its assertion that the protection of persons *hors de combat* is part and parcel of the law of international armed conflict. It is equally trite law that conventional and customary rules applicable in international armed conflicts do indeed protect persons *hors de combat.*[28] What is problematic, though, is that the Trial Chamber seems to suggest that this protection of persons *hors de combat* is limited to those "who do not

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[23] *Supra* note 18 and the accompanying text; See also Judicial Committee of the Privy Council (U.K.), *Public Prosecutor v. Oie Hee Koi* and the connected appeals, 4 December 1967, [1968] A.C. 829.

[24] Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (AP I), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 75, Article 35 (2); Henckaerts and Doswald-Beck 2005, Customary International Humanitarian Law (hereinafter CLS), Rule 70.

[25] Convention (IV) relative to the Protection of Civilian Persons in Time of War (GC IV), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 4.

[26] ICTY, *Prosecutor v. Tadić*, Case No. IT-94-1-A, Appeals Chamber, 15 July 1999, http://www.icty.org/x/cases/tadic/acjug/en/tad-aj990715e.pdf, paras 166–169.

[27] Ibid; See also ICTY, *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Appeals Chamber, 17 December 2004, http://www.icty.org/x/cases/kordic_cerkez/acjug/en/cer-aj041217e.pdf, paras 322–323, 328–330.

[28] Henckaerts and Doswald-Beck 2005, p. 306, Rule 87 CLS.

belong to any of the armed groups participating in the hostilities".[29] Yet, the protection provided by the law in fact extends to persons *hors de combat* who do belong to members of the armed forces of a party to an armed conflict. Indeed, the First Additional Protocol of 1977 makes it clear that being *hors de combat* encompasses members of the armed forces, namely those who are in the power of the adverse party, who clearly express an intention to surrender, and who are incapacitated by wounds or sickness.[30] As far as members of the armed forces in an *international* armed conflict are concerned who are wounded, sick, or shipwrecked or who have fallen into the power of the enemy, they are identified as persons protected in the First, Second and Third Geneva Conventions.[31] Furthermore, if Common Article 3 is anything to go by (although it is acknowledged that the explicit wording of that provision suggests that it is limited to armed

[29] *Supra* note 18.

[30] AP I, *supra* note 24, Article 41 (2).

[31] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter GC I), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 13; Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter GC II), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 13; Convention (III) relative to the Treatment of Prisoners of War (Hereinafter GC III), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, Article 4. See also, for instance, the ICTY Appeal Judgments in *Prosecutor v. Galić* and *Prosecutor v. Blaškić*, confirming that members of the armed forces do not gain the status of civilians by virtue of the fact that they are *hors de combat*. In other words, in an international armed conflict, they retain their status as combatants: ICTY, *Prosecutor v. Galić*, Case No. IT-98-29-A, Appeals Chamber, Judgment, 30 November 2006, http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf, footnote 437 and text, affirmatively citing para 114 and footnote 220 of the *Blaškić* Appeal Judgment of 29 July 2004, *Prosecutor v. Blaškić*, Case No. IT-95-14-A, Appeals Chamber, Judgment, 29 July 2004, http://www.icty.org/x/cases/blaskic/acjug/en/bla-aj040729e.pdf, in which the ICTY Appeals Chamber asserted: "Persons *hors de combat* are certainly protected in armed conflicts through Common Article 3 of the Geneva Conventions. This reflects a principle of customary international law. Even *hors de combat*, however, they would still be members of the armed forces of a party to the conflict and therefore fall under the category of persons referred to in Article 4(A)(1) of the Third Geneva Convention"; As such, they are not civilians in the context of Article 50, para 1, of AP I, *supra* note 24. Common Article 3 of the Geneva Conventions supports this conclusion in referring to "[p]ersons taking no active part in the hostilities, including *members of armed forces* who have laid down their arms *and those placed hors de combat* by sickness, wounds, detention, or any other cause"' [emphasis added]; It is also somewhat surprising that the Trial Chamber of the SCSL does not seem to have taken notice of the earlier decision in *Prosecutor against Alex Tamba Brima, Brima Bazzy Kamara, Santigie Borbor Kanu*, Case No. SCSL-04-16-T, Trial Chamber II, Judgment, 20 June 2007, http://www.sc-sl.org/CASES/ProsecutorvsBrimaKamaraandKanuAFRCCase/TrialChamberJudgment/tabid/173/Default.aspx, paras 218–219, where the aforementioned ICTY jurisprudence was invoked concurringly.

conflict 'not of an international character', to which we will turn in the subsequent section),[32] the provision makes it abundantly clear that the notion of being '*hors de combat*' also extends to 'members of armed forces' that are incapacitated from partaking in hostilities 'by sickness, wounds, detention or any other cause'.

More fundamentally, however, the wording chosen by the Trial Chamber suggests that it sees the law of international armed conflict to *exhaust itself* in regulating the conduct of combatants *vis-à-vis* their adversaries and persons *hors de combat* "who do not belong to any of the armed groups participating in the hostilities". It seems to elevate the aforementioned areas in which that holds true to an unqualified dogma that permeates the entire body of law, without being subject to any exceptions. This is apparent from the Trial Chamber's assertion that to do otherwise would "constitute an inappropriate re-conceptualisation of a fundamental principle of international humanitarian law".[33] In other words, according to the Trial Chamber, the law of international armed conflict falls short of granting *any* protection to members of the armed forces of a party to an armed conflict against acts committed by (other members of) that same party. That view needs to be qualified in a number of respects, including the following.

11.5.1.1 Protection of the Wounded, Sick and Shipwrecked

First, the contemporary law of armed conflict regulating the protection of the wounded, sick and shipwrecked extends to *all* those who are in need of medical assistance or care, or in peril at sea or in other waters as a result of misfortune, and who refrain from all acts of hostility.[34] Already the 1864 Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field clearly distinguished between 'wounded or sick combatants' in general and '*enemy* combatants wounded during an engagement'[35] and stipulated that the former "shall be collected and cared for"… "to whatever nation they may belong".[36] The 1906 and 1929 Geneva Conventions for the Amelioration of the Condition of the

[32] Note, however, that some have taken the position that Common Article 3, Ibid., "is not limited to the field dealt with in Article 3. Representing, as it does, the minimum, which must be applied in the least determinate of conflicts, its terms must a fortiori be respected in the case of international conflicts proper, when all the provisions of the Convention are applicable. For 'the greater obligation includes the lesser …'", Pictet 1960b, p. 38.

[33] *Supra* note 18.

[34] For these definitions, AP I, *supra* note 24, Article 8 (a) and (b).

[35] 1864 Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, Geneva, 22 August 1864, available at http://www.icrc.org/ihl.nsf/full/120?opendocument, Article 6 (emphasis added).

[36] Ibid; Considered in its historical context as a reaction to Henry Dunant's 'A Memory of Solferino' it is worthy of note that the Swiss businessman was not only struck and appalled by the treatment of the wounded and sick by enemy forces and looters, but his writing also displays a striking concern for the lack of care available to the wounded and sick from their own armed forces, Dunant 1986.

Wounded and Sick in Armies in the Field subsequently reaffirmed such an inclusive approach by expressly regulating certain aspects of the relationship between the wounded and sick and their own State[37] or imposing obligations on States Parties which were broad enough to extend to a belligerent's own armed forces.[38]

Furthermore, a comparison of the language chosen to circumscribe the personal scope of applicability of the 1949 First and Second Geneva Conventions, on the one hand, with that of the 1949 Third Convention, on the other, suggests that the wounded, sick and shipwrecked also enjoy protection against acts of (members of) their own party. For, while the Third Geneva Convention explicitly provides that the categories of persons mentioned in Article 4 only qualify as prisoners of war if and when they 'have fallen into the power of the enemy', no similar qualification is to be found in relation to the categories mentioned in Article 13 of both the First and the Second Convention. Indeed, underlying such a conception of who is entitled to protection as a wounded, sick, or shipwrecked person is, in the words of Jean Pictet, "the essential idea which was championed by the founders of the Red Cross and, since 1864, has been the focal point of the Geneva law—namely, that the person of a combatant who has been placed 'hors de combat' by wounds, sickness or any other cause, such as shipwreck, is from that moment sacred and inviolable. He must be tended with the same care *whether he be friend or foe*".[39] The prohibition of *any* adverse distinction between the wounded, sick and shipwrecked on grounds other than medical ones emphasises that they are entitled to the same protection, respect and care, if and to the extent that they are in the same need thereof.[40] The question whether they belong to the enemy armed forces or one's own is irrelevant as a matter of law. In comparison to other treaties, the First Additional Protocol of 1977 is perhaps the most clear in that regard when it

[37] See e.g. Article 1 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, 6 July 1906, Geneva, available at http://www.icrc.org/ihl.nsf/FULL/180?OpenDocument: "Officers, soldiers, and other persons officially attached to armies, who are sick or wounded, shall be respected and cared for, without distinction of nationality, by the belligerent in whose power they are. A belligerent, however, when compelled to leave his wounded in the hands of his adversary, shall leave with them, so far as military conditions permit, a portion of the personnel and 'matériel' of his sanitary service to assist in caring for them."; See also the almost identical provision in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Geneva, 27 July 1929, Article 1, available at http://www.icrc.org/ihl.nsf/FULL/300?OpenDocument.

[38] See e.g. Article 3 of the 1906 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Ibid: "After every engagement the belligerent who remains in possession of the field of battle shall take measures to search for the wounded and to protect the wounded and dead from robbery and ill treatment. He will see that a careful examination is made of the bodies of the dead prior to their interment or incineration." See also the almost identical provision in the 1929 Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, Ibid., Article 3.

[39] Pictet 1960a, p. 83 (emphasis added).

[40] Kleffner 2008, pp. 325–365, 331.

provides that "[a]ll the wounded, sick and shipwrecked, *to whichever Party they belong,* shall be respected and protected".[41]

11.5.1.2 Fundamental Guarantees

Secondly, the Trial Chamber does not give any consideration to the fundamental guarantees that are part of both conventional[42] and customary[43] international humanitarian law applicable in international armed conflict. Article 75 (1) of the First Additional Protocol provides that such guarantees grant protection to those affected by international armed conflicts who are "in the power of a Party to the conflict and who do not benefit from more favourable treatment under the Conventions or under [the First Additional Protocol] … without any adverse distinction …".[44] If the Trial Chamber had considered that provision and its drafting history, it would have found that precisely the point which lies at the heart of the current matter had given rise to controversy, with some States taking the position that Article 75 should apply to a State's own nationals, whereas others opposed that view. It was in fact that controversy which prevented the Diplomatic Conference from adopting more precise wording. As frequently happens in treaty negotiations, this point of contention was not settled in the Diplomatic Conference's quest to achieve consensus.[45] That controversy alone appears to be a good reason for the Trial Chamber to have delved into the matter somewhat more in depth. At the heart of such an analysis would have been the meaning of the non-discriminatory applicability of the fundamental guarantees. Article 75 (1) AP I prohibits *all* forms of adverse distinction, whether it is "based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status, *or on any other similar criteria*".[46] If the notion of 'national origin' does not already do so, such an open-ended list militates against an exclusion of persons from the protective reach of the provision on the ground that they are a Party's own nationals or are otherwise seen as 'belonging to' that Party. Indeed, one State Party to the First Additional Protocol, Finland, has

[41] AP I, *supra* note 24, Article 10 (1), (emphasis added); See in this vein also David 2002, p. 228, para 1.204.

[42] AP I, *supra* note 24, Article 75.

[43] Henckaerts and Doswald-Beck 2005, Rules 87-105 CLS.

[44] AP I, *supra* note 24, Article 75 (1).

[45] Pilloud et al. 1987, p. 868, paras 3017–3020.

[46] Emphasis added.

expressly declared that it understands Article 75 to apply also vis-à-vis a State Party's own nationals,[47] a view that is occasionally shared in the literature.[48]

The aforementioned areas of the protection of the wounded, sick and shipwrecked and of fundamental guarantees suggest that a correct analogous application of the law of international armed conflict would have led the Trial Chamber at least to a less sweeping statement as regards the limits of that law's protective reach and to a more in-depth consideration of the issue.

11.5.2 The Protective Reach of the Law of Non-International Armed Conflict

If the foregoing analysis suggests that a more nuanced stance by the Trial Chamber would have been justified as far as the protective reach of the law of international armed conflict is concerned, its reasoning becomes outright puzzling when considered against the backdrop of the nature of the conflict in Sierra Leone, as determined by the Trial Chamber itself. Earlier in the judgment, the Trial Chamber conducted an examination of the parties to the armed conflict and the involvement of ECOMOG and Liberia, which led it to conclude that "the armed conflict in Sierra Leone was of a non-international character",[49] meeting the threshold of Additional Protocol II.[50]

To then determine the question of the lawfulness or otherwise under the law of armed conflict of the killing of members of one's own armed forces by reference to the law of *international* armed conflict strikes one as being inconsistent. Admittedly, this inconsistency could be immaterial as far as the legal consequences are concerned, if there were no fundamental differences between the two bodies of law that apply in international and non-international armed conflicts, respectively. However, the pivotal point is that there are in fact such fundamental differences.

The difference that is most pertinent for our analysis is that the law of non-international armed conflict grants protection according to a person's actual

[47] See the Finnish Declaration at the time of ratifying the First Additional Protocol to the effect that "[w]ith reference to Articles 75 and 85 of the Protocol, the Finnish Government declare their understanding that, under Article 72, the field of application of Article 75 shall be interpreted to include also the nationals of the Contracting Party applying the provisions of that Article, as well as the nationals of neutral or other States not Parties to the conflict, and that the provisions of Article 85 shall be interpreted to apply to nationals of neutral or other States not Parties to the conflict as they apply to those mentioned in paragraph 2 of that Article", reproduced in Roberts and Guelff 2000, p. 504.

[48] See e.g. Aldrich 1996, pp. 851–858.

[49] *Supra* note 1, para 977.

[50] Ibid., para 981.

activities, whereas the law of international armed conflict does so, by and large,[51] according to the status of the person in question.[52] The latter status-based protection attaches to a person falling into one of the categories that the law of international armed conflict defines positively (chiefly the wounded, sick and shipwrecked, medical and religious personnel, prisoners of war, and 'protected persons' in the sense of GC IV). In contrast, the protection under the law of non-international armed conflict is granted to persons defined negatively as those who do not or no longer take a direct part in hostilities.[53] No other criterion restricts or extends the protection under the law of non-international armed conflict than the question whether or not someone does not participate or no longer directly participates in hostilities. Indeed, both Common Article 3 and Additional Protocol II affirm such an understanding, when they stipulate that humane treatment shall be granted without any adverse distinction.[54] As regards the non-discrimination clause in Common Article 3, Pictet recalls that States considered it desirable to draft the clause in such a way so as to ensure that there are no possible loopholes as far as specific criteria on the basis of which it is prohibited to make an adverse distinction in non-international armed conflicts are concerned.[55] Articles 2 and 4 of AP II make it equally clear that *everybody* who is not participating or no longer directly participates in hostilities is entitled to humane treatment.[56] Customary international humanitarian law confirms that this entitlement is not restricted to those who belong to an adverse party or to those who do not belong to any of the armed groups participating in the hostilities.[57]

Nor can such a restriction be deduced from the case law of international or domestic tribunals other than the Special Court for Sierra Leone. The two cases of

[51] An important exception in that respect are the fundamental guarantees referred to above, Sect. 11.5.1.2.

[52] Bouvier and Sassoli 2011, p. 328, with further references.

[53] See on the distinction between positive and negative definitions of who enjoys protection, ICTY *Prosecutor v. Tadić*, Case No. IT-94-1-Tbis-R117, Trial Chamber, Merits judgment, 11 November 1999, http://www.icty.org/x/cases/tadic/tjug/en/tad-tsj991111e.pdf, para 615; Notwithstanding this distinction, the law of non-international armed conflict includes notions that are reminiscent of positively defined status-based notions in international armed conflicts, such as 'wounded, sick and shipwrecked' and 'civilian', cf. e.g. Parts III and IV of Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter AP II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125. However, the law of non-international armed conflict fails to define them positively. On the arising conceptual consequences in the realm of the principle of distinction in non-international armed conflicts, see Kleffner 2007, pp. 315–336.

[54] *Supra* note 31, Common Article 3 (1); AP II, Ibid., Articles 2 and 4.

[55] Pictet 1952, pp. 55 et seq.

[56] Pilloud et al. 1987, p. 1369, para 4520, referring to the Commentary on Article 2 AP II, pp. 1358–1359, paras 4482–4489.

[57] Henckaerts and Doswald-Beck 2005, Rule 88 CLS.

Motosuke[58] and Pilz[59] that are at times referred to in support of such a restriction[60] both concern situations of international armed conflicts that predate the coming into force of the 1949 Geneva Conventions. The cases' significance for determining the protective reach of the law of *non-international* armed conflict as it stands today is therefore limited. In that respect, the fate of the argument in a case before the ICTY that these two cases support a restriction of the protective reach of Common Article 3 as suggested by the Trial Chamber of the SCSL is revealing. In *Kvocka,* the two cases were invoked to substantiate the Defence's appeal against the conviction for a violation of the laws and customs of war under Article 3 of the ICTY Statute of Zoran Žigić, a Serb guard at Keraterm camp where predominantly non-Serb detainees were held, abused and killed. The Trial Chamber had convicted Zoran Žigić of the murder as a violation of the laws and customs of war in the Keraterm camp of Drago Tokmadzic, a half-Serb police officer who had declared loyalty to the Serbian authorities. The Defence argued:

> [T]here is no evidence whatsoever that Drago Tokmadzic belonged to the opposite side in the conflict, and as a civilian at that, so that the provisions of the Statute of the Tribunal would be applicable. On the contrary. There was evidence that he was a policeman in the Serb police force and it was wearing that uniform that he was brought to Keraterm. There is also evidence that he had signed a declaration of loyalty to the Serb authorities and that he had previously himself been bringing prisoners to Keraterm, and that in terms of ethnicity he was half Serb, half Croat. The only evidence as to why he was killed is that he was a cruel policeman who beat up people in the street. Even if the Serb side had thought that he belonged to the other side, which is not the case, one could not speak of the crimes that fall within the competence of the Tribunal. Namely, there is no mens rea that can replace or fill the absence of an objective and vital element such as actus reus, that the crime committed against the opposite side in the conflict. Nor is it sufficient to suspect that a person belonged to the other side. What is necessary is certain and unequivocal proof of that, which in this case is missing. This opinion is elaborated and supported by Judge Cassese in his work published in 2003 titled 'International Criminal Law', Oxford University Press, page 48, and he illustrates this opinion using cases Piltz and Motosuke. […T]he Prosecution must prove that Tokmadzic belonged to the opposite side in the conflict beyond any reason doubt.[61]

The Appeals Chamber's findings in response to this argument of the Defence were as brief as they were clear: "The ethnic background of Drago Tokmadzic is in fact irrelevant to Žigić's conviction of murder as a violation of the laws or

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[58] Temporary Court-Martial at Amboina, In re *Motosuke*, Judgement of 28 January 1948, summarised in Annual Digest and Reports of Public International Law Cases, Vol. 15, 1948, p. 682.

[59] Dutch Special Court of Cassation, Judgment of 5 July 1950, summarised in International Law Reports, Vol. 17, p. 391.

[60] Cassese 2008, p. 82.

[61] ICTY, 24 March 2004, Appeals Proceedings Transcript, available at http://www.icty.org/x/cases/kvocka/trans/en/040324IT.htm, pp. 304–306; linguistic mistakes in original transcript.

customs of war. As he was detained in the camp, he belonged to the group of persons protected by the Common Article 3 of the Geneva Conventions".[62]

To sum up, the current state of the law of non-international armed conflict does not support an exclusion from the entitlement of humane treatment of a person who does not participate or no longer directly participates in hostilities on the sole ground that he or she does not belong to the *adverse* party or does not belong to *any* party. The law equally protects those *hors de combat* who are members of armed forces of a party to an armed conflict against mistreatment at the hands of (members of) that same party.

11.6 Concluding Remarks

The recognition that the law of armed conflict does not exhaust itself in the regulation of the conduct of adverse parties vis-à-vis one another and vis-à-vis civilians, but also includes within its protective realm persons *hors de combat* who are members of a party's own armed forces, may appear counter-intuitive to some extent. The counter-intuition confirms that our perception of the law of armed conflict continues to be dominated by the structural feature inherent in all armed conflicts: the existence of organised armed violence with the consequential risk of violations that one party to an armed conflict commits against captured adversaries and the civilian population. The treatment by a party to an armed conflict of members of its own armed forces are not at the forefront of our minds when we think about armed conflicts. There are good reasons for this, not the least the fact that captured adversaries and the civilian population do, of course, continue to be those who are most at risk of falling victims to violations of the law of armed conflict.

At the same time, there are other persons who may be affected by armed conflicts and who are in need of protection. The law of armed conflict would fail to realise its mission to strike a reasonable balance between military necessity and humanitarian considerations if it were to exclude altogether from its protection any of those persons on arbitrary grounds. The evolution of the law of armed conflict bears witness to the fact that States generally share that view, notwithstanding occasional attempts to exclude certain categories of persons from *any* form of protection. The fundamental guarantees structured around the quintessential centre piece of humane treatment without any adverse distinction confirm that the international community of States subscribe to a body of law without loopholes as far as the entitlement to humane treatment of those who do not or no longer take a direct part in hostilities is concerned. Contrary to what the Trial Chamber of the SCSL asserts, a potential loophole in respect of members of a party's own armed

[62] ICTY, *Prosecutor v. Kvocka et al.*, Case No. IT-98-30/1-A, Appeals Chamber, Judgment, 28 February 2005, http://www.icty.org/x/cases/kvocka/acjug/en/kvo-aj050228e.pdf, para 561.

forces cannot be filled satisfactorily by "the criminal law of the State of the armed group concerned and human rights law",[63] especially not in non-international armed conflicts. The criminal law of the State will, for all practical purposes, be of limited value. This is clearly epitomized by the very fact that a non-international armed conflict with at least one non-state organised armed group as a party thereto exists. And to fill the protective void that would result from the Trial Chamber's reasoning with human rights law is also far less easily achieved than suggested. The Trial Chamber seems to take the applicability of human rights law as a given, notwithstanding the continuous debate that surrounds that applicability to non-state organised armed groups.

All in all, the Trial Chamber's reasoning and findings on the question whether the killing of a member of one's own armed forces can amount to a war crime leaves one with a great deal of dissatisfaction. It is to be hoped that the findings will not constitute a precedent that contributes to a re-conceptualisation and reduction of the protective reach of the law of armed conflict which would entail that the law of armed conflict loses part of its human face.

References

Documents

Dunant H (1986) A memory of Solferino, English version. International Committee of the Red Cross, Geneva. http://www.icrc.org/eng/assets/files/publications/icrc-002-0361.pdf

Roberts A, Guelff R (2000) Documents on the laws of war, 3rd edn. Oxford University Press, Oxford

Literature

Aldrich G (1996) Individuals as subjects of international humanitarian law. In: Makarczyk J (ed) Theory of international law at the threshold of the 21st century: essays in honour of Krzystof Skubiszewski. Kluwer Law International, The Hague

Bouvier A, Sassoli M (2011) How does law protect in war? Cases, documents and teaching materials on contemporary practice in international humanitarian law, 3rd edn. International Committee of the Red Cross, Geneva

Cassese A (2008) International criminal law, 2nd edn. Oxford University Press, Oxford

David E (2002) Principes de droit des conflits armés, 3rd edn. Bruylant, Bruxelles

Henckaerts J-M, Doswald-Beck L (eds) (2005) Customary international humanitarian law. Cambridge University Press, Cambridge

Kleffner J (2007) From 'Belligerents' to 'Fighters' and civilians directly participating in hostilities—on the principle of distinction in non-international armed conflicts one hundred years after the second peace conference. Neth Int Law Rev 54:315–336

[63] *Supra* note 18 and the accompanying text.

Kleffner J (2008) Protection of the wounded, sick and shipwrecked. In: Fleck D (ed) The handbook of international humanitarian law, 2nd edn. Oxford University Press, Oxford

Meron T (2000) The humanization of humanitarian law. AJIL 94(239):247–251, 325–350, 353–365

Pictet J (1952) Commentary to the first Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field. International Committee of the Red Cross, Geneva

Pictet J (1960a) Commentary to the second Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea. International Committee of the Red Cross, Geneva

Pictet J (1960b) Commentary to the third Geneva Convention relative to the treatment of prisoners of war. International Committee of the Red Cross, Geneva

Pilloud C, Sandoz Y, Swinarski C, Zimmermann B (1987) Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva

Chapter 12
Seeking the Truth About Serious International Human Rights and Humanitarian Law Violations: The Various Facets of a Cardinal Notion of Transitional Justice

Théo Boutruche

Abstract The notion of truth and the search for it constitute central tenets of transitional justice processes and mechanisms in societies recovering from an armed conflict or from a period of large-scale human rights abuses. Truth lies at the heart of human nature, when victims of international human rights and humanitarian law violations want to know what happened. However, to date, the concept of truth seems to have suffered from the many assumptions that shape the emerging field of transitional justice. The most common of those is that truth should necessarily bring about reconciliation. Similarly the notion of truth would be a straightforward and simple concept. It is only recently that experts and scholars have begun to question such assumptions. Against this backdrop, this chapter therefore intends to go beyond the often oversimplified notion of truth in transitional justice. It seeks to explore some of the various and complex dimensions of the truth to better understand tensions that may exist when, for example, efforts favour the collective dimension of truth for a whole society over the needs of victims as individuals. This chapter then reviews to what extent some of the transitional justice mechanisms contribute to ascertaining the truth in its full complexity. Ultimately in as much as transitional justice requires a combination of mechanisms and processes to achieve its goals, this chapter will show that considering the many facets of the truth about past abuses is critical to ensure victims' rights are respected.

The author is the Post-Conflict Legal Adviser at REDRESS in London.The views expressed in this chapter are solely those of the author and do not necessarily reflect those of REDRESS.

T. Boutruche (✉)
REDRESS, London, UK
e-mail: theoboutruche@gmail.com

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12.1 Introduction

The brutal Khmer Rouge regime governed Cambodia from 1975 to 1979 and caused the deaths of approximately 1.7 million Cambodians by killings, starvation and forced labour. On 21 November 2011, Chum Noeu, a 62-year-old survivor who lost 13 relatives under the regime attended the opening day of the trial of three Khmer Rouge leaders before the Extraordinary Chambers in the Courts of Cambodia (ECCC), a Cambodian court consisting of Cambodian and international personnel and supported by the United Nations and international donors. He said: "We want justice so that the dead can finally close their eyes. What is the truth behind all of torture and killings? What happened?"[1]

There are thousands of testimonies from victims of atrocities and abuses around the world expressing this visceral human need for them to know the truth. The above statement, however, also illustrates in part the complex dimensions and expectations underlying the notion of truth, notably in the case of large-scale and serious human rights and international humanitarian law violations. Truth is firstly about knowing what happened, establishing the facts and the circumstances surrounding a certain abuse. While knowing the truth is an individual demand for a victim or his or her relatives, it also has a collective dimension, for the community of victims or the entire Cambodian people who suffered from the Khmer Rouge regime as expressed by this survivor. In this respect, truth is a prerequisite for any victim, as well as the dead depending on cultural beliefs, to find closure. Truth would also be closely related and associated with obtaining justice through the prosecution of the main leaders of the Khmer Rouge regime.

Those preliminary remarks only partially account for the role and facets of the notion of truth when considering it in the broader perspective of the emerging field

[1] Walker 2011.

of transitional justice. Transitional justice is commonly described as comprising the mechanisms and processes associated with societies recovering from armed conflicts or a period marked by large-scale abuses to address the legacy of crimes under international law in order to ensure accountability, to serve justice and to achieve reconciliation.[2] In that context, the role of truth about serious violations of international human rights and humanitarian law and the analysis of truth-seeking mechanisms have received extensive attention from scholars and practitioners. Due to the vastness of this topic, its interdisciplinary nature and the space constraints, this chapter intends only to address truth within the area of transitional justice through a particular angle based on the following premises.

Truth is a central tenet of transitional justice. It is commonly contemplated in two different ways. On the one hand, truth is considered as an overarching goal of what must be achieved in post-conflict societies.[3] On the other hand, it is also related to specific processes among the transitional justice mechanisms that aim at seeking the truth. For example, truth commissions are "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years".[4] As highlighted by one particular scholar, it is striking to note that truth is sometimes considered as a rather clear notion,[5] when in reality it is not. Furthermore, the field of transitional justice is based on numerous assumptions, such as the positive interaction between truth and reconciliation that has only recently been challenged by some experts.[6] Such assumptions also contribute to oversimplifying what truth really means. The understanding of the notion of truth about crimes under international law varies depending on the beneficiaries, be they the individuals, the community, or society as a whole. Beyond those individual and collective dimensions, the truth has also a legal dimension, with the emerging right to know the truth. Furthermore, the importance of truth can also be influenced by the gravity and type of violations considered. The truth and recognition that a crime against humanity was committed will have more significance than the mere acknowledgment that a series of killings took place.

Against this backdrop, this chapter seeks to examine some of the various facets of truth and how it relates to other transitional justice goals and mechanisms. It considers the intrinsic human dimension of the truth as a starting point to explore some of its complex dimensions. It will first look into the manifold notion of truth, including its individual and collective dimensions, as well as its legal and psychological elements. It will then elaborate on how truth relates to and to what extent it is served by the various transitional justice mechanisms. Truth being a complex notion, transitional justice processes would then only contribute in part to

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[2] United Nations Secretary-General 2004, para 8.

[3] Ibid., para 25; McAdams 2011, pp. 304–305.

[4] United Nations Secretary-General 2004, para 50.

[5] Clark 2011, p. 248

[6] Ibid., p. 241.

establishing it. This will help shed some light on some potential tensions that can exist between the meaning of truth for individuals and the role of truth for a society recovering from large-scale abuses. Disclosing the truth through the prosecution of the perpetrators bearing the greatest responsibility for some international crimes might not meet the needs of victims of acts committed by low-ranking perpetrators. Similarly the fact that some international crimes are dealt with through international judicial mechanisms while others are addressed through traditional justice mechanisms may not achieve the same result for the disclosure of the truth.

Ultimately truth is part of a process composed of various elements ranging from establishing the facts and their recognition and classification as certain crimes under international law to certain consequences such as the conviction of the perpetrators and the awarding of reparations. Truth remains the essence of any attempt by societies to come to terms with the past.

12.2 The Truth: A Manifold Notion in Transitional Justice

12.2.1 The Truth: A Question of Facts

The notion of truth is primarily about ascertaining the facts related to a given incident. Faced with situations of a denial or of a conflicting account of certain facts, the truth about human rights and international humanitarian law violations relates to establishing objectively a range of facts to determine what really happened. In the context of an armed conflict or a situation of violence, each side tends to claim that abuses were committed. This reinforces the need to establish the factual truth to distinguish between alleged abuses that turn out to be unfounded and proven acts.

Most importantly, seeking the truth about a given crime is not limited to the facts about the act itself. The truth must be about a series of aspects. As highlighted in the UN Office of the High Commissioner for Human Rights' (OHCHR) Study on the right to the truth it implies knowing "the full and complete truth as to the events that transpired, their specific circumstances, and who participated in them, including knowing the circumstances in which the violations took place, as well as the reasons for them".[7] Under this definition, the truth about certain events also encompasses the context in which those acts occurred, identifying the perpetrators and why such acts were committed. For example, the TRC in Liberia was tasked with "investigating the antecedents of the crises which gave rise to and impacted the violent conflict in Liberia".[8]

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[7] Office of the United Nations High Commissioner for Human Rights 2006, para 59.

[8] Truth and Reconciliation Commission of Liberia Mandate, enacted on May 12, 2005, by the National Transitional Legislative Assembly, Section 4 (c). http://trcofliberia.org/about/trc-mandate. Accessed 19 January 2012. The TRC Mandate is the Act That Established the Truth and Reconciliation Commission (TRC) of Liberia.

12.2.2 The Individual and Collective Dimensions of the Truth

At first establishing the truth about human rights violations seems to have the most importance for the victims and their relatives as individuals. Not knowing what happened would result in a second victimisation for persons already traumatised. In as much as the truth is a condition for the healing process of victims, the establishment of the facts participates in the process of recognising individuals as victims of abuses. The truth is intrinsically related to the trauma suffered by victims. There is a psychological element to knowing the truth that lies at the core of any attempts to grasp its nature and role. The most telling example is the case of enforced disappearances or missing persons, people whose fate or whereabouts is unknown.[9] In both situations, their relatives or the power on which they depend have no information on their fate as a result of armed conflict or internal violence. For the families affected, the uncertainty about the fate of a relative causes some of the worst suffering that is humanly difficult to comprehend for any observer. This is about finding out whether their loved one is alive or dead. This uncertainty also prevents relatives from engaging in the mourning process to achieve personal healing. Similarly withholding or denying the truth about the circumstances of unlawful killings in the wake of an armed conflict or repression bars the families of the victims from proper mourning as an individual process.

Knowing the truth for victims and hearing the truth from perpetrators are commonly recognised as having a therapeutic effect, although it cannot be a goal in itself. Firstly because the truth may only contribute in part to the healing process which also depends on other factors such as the reintegration of the victim in his or her family circle as well as within the community and the society as a whole. Secondly, the truth being a complex multi-fold notion, the form of truth delivered to a victim may not meet his or her expectations, in which case it could hamper its therapeutic effect. A victim of economic loss from Kitgum district in northern Uganda insisted that "Truth telling leads to emotional healing which can be followed by reconciliation and compensation".[10] Ultimately this therapeutic effect very much depends in which context the truth telling process takes place. There may be a risk of the re-traumatisation of victims if guarantees are not met.[11]

However, mass human rights abuses, by their scale and nature, surely also have a collective dimension. Such violations or certain patterns of abuses create a collective trauma and affect entire communities and the society as a whole. There are countless examples in the Democratic Republic of Congo (DRC) of local communities in villages being identified by reference to a massacre that took place

[9] The scope of the issue of missing persons appears to be broader than that of disappearances, which are strictly speaking a human rights law matter. The latter term commonly refers to persons being abducted or killed by State agents of dictatorship regimes.

[10] Office of the United Nations High Commissioner for Human Rights 2007, p. 32.

[11] Brounéus 2010, p. 408.

during the war. Atrocities committed by the Lord Resistance Army (LRA) in the DRC, Uganda, South Sudan or the Central African Republic lead international actors to talk of "LRA-affected communities". The truth about those abuses becomes a condition for the affected communities and for the society to recover. The very purpose of transitional justice processes and mechanisms is to consider this collective dimension to address how a post-conflict society as a whole can recover. There is therefore an intrinsic dual dimension of the truth in cases of mass human rights violations. According to a psychiatrist, "remembering and telling the truth about terrible events are prerequisites both for the restoration of the social order and for the healing of individual victims".[12] Furthermore, addressing the truth about such atrocities is a condition for any other processes to take place such as reconciliation. As outlined in the objectives of South Africa's Truth and Reconciliation Commission, ''establishing and making known the fate and whereabouts of victims'' is one of the means of achieving national unity and reconciliation.[13]

An interesting parallel can be drawn with the current debate on the forms of reparation for former child soldiers in the context of the legal proceedings before the International Criminal Court (ICC) in the Lubanga case. There seems to be tension between reconciling the individual and collective forms of reparation. A Congolese lawyer representing 19 victims before the ICC expressed doubts that collective reparations would work for former child soldiers and their families: "Child soldiers are not a community". "It is not like a village that has been victimized. They are very often in conflict with their own families. I cannot see my clients as a group. They are really individuals".[14] On the other hand, when so many human rights abuses took place, one may wonder how practically it is possible to address all victims' need individually, the collective reparations being a tool to recognise the atrocities committed while overcoming the challenge of the scale of abuses. As for reparations, the disclosure of the truth must respond to both the collective and individual dimensions of the victims. While a specific act turned an individual into a victim, who has a right to be recognised as such, this act also took place in the context of mass atrocities that affected hundreds or thousands of persons. Failing to consider the individual perspective of the truth risks impacting on the collective assertion of the truth as each victim may not recognise himself or herself in this general approach, creating a somehow fake result. On the other hand, an aggregation of individual victims may not reflect what the truth is about for a community or the society as a whole, thereby limiting the overall transition of a country.

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[12] Herman 2001, p. 1, quoted by Henri 2009, p. 122.

[13] South African Promotion of National Unity and Reconciliation Act, 26 July 1995, Act No. 34 (1995) - G16579, Section 3(1)(c). http://www.saflii.org/za/legis/num_act/ponuara1995477/. Accessed 19 January 2012.

[14] IRIN 2012.

These individual and collective dimensions may also account for the complex nature of the truth in post-conflict societies. First, the expectations, imperatives and solutions when addressing the legacy of large-scale abuses will vary depending on whether one considers the viewpoint of victims as individuals or the society as a whole. The need to uncover the comprehensive truth will not be dealt with according to the same criteria and motives when addressing it as a collective matter. Second, this collective dimension sheds some light on another element of the truth. One thing is to establish the facts, another thing is for an entire community to accept and acknowledge them. The relationship is no longer between a victim and a perpetrator but it is about a collective recognition. The work carried out by a researcher in the case of post-conflict societies in the former Yugoslavia and the efforts to establish the truth illustrates this complexity and the role of denial by a local community. Janine Clark insists that in Bosnia-Herzegovina, "there are essentially three ethnic versions of truth—the Bosnian Serb, the Bosnian Muslim and the Bosnian Croat—that quintessentially disagree on what happened during the country's three year war, on who were the aggressors and who were the principal victims". And this is so despite the International Criminal Tribunal for the former Yugoslavia's (ICTY) numerous trials.[15] She points out that due in part to the importance of denial, "truth in post conflict societies is a far more ambiguous and problematic concept than supporters of criminal trials and truth and reconciliation commissions sometimes appear to assume".[16]

12.2.3 Legal Dimensions of the Truth

The legal dimensions of the notion of truth relate to the emergence of a right to know the truth about gross human rights violations and serious violations of human rights law. The truth is no longer a mere need of victims that must be taken into account, but it is enshrined in a right with legal implications and cannot be denied. The truth must also be considered within the broader legal framework of victims' rights. In addition, there is a close link between establishing the facts about certain abuses and determining their legal classification under human rights and international humanitarian law.

12.2.3.1 The Development of a Right to the Truth

The development of a right to know the truth lies in the individual dimension of the truth for victims and the growing recognition of their rights under human rights and

[15] Clark 2011, pp. 247–249.

[16] Ibid., p. 242.

international humanitarian law. In that respect, it is worth noting that the right to know the truth illustrates the interplay between human rights and humanitarian law.

This right, as an individual right under human rights law, finds its origins in the provision of international humanitarian law (IHL) related to missing persons. Article 32 of the 1977 Additional Protocol I lays down the "right of families to know the fate of their relatives". It is critical to note that originally the specific norms of IHL on missing persons were not primarily designed for the protection of those persons *per se*. Rather, as highlighted during the 1974–1977 Geneva Diplomatic Conference that led to the adoption of the two Additional Protocols to the 1949 Geneva Convention, they aimed at mitigating the suffering of the families of those who have disappeared in war.[17] Article 26 of the Geneva Convention IV already implicitly referred to this principle. Article 32 of the 1977 Additional Protocol I spells out the motive behind the obligations the protocol sets out regarding missing persons. For example, Article 33 (1) of the same treaty introduces the general obligation for each party to the conflict, as soon as circumstances permit and at the latest after active hostilities have ended, to search for the persons who have been reported missing by an adverse party. Although the 1977 Additional Protocol II does not contain any provision regarding missing persons in times of non-international armed conflict, the general obligation to account for them and to transmit information was recognised as applying in both international and non-international armed conflict. In this regard, the International Committee of the Red Cross (ICRC) Study on customary international humanitarian law refers to a norm of customary international law which is applicable in both international and non-international armed conflict, according to which "each party to the conflict must take all feasible measures to account for persons reported missing as a result of armed conflict and must provide their family members with any information it has on their fate".[18]

As stated in the UN Office of the High Commissioner for Human Rights Study on the right to the truth for victims and their relatives, this right finds its roots in IHL.[19] With the abundance of enforced disappearances in the 1970s,[20] the concept of the right to the truth attracted more attention from international and regional human rights bodies and special procedures. While this right was mainly related to the context of enforced disappearances, its scope extended to other serious human rights violations such as torture.[21] One of the most recent treaties to recognise the right to the truth is the International Convention for the Protection of All Persons

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[17] Boutruche 2010, para 6.

[18] Henckaerts et al. 2005, p. 421.

[19] Office of the United Nations High Commissioner for Human Rights 2006, para 5.

[20] As noted in United Nations High Commissioner for Human Rights, *supra* note 19, para 8: "the ad hoc working group on human rights in Chile, the Working Group on Enforced or Involuntary Disappearances and the Inter-American Commission on Human Rights developed an important doctrine on this right with regard to the crime of enforced disappearances".

[21] For an overview of the legal instruments, practice and jurisprudence recognising the right to the truth: United Nations High Commissioner for Human Rights 2006, *supra* note 19, paras 8–24.

from Enforced Disappearance of 20 December 2006, which affirmed in its preamble "the right of any victim to know the truth about the circumstances of an enforced disappearance and the fate of the disappeared person". Article 24 (2) of this convention states that: "Each victim has the right to know the truth regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. Each State Party shall take appropriate measures in this regard." The establishment by the Human Rights Council of a Special Rapporteur on the promotion of truth, justice, reparation and the guarantee of non-recurrence in 2011 whose mandate includes "to identify, exchange and promote good practices and lessons learned, as well as to identify potential additional elements with a view to recommend ways and means to improve and strengthen the promotion of truth" reinforces the institutional framework pertaining to the development of the right to the truth.[22]

12.2.3.2 Reconciling the Right to the Truth with Victims' Perceptions and Expectations

Considering the truth as a right with legal implications surely constitutes progress, not least as it provides a normative framework as well as protection for victims of human rights and IHL violations. However, it also raises some issues when considering the complexity of the truth at the individual and collective levels and in relation to the perceptions of what truth means for victims and what they expect.

The first legal implication that may act as a limitation is to determine who is legally entitled to claim this right to the truth. As stressed earlier, the truth about large-scale abuses comprises a collective dimension for communities and for the whole society. Recognising the collective trauma experienced by communities or by the society begs the question as to whether communities or the society in a post-conflict period can claim a collective right to the truth. There was already considerable discussion over the use of the term "right" during the Geneva Diplomatic Conference. By referring to this expression, delegates clearly and carefully went beyond the mere recognition of the "basic need" to know the fate of one's relatives. Rather, it was much more controversial whether such a provision granted an individual right to the representatives of a family to call for specific action from a government. This debate arises once again in the context of the development of the right to the truth under human rights law.

As highlighted in the OHCHR Study on the right to the truth, all the human rights instruments confer this right on victims and their relatives.[23] This is in line with the traditional understanding of an individual entitlement to human rights.

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[22] United Nations Human Rights Council, Resolution 18/7 of 29 September 2011, A/HRC/18/L.22. http://www2.ohchr.org/english/bodies/hrcouncil/18session/resolutions.htm. Accessed 19 January 2012.

[23] Office of the United Nations High Commissioner for Human Rights 2006, para 35.

However, the concept of a "victim" may also have a collective dimension. Principle 8 of the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law adopted by UN General Assembly resolution 60/147 of 16 December 2005 envisages this collective element when defining "victims":

> For purposes of the present document, victims are persons who individually or collectively suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that constitute gross violations of international human rights law, or serious violations of international humanitarian law. Where appropriate, and in accordance with domestic law, the term "victim" also includes the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization.

While this definition of victims would entail a collective right to the truth, this remains within the framework of the notion of a victim. Considering that the communities or the society as such require a broader approach, that may not be endorsed by State practice at this stage of the development of international law. International law would still be in a phase of development regarding a concept of a society's right to the truth. State practice exists, however. Some Latin American countries, which are strong supporters of the right to the truth in international fora, have expressed the view that society is entitled to the truth about serious human rights violations.[24]

The second issue of recognising a right to the truth relates to its content. The OHCHR Study on the right to the truth spells out the following elements of this right: "These may be summarized as the entitlement to seek and obtain information on: the causes leading to the person's victimization; the causes and conditions pertaining to the gross violations of international human rights law and serious violations of international humanitarian law; the progress and results of the investigation; the circumstances and reasons for the perpetration of crimes under international law and gross human rights violations; the circumstances in which violations took place; in the event of death, missing or enforced disappearance, the fate and whereabouts of the victims; and the identity of perpetrators".[25] For victims of human rights violations, it seems obvious that knowing the truth entails knowing the identity of the persons who committed those abuses. While this may not be in conflict with the international criminal law principle of the presumption of innocence when the right to the truth is addressed in the framework of criminal judicial procedures, this might be more problematic when perpetrators are named pursuant to an extrajudicial mechanism.[26] This is in particular the case when such processes do not apply due process guarantees. Provided that such guarantees are met,

[24] Ibid., para 37.

[25] Ibid., para 38.

[26] Ibid., para 39.

knowing the identity of the perpetrators is, however, part of the general process of establishing the truth about particular abuses. The Human Rights Committee has urged a State party to the International Covenant on Civil and Political Rights to guarantee that the victims of human rights violations know the truth with respect to the acts committed and know who the perpetrators of such acts were.[27]

The right to the truth is also linked to other principles with regard to the fight against impunity and other victims' rights such as the right to an effective remedy, the right to legal and judicial protection, the right to family life, the right to an effective investigation, the right to a hearing by a competent, independent, and impartial tribunal and the right to obtain reparation.[28] This is so in particular because certain processes, such as an investigation or a trial, contribute to the full exercise of this right. However, one may ask to what extent, for some victims, the truth as a concept should not also include bringing the perpetrators to justice or receiving reparation as a recognition of the truth. While these processes could be seen as some of the mere consequences of the establishment of the truth, if they fail to happen, victims could see this as an incomplete manifestation of the truth, beyond a legal restricted definition of what the right to the truth entails. Furthermore, under the victims' rights framework, there is a close link between the truth and the right to obtain reparation. The Basic Principles and Guidelines on the Right to a Remedy and Reparation state that full and effective reparation includes the following forms: restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition. Principle 22 defines satisfaction as including the verification of the facts and a full and public disclosure of the truth to the extent that such disclosure does not cause further harm or threaten the safety and interests of the victim, the victim's relatives, witnesses or persons who have intervened to assist the victim or prevent the occurrence of further violations.[29]

12.2.3.3 The Truth, Patterns of Violations and the Legal Qualification of Facts

The truth about gross human rights violations or serious IHL violations is primarily about establishing the facts, the circumstances and the reasons for such violations. In the context of post-conflict and post-dictatorial societies addressing the scores of violations committed, this relates to individual victims and their families. However, patterns of violations also contribute to accurately representing the truth. Certain types of violations are characterised by different patterns of

[27] United Nations Human Rights Committee 1996, para 25.

[28] Orentlicher 2005; Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted and proclaimed by the United Nations General Assembly Resolution 60/147 of 16 December 2005, A/RES/60/147. http://www2.ohchr.org/english/law/remedy.htm. Accessed 19 January 2012.

[29] Orentlicher 2005, Principles 18 and 22 (b).

violence that need to be identified to correctly reflect the reality. For instance, the OHCHR fact-finding mission in Kenya identified "three patterns of violence—spontaneous, organised and retaliatory" following the elections.[30] Similarly, in the context of the violence, which included torching and looting houses, during and after the conflict in Georgia in 2008, the Independent International Fact-Finding Mission on the Conflict in Georgia noted that "patterns of violence differed depending on the area concerned" and that "[t]he most extensive destruction and brutal violence seem to have taken place in South Ossetia, with certain characteristics that appear to be different from what happened in the buffer zone".[31] Due to the nature of certain violations it is fundamental that the scale of facts should be identified and qualified. In the case of sexual violence committed during the September 2009 massacre in Guinea, Human Rights Watch underlined that: "[th]e almost simultaneous occurrence of attacks by multiple perpetrators in several different areas of the field, and, later, in different areas of the sports complex, strongly suggests that the sexual violence was organised and part of a widespread pattern, not random acts by rogue soldiers".[32] Denying those specific patterns or their large scale would mean denying a part of the truth. It is therefore essential to consider both the individual case of a violation and the possible pattern it may be related to. Discussing the work and selection carried out by the UN Truth Commission for El Salvador, Thomas Buergenthal underlined that "[t]he more we learned about El Salvador's civil war (…) the clearer it became that some cases were paradigmatic of a practice of violence that terrorized the country".[33] Under the mandate of the Truth and Reconciliation Commission of Liberia, this commission had to determine "whether these were isolated incidents or part of a systematic pattern; establishing the antecedents, circumstances, factors and context of such violations and abuses; and determining those responsible for the commission of the violations and abuses and their motives as well as their impact on victims".[34]

At first, establishing the factual truth about abuses seems to be separated from any legal classification of such acts. Resorting to a legal qualification and standards may well prove to be too restrictive to fully account for what happened. On the other hand, through a legal classification, the specificity or gravity of certain acts can be recognised, which could be as important as finding out about the facts themselves. Qualifying certain acts as of crime against humanity implies that they have been "committed as part of a widespread or systematic attack directed against any civilian population", thereby demonstrating the scale and specificity of

[30] Office of the United Nations High Commissioner for Human Rights 2008.

[31] Independent International Fact-Finding Mission on the Conflict in Georgia 2009, p. 353. See also p. 369.

[32] Human Rights Watch 2009, p. 61.

[33] Buergenthal 1994, p. 506.

[34] Truth and Reconciliation Commission of Liberia Mandate, *supra* note 8, Section 4 (a).

the violations.[35] Among the crimes under international law, the crime of genocide is often referred to as the "crime of crimes".[36] Qualifying some acts as genocide constitutes the recognition of the horrific nature of the violence directed against certain victims, as it requires a specific psychological element, the "intent to destroy, in whole or in part, a national, ethnical, racial or religious group".[37] As such this legal qualification could be seen as part of the collective dimension of the truth about acts that intend to destroy a whole group.

This overview of some of the many dimensions and elements of the truth accounts for the complexity of this notion when considering large-scale human rights or IHL violations. In light of this manifold notion, which lies at the heart of transitional justice, the question remains to what extent transitional justice processes and mechanisms contribute to the establishment of a comprehensive truth in all its facets.

12.3 The Contribution and Limits of Transitional Justice Mechanisms and Processes to the Truth

Transitional justice is commonly presented as a set of mechanisms and processes through which societies address the legacy of past large-scale and mass human rights or IHL violations to ensure accountability, to serve the truth and justice and to achieve reconciliation. Such mechanisms and processes should be complementary in contributing to those objectives, each of them having advantages and limitations. But a cross-cutting issue seems also to affect the way those mechanisms interact with one another. As a rather new field, transitional justice seems to be based on assumptions that result in a limited focus on victims. It is essential to consider this criticism before addressing some of the transitional mechanisms with regard to the search for the truth.

12.3.1 Assumptions in Transitional Justice: The Need to Consult the Victims

Reflecting on the UN experience, the UN Secretary-General stressed that "strategies must be holistic, incorporating integrated attention to individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or an

[35] The Rome Statute of the International Criminal Court, Rome, 17 July 1998, UN Doc. A/CONF.183/9, Article 7(1). http://untreaty.un.org/cod/icc/statute/romefra.htm. Accessed 19 January 2012.

[36] Schabas 2000, p. 1.

[37] The Rome Statute of the International Criminal Court, *supra* note 35, Article 6.

appropriately conceived combination thereof". He also pointed out that "[t]he United Nations must consider through advance planning and consultation how different transitional justice mechanisms will interact to ensure that they do not conflict with one another".[38] However, beyond the scholars and practitioners' discussions of whether transitional justice is an emerging field or a discipline of its own,[39] one of the recurring critics towards this area is that it relies heavily on assumptions that have not been empirically demonstrated, such as with regard to the positive relationship between truth and reconciliation and not least about what victims of mass human rights violations want as individuals. The transitional justice literature increasingly focuses on the need for a victim-centred approach[40] and on the importance of an evidence-based approach to fill the empirical gaps created by such assumptions.[41] A certain author has rightly noted that with respect to the issue of the role of the victim in the transitional justice field, "there remains no meaningful consensus as to what victims can, or should, be able to expect from the process, and the few studies with empirical data concerning both their needs and expectations are laced with mixed results".[42] He further stresses "there is an unfounded assumption in place that the search for the truth and/or justice is capable of fulfilling the needs of individual victims, whilst at the same time, meeting the apparently more pressing goals of punishment and/or societal reconciliation". He warns that transitional justice is not a "magic bullet" and that "care should be taken not to conflate the concept of individuals and societal healing" that "are distinct processes and progress at different rates".[43] It is, however, a very challenging task to overcome such assumptions and this top-down approach that often dominates transitional justice strategies.

The question of the victims' needs and expectations and the transitional justice options to address large-scale human rights and IHL violations in Northern Uganda show the importance of overcoming such assumptions. It was often contended that Ugandans were more prone to pardoning than other people. A study conducted by the OHCHR on Victims' Perceptions of Accountability, Reconciliation and Transitional Justice in Northern Uganda noted that:

> Recent debates about the northern Ugandan conflict have been dominated by analyses based on artificial dichotomies, including peace versus justice, local versus international responses to harm, and the population's desire for forgiveness and reconciliation versus punishment. The effect of this polarisation has been to cloud debates about the most appropriate ways to address conflict and its aftermath, implying either/or choices when combinations of these elements often better reflect popular perceptions and lead to more effective practical strategies.[44]

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[38] United Nations Secretary-General 2004, para 26.

[39] Weinstein 2011, pp. 1–10.

[40] Robins 2011, pp. 75–98; See also McDonald 2006, pp. 237–276.

[41] Clark 2011, pp. 241, 242.

[42] Doak 2011, p. 264.

[43] Ibid., pp. 264, 265.

[44] Office of the United Nations High Commissioner for Human Rights 2007, pp. 1–2.

Based on interviews with victims, this study demonstrated on the contrary that:

> Respondents stated consistently that truth-recovery and reparation in the form of compensation are their principal needs in terms of transitional justice responses to the conflict. However, they provided highly variable accounts of which local, national or international mechanisms can best deliver truth and compensation. In particular, perceptions of the virtues of the International Criminal Court (ICC) and traditional practises – the two broad transitional justice approaches that have dominated recent discussions of the northern Ugandan situation – were greatly mixed. Many respondents argued that a multi-faceted transitional justice response, combining several processes and institutions to address different types of harm caused by different levels of perpetrators, is required.[45]

It further noted that "it will be important for decision makers to address the overwhelming need expressed by the victims groups for truth about past harms and consider the need for a systematic process of historical clarification mandated to explore the long view of the current conflict, even before 1986".[46] While, of course, such findings do not solve the remaining question of designing the appropriate transitional justice strategy, they do provide a more nuanced picture based on victims' perceptions. For any transitional justice to have a possibility of success, it is key not to overlook the expectations of victims as individuals through seeking the truth for the society as a whole. As noted by one author:

> [I]t seems inappropriate to view a community or a society as "healed" as though it were an individual with a conscience, identity and memory. The most common consequences of victimization, which include fear, self-blame, insomnia, depression, anxiety, a sense of loss of control and post-traumatic stress, are not experienced on a collective basis and cannot be cured through processes that prioritise broader objectives, whether these are the punishment of perpetrators or societal reconciliation.[47]

This reinforces the need to ensure comprehensive and thorough national consultations prior to designing any transitional justice mechanisms.[48] This consultation process should include victims and not just the main stakeholders at the national level. It should also inform the next steps of a transitional process rather than being a mere formality to legitimate the process. This is the only way to downplay the influence of assumptions and to take into account victims' perceptions and expectations as individuals. This is of the utmost importance when considering that existing transitional justice mechanisms contribute only in part to establishing the truth in all its facets.

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[45] Ibid., p. ii.

[46] Ibid.

[47] Doak 2011, p. 265.

[48] United Nations Secretary-General 2004, para 25.

12.3.2 Transitional Justice Mechanisms and the Establishment of the Truth

While establishing the truth is an overarching goal of any transitional justice strategy in a post-conflict society, specific transitional justice mechanisms are labelled as "facilitating truth telling" or "truth seeking".[49] They are particular processes that aim at disclosing the truth. On the other hand, other transitional justice mechanisms also contribute to this goal, in one way or another. However, in as much as ascertaining the truth does not necessarily bring about reconciliation, it is increasingly argued that those mechanisms, be they specific truth-seeking mechanisms or other processes such as criminal prosecution, do not automatically contribute to the manifestation of the comprehensive truth in its full complexity.

12.3.2.1 Truth Seeking and Truth Telling Processes

Truth commissions are commonly defined as "official, temporary, non-judicial fact-finding bodies that investigate a pattern of abuses of human rights or humanitarian law committed over a number of years".[50] Beyond the lack of consensus on a more specific definition,[51] discussions have focused on the assessment of the work of dozens of truth commissions that have been created. Generally, they were recognised as having "the potential to be of great benefit in helping post-conflict societies establish the facts about past human rights violations, foster accountability, preserve evidence, identify perpetrators and recommend reparations and institutional reforms".[52] Truth commissions that include a mandate to conduct public hearings can also contribute to triggering national debates. Results very much depend, however, on the way they are designed and how well resourced they are.

TRCs established in the past made a significant contribution to disclosing the truth about past large-scale human rights and IHL violations, including through documenting the specific characteristics of an armed conflict or the particular crimes that were committed. The Liberia TRC released its report in December 2009. It was, for example, the first TRC to extensively explore economic crimes as a key factor in fuelling the armed conflict.[53] The Moroccan Equity and Reconciliation Commission created in January 2004, whose mandate was to investigate forced disappearances and arbitrary detention between Morocco's independence in 1956 and 1999 and to rule on reparation requests, adopted an innovative approach

[49] Ibid., respectively p. 17 and para 8.

[50] Ibid., para 50.

[51] Dancy et al. 2010, p. 47.

[52] United Nations Secretary-General 2004, para 50.

[53] James-Allen et al. 2010.

to collective reparations. Due to the damage incurred by certain communities and regions, the Commission primarily focused on communal reparation. It recommended the adoption of socio-economic and cultural development projects serving the interest of cities and regions, and it further specifically recommended the conversion of former illegal detention centres.[54] Truth commissions are also considered an important tool to shed some light on the various components of a repressive regime, as well as identifying the complex levels of responsibility in past abuses. Unsurprisingly, in the post-Gaddafi Libya, it was suggested to set up a TRC to contribute to the debate over how far the vetting of anyone connected with the previous regime should go in order to avoid revenge-motivated decisions.[55]

As stressed by the UN Secretary-General, many factors can hamper the work of TRCs. Such shortcomings in turn affect the results in terms of what type of truth is established through those mechanisms. The Truth and Reconciliation Commission (TRC) which operated from July 2003 to February 2007 in the DRC and that was designed to support democracy during the political transition period produced "poor results".[56] This was explained by a series of reasons ranging from the nature of its composition and the lack of a consultation process to the lack of human and material resources.[57] The Lessons Learnt and Reconciliation Commission (LLRC) set up by Sri Lanka's President in May 2010 to look into the conflict between government forces and the Liberation Tigers of Tamil Eelam blatantly illustrates the institutional weaknesses of a body which cannot genuinely contribute to establishing the truth. The LLRC did not even have an explicit mandate to investigate violations of human rights and humanitarian law and was chaired by Sri Lanka's former Attorney General who was accused of obstructing the investigation and prosecution of human rights abuses cases from the period of his tenure.[58]

The Truth and Reconciliation Commission established in South Africa in 1995 to investigate gross human rights violations that were perpetrated during the period of the Apartheid regime from 1960 to 1994, while seen as a milestone in the history of such commissions, also illustrates the complexity of establishing the truth through TRCs. South Africa's TRC constitutes in many ways a landmark in the practice of TRCs. It for example included public hearings which proved to be a key element of the overall transition in this country. However, as pointed by Archbishop Desmond Tutu, the chairman of this commission, "one of the greatest weaknesses in the Commission was the fact that we failed to attract the bulk of the white community to participate enthusiastically in the Truth and Reconciliation process",[59] noting in particular that the military "hardly cooperated with the Commission at all [leaving] a

[54] National Commission for truth justice and reconciliation 2005.

[55] Pack and Zaptia 2011.

[56] International Center for Transitional Justice 2009.

[57] Office of the United Nations High Commissioner for Human Rights 2010, pp. 478–480.

[58] Amnesty International 2011.

[59] Quoted by Clark 2011, p. 249.

considerable gap in our truth-gathering process".[60] Based on the experience in South Africa, one scholar stresses the issue regarding the comprehensiveness of truth established through TRCs and, once the truth is ascertained, the importance of the acceptance, acknowledgment and internalisation thereof by local communities.[61] The South African TRC's controversial power to grant amnesties also illustrates another dimension of truth-seeking processes. The TRC was indeed mandated to grant amnesties to perpetrators under certain conditions, including when they confessed their crimes truthfully and completely to the commission. This power gave rise to heated debates and controversy. Disclosing the truth was seen as a critical part of the process, but this power to grant an amnesty would prevent drawing all the consequences from the establishment of the truth. A judge of the South African Constitutional Court in a case brought against the TRC recognised this difficulty, especially concerning the link between an amnesty and the full disclosure of the truth: "[The granting of an amnesty] is a difficult, sensitive, perhaps even agonising, balancing act between the need for justice to victims of past abuse and the need for reconciliation and rapid transition to a new future; between encouragement of wrongdoers to help in the discovery of the truth and the need for reparations for the victims of that truth; between a correction in the old and the creation of the new. It is an exercise of immense difficulty interacting in a vast network of political, emotional, ethical and logistical considerations".[62]

12.3.2.2 International Fact-Finding Mechanisms and Criminal Courts and Tribunals

Various international actors increasingly resorting to fact-finding missions to address alleged human rights and international humanitarian law violations as well as the development of international criminal tribunals and courts as part of transitional justice institutional processes contribute to the establishment of the truth. However, such mechanisms also contain significant limitations.

Verifying alleged violations of human rights and IHL norms necessitates a critical look at individual and specific cases. Determining facts in this context requires the establishment of a number of factual elements related to individual cases, ranging from information on the victim to the time, location and

[60] Quoted by Clark 2011, p. 250.

[61] Clark 2011, p. 250.

[62] South African Constitutional Court, *Azanian Peoples Organization (AZAPO) and Others v President of the Republic of South Africa and Others*, Case CCT 17/96, 25 July 1996, 1996 (8) BCLR 1015, para 21. http://www.saflii.org/za/cases/ZACC/1996/16.pdf. Accessed 19 January 2012.

circumstances of the incident.[63] While fact-finding missions usually look at patterns of violations, they also have to choose among certain facts, thereby limiting the extent of the truth revealed by fact-finding missions. As noted by the International Commission of Inquiry on Darfur in reference to the Darfur case:

> It was not possible for the Commission to investigate all of the many hundreds of individually documented incidents reported by other sources. The Commission, therefore, selected incidents and areas that were most representative of acts, trends and patterns relevant to the determination of violations of international human rights and humanitarian law and with greater possibilities of effective fact-finding.[64]

Conversely, international criminal courts and tribunals have focused on individual cases and, due to their mandate, they have usually prosecuted the perpetrators bearing the greatest responsibility.[65] Although their significant investigative means, such as resorting to forensic experts, contribute to the establishment of the truth, this is only for a handful of perpetrators. Furthermore, as they focus on punishment, they are often criticised for neglecting victims.[66] Specific international criminal law procedural elements also limit the comprehensiveness of the truth being established through criminal trials. For example, it is suggested that plea bargaining, "whereby a defendant pleads guilty in return for certain charges to be dropped and/or for a reduced sentence (…) arguably impact(s) on the fullness of any truth established".[67] Fact-finding missions and international criminal tribunal and courts must be complemented by other transitional justice mechanisms to contribute to ascertaining the truth to its fullest extent.

12.4 Conclusion

This brief overview of some of the various dimensions of the truth in transitional justice processes demonstrated the necessity to reconsider assumptions and structural issues when addressing the legacy of past abuses. In as much as there is a lack of empirical data on the positive impact of the truth on reconciliation in a post-conflict society, the truth itself should not be oversimplified. The complexity and inherent human nature of the truth for victims require any transitional justice mechanism to be carefully designed if it is to genuinely and comprehensively contribute to the establishment of the truth. As pointed out by one author, "[c]ontemporary writings

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[63] Boutruche 2011, p. 115.

[64] International Commission of Inquiry on Darfur to the United Nations Secretary-General 2005, p. 223; United Nations Human Rights Council 2009, p. 157.

[65] See for example Article 1 of the Statute of the Special Court for Sierra Leone. Statute of the Special Court for Sierra Leone, Freetown, 16 January 2002. http://www.sc-sl.org/LinkClick.aspx?fileticket=uClnd1MJeEw%3D&. Accessed 19 January 2012.

[66] Doak 2011, p. 264.

[67] Clark 2011, p. 252.

about the needs of survivors of mass atrocity are peppered with terms like 'healing,' 'closure,' forgiveness,' and 'reconciliation' and phrases such as 'coming to terms with the past'".[68] As a prerequisite for any additional meaningful transitional justice processes such as prosecution or institutional reform, truth must be recognised as a manifold concept.

While the notion of truth is primarily about ascertaining the facts related to a given incident, as demonstrated in this chapter, it goes far beyond this factual aspect. The truth about past abuses is a complex concept encapsulating not only a psychological and legal dimension for individual victims, but it also relates to a collective dimension for a community or the society as a whole. In as much as the development of a right to the truth strengthens the rights of victims, the legal prism should not be the Alfa and Omega of how the truth is considered within the field of transitional justice. This simplification would amount to a limitation on what the truth encompasses and would therefore hamper its positive effects. Similarly, transitional justice processes and mechanisms taken separately only partly contribute to the establishment of a comprehensive truth in all its facets. For example, criminal prosecutions, due to the procedural requirements of international criminal law and the limited participation of victims, cannot in themselves serve the imperatives of the truth. There is a need to systematically consult with victims and to take a holistic approach in designing transitional justice mechanisms to ensure a tailored framework capable of delivering truth in all its components, paying due attention to local community mechanisms and dynamics.

With an increasing debate concerning the various forms of reparations in the context of the ICC framework, with tensions between favouring individual, collective or symbolic reparations, it is key to reconsider the many facets of truth in order to genuinely achieve the goals of transitional justice. In that respect, the importance of truth for victims as individuals should never be lost on the way to searching for the truth for a society as a whole.

Through her research, teaching and publications, Avril McDonald had always been a fervent advocate of victims' rights, consistently trying to counterbalance political realities with an expert legal analysis to ensure that the human voices of victims are heard beyond the technicalities of the law.[69] This contribution pays tribute to this tireless supporter of the truth.

[68] Stover 2005, p. 11.

[69] McDonald 2000, pp. 11–26.

References

Documents

Amnesty International (2011) When will they get justice? Failures of Sri Lanka's lessons learnt and reconciliation commission. http://www.amnesty.org/en/library/asset/ASA37/008/2011/en/76ea6500-a9f5-4946-bf2b-7fc08bc5e37a/asa370082011en.pdf. Accessed 19 Jan 2012

Henckaerts J-M et al (2005) Customary International Humanitarian Law, vol I. ICRC and Cambridge Press University, Geneva. http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-i-icrc-eng.pdf. Accessed 19 Jan 2012

Human Rights Watch (2009) Bloody Monday—The September 28 Massacre and rapes by security forces in Guinea. http://www.hrw.org/reports/2009/12/16/bloody-monday-0. Accessed 19 Jan 2012

Independent International Fact-Finding Mission on the Conflict in Georgia (2009) Report of the Independent International Fact-Finding Mission on the conflict in Georgia, vol II. http://www.ceiig.ch/. Accessed 19 Jan 2012

International Center for Transitional Justice (2009) Confronting past crimes at the national level. http://ictj.org/sites/default/files/ICTJ-CAR-ICC-Briefing-2009-English.pdf. Accessed 19 Jan 2012

International Commission of Inquiry on Darfur to the United Nations Secretary-General (2005) Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General, Geneva 25 Jan 2005, Pursuant to Security Council Resolution 1564 of 18 September 2004. http://www.un.org/news/dh/sudan/com_inq_darfur.pdf. Accessed 19 Jan 2012

IRIN (2012) DRC: Thorny issue of reparations for Lubanga's victims, IRIN, 10 April 2012. http://www.irinnews.org/report/95257/DRC-Thorny-issue-of-reparations-for-Lubanga-s-victims. Accessed 6 July 2012

James-Allen et al (2010) Beyond the truth and reconciliation commission: transitional justice options in Liberia, James-Allen P, Weah A, Goodfriend L, International Center for Transitional Justice. http://ictj.org/publication/beyond-truth-and-reconciliation-commission-transitional-justice-options-liberia. Accessed 19 Jan 2012

National Commission for Truth, Justice and Reconciliation (2005) Summary of the final report. http://www.ccdh.org.ma/IMG/pdf/rapport_final_mar_eng-3.pdf. Accessed 19 Jan 2012

Office of the United Nations High Commissioner for Human Rights (2006) Study on the right to the truth, 8 Feb 2006, E/CN.4/2006/91. http://www.un.org/en/events/righttotruthday/documents.shtml. Accessed 19 Jan 2012

Office of the United Nations High Commissioner for Human Rights (2007) Making peace our own—victims' perceptions of accountability, reconciliation and transitional justice in Northern Uganda, p 32. http://www.reliefweb.int/sites/reliefweb.int/files/resources/73D90F36C90947ABC125733700427A09-Full_Report.pdf. Accessed 19 Jan 2012

Office of the United Nations High Commissioner for Human Rights (2008) Report from OHCHR fact-finding Mission to Kenya, 6–28 Feb 2008 http://www.ohchr.org/Documents/Press/OHCHRKenyareport.pdf. Accessed 19 Jan 2012

Office of the United Nations High Commissioner for Human Rights (2010) Report of the mapping exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003. http://www.ohchr.org/Documents/Countries/ZR/DRC_MAPPING_REPORT_FINAL_EN.pdf. Accessed 19 Jan 2012

Orentlicher D (2005) Report of the independent expert to update the Set of principles to combat impunity, Updated Set of principles for the protection and promotion of human rights through action to combat impunity, E/CN.4/2005/102/Add.1. http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement. Accessed 19 Jan 2012

Pack J, Zaptia S (2011) Libya needs a truth and reconciliation commission. The Guardian, 13 Oct 2011. http://www.guardian.co.uk/commentisfree/2011/oct/13/libya-truth-and-reconciliation-commission. Accessed 19 Jan 2012

United Nations Human Rights Committee (1996) Concluding observations: Guatemala, 3 March 1996, CCPR/C/79/Add.63. http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.79.Add.63.En?Opendocument. Accessed 19 Jan 2012

United Nations Human Rights Council (2009) Report of the United Nations fact-finding mission on the Gaza Conflict, 25 Sept 2009, A/HRC/12/48157 http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/factfindingmission.htm. Accessed 19 Jan 2012

United Nations Secretary-General (2004) The rule of law and transitional justice in conflict and post-conflict societies, 23 Aug 2004, S/2004/616. http://www.un.org/ga/search/view_doc.asp?symbol=S/2004/616. Accessed 20 Jan 2013

Walker P (2011) Khmer Rouge leaders go on trial in Cambodia charged with genocide. The Guardian, 21 Nov 2011. http://www.guardian.co.uk/world/2011/nov/21/khmer-rouge-leaders-trial-cambodia. Accessed 19 Jan 2012

Literature

Boutruche Th (2010) Missing and dead persons. Max Planck encyclopedia of public international law, vol VII. Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press, Heidelberg, pp 287–292

Boutruche Th (2011) Credible fact-finding and allegations of international humanitarian law violations: challenges in theory and practice. J Confl Secur Law 16(1):105–140

Brounéus K (2010) The trauma of truth-telling: effects of witnessing in the Rwandan Gacaca Courts on psychological health. J Confl Resolut 54(3):408–437

Buergenthal T (1994) The United Nations Truth Commission for El Salvador. Vanderbilt J Transnatl Law 27:497–542

Clark J (2011) Transitional justice, truth and reconciliation: an under-explored relationship. Int Crim Law Rev 11:241–261

Dancy G et al (2010) The turn to truth: trends in truth commission experimentation. J Hum Rights 9:45–64

Doak J (2011) The therapeutic dimension of transitional justice: emotional repair and victim satisfaction in international trials and truth commissions. Int Crim Law Rev 11:263–298, 264–265

Henri N (2009) Witness to rape: the limits and potential of international war crimes trials for victims of wartime sexual violence. Int J Transitional Justice 3(1):114–134

Herman J (2001) Trauma and recovery: the aftermath of violence from domestic abuse to political terror. Pandora, London

McAdams A (2011) Transitional justice: the issue that won't go away. Int J Transitional Justice 5(2):304–312

McDonald A (2000) Sierra Leone's uneasy peace: the amnesties granted in the Lomé Peace Agreement and the United Nations' dilemma. Humanitäres Völkerrecht 13:11–26

McDonald A (2006) The development of a victim-centered approach to international criminal justice for serious violations of International Humanitarian Law. In: Carey J, Dunlop W, Pritchard R (eds) International humanitarian law: prospects. Transnational Publishers Inc., Ardsley, pp 237–276

Robins S (2011) Towards victim-centred transitional justice: understanding the needs of families of the disappeared in post-conflict Nepal. Int J Transitional Justice 5(1):75–98

Schabas W (2000) Genocide in international law: the crime of crimes. Cambridge University Press, Cambridge

Stover E (2005) The witnesses: war crimes and the promise of justice in The Hague. University of Pennsylvania Press, Philadelphia
Weinstein (2011) The myth of closure, the illusion of reconciliation: final thoughts on five years as co-editor-in-chief. Int J Transitional Justice 5(1):1–10

Chapter 13
La responsabilité pénale des autorités politiques pour des crimes de droit international humanitair (DIH)

Eric David

Abstract Certains jugements du TPIR ont acquitté des personnes qui occupaient des hautes fonctions politiques dans le gouvernement et l'administration d'un pays – le Rwanda – qui a couvert un génocide (avril-juillet 1994). De tels acquittements sont critiquables car le droit positif permettait d'établir la responsabilité pénale des personnes acquittées ainsi que le montre le présent article.

Contents

(1) Dans ses écrits qui reflétaient son engagement pour le droit international humanitaire (DIH) – un engagement interrompu, hélas, trop tôt – Avril McDonald a consacré une part de ses recherches à la justice pénale internationale[1] et à la situation des victimes.[2] L'intérêt de la dédicataire de ces lignes pour la justice

Eric David est Professeur émérite de droit international, Centre de droit international, Université libre de Bruxelles.

[1] McDonald 1999, 2002, 2009.
[2] McDonald 2006, 2007.

E. David (✉)
Université libre de Bruxelles, Av. F.D. Roosevelt, 50 1050 Bruxelles, Belgium
e-mail: edavid@ulb.ac.be

M. Matthee et al. (eds.), *Armed Conflict and International Law: In Search of the Human Face*, DOI: 10.1007/978-90-6704-918-4_13,

pénale internationale et pour les victimes a conduit le présent auteur à rédiger, en hommage à la mémoire d'Avril, quelques brèves réflexions suscitées par certains jugements du Tribunal pénal international pour le Rwanda (TPIR) et, de la Cour pénale internationale (CPI) qui ont, soit, acquitté des accusés, soit, rejeté les charges portées contre eux par le Procureur. Les affaires considérées sont les affaires *Ntagerura, Bagambiki et al.*,[3] *Rwamakuba*[4] et *Mbarushimana*.[5] Point commun à ces trois affaires et aux quatre accusés: ceux-ci étaient membres d'instances politiques dirigeantes sous l'autorité desquelles les pires crimes ont été commis. Ils ont pourtant été acquittés (Ntagerura, Bagambiki et Rwamakuba) ou relaxés des poursuites (Mbarushimana) faute pour l'accusation d'avoir réussi à prouver leur participation directe aux crimes en cause.

Acquittements et arrêt des poursuites se justifient-ils lorsqu'une personne détient une position dirigeante dans l'organe sous l'autorité duquel ces crimes sont commis ? Si, d'un point de vue moral et politique, la réponse est clairement négative l'auteur pense qu'une réponse négative est également défendable au plan juridique.

(2) Pour des raisons liées à des contraintes de temps dues à des engagements professionnels particulièrement contraignants – la retraite est parfois plus mobilisante que le travail *full time* de la vie active –, les présentes réflexions restent beaucoup trop brèves et superficielles. L'auteur en est parfaitement conscient mais il ne voulait pas rester absent d'un recueil destiné à exprimer l'admiration, le respect et l'amitié de ses contributeurs à l'égard d'Avril McDonald.

(3) Après avoir rappelé les affaires en cause Sect.13.1, on verra que, juridiquement, une solution autre que l'acquittement ou l'arrêt des poursuites eût été possible Sect.13.2.

13.1 Les affaires *Rwamakuba, Ntagerura et al., Mbarushimana*

(**4**) André Rwamakuba, un médecin spécialisé en santé publique, directeur du département de la santé dans la région de Kigali, avait été ministre de l'enseignement primaire et moyen dans le gouvernement intérimaire rwandais à partir du 9 avril 1994[6] jusqu'à sa fuite du Rwanda, à un moment non précisé dans le jugement.

Les autorités namibiennes l'arrêtent le 2 août 1995 et en avertissent le TPIR. Le Procureur informe la Namibie qu'il n'a pas de charge justifiant le mise en détention de Rwamakuba qui est remis en liberté le 8 février 1996.[7]

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[3] TPIR, aff. ICTR-99-46-T, 25 févr. 2004 http://www.ictrcaselaw.org/docs/doc54084.pdf et ICTR-99-46-A, 7 juillet 2006 http://www.ictrcaselaw.org/docs/doc79826.PDF.

[4] TPIR, aff. ICTR-98-44C-T, 20 sept. 2006 http://www.ictrcaselaw.org/docs/doc81958.PDF.

[5] CPI, aff. ICC-01/04-01/10, 16 déc. 2011 http://www.icc-cpi.int/iccdocs/doc/doc1341443.pdf.

[6] TPIR, *Rwamakuba*, aff. ICTR-98-44C-T, 20 sept. 2006, § 3.

[7] Ibid., § 4.

Deux ans plus tard, le Procureur délivre un acte d'accusation contre Rwamakuba. Il est arrêté en Namibie, le 21 octobre 1998, et remis au TPIR le lendemain. Rwamakuba est accusé de génocide et, à titre subsidiaire, de complicité de génocide, d'extermination comme crime contre l'humanité dans des faits qui ont eu lieu, entre le 6 et le 30 avril 1994, à Gikomero et à l'hôpital universitaire de Butare.[8] L'accusé est également présenté comme ayant mené des campagnes politiques hostiles aux tutsi. En tant que ministre de l'enseignement, il aurait aussi pris part à la politique gouvernementale d'extermination des tutsi au Rwanda. Le procureur ne fonde la responsabilité pénale de l'accusé que sur la base de l'art. 6, § 1, du Statut du TPIR – commettre, ordonner de commettre, ou aider/encourager à commettre un des crimes visés aux art. 2-4 du Statut –, non sur la base de l'art. 6, § 3 (responsabilité du supérieur pour les crimes des subordonnés).[9] Le jugement insiste sur le fait que le Procureur ne l'a pas poursuivi pour conspiration à commettre le crime de génocide ou participation à une entreprise criminelle conjointe,[10] et que la Chambre ne peut pas le juger pour des omissions qui ne figuraient pas dans l'acte d'accusation sinon cela porterait atteinte aux droits de la défense et au droit de tout accusé à un procès équitable.[11]

L'accusation n'ayant pas réussi à prouver, selon la Chambre, la participation directe de l'accusé aux crimes commis à Gikomero et à Butare, la Chambre l'acquitte des charges de génocide et de crimes contre l'humanité portées contre lui.[12]

(**5**) André Ntagerura était ministre des transports et des communications dans le gouvernement intérimaire de juin à juillet 1994. Arrêté au Cameroun en 1996, il est transféré au TPIR début 1997; il était accusé de génocide, d'extermination en vue de commettre le génocide.[13]

Emmanuel Bagambiki était préfet de Cyangugu du 4 juillet 1992 au 17 juillet 1994. Arrêté au Togo en juin 1998, il est transféré au TPIR un mois plus tard pour répondre de charges similaires à celles retenues contre Ntagerura.[14]

Le 25 février la Chambre 1^{e} instance acquitte les deux accusés, essentiellement, en raison du caractère vague de l'acte d'accusation et pour insuffisance ou imprécision des éléments de preuve apportés par l'accusation.[15] Dans le cas de Ntagerura, la Chambre de 1^{e} instance a décidé de ne pas suivre le Procureur parce que les charges retenues étaient « d'une précision inadmissible », ou parce que le Procureur lui-même avait reconnu ne pas avoir prouvé certaines charges, ou parce

[8] Ibid., §§ 15, 211.

[9] Ibid., §§ 15–18.

[10] Ibid., §§ 21 ss.

[11] Ibid., §§ 28, 208 s.

[12] Ibid., §§ 214 s., chap. IV.

[13] *Id.*, *Ntagerura, Bagambiki et Imanishimwe*, aff. ICTR-99-46-T, 25 févr. 2004, §§ 5-6 ; *id.*, aff. ICTR-99-46-A, 7 juillet 2006, § 5.

[14] Ibid., 25 févr. 2004, § 12 ; 7 juillet 2006, § 5.

[15] Ibid., 25 févr. 2004, §§ 704–706.

que les faits imputés à l'accusé n'avaient pas été prouvés au-delà de tout doute raisonnable.[16] Ce dernier motif fonde aussi l'acquittement de Bagambiki.[17]

(**6**) Callixte Mbarushimana était secrétaire exécutif des Forces démocratiques de libération du Rwanda (FDLR) depuis 2007.[18] Parfois présenté comme le n° 3 de l'organisation,[19] il vivait en France où il jouait un rôle de porte-parole des FDLR.[20] Arrêté en France en octobre 2010 à la suite d'un mandat d'arrêt délivré par la Chambre préliminaire de la CPI, il avait été remis à la Cour en janvier 2010 pour répondre de crimes de guerre et de crimes contre l'humanité que les FDLR auraient commis depuis janvier 2009.[21] Le 16 décembre 2011, la Chambre préliminaire refuse de confirmer les charges faute de preuve suffisante à l'appui de celles-ci: selon la Chambre, il n'avait pas été prouvé que l'accusé était au courant des crimes commis sur le terrain, ni que les communiqués de presse eussent eu d'incidence sur les activités militaires des FDLR.[22]

(**7**) Quand on connaît l'immensité des crimes commis au Rwanda d'avril à juillet 1994 et dans l'est de la République Démocratique du Congo (RDC) en 2009-2010 et quand on lit leur descriptions, on a quelque peine à comprendre comment des personnes situées à un tel niveau de pouvoir, à l'époque de perpétration de ces crimes, peuvent échapper à toute responsabilité pénale. Le droit serait-il à ce point pauvre et impuissant qu'il doive conduire à un tel résultat ? Il semble pourtant qu'il était possible de trouver une réponse juridique différente de celle arrêtée par les chambres du TPIR et la chambre préliminaire de la CPI comme on va le voir à présent.

13.2 La responsabilité pénale de hautes autorités politiques et administratives dans des crimes de DIH: fondement et moyens

13.2.1 Le fondement de la responsabilité pénale de hautes autorités politiques et administratives dans des crimes de DIH

(**8**) En droit pénal comme en droit pénal international, on distingue habituellement quatre types de responsabilités:

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[16] Ibid., §§ 705 s.

[17] Ibid., §§ 718, 722, 724.

[18] CPI, *Mbarushimana*, aff. ICC-01/04-01/10, 16 déc. 2011, § 5.

[19] Ibid., §§ 8 et 336.

[20] Ibid., §§ 1 et 317.

[21] Ibid., §§ 13–15.

[22] Ibid., §§ 314, 327 s., 333 s. ; voy. toutefois l'op. diss. de la juge Sanji Mnasemono Monageng, ibid.

– La responsabilité de l'auteur et du co-auteur directs du fait matériel en ce compris la responsabilité de la personne qui ne commet pas l'infraction mais qui ordonne son exécution (par ex.,[23] Statut TPIR, art. 6, § 1; Projet CDI de code des crimes contre la paix et la sécurité de l'humanité – ci-après, « projet CDI » –, art. 2, § 3, a-b; Statut CPI, art. 25, § 3, a-b);
– La responsabilité de la personne qui ne commet pas l'infraction mais qui y contribue par son assistance (complicité) (Statut TPIR, art. 6, § 1; Projet CDI, art. 2, § 3, d Statut CPI, art. 25, § 3, c-d);
– La responsabilité du supérieur qui ne prévient pas ou ne réprime pas l'infraction commise par le subordonné (Statut TPIR, art. 6, § 3; Projet CDI, art. 2, § 3, c, et art. 6; Statut CPI, art. 28);
– La responsabilité consécutive à la tentative de commettre l'infraction lorsque son exécution est empêchée par des circonstances indépendantes de la volonté de l'auteur (Projet CDI, art. 2, § 3, g; Statut CPI, art. 25, § 3, f).

(**9**) Dans les quatre cas considérés, aucun des accusés n'avaient participé ou tenté de participer directement aux crimes commis par les milices *interhahamwe*, les forces armées rwandaises ou les FDLR. Les quatre accusés occupaient des fonctions dirigeantes, mais ils n'avaient pas d'autorité directe sur les auteurs des crimes en cause.[24]

Aurait-on pu parler de complicité ? Ce serait possible s'ils avaient fourni, en connaissance de cause, une aide substantielle au crime, mais ce n'était pas le cas.

(**10**) Le problème se pose de manière analogue dans le cas des Chambres extraordinaires au sein des tribunaux cambodgiens (CETC): la Chambre de la Cour suprême du Cambodge, agissant dans le cadre des CETC, a défini la compétence *ratione personae* de celles-ci en interprétant le mandat des chambres qui consistait à

> « traduire en justice les dirigeants du Kampuchéa démocratique et les principaux responsables des graves violations du droit pénal cambodgien, des règles et coutumes du droit international humanitaire et des conventions internationales auxquelles adhère le Cambodge » (Accord ONU-Cambodge, annexé à la résolution de l'AGNU du 13 mai 2003, A/RES/57/228B, § 1).

Dans l'affaire *Duch*, la Chambre a estimé que ce mandat couvrait deux catégories de personnes: les dirigeants Khmères qui étaient responsables de violations du DIH et les agents khmères qui n'avaient pas la qualité de dirigeants mais qui étaient les principaux responsables de ces violations. Autrement dit, la Chambre excluait les poursuites contre les dirigeants khmères rouges qui ne pouvaient pas être tenus responsables de ces violations du simple fait de leur qualité de dirigeants:

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[23] Les textes cités ici sont purement exemplatifs et ne prétendent évidemment pas à l'exhaustivité.

[24] TPIR, *Rwamakuba*, aff. ICTR-98-44C-T, 20 sept. 2006, § 207 ; *id.*, *Bagambiki,* aff. ICTR-99-46-A, 7 juillet 2006, § 347 ; CPI, *Mbarushimana*, aff. ICC-01/04-01/10, 16 déc. 2011, §§ 297 et 327.

> The Supreme Court Chamber finds that the above drafting history demonstrates that the term 'senior leaders of Democratic Kampuchea and those who were most responsible' refers to two categories of Khmer Rouge officials that are not dichotomous. One category is senior leaders of the Khmer Rouge who are among the most responsible [ref. omitted] *because a senior leader is not a suspect on the sole basis of his/her leadership position*. The other category is non-senior leaders of the Khmer Rouge who are also among the most responsible. Both categories of persons must be Khmer Rouge officials and among the most responsible, and, pursuant to Article 2 new of the UN-RGC [Royal Government of Cambodia] Agreement, both are 'suspects' subject to criminal prosecution before the ECCC [Extraordinary Chambers in the Courts of Cambodia].[25]

Cette exclusion de responsabilité pénale était-elle fondée ?

(**11**) Ne pouvait-on pas considérer, en effet, que, vu leur position élevée dans la hiérarchie politique et administrative, les accusés (tout comme les dirigeants khmères non directement impliqués dans les massacres cambodgiens), par leur silence et leur passivité, encourageaient, voire incitaient, à commettre les crimes en cause ? Le Tribunal Pénal International pour l'ex-Yougoslavie (TPIY) avait dit que le rôle de spectateur approbateur et silencieux valait complicité ou encouragement, mais encore fallait-il que celui-ci eût une position d'autorité à l'égard des auteurs des crimes:

> "Alors que l'on peut dire de tout spectateur qu'il encourage un spectacle, le public étant l'élément indispensable de tout spectacle, le spectateur a été dans ces affaires [jurisprudence postérieure à la 2e guerre mondiale] déclaré complice uniquement lorsque sa position d'autorité était telle que sa présence avait pour effet d'encourager ou de légitimer notablement les actes des auteurs."[26]

Or, dans les affaires en cause, les accusés ne jouissaient pas de cette position de supérieur à subordonné à l'égard des auteurs du crime. Le critère du spectateur approbateur et silencieux ne leur était donc pas applicable.

(**12**) Restent alors des qualification de droit interne telles que l'association de malfaiteurs ou l'organisation criminelle qui visent tout groupement formé en vue de commettre des crimes ou des délits (c.p. fr., art. 450-1; c.p. belge, art. 322 et 324). Au vu de la situation régnant au Rwanda et en RDC où des innombrables crimes étaient commis sans que les autorités en cause ne réagissent, ces qualifications auraient été applicables mais elles n'existent pas comme telles en droit pénal international, sauf dans le cadre de la criminalité transnationale organisée et du terrorisme. Pour la criminalité transnationale organisée, la Convention de Palerme du 12 décembre 2000 (art. 5) et ses protocoles incriminent la participation à un groupe criminel organisé pour certaines infractions (corruption, blanchiment, traite des êtres humains, trafic des migrants); pour le terrorisme, « la participation aux activités d'un groupe terroriste » si elle « contribue aux activités du groupe terroriste » a été

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[25] Chambre de la Cour suprême, CETC, aff. 001/18-07-2007-ECCC/SC, 3 Febr. 2012, § 57, http://www.eccc.gov.kh/sites/default/files/documents/courtdoc/Case%20001AppealJudgementEn.pdf.

[26] TPIY, *Furundzija*, aff. IT-95-17/1-T, 10 déc. 1998, § 232, http://www.icty.org/x/cases/furundzija/tjug/fr/fur-tj981210f.pdf.

incriminée (décision-cadre de l'Union Européenne (UE), 2002/475/JAI, du 13 juin 2002, art. 2, § 2, b)[27]; or, les crimes de DIH ne figurent pas, explicitement, au nombre des infractions où le simple *membership* du groupe qui les commet est incriminé.

(**13**) Cela justifiait-il l'acquittement des accusés ou l'exclusion de poursuites contre des dirigeants khmères rouges non impliqués directement dans les crimes de DIH commis au Cambodge ? En limitant la présente analyse au cas des accusés du TPIR et de la CPI (mais le raisonnement est transposable *mutatis mutandis* au dirigeants khmères rouges), on peut dire qu'il y avait deux autres manières d'affirmer leur responsabilité pénale en raison de leur position de membre, pour les uns, du gouvernement intérimaire rwandais d'avril à juillet 1994, pour le dernier, des instances dirigeantes des FDLR en 2009-2010: à cet effet, le TPIR et la CPI auraient pu se fonder, soit sur le précédent du jugement prononcé par le Tribunal de Tokyo en 1948 (Sect. 13.2.1.1, soit sur la prévention d'entreprise criminelle commune (Sect. 13.2.1.2).

13.2.1.1 Le jugement de Tokyo

(**14**) Le Tribunal militaire international pour l'Extrême-Orient, dans son arrêt du 12 novembre 1948, avait jugé que tout membre d'un cabinet gouvernemental dont la compétence s'étendait aux prisonniers de guerre devait répondre des crimes commis contre eux s'il en avait connaissance et s'il n'avait rien fait pour les empêcher. Même si son département n'était pas directement concerné par ces crimes, le membre de ce cabinet en devenait responsable s'il ne démissionnait pas et choisissait de continuer à faire partie de ce cabinet:

> A member of a Cabinet which collectively, as one of the principal organs of the Government, is responsible of the care of the prisoners is not absolved from responsibility if, having knowledge of the commission of the crimes […] and omitting or failing to secure the taking of measures to prevent the commission of such crimes in the future, he elects to continue as a member of the Cabinet. This is the position even though the Department of which he has the charge is not directly concerned with the care of prisoners. A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, is powerless to prevent future ill-treatment, but elects to remain in the Cabinet there by continuing to participate in its collective responsibility for protection of prisoners he willingly assumes responsibility for any ill-treatment in the future.[28]

(**15**) Cette partie de l'arrêt n'avait pas fait l'unanimité des juges,[29] mais elle répond parfaitement au malaise que l'on ressent à l'idée que les membres d'une instance dirigeante qui porte la responsabilité des pires crimes que l'on puisse imaginer échappent à toute responsabilité pénale à cause de leur absence de

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[27] *JOUE* L 164 du 22 juin 2002, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2002:164:0003:0007:FR:PDF.

[28] *The Tokyo judgment. The international Military Tribunal for the Far East*, 29 Apr. 1946–12 Nov. 1948, Röling B V A, Rüter C F (eds) (1977), APA–Univ. Press Amsterdam, p. 30.

[29] Pour des commentaires, David 2009, § 4.85.

participation directe aux crimes en cause. C'est un précédent qui aurait pu être utilement invoqué par l'accusation à l'appui des poursuites des accusés.

En outre, il eût été possible de leur appliquer la prévention de participation à une entreprise criminelle commune (ci-dessous).

13.2.1.2 L'entreprise criminelle commune

(**16**) La qualification d' « entreprise criminelle commune » semble parfaitement adaptée à l'incrimination du *membership* des éléments d'une autorité qui dirige des forces commettant des crimes. Cette qualification n'est pas neuve: elle remonte à la jurisprudence postérieure à la 2e guerre mondiale et a été réactivée par le TPIY dans l'affaire *Tadic* où la Chambre d'appel, se basant sur cette jurisprudence, a estimé que la participation à un groupe qui poursuivait un « but criminel commun » entraînait la responsabilité pénale de tous ceux qui avaient contribué à la perpétration du crime.[30] Encore fallait-il que chacun des participants ait joué un « rôle propre » dans le crime commis en partageant « la même intention délictueuse » que l'auteur du crime.[31] La jurisprudence mentionnée dans l'arrêt *Tadic* de 1999 requiert le critère intentionnel et une forme de lien entre les auteurs directs du crime et les personnes accusées d'avoir poursuivi le « but criminel commun ».

(**17**) Dans les cas de Rwamakuba, Ntagerura, Bagambiki et Nbarushimana, la preuve de leur intention criminelle et de leur rôle contributeur au crime n'était pas vraiment rapportée. Si les accusés ne pouvaient ignorer les crimes commis sous l'autorité de l'instance dont ils faisaient partie, leur intention criminelle et leur contribution à ces crimes pouvaient se déduire, d'une part, de leur silence à l'égard de ces crimes, d'autre part, de la continuité de leur participation aux activités de cette instance.

La mise en évidence de leur responsabilité pénale, au plan juridique, était donc plus difficile à établir.

(**18**) Pourtant, selon l'auteur, des liens de causalité évidents existaient entre les crimes commis et la qualité de membre de l'instance dirigeante qui couvrait ces crimes. Il suffisait d'interpréter de bonne foi et de manière raisonnable les notions de « but criminel commun » et de « rôle propre »: peut-on vraiment affirmer qu'on ne partage pas le but criminel du groupe que l'on rejoint alors qu'il pratique une criminalité de masse que tous les journaux du monde relatent quotidiennement ? Poser la question, c'est y répondre: en 1270, le coutumier français de Louis XI – les « Établissements de Saint-Louis » – disposait en son art. 32: « Tous ceux et celles qui font société avec les voleurs et les meurtriers, ou qui les recèlent, seront condamnés au feu. »

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[30] TPIY, *Tadic*, aff. IT-94-1-A, 15 juillet 1999, §§ 190 ss., http://www.icty.org/x/cases/tadic/acjug/fr/tad-991507f.pdf.

[31] Ibid., §§ 210 s.

S'il ne s'agit pas, ici, de demander le bûcher pour ceux qui acceptent un poste de haute responsabilité dans l'organe directeur d'une collectivité qui commet des crimes nombreux et graves, ce que le simple bon sens commandait déjà au 13e siècle eût dû justifier, aujourd'hui, la reconnaissance d'une responsabilité pénale des accusés. A titre de comparaison, quand l'UE sanctionne économiquement un régime qui viole gravement les droits et libertés fondamentaux, elle n'hésite pas à sanctionner aussi des personnes qui « tirent profit des politiques économiques des dirigeants » de ce régime[32] alors que le lien de causalité entre ces personnes et les violations des droits et libertés fondamentaux imputées à ce régime est loin d'être évident. En réalité, c'est la proximité de ces personnes avec ce régime et les avantages économiques qu'elles en tirent qui justifie l'attribution à ces personnes d'une responsabilité dans les violations en cause. La même philosophie de raisonnement devrait s'appliquer au membre d'un gouvernement qui viole outrageusement les droits et libertés fondamentaux même si ce dirigeant ne participe pas à ces violations.

13.2.2 La requalification de la responsabilité pénale des accusés

(**19**) Dans l'affaire *Rwamakuba*, le Procureur avait décidé de ne pas poursuivre l'accusé sur la base de la doctrine de l'entreprise criminelle commune.[33] Dans l'affaire *Ntagerura, Bagambiki et al.*, la Chambre de 1e instance n'avait pas examiné les chefs d'accusation fondés sur la théorie de l'entreprise criminelle commune car celle-ci ne figurait pas dans l'acte d'accusation: le procureur s'était borné à y « faire allusion » dans sa déclaration liminaire et dans son réquisitoire sans préciser « la catégorie d'entreprise individuelle commune » à laquelle il se référerait; c'est pourquoi la Chambre n'y avait pas donné suite.[34]

(**20**) L'affaire *Mbarushimana* est, à cet égard, différente car le Procureur avait établi la responsabilité pénale de l'accusé sur la base, notamment de l'art. 25, § 3, d, du Statut qui prévoit un critère de responsabilité pénale analogue à celui de l'entreprise criminelle commune, mais la majorité de la Chambre préliminaire ne l'avait pas suivi car il n'était pas prouvé, selon elle, que les FDLR avaient « mené une politique consistant à attaquer la population civile »[35] ni que, les crimes de guerre commis par les forces des FDLR présentes sur le terrain pussent engager le

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[32] CJUE, *Pye Phyo Tay Za*, aff. C-376/10, 13 mars 2012, §§ 70 s, http://curia.europa.eu/juris/document/document.jsf?text=&docid=120361&pageIndex=0&doclang=FR&mode=lst&dir=&occ=first&part=1&cid=255347.

[33] TPIR, *Rwamakuba*, aff. ICTR-98-44C-T, 20 sept. 2006, §§ 23, 27 ; voy. aussi § 208.

[34] *Id.*, *Ntagerura, Bagambiki et al.*, aff. ICTR-99-46-A, 7 juillet 2006, §§ 44 s.

[35] CPI, *Mbarushimana*, aff. ICC-01/04-01/10, 16 déc. 2011, § 291.

suspect vu qu'il n'avait pas autorité sur les forces locales[36] et qu'il n'était pas au courant des crimes commis.[37] Il s'agissait donc plus d'un problème de fait que de qualification, ce qui n'affecte cependant pas le caractère contestable du refus de la Chambre de confirmer les charges d'un homme qui était le n° 3 des FDLR.

(**21**) En revanche, pour les affaires *Rwamakuba*, *Ntagerura, Bagambiki et al.*, on peut se demander si les chambres du TPIR n'auraient pas dû requalifier les faits ainsi que les cours et tribunaux peuvent le faire en procédure pénale interne.[38] Ainsi qu'on l'a écrit, qualifier « c'est […] énoncer un fait dans les termes mêmes de la loi pénale qui le réprime »[39] ou revêtir le fait du bon « vêtement juridique ».[40] La qualification procède de l'essence du droit. En droit pénal, elle consiste à constater qu'un fait est visé par la loi qui le réprime. Il importe, donc, de cerner la réalité avec une précision de caractère scientifique. La mission d'une instance de jugement est

> « de rechercher les éléments constitutifs et la nature du fait dont elle est saisie et, partant, d'attribuer à ce fait sa qualification exacte »[41]

Conformément à l'adage *jura novit curia* (la cour connaît le droit), il appartient donc au juge de réviser la qualification des faits dont il est saisi s'il constate que la qualification que leur a donnée le ministère public est erronée et à condition, toutefois, que « le fait requalifié [soit] le même que celui qui fondait la poursuite »,[42] et que « le prévenu [ait] été averti du changement » ou « [ait] pu se défendre sur la nouvelle qualification ».[43]

Les statuts des TPIR ne leur confèrent cependant pas un pouvoir de requalification contrairement à ce qui existe pour la CPI (règlement de la Cour, norme 55[44]) – un pouvoir dont elle a usé dans le jugement *Lubanga* en changeant la qualification du conflit en RDC: qualifié de « conflit armé international » dans la décision sur la

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[36] Ibid., §§ 297 et 327.

[37] Ibid., § 314.

[38] Voy. par ex., Cass. fr., crim., 10 juillet 2002, *Bull.crim.* n°149 p. 543.

[39] RIGAUX M, TROUSSE P E 1948-1949, p. 711.

[40] Morlet 1990, p. 561.

[41] Ibid., p. 562 et réf.

[42] Ibid., p. 563.

[43] Ibid., p. 584.

[44] Norme 55 : « 1. Sans dépasser le cadre des faits et circonstances décrits dans les charges et dans toute modification qui y aurait été apportée, la chambre peut, dans la décision qu'elle rend aux termes de l'article 74, modifier la qualification juridique des faits afin qu'ils concordent avec les crimes prévus aux articles 6, 7 ou 8 ainsi qu'avec la forme de participation de l'accusé auxdits crimes prévue aux articles 25 et 28. »

confirmation des charges, le conflit armé est devenu « non international » dans la décision de fond de la Chambre de 1e instance.[45]

(**22**) Si une requalification judiciaire est, donc, possible à la CPI, elle doit cependant respecter les droits de la défense: les juges doivent avertir l'accusé de ce changement de qualification et l'autoriser à se défendre sur ce point (Règlement de la CPI, norme 55, § 2) sinon ils violent le droit de toute personne à un procès équitable (Convention Européenne des Droits de l'Homme, art. 6, § 1).[46]

(**23**) En conclusion, ce trop rapide examen de trois acquittements et d'un refus de poursuites révèle certaines timidités de la justice qui, dans le souci de parfaitement respecter les principes de base du droit pénal en vient à oublier l'objet même de sa mission – mettre fin aux crimes les plus odieux[47] – et à ne pas poursuivre des gens qui, par leur engagement ne méritent pas d'échapper à la justice. Il s'agit, non de punir pour punir, mais de reconnaître que certains engagements, même s'ils ne s'accompagnent pas de gestes criminels, n'en restent pas moins criminels en soi. Cette culpabilité doit être affirmée haut et fort car ce qui importe, c'est non la peine, mais le discours judiciaire qui doit refléter le plus fidèlement possible la réalité: *res judicata pro veritate habetur*,[le jugement vaut vérité].

J.-P. Sartre disait à propos du rôle de l'écrivain: « La fonction de l'écrivain est de faire en sorte que nul ne puisse ignorer le monde, et que nul ne s'en puisse dire innocent. ».[48]

C'est aussi une fonction de la justice. On ne saura jamais si Avril eût été d'accord, mais l'auteur pense qu'elle aurait probablement souri …

References

David E (2009) Principes de droit des conflits armés. Bruylant, Bruxelles
McDonald A (1999) Sex Crimes at the ad hoc Tribunals. Nemesis 15:72–82
McDonald A (2002) Sierra Leone's shoestring Special Court. Int Rev Red Cross 84:121–143
McDonald A (2006) The development of a victim-centered approach to International Criminal Justice for serious violations of International Humanitarian Law. In: Carey J et al (eds) International Humanitarian Law, vol 3 prospects. Transnational Publishers Inc., New York, pp 237–276

[45] CPI, *Lubanga*, aff. ICC-01/04-01/06-2843-tFRA, 14 mars 2012, résumé du jugement, § 22, http://www.icc-cpi.int/fr_menus/icc/situations%20and%20cases/situations/situation%20icc%200104/related%20cases/icc%200104%200106/court%20records/chambers/trial%20chamber%20i/Pages/2843.aspx.

[46] Cour EDH, G.C., *Pélissier et Sassi c/France*, 25 mars 1999, http://hudoc.echr.coe.int/.

[47] S/RES/955, 8 nov. 1994, préambule, 6e al.

[48] Sartre 1985, pp. 29–30, Sartre 1948.

McDonald A (2007) The international victims reparations agency: helping victims to help themselves. In: Fijalkowski A (ed) International institutional reform: proceedings of the seventh Hague joint conference on contemporary issues of international law. T.M.C Asser Press, The Hague, pp 34–44

McDonald A (2009) Bosnia's war crimes chamber and the challenge of an opening and closure. In: Doria J et al (eds) The legal regime of the International Criminal Court. Essays in Honour of Professor Igor Blishchenko. Martinus Nijhoff Publishers, Leiden, pp 297–328

Morlet P (1990) Changement de qualification – Droit et devoirs du juge, Revue du Droit Pénale et de Criminologie

Sartre JP (1948) Situations II. Gallimard, Paris

Sartre JP (1985) Qu'est-ce que la littérature. Gallimard, Paris

Chapter 14
Discrepancies Between International Humanitarian Law on the Battlefield and in the Courtroom: The Challenges of Applying International Humanitarian Law During International Criminal Trials

Rogier Bartels

Abstract International humanitarian law and international criminal law are distinct but related fields. The application of international humanitarian law to concrete facts by international tribunals and courts has contributed to the development and clarification of this body of law. However, using a law in the courtroom that was created instead, to be applied on the battlefield poses significant challenges. In the process of such use, the law may have been distorted to fit facts that it was not envisioned to cover. Its use is as a means to punish unwanted behaviour during armed conflicts and to combat impunity risks contorting the balance on which international humanitarian law is based: military necessity and humanity. This chapter highlights some findings by international criminal tribunals and courts that do not sit easily with international humanitarian law as applied by armed forces, and discusses the consequences that applying the laws of armed conflict during criminal trials may have for this branch of international law.

The author had the privilege of collaborating with Avril during his time at the Netherlands Red Cross and the International Criminal Tribunal for the former Yugoslavia. The many conversations with her, both during professional and social occasions, will always remain fond memories. The author would like to thank Jeroen van den Boogaard, Chris Gosnell, Robert Heinsch, Eric Iverson, Dov Jacobs, Thomas Wayde Pittman, Barbara Sonczyk, and Natalie Wagner for their helpful comments on an earlier draft. Naturally, the views expressed in this chapter are those of the author alone and any mistakes remain his own responsibility. The case law is updated until June 2012.

R. Bartels (✉)
Netherlands Defence Academy, Breda, The Netherlands
e-mail: rj.bartels@nlda.nl

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Contents

14.1 Introduction

International humanitarian law (hereinafter: IHL), also referred to as laws of war, laws of armed conflict, or as *ius in bello*, has been around for a long time. Whereas States concluded humanitarian law treaties well before the conception of international criminal justice,[1] IHL was not drafted to be applied in a courtroom. It *was* not, and *is* not, intended to be "the international equivalent of a comprehensive national criminal code".[2] Instead, IHL aims to protect those who are not, or are no longer, taking part in hostilities, the wounded and sick, prisoners of war and civilians during armed conflict. In fulfilling its aim to protect, it places certain restrictions on warring parties, whilst at the same time it acknowledges wartime reality. As "a body of preventive law", it is usually applied in practice by non-lawyers[3] and, in particular, by members of the armed forces of the parties to a conflict. This application on the battlefield requires certain simplicity. Rules of IHL thus differ from a criminal code and do not include elements of crimes.

[1] The first multilateral humanitarian law treaty dates back to 1864 (Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864, http://www.icrc.org/ihl.nsf/FULL/120?OpenDocument). After a failed attempt to set up a tribunal to try the German Emperor Wilhelm II, the International Military Tribunals of Nuremberg and Tokyo saw the light of day in 1945; however, it took until the 1990s for international criminal law to really take off.

[2] Fenrick 1997, p. 26.

[3] Fenrick 1997, p. 26. However, in situations of targeting, military lawyers will normally be involved in the target selection process. See e.g. Boyle 2001, pp. 32–33.

Moreover, violations of a large number of the rules are not even war crimes, and those rules are better considered as 'instruction norms'.[4]

On the other hand, in order to prosecute and try alleged war criminals, the parties in a criminal trial have to have resort to clear rules.[5] Also, an assessment must be made as to whether the elements of an alleged crime have been met for a conviction to be entered.[6] Substantive international criminal law[7] is not an autonomous body of law that happens to be based on IHL, but is instead an accessory to the latter. War crimes law should therefore logically be interpreted with a close eye on the IHL, the very law upon which the violations are based.[8]

Notwithstanding the foregoing, international criminal law (hereinafter: ICL) has developed greatly since the 1990s and has, through the numerous judgments of the international tribunals and courts, e.g. the International Criminal Tribunal for the former Yugoslavia (hereinafter: ICTY) and the International Criminal Tribunal for Rwanda (hereinafter: ICTR), contributed to the implementation of IHL in general, and to the development and clarification of the substance of IHL.[9] Viewing IHL through the lens of ICL also entails risks, however.[10] Not all 'clarifications' by such courts and tribunals have actually simplified, or indeed

[4] Examples include Articles 38–41, 57–66, and 79 of the Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, (hereinafter: Third Geneva Convention), United Nations Treaty Series, Vol. no. 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-972-English.pdf. In addition, it was not accepted until the *ad hoc* Tribunals that war crimes included more than only "grave breaches" and that other serious violations of IHL as well as such violations committed during non-international armed conflicts were also to be included. See generally Wagner 2003.

[5] In its report on the North Atlantic Treaty Organisation's (hereinafter: NATO) 1999 bombing campaign in relation to Kosovo, the Office of the Prosecutor of the ICTY acknowledged that sometimes IHL is not clear enough to start an investigation into alleged crimes. See the Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslavia of 2000 (hereinafter: "Final Report to the Prosecutor"), p. 90.

[6] The judges at the *ad hoc* Tribunals had to develop the elements of crimes themselves (albeit aided by the parties that made proposals) for the alleged crimes that they were asked to pronounce upon. The International Criminal Court has elements of crimes that have been drafted by a special working group, and were subsequently adopted by the Assembly of States Parties. The elements of crimes merely serve to "assist" the judges and are not binding on the chambers, however. See Article 9(1) of the Rome Statute of the International Criminal Court (hereinafter: Rome Statute), Rome, 17 July 1998, U.N. Doc. A/CONF. 183/9, http://untreaty.un.org/cod/icc/statute/romefra.htm.

[7] Besides war crimes, substantive international criminal law also includes the crime of genocide and crimes against humanity. Both of these crimes can be committed outside a situation of armed conflict. See further Sect. 14.2 below.

[8] See Werle 2009, p. 358, para 964, referring to the ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 81.

[9] See on this issue e.g. Darcy 2010; Heinsch 2007; Danner 2006; van den Herik 2005; Kress 2001; Green 1999; Greenwood, 1998; Meron 1998a; Fenrick 1998.

[10] Sassòli 2009, pp. 111, 117–119.

clarified, IHL. Whilst certain rulings might be understandable from a criminal law point of view, the impact on IHL when applied on the battlefield, instead of in the courtroom, could actually lead to confusion and to a blurring of the (usually) clear and basic rules of IHL. Under IHL, a soldier can legitimately attack his enemy in order to kill the enemy or make him retreat, as long as in doing so, he does not cause excessive incidental damage to civilian objects or uses a forbidden means or method of warfare. However, as will be discussed below, this soldier could be found guilty of having committed a crime against humanity of deportation, if the enemy indeed retreats.[11] This is a confusing situation for the soldier in the field, indeed.

This chapter highlights and discusses some of the discrepancies between IHL and ICL and explains why applying IHL in retrospect, that is, before international courts and tribunals, is challenging and thus requires a good understanding not only of the foundations of IHL, but also of the way IHL is meant to apply on the battlefield. In doing so, it will first briefly address some of the challenges with which the international criminal institutions are faced when alleged violations of IHL are prosecuted before them. The discussion then focuses on the way these institutions have contributed to the clarification of IHL. The next section discusses some issues of IHL that have been addressed by the institutions in a way that, from an IHL perspective, could be seen as incorrect, and some issues that have been addressed as crimes against humanity, but appear to be at odds with the rationale of IHL. The third and final section provides an explanation of the reasons why discrepancies exist between IHL itself and the way this body of law is dealt with in international criminal justice.

Whilst critical of certain findings by the international courts and tribunals, and the negative effect these findings could potentially have on IHL and the protection afforded by it, this contribution also acknowledges the important work done by these institutions. It merely wishes to contribute to academic debate that aims to assist the work of those at these very tribunals and courts.

14.2 From IHL to ICL

In addressing the Office of the Prosecutor of the International Criminal Court (hereinafter: ICC), Frits Kalshoven qualified the "colossal distance" travelled from IHL to ICL as a "quantum jump".[12] He added that he wanted "to remove any suggestion that in moving from IHL to international criminal law we might have lost IHL somewhere on the road. Far from it, IHL is still very much with it […]".[13]

[11] See Sect. 14.6.

[12] See Kalshoven's speech, published as Kalshoven 2004, p. 151.

[13] Ibid., at p. 153.

The *ad hoc* tribunals, and therefore (modern) international criminal law,[14] are founded on IHL: the ICTY's and ICTR's full names make this very clear.[15] Whilst the Special Court for Sierra Leone (hereinafter: Special Court) does not specifically refer in its name to "serious violations of international humanitarian law", the first article of its Statute clearly states that the Special Court's jurisdiction is mandated to adjudicate over such violations.[16] IHL, as referred to in the statutes of the *ad hoc* Tribunals, is used in a broad sense.[17] In this chapter, the term "international humanitarian law" is used in the narrow sense, i.e. referring to the rules governing the parties to an armed conflict (the laws of war, laws of armed conflict, or *ius in bello*). It does not, therefore, include the law of genocide or crimes against humanity. Be that as it may, acts constituting the latter two crimes, when committed in times of armed conflict, will often also constitute war crimes. As long as there is a nexus with the armed conflict, the same behaviour, e.g. the directing of an attack at civilians, may qualify—depending on the circumstances and the fulfilment of the mental and subjective elements—as a war crime, a crime against humanity and/or genocide.

International law is a man-made phenomenon and is shaped by actors (e.g. States, organisations and individuals) that are driven and brought together by their perceived need to solve particular problems at the international level. Triggering events, opportunities and ideas are key factors behind this development of

[14] 'Modern' vis-à-vis the criminalisation of, e.g., piracy and slavery. Extradition and mutual assistance in criminal cases are often—besides the term that is also used: transnational criminal law—grouped under the heading of "international criminal law". ICL is used herein for the law criminalising genocide, crimes against humanity, and violations of IHL.

[15] The full name of the ICTY is the "International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991". The ICTR's full name is the "International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law Committed in the Territory of Rwanda and Rwandan Citizens responsible for genocide and other such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994". See, respectively, UN SC Resolutions 827 (S/RES/827 (25 May 1993)) and 955 (S/RES/955 (8 November 1994)). The United Nations Secretary-General's report to the Security Council on the establishment of the ICTY also made clear that the Tribunal was to apply "rules of international humanitarian law which are beyond any doubt part of customary law" (see Report of the Secretary-General, 'Report pursuant to Article 2 of Security Council Resolution 808' (1993) U.N. Doc. S/25704, 34).

[16] Article 1(1) of the Special Court Statute reads: "The Special Court shall, except as provided in subparagraph (2), have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996" (Statute of the Special Court for Sierra Leone, annexed to the Agreement between the United Nations and the Government of Sierra Leone on the Establishment of a Special Court for Sierra Leone, signed on 17 January 2002).

[17] As such "serious violations of international humanitarian law" would also include acts of genocide and crimes against humanity. In 1966, Pictet described IHL "in the wide sense" as "compromising two branches: the law of war and human rights" (Pictet 1966, p. 10).

international law.[18] This accounts for "the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as everything depends on everything, these regimes overlap".[19]

This overlap, as will be discussed below, is in fact one of the challenges to a good application of IHL when prosecuting and adjudicating alleged violations; that is, applying IHL in court in retrospect.

14.3 Challenges in Applying IHL in Retrospect

As noted above, IHL was originally created to guide warring states in their conduct of hostilities and to determine state responsibility for the way they would conduct their military operations. Importantly, though, it was not created for evaluating the individual criminal responsibility of the commanders for unlawful conduct.[20] This also explains why the rules of IHL include highly subjective notions, such as 'military necessity', 'excessive damage', and 'military advantage'.[21] Whilst such notions are already difficult to apply correctly during combat, the fact that they are difficult both to qualify and to quantify provides the flexibility to enable their use during armed conflicts. Applying them afterwards in a courtroom, however, "is an uphill task, as they involve value-based, individual judgements".[22]

This task is even more daunting, given the fact that—naturally—not everybody who works in international criminal justice is an experienced military or humanitarian lawyer. The successful prosecution of international crimes requires criminal lawyers who are used to, and capable of, dealing with very large amounts of evidence, a vast volume of procedural rules, and examining witnesses. At the same time, those with knowledge of, and experience with, IHL, are not always well divided over the various parties, teams or chambers.

Discussed next are some legal and practical challenges with which the international institutions dealing with alleged violations of IHL are faced.

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[18] Bothe 2004, p. 37.

[19] Ibid. For the fragmentation of international law and the consequences for the separate branches, see the Report of the Study Group of the International Law Commission (2006), which was prepared by Martti Koskenniemi.

[20] Wuerzner 2008, p. 929.

[21] Ibid.

[22] Ibid.

14.3.1 Legal Challenges in the Adjudication of Violations of IHL

IHL and ICL have different objectives. Whereas the former aims to regulate warfare and thereby to mitigate the suffering resulting therefrom,[23] the latter seeks to counter the impunity of those having violated the rules of IHL in such a manner as to give rise to individual criminal responsibility.[24] In striving to limit suffering in times of armed conflict, IHL has an in-built presumption of protection: only those who qualify as combatants or take a direct part in hostilities can be targeted. In case of doubt about the status of a person or object, IHL proscribes that the person or object concerned is to be considered as protected and thus cannot be attacked.[25] Under ICL, those who are alleged to have committed international crimes, by *inter alia* breaching IHL, are prosecuted. One of the essential principles of criminal law thus forms part of ICL: the presumption of innocence.[26] As a corollary of this principle, the prosecution has to prove beyond reasonable doubt that the accused has committed the crimes as charged. In doing so, another corollary of this principle, *in dubio pro reo*, requires that "the accused is entitled to the benefit of doubt as to whether the offence has been proven".[27] If then, an accused is charged with directly attacking civilians not directly participating in hostilities or persons *hors de combat*, the prosecution has to prove that the alleged victims could not legitimately be attacked for being combatants or for directly participating in hostilities, and therefore were not, at the time of the attack, protected by IHL. On this issue, the ICTY has found that the prosecution "must show that a reasonable person could not have believed that the individual he or she attacked was a combatant".[28] The presumption of protection as defined in IHL

[23] Fleck 2008, p. 11; Kalshoven 2011, p. 2.

[24] Cryer et al. 2010, p. 1; Werle 2009, pp. 29–36.

[25] See Articles 45(1) ("Should any doubt arise as to whether any such person is entitled to the status of prisoner of war, he shall continue to have such status and, therefore, to be protected by the Third Convention and this Protocol until such time as his status has been determined by a competent tribunal."), 50(1) ("In case of doubt whether a person is a civilian, that person shall be considered to be a civilian."), and 52(3) ("In case of doubt whether an object which is normally dedicated to civilian purposes […] is being used to make an effective contribution to military action, it shall be presumed not to be so used.") of Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 9 December 1978) 1125 United Nations Treaty Series 3 (hereinafter: Additional Protocol I), http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17512-English.pdf.

[26] See Article 21(3) ICTY Statute, Article 20(3) ICTR Statute, and Article 66 Rome Statute.

[27] ICTY, *Prosecutor v. Delalić et al.*, Case No. IT-96-21-T, Judgement, 16 November 1998 ("*Delalić et al.* Judgement") para 601. See generally Raimundo 2008, pp. 110–111.

[28] ICTY, *Prosecutor v. Stanislav Galić,* Case No. IT-98-29-T, Judgement, 5 December 2003 ("*Galić* Judgement"), para 55.

thus—for obvious and understandable reasons—works in reverse in ICL.[29] IHL's aim to protect those not or no longer taking part in hostilities then 'clashes' with the protection under criminal law of the accused's right to a fair trial.

The opposite objectives of the parties in an (international) criminal trial, which in short boil down to the prosecution seeking to achieve a conviction and the defence an acquittal, can lead to submissions by the parties on the law that best serve their desired outcome, respectively. This, in turn, can lead to judicial findings that follow the approach taken by one of the parties and so do not necessarily reflect the law in a correct manner.[30]

ICL gives rise to individual criminal responsibility, which results in certain provisions of war crimes law being interpreted more narrowly than their IHL counterparts. Care should therefore be taken to make clear that the narrower reading of a war crime will come to replace the broader interpretation of the rule of IHL on which it is based.[31] One scholar warns in this regard that "[i]f appropriate care is not taken, interpretations of the war crime could end up in the narrowing of the protections afforded by international humanitarian law".[32]

The protection under ICL is not always narrower than under IHL, however. The next example shows that alleged perpetrators can more easily be held accountable for war crimes than that they would lose their protected status under IHL. When looking at individual criminal responsibility and modes of liability, one can also see that dealing with IHL in retrospect does not always correspond to battlefield reality. For example, a joint criminal enterprise (hereinafter: JCE) can include persons who (initially by the prosecution and subsequently by the judges seized of the case) are deemed to have been of vital importance to the commission of war

[29] This challenge obviously also exists for the adjudication of violations of IHL on the national level. See on the issue of the civilian presumption and the principle of *in dubio pro reo*, Hayashi 2006, pp. 76–84, which also includes a discussion on the approach taken by the ICTY with regard to "doubt" as to direct participation and prisoner of war status.

[30] See below the discussion of the *Lubanga* case (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06) at "Military targets vs civilian objects". Naturally, case law is formed by the decisions of the chambers and not by the view of a prosecutor's office or the defence. However, with regard to submissions by the parties, it is interesting that the Final Report to the Prosecutor (see *supra* note 5) has been so widely referred to in both academic writings and in case law. Similarly, the reliance of the Customary IHL Study on the First Indictment in *Karadžić and Mladić* as evidence of the customary nature of the prohibition to attack UN personnel appears not to take into account the fact that, although the indictment has been confirmed by the Pre-Trial Chamber, it is still merely the view of one of the parties to a criminal trial and a chamber at trial has yet to pronounce thereon (see Henckaerts and Doswald-Beck 2005b, Rule 33 and accompanying text, p. 113).

[31] Sivakumaran 2011, p. 220.

[32] Ibid., at p. 230.

crimes, [33] and yet whose acts do not fall within the definition of direct participation in hostilities.[34] During the armed conflict then, the opposing party would not have been allowed under IHL to target these persons, and thereby prevent the

[33] For its part, a joint criminal enterprise (JCE) is purely an ICL concept that was first introduced by the ICTY in *Prosecutor v. Tadić*. The judges deemed it necessary to introduce this extra-statutory mode of liability because

> to hold criminally liable as a perpetrator only the person who materially performs the criminal act would disregard the role as co-perpetrators of all those who in some way made it possible for the perpetrator physically to carry out that criminal act. At the same time, depending upon the circumstances, to hold the latter liable only as aiders and abettors might understate the degree of their criminal responsibility.
>
> (ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1, Judgement (Appeals Chamber), 15 July 1999 ("*Tadić* Appeal Judgement") para 192).

This mode of participation was found (and has since been found by later ICTY Trial and Appeals Chambers, as well as at the ICTR, Special Court and the Extraordinary Chambers in the Courts of Cambodia) to exist for war crimes. There are three different types of JCE, namely:

> i. *A plurality of persons.* They need not be organised in a military, political or administrative structure […].
>
> ii. *The existence of a common plan, design or purpose which amounts to or involves the commission of a crime provided for in the Statute.* There is no necessity for this plan, design or purpose to have been previously arranged or formulated. The common plan or purpose may materialise extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a joint criminal enterprise.
>
> iii. *Participation of the accused in the common design* involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.), but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. (*Tadić* Appeal Judgement, para 224).

[34] Direct participation in hostilities is purely an IHL concept that has been subject to extensive legal debate. A study initiated by Avril McDonald, together with the International Committee of the Red Cross (hereinafter: ICRC), seeking to clarify the concept of direct participation in hostilities, was published by the ICRC in 2009: the Interpretive Guidance on the notion of direct participation in hostilities under international humanitarian law. According to this Interpretive Guidance (herein referred to as Melzer 2009), the notion of direct participation in hostilities "refers to specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict." (Melzer 2009, p. 16). Such acts must meet the following cumulative criteria:

> 1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm), and
>
> 2. there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation), and
>
> 3. the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus). (Melzer 2009, p. 16).

commission of war crimes. Members of the opposition themselves could even be prosecuted for war crimes if they would have undertaken military action against the (protected) persons in question. The foregoing is difficult indeed to explain to members of the armed forces when teaching them about the rules of IHL and about individual criminal responsibility.[35]

Sometimes the rules of IHL might themselves be problematic. Consider, for example, the following: although members of the armed forces would assume that they should not cause excessive collateral damage to persons *hors de combat* when taking targeting decisions, the prosecution of an act having caused extensive casualties[36] amongst persons *hors de combat* that were foreseeable to the attacker would be impossible under the current regimes of e.g. the ICTY and the ICC, as long as the object of the attack was a legitimate military target. Since the principle of proportionality, as codified in Articles 51(5)(b) and 57(2) of Additional Protocol I, requires commanders to make an assessment as to whether the military advantage to be obtained by an operation outweighs the possible damage to civilians and/or civilian objects that could result from this military action.[37] The law is very strict on this issue. It is only *civilian* damage that has to be balanced against the military advantage.[38] Persons *hors de combat*, such as prisoners of war (POW) or wounded soldiers, do not therefore benefit from the 'protection' of the principle of proportionality. If a high value military object, e.g. a commander of the opposing forces, the elimination of which would result in a significant military advantage, would be in the direct vicinity of a POW camp or field hospital, then the number of persons *hors de combat* who would possibly be killed or (further)

[35] Interestingly, this issue was discussed only briefly during the expert meetings that formed part of the drafting of the Interpretive Guidance. IHL and ICL are (arguably) separate legal regimes, and academic experts in both or either of these fields might not view this issue as being problematic because they have a clear understanding of each of the two concepts. However, those practicing in these fields, and those with less in-depth knowledge of IHL and of ICL, have trouble in understanding how someone can be responsible for committing war crimes without losing his/her protection as a civilian under the laws of war.

[36] The Commentary to the Additional Protocol I uses the term "extensive". The Commentary's substitution of the word "excessive" by "extensive" is criticised by, *inter alia*, Anthony Rogers for negating the balancing process inherent in the idea of proportionality (see Rogers 2004, p. 18). Extensive is deliberately used here, however, as it should be clear that a large number of casualties is at issue, which does not fall within the required equation, and thus need not be balanced against the military advantage that would be gained.

[37] See e.g. Kolb and Hyde 2008, p. 48; and Dinstein 2004, p. 59.

[38] Articles 51(5)(b) and 57(2) of Additional Protocol I refer only to "civilian life, injury to civilians, damage to civilian objects, or a combination thereof" that would be "excessive in relation to the concrete and direct military advantage anticipated".

injured as a result of a strike would not have to be taken into consideration by the attacking party. The same applies to an attack on a building or location that would qualify as a military object, which at the moment of the attack would house persons *hors de combat*. In both situations, even if the number of persons *hors de combat* who would be killed would—if the same number of civilians would have been killed—appear to be clearly excessive, no war crime charges could be brought for ordering or carrying out the attack.[39]

14.3.2 Practical Challenges in the Adjudication of Violations of IHL

Since violations of IHL occur by definition during a situation of armed conflict, which is normally a situation of chaos,[40] the process of the international prosecution of the alleged perpetrators and the judging of their behaviour is inherently difficult.[41] This is especially the case with regard to alleged violations occurring in the conduct of hostilities. In fact, one author has raised the question whether this is actually a 'mission impossible'.[42] The 'fog of war' that influences decisions taken on the battlefield has to be taken into account during a subsequent criminal trial also.

Challenges occur firstly with regard to the determination of the facts and the knowledge and intent of the accused at the time of the alleged violation. Documentary evidence often does not exist, or is difficult to obtain.[43] Indeed, States have shown to be unwilling to hand over sensitive information stating reasons of national security.[44] The *ad hoc* tribunals have the power to *subpoena*, but their

[39] It is submitted by the present author that the fundamental principle of proportionality underlying Articles 52 and 57 of Additional Protocol I would include any person who cannot directly be targeted under IHL, i.e. in addition to civilians, also persons *hors de combat*.

[40] Of course also during an armed conflict certain (international) crimes can be very well organised, planned and far from 'chaotic'. One need only think of the Holocaust as being a case in point.

[41] It is acknowledged that courts at the national level are faced with many problems also when dealing with war crimes. Some of these problems are of a similar nature as those on the international level. Because of the substance of the applicable law and the situations in which the alleged crimes were committed, some problems are due to the national criminal justice systems. See, generally, Witteveen 2010.

[42] The question is answered in the negative, but it is held that the prosecution of conduct of hostilities crimes meets with many difficulties. Wuerzner 2008, pp. 907–930.

[43] Nazi Germany documented the Holocaust meticulously and the ICTY has been able to make use of thousands of documents produced by the parties to the Balkan conflict. However, obtaining documents containing, e.g., the targeting decisions or orders to commit a violation, is difficult as the armed forces will normally attempt to prevent these documents from falling into the hands of a third party. Furthermore, written documents by militia, whose activities may more often be before the ICC, rarely exist, if indeed at all; or such documents may be few in number.

[44] See, *inter alia*, Dawson and Dixon 2006, pp. 112–134; and Neuner 2002, p. 163.

powers are limited when it concerns States or State officials,[45] and the ICC has no such power at all.[46] Much of the evidence is obtained through witnesses, but witness testimonies have inherent problems, due in part to the lapse of time between the moment the alleged crime took place and the testimony, the nature of the crimes and the various psychological reasons that influence the credibility of this type of evidence.[47]

Notwithstanding the obligation to take all feasible precautions when launching an attack, certain attacks that have resulted in the death of and/or serious injury to civilians or those *hors de combat* would only constitute a violation of IHL if the attacker intended to cause the resulting harm to the persons protected by IHL.[48] Mistakes or faulty weaponry can result in outcomes that IHL aims to prevent, but these outcomes do not necessarily constitute violations of IHL.[49] The United States Military Tribunal in Nuremberg developed the so-called "*Rendulic* rule", which entails that one should not lightly second-guess the reasonableness of battlefield decisions.[50] This rule is reflected in the declarations made by several States to Additional Protocol I. Canada's statement of understanding in relation to provisions dealing with the general protection against the effects of hostilities highlights that

> [i]t is the understanding of Canada that, in relation to Art 48, 51 to 60 inclusive, 62 and 67, military commanders and others responsible for planning, deciding upon or executing attacks have to reach decision on the basis of their assessment of the information

[45] ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-95-14, Decision on the Objection of the Republic of Croatia to the Issuance of *Subpoena Duces Tecum,* 29 October 1997. The Appeals Chamber held that the Tribunal "does not possess any power to take enforcement measures against sovereign States" and that States can only receive "orders" or "requests" from the Tribunal pursuant to Article 29 of the ICTY Statute.

[46] See, *inter alia*, Sluiter 2009, pp. 590–608.

[47] See Combs 2010. It should be noted that Combs' extensive research did not include the ICTY, but some of the problems that she highlights also apply to witness testimonies at the ICTY.

[48] Individual criminal responsibility thus also only arises when the attacker intended the outcome (or at least an outcome contrary to IHL) to occur. See, *inter alia*, Article 8(2)(a)(i), (iii), (iv) and (vi) of the Rome Statute, using the wording "willful(ly)" and "wantonly"; and 8(2)(b)(i)–(iv), (ix) of the Rome Statute, proscribing that the acts should have been carried out "intentionally".

[49] Examples include the 7 May 1999 attack by NATO on the Chinese Embassy in Belgrade as part of Operation Allied Force (see the Final Report to the Prosecutor, *supra* note 5, paras 80–85); as well as the attack by the United States on the Amiriyah shelter/Al Firdus bunker during the 1991 Gulf War (United States Department of Defense 1992, pp. 615–616).

[50] In the *Hostage* case, the Military Tribunal held that "The course of a military operation by the enemy is loaded with uncertainties, such as the numerical strength of the enemy, the quality of his equipment, his fighting spirit, the efficiency and daring of his commanders, and the uncertainty of his intentions. These things when considered on his own military situation provided the facts or want thereof which furnished the basis for the defendant's decision […]. [T]he conditions, as they appeared to the defendant at the time were sufficient upon which he could honestly conclude that urgent military necessity warranted the decision made. This being true, the defendant may have erred in the exercise of his judgement but he was guilty of no criminal act." (*United States of America v. Wilhelm List et al.*, in Trials of War Crimes before the Nuremberg Military Tribunals under Control Council No. 10, Vol. XI TWC (1948) ("*Hostage case*") 1297).

> reasonably available to them at the relevant time and that such decisions cannot be judged on the basis of information which has subsequently come to light.[51]

This approach has also been adopted by the ICTY in, e.g., *Galić*,[52] and has been incorporated in the study of the International Committee of the Red Cross on customary international humanitarian law.[53]

Secondly, all parties involved in the trial must have a proper understanding of both IHL and military operations. For example, the *Martić* Trial Chamber of the ICTY, which was seized of a case involving conduct of hostilities issues, has been questioned for its (lack of) understanding of military operations,[54] highlighting the need for military experts to be involved in the proceedings. Hayashi observes, in this regard, that whilst judges need not have been soldiers themselves, some degree of familiarity with, and sensitivity to, the nature of the military profession is essential for realistic judicial decisions.[55] And whilst at the ICTY there have been quite a number of persons with (extensive) military experience working for all parties involved, this number is (at present) very low at the ICC. This does not have to be problematic at the present time, because the cases do not currently deal with large-scale military operations carried out by a conventional army. Nevertheless, with preliminary investigations into situations such as the 2009/2010 Gaza Conflict, the 2008 Russia-Georgia War, and the ongoing conflict in Afghanistan,[56] a good knowledge of military affairs and battlefield reality at the Office of the Prosecutor is essential; not only for a correct legal assessment, but also for knowing what to investigate and what information to bring before the judges.

The parties involved in international criminal justice cannot rely solely on expert witnesses for their own information on military issues, such as weapons systems,[57]

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[51] Canada, Reservations and statements of understanding made upon ratification of the 1977 Additional Protocol I, 20 November 1990, para 7. Similar statements have been made by, e.g., Austria, the Netherlands and the United Kingdom (see the reservations/declarations to Additional Protocol I at www.icrc.org/ihl).

[52] *Galić* Judgement, *supra* note 28, para 58.

[53] Rules 24 and 15 of ICRC, 'Study on Customary International Humanitarian Law' (2005) (hereinafter: ICRC Customary IHL Study). Since 2005 updated and available at http://www.icrc.org/customary-ihl/eng/docs/home.

[54] See Van Schaack and Slye 2007, pp. 252–253.

[55] Hayashi 2006, pp. 87–88.

[56] Office of the Prosecutor of the ICC Press Release, 'Georgia preliminary examination: OTP concludes second visit to the Russian Federation' (4 February 2011) ICC-OTP-20110204-PR625; and the overview available at http://www.icc-cpi.int/Menus/ICC/Structure+of+the+Court/Office+of+the+Prosecutor/, stating that the ICC's Office of the Prosecutor is conducting preliminary examinations, e.g. into the situations in Georgia, Afghanistan and Palestine.

[57] The various *ad hoc* Tribunals and the ICC have often made use of expert witnesses, called by both the Prosecution and the Defence. An example is the *Gotovina* case before the ICTY, where Lieutenant Colonel Konings, an artillery expert in the Royal Netherlands Army, called by the Prosecution, and Professor Corn, a former US army officer, called by the Defence, testified on issues such as the feasibility of taking precautions and targeting with artillery. See ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-T, Judgement, 15 April 2011 (*Gotovina* Trial

for the simple reason that these witnesses must be asked relevant questions, and the correct legal analysis should be made based on the evidence given.[58]

Recently, the ICTY *Gotovina* Trial Chamber was criticised by a group of military experts for not having done the latter in a report that "provides perspectives on whether particular artillery attacks which were analyzed by the Trial Chamber complied with specific tenets of international humanitarian law".[59] The report states that the *Gotovina* Trial Judgement's "legal conclusions […] lack the appropriate measure of operational sophistication that is necessary for understanding both how to apply the law and the consequences of that legal application to the implementation of IHL in future operations",[60] and that the judgement "conflates the criminal standard with the operational standard in IHL".[61]

Despite the challenges discussed hitherto, ICL has nevertheless contributed to the clarification of IHL, to which the discussion now turns.

14.4 The Clarification of IHL by ICL and the Criticisms Thereof

With regard to the clarification of IHL by ICL, William Fenrick has described the judgments of the *ad hoc* Tribunals as having added "flesh to the bare bones of treaty provisions or to skeletal legal concepts" of IHL.[62] Similarly, Theodor Meron—before himself joining the ICTY as a judge—has held that the jurisprudence of the *ad hoc* Tribunals helped IHL "to come of age" and to develop more rapidly between 1991 and 1998 than during the 45 years after the Nuremberg Tribunals.[63] Indeed, in their case law the Tribunals have clarified many issues of

(Footnote 57 continued)
Judgement), paras 36, 1163–1175; See also ICTY, *Prosecutor v. Pavle Strugar*, Case No. IT-01-42-T, Judgement, 31 January 2005, paras 130–131, 203–204; ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-T, Judgement, 12 June 2007, para 29.

[58] This is also true for the testimony of crime-based witnesses.

[59] ICTY, *Prosecutor v. Gotovina et al.*, Case No. IT-06-90-A, Decision on Application and Proposed Amicus Curiae Brief, 14 February 2012, para 7. The group of military experts (from Canada, the United Kingdom and the United States) attempted to submit its report as an *amicus curiae* brief to the ICTY's Appeals Chamber, but its request was denied by the Appeals Chamber. See the aforementioned decision.

[60] International Humanitarian Law Clinic at Emory University School of Law 2012, p. 12. See, however, http://opiniojuris.org/2012/02/01/significant-problems-with-the-gotovina-expert-report/ for a critique of the report by Kevin Jon Heller. The present author shares some of the concerns as to the effect on the application of the law in military practice, mentioned in the report, and agrees that the law has to continue being realistic, but does not share all the criticisms included in the report.

[61] International Humanitarian Law Clinic at Emory University School of Law, p. 7.

[62] Fenrick 1998, p. 197.

[63] Meron 1998b, pp. 463, 464. See for similar remarks Schabas 2001, p. 42

IHL. Notable examples include the notion of armed conflict,[64] the lower threshold of non-international armed conflicts,[65] rape as a war crime,[66] and the war crime of terrorising the civilian population.[67] Although the findings by the tribunals are not binding on States, they nevertheless have a great influence on IHL,[68] as demonstrated by the references made by States and national courts to the Tribunals' case law, as well as by the impact that this case law has had on the negotiation of international treaties, including the Rome Statute and the Convention on Cluster Munitions.[69] The extensive references to the case law of the Tribunals in the ICRC Customary IHL Study is perhaps the best example of the impact that the Tribunals have had on IHL.[70]

However, in the process of clarification, the Tribunals might not always have struck the right balance. There has been criticism in academic writings about certain decisions that are said to misstate IHL as such, or the customary status of certain rules of IHL.[71] One such example is the criticism of the findings by the ICTY on the notion of belligerent reprisals in *Kupreškić*[72] and in *Martić*.[73] Whilst

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[64] See ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paras 66–70.

[65] In first *Limaj* and then in *Haradinaj*, the ICTY clarified the definition of non-international armed conflict that had been used by this Tribunal since *Tadić* (see ICTY, *Prosecutor v. Ramush Haradinaj, Idriz Balaj and Lahi Brahimaj*, Case No. IT-04-84-T, Judgement, 3 April 2008). In *Boškoski*, the Trial Chamber elaborated on this clarification by giving a detailed overview of what constitutes such a conflict, and by reviewing how the relevant elements of Common Article 3 that were recognised in *Tadić*, namely 'intensity' and 'organisation of the armed group' are to be understood (ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-T, Judgement, 10 July 2008, paras 175–206). The Appeals Chamber later confirmed the approach taken by the Trial Chamber. See ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Case No. IT-04-82-A, Appeal Judgement, 19 May 2010, paras 19–24.

[66] See mainly ICTY, *Prosecutor v. Kunarac, Kovač and Vuković*, Case No. IT-96-23-T& IT-96-23/1-T, Judgement, 22 February 2001. The debate in this judgment on the definition of rape as an international crime was preceded by the debate in the ICTR's *Akayesu case* and the ICTY's *Furundžija* case. See ICTR, *The Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998; and ICTY, *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgement, 10 December 1998.

[67] The prohibition of acts or threats the primary purpose of which is to spread terror among the civilian population (Article 52(2) Additional Protocol I), as clarified by the ICTY in the *Galić* Judgement, *supra* note 28.

[68] Sandoz 2009, p. 1061.

[69] See e.g. Graditzky 1999, p. 199; Darcy 2010, p. 321; Meron 1998c, p. 1518. Convention on Cluster Munitions (adopted 30 May 2008, entered into force 1 August 2010) CCM/77, http://www.icrc.org/ihl.nsf/FULL/620?OpenDocument.

[70] See Cryer 2006, pp. 239–263; and Darcy 2010, p. 321.

[71] See, *inter alia*, the "critical analysis" by Wolff Heintschel von Heinegg in Heintschel von Heinegg 2003, pp. 35–43.

[72] ICTY, *Prosecutor v. Zoran Kupreškić et al.*, Case No. IT-95-16-T, Judgement, 14 January 2000 ("*Kupreškić et al* Judgement").

[73] ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-R61, Judgement, 8 March 1996 ("*Martić* Judgement").

resorting to belligerent reprisals has been restricted by the 1949 Geneva Conventions and a further limitation on its use was agreed upon in 1977, several States entered reservations or made declarations concerning the belligerent reprisals provisions of Additional Protocol I; also, certain important States have not ratified the said Protocol.[74] Indeed, the way belligerent reprisals were dealt with in the Protocol has even been said to be one of the very reasons for which the United States of America has not ratified it.[75] Additional Protocol II[76] is silent on the issue of belligerent reprisals and apart from the Amended Protocol to the 1980 Certain Conventional Weapons Convention that extends the prohibition of the use of landmines as reprisals against civilians to non-international armed conflicts, there is no positive international rule dealing with reprisals in non-international conflicts.

Despite the foregoing, the ICTY held in *Kupreškić* that the provision in Additional Protocol I prohibiting such reprisals is declaratory of customary international law and thus binding on all States, including those that have not ratified the Protocol.[77] And in *Martić*, the same Tribunal held that the prohibition of belligerent reprisals against the civilian population or individual civilians "is an integral part of customary law and must be respected in all armed conflicts".[78] Two authors, who also happen to be the most authoritative scholars who have written on the law of belligerent reprisals, Frits Kalshoven and Christopher Greenwood, have both heavily criticised these findings as not being properly founded on customary law.[79]

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[74] See the list of state parties and reservations made to Additional Protocol I at www.icrc.org/ihl.

[75] Sofaer 1988, pp. 784, 785.

[76] Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter Additional Protocol II), Geneva, 8 June 1977, United Nations Treaty Series, Volume Number 1125 ("Additional Protocol II"), http://treaties.un.org/doc/Publication/UNTS/Volume%201125/volume-1125-I-17513-English.pdf

[77] *Kupreškić et al* Judgement, *supra* note 72, paras 527–535.

[78] *Martić* Judgement, *supra* note 73, paras 16–17.

[79] Kalshoven 2003, pp. 481–509; Greenwood 2001, pp. 539–557, who concludes that in relation to the customary prohibition found by the Tribunal, "the general statement about customary law is flawed", and that "the remarks about reprisals in non-international armed conflicts are more attractive but were made without consideration (or, at least, without any discussion in the text of the decision) of State practice" (at pp. 556–557).

Similar criticism has also come from several other scholars,[80] as well as the United Kingdom's Ministry of Defence.[81]

The way in which the ICTY has pronounced on command responsibility for commanders of non-state actors in *Hadžihasanović*,[82] on protection based on allegiance to a party to the conflict rather than on nationality,[83] and on the concept of perfidy in non-international armed conflicts,[84] has also met with academic criticism.

Clearly, then, continued discussion is warranted about certain 'clarifications' of IHL made by the Tribunals.

14.5 Discrepancies Between Legal Findings and IHL

Determinations have been made in some decisions by the international tribunals that show a clear discrepancy between the (retrospective) ICL approach to alleged criminal conduct in an armed conflict situation and IHL, the law applicable at the time of the alleged crimes. A well-known example is the erroneous approach to the principle of military necessity, one of IHL's fundamental principles, in relation to the protection of civilians by the ICTY Trial Chamber in *Blaškić*, when it stated that "[t]argeting civilians or civilian property is an offence when not justified by military necessity".[85] This was later addressed by another trial chamber as a misstatement of IHL,[86] and by the Appeals Chamber in *Blaškić*, which deemed it "necessary to rectify the Trial Chamber's statement" and to "underscore that there is an absolute prohibition on the targeting of civilians in customary international

[80] Robert Cryer *et al*. wrote that the *Kupreškić* Judgement "rather unconvincingly derived the prohibition of practically all reprisals from contradictory practice and a bold interpretation of the Martens clause" (Cryer et al. 2010, p. 134). See also the discussion of *Kupreškić* in Kuhli and Günther 2011, pp. 1261–1278.

[81] The United Kingdom Ministry of Defence's *Manual of the Law of Armed Conflict* states that it "is unconvincing and the assertion that there is a prohibition in customary law flies in the face of most of the state practice that exists. The UK does not accept the position as stated in this judgment" (United Kingdom Ministry of Defence 2004, pp. 420–421).

[82] ICTY, *Prosecutor v. Enver Hadžihasanović et al.*, Case No. IT-01-47-AR72, Decision on Interlocutory Appeal Challenging Jurisdiction in relation to Command Responsibility, 16 July 2003. See Greenwood 2004, p. 601; See also Mettraux 2009, p. 22.

[83] Sassòli 2009; Sassòli and Olsen 2000; Compare Dörmann 2003, pp. 45–74.

[84] Greenwood 1998.

[85] ICTY, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-T, Judgement, 3 March 2000, para 180. The *Kordić* Trial Chamber used a different, but similarly ambiguous wording when it stated that "prohibited attacks are those launched deliberately against civilians or civilian objects in the course of an armed conflict and are not justified by military necessity." (ICTY, *Prosecutor v.* Dario *Kordić and Mario Cerkez,* Case No. IT-95-14/2-T, Judgement, 26 February 2001, para 328).

[86] *Galić* Judgement, *supra* note 28, paras 42–45.

law".[87] However, as will be discussed below, there have been *dicta* or similar erroneous findings by trial chambers that have not been 'rectified'.

Also with regard to the principle of military necessity (which, given its nature to justify certain actions in times of armed conflict that would otherwise be prohibited,[88] has often been subject to discussion before chambers dealing with alleged violations of IHL), Nobuo Hayashi has noted that it remains problematic in the ICTY's case law that

> [w]hile some ICTY judgements clearly indicate the absence of military necessity as an element of persecutions by way of property destruction, others do not. This discrepancy is unfortunate because the destruction of property justified by military necessity constitutes neither a grave breach of the Geneva Conventions nor a violation of the laws and customs of war.[89]

These legal findings, which have been said to be contrary to existing IHL, are not restricted to the ICTY, however. Also at other international institutions, including the Special Court and the ICC,[90] some determinations have been made that appear to show a discrepancy between the (retrospective) ICL approach to

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[87] ICTY, *Prosecutor v. Tihomir Blaškić,* Case No. IT-95-14-A, Appeal Judgement, 29 July 2004, para 109.

[88] See, e.g., Article 23 (g) of the 1907 Hague Convention IV respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (better known as the Hague Regulations), http://www.icrc.org/ihl.nsf/FULL/195?OpenDocument; Articles 8, 33, 34, 50 of Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (hereinafter First Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-970-English.pdf; Articles 8, 28, 51 of Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (hereinafter Second Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-971-English.pdf; Article 126 of 1949 Geneva Convention III; Articles 49, 53, 143, 147 of Convention (IV) relative to the Protection of Civilian Persons in Time of War (hereinafter Fourth Geneva Convention), Geneva, 12 August 1949, United Nations Treaty Series, Volume Number 75, http://treaties.un.org/doc/Publication/UNTS/Volume%2075/volume-75-I-973-English.pdf; Articles 54(5), 62(1), 67(4), 71(3) of Additional Protocol I; Articles 4(2), 11(2) of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, United Nations Treaty Series, Volume Number 249, http://treaties.un.org/doc/Publication/UNTS/Volume%20249/volume-249-I-3511-English.pdf; Article 17(1) of Additional Protocol II; but also Article 8(2)(b)(xiii), 8(2)(e)(viii), 8(2)(e)(xii) of the Rome Statute.

[89] Hayashi 2006, p. 108 (footnote omitted).

[90] See, *inter alia*, the way in which the pillage of military supplies (such as ammunition), which is by all means legal under IHL, was considered a crime by the Special Court (SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-A, Appeal Judgement, 28 May 2008) and is considered to be an alleged war crime by the ICC's Prosecutor and Pre-Trial Chamber II (ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 December 2010; and ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-121-CORR-RED, Corrigendum of the "Decision on the Confirmation of Charges", 7 March 2011 ("*Banda and Jerbo* Confirmation Decision").

alleged criminal conduct in an armed conflict situation and IHL, the law applicable at the time of the alleged crime. These include the following topics, which are dealt with next: pillage, the spreading of terror, protected persons and military targets versus civilian objects.

14.5.1 Pillage

The Special Court's Trial Judgement in *Moinina Fofana and Allieu Kondewa* identifies the taking of ammunition from a police officer's house as having satisfied "both the general requirements of war crimes and the specific elements of pillage as a war crime".[91] This finding was made despite the prohibition of pillage in Article 33 of the Fourth Geneva Convention leaving "intact the right of requisition or seizure".[92] In addition to the right of requisition or seizure, a party to an international armed conflict may also lawfully take weapons and military equipment from the enemy as war booty.[93] The ICRC Customary IHL Study could not, as it had done so with regard to international armed conflicts, identify with respect to non-international armed conflicts a rule that would allow, according to international law, the seizure of military equipment belonging to an adverse party. However, it also did not identify a rule that would prohibit such seizure under international law.[94] In light of this, the finding by the Special Court is questionable at best, and would have merited a more elaborate explanation as to why ammunition could qualify as property, the taking of which would constitute pillage.

Similar findings have been made at the ICC, albeit at the Pre-Trial level, that demonstrate a discrepancy between pillage under ICL and under IHL. Notwithstanding the reference in the Elements of Crimes that "appropriations justified by military necessity cannot constitute the crime of pillaging", the Pre-Trial Chamber in *Banda and Jerbo* confirmed charges for pillage of "vehicles, refrigerators, computers, cellular phones, military boots, and uniforms, fuel, ammunition and

[91] SCSL, *Prosecutor v. Moinina Fofana and Allieu Kondewa*, Case No. SCSL-04-14-T, Judgement, 2 August 2007, paras 839–841.

[92] Pictet 1958, pp. 226–227.

[93] The ICRC Customary IHL Study states at Rule 49: "The parties to the conflict may seize military equipment belonging to an adverse party as war booty." See further Dörmann 2002, p. 277, referring to Oppenheim 1952, p. 401 and further. "War booty" is in various military manuals defined as "enemy military objects (or equipment or property) captured or found on the battlefield." (E.g. the Argentinian, Australian, Canadian, Dutch, French and German manuals as referred to in: ICRC Customary IHL Study, Rule 49, under "Definition").

[94] Henckaerts and Doswald-Beck 2005b, p. 174 (Commentary to Rule 49 on "War Booty") or Henckaerts and Doswald-Beck 2005b, http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule49.

money".[95] Whilst some of these items cannot be seen as war booty and their appropriation could thus constitute pillage, it is unclear how the ICC Prosecution views that the taking of vehicles,[96] military boots and uniforms, and ammunition (and arguably also fuel) would not be justified by military necessity. The Pre-Trial Chamber made no distinction, however, between the various items when confirming the charges with respect to pillage.[97]

14.5.2 The Spreading of Terror

Another such discrepancy between legal findings and IHL has been made with regard to the spreading of terror. The prohibition under IHL to spread terror amongst the civilian population was for the first time considered by an international tribunal in two cases before the ICTY dealing with the siege of Sarajevo between 1992 and 1995.[98] It did so, notwithstanding the fact that the ICTY Statute did not expressly provide for the crime. At the Special Court, on the other hand, jurisdiction over the crime was set forth in the Statute as "acts of terrorism",[99] and was subsequently addressed in multiple cases. In *Prosecutor v. Norman et al.*, the Trial Chamber sought to define "acts of terrorism", which were drawn from Article 4(2)(d) of Additional Protocol II, and found Article 13(2) of Additional Protocol II to be useful in interpreting the meaning of terrorism in Article 4(2) of the same Protocol. Relying on the ICRC Commentaries on Article 51 of Additional Protocol I, upon which Article 13(2) of Additional Protocol II is based, the Chamber held that "the prospective ambit of Protocol II in respect of 'acts of terrorism' does extend beyond acts or threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side effect'",[100] inserting the word "terror" into the quote, as we shall see below.

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[95] ICC, *Prosecutor v. Abdallah Banda Abakaer Nourain and Saleh Mohammed Jerbo Jamus*, ICC-02/05-03/09-79-Red, Document Containing the Charges Submitted Pursuant to Article 61(3) of the Statute, 11 November 2010, para 44.

[96] According to some witnesses, the African Union markings appearing on AMIS vehicles were later removed and covered with mud (*Banda and Jerbo* Confirmation Decision, *supra* note 90, para 121). This is a common practice in Darfur, where the non-state actors cover captured vehicles in mud for camouflage and use the vehicles in their fight against the government forces and militias. See e.g. Ferguson, 'Sudan rebels tell war stories over sheep feast', 26 December 2010, http://edition.cnn.com/2010???/WORLD/africa/12/14/sudan.darfur.rebels/index.html.

[97] *Banda and Jerbo* Confirmation Decision, *supra* note 90, paras 110–117.

[98] In *Galić* (*supra* note 28) and ICTY, *Prosecutor v. Dragomir Milošević*, Case No. IT-98-29/1.

[99] Article 3(d) of the Special Court's Statute.

[100] SCSL, *Prosecutor v. Norman et al.*, Case No. SCSL-03-14-I, Decision on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005 ("*Norman* Rule 98 Decision"), para 111.

This approach was also adopted by later chambers, including in *Prosecutor v. Brima et al*., wherein the Trial Chamber rejected the argument by the Kanu Defence that the crime of acts of terrorism encompasses acts or threats of violence that target only protected *persons* and not protected *property*. Instead, the Trial Chamber endorsed the finding in the *Norman* decision that acts of terrorism includes both acts and threats of violence committed against protected persons and installations that cause "victims terror as a side effect".[101]

This excerpt from the ICRC Commentary on which the *Norman* decision and the *Brima* Judgement rely, actually reads in the relevant part that "the prohibition of acts of terrorism, with no further detail, covers not only acts directed against people, but also acts directed against installations *which would cause victims as a side-effect*".[102] The misquote by the Special Court thus allows for the war crime of terror to lose its *dolus specialis* as a constituent element of the crime. Victims' terror is a side-effect, according to these holdings by the Special Court, and not the primary reason for the attack on installations. However, such was not the intention of the Diplomatic Conference of 1977, which intended to prohibit solely *dolus specialis* acts of terror. It is important to recall in this regard, and as was done so by the ICTY in *Galić*,[103] that all (otherwise lawful) attacks are likely to cause terror as a by-product, since "acts of violence related to a state of war almost always give rise to some degree of terror among the population".[104]

14.5.3 Protected Persons

With regard to protected persons, the ICTY in *Tadić* expanded the notion of protection under the Fourth Geneva Convention of 1949 from which civilians could benefit, by no longer restricting it to a nationality requirement (Bosnian citizens, despite generally being divided into ethnic groups of Croats, Serbs and Muslims, all shared the same nationality, and therefore did not benefit from protected persons status when they fell into the hands of the other Bosnian ethnic group(s)). The Tribunal's Appeals Chamber found that the nationality requirement no longer hinges on formal bonds, but on the factors of (ethnic) allegiance and

[101] SCSL, *Prosecutor v. Brima et al.*, Case No. SCSL-04-16-T, Judgement, 20 June 2007, paras 668, 669, referring to the *Galić* Appeal Judgement, para 671, and referring to the *Norman* Rule 98 Decision, para 111.

[102] Sandoz et al. 1987, para 4538 (emphasis added).

[103] *Galić* Judgement, *supra* note 28, para 136. See more in detail, Bartels and Wagner 2008, pp. 296–299; and Bianchi and Naqvi 2011, pp. 232, 233.

[104] Sandoz et al. 1987, para 1940.

effective protection.[105] This approach has been criticised for being impractical in the field.[106]

For its part, Article 8(2)(b)(i) of the Rome Statute criminalises intentionally directing attacks against the civilian population, but does not explain what is to be understood under this term. As the Elements of Crime are also silent on this issue, the Pre-Trial Chamber in *Katanga and Ngudjolo*, in accordance with Article 21(1)(b), looked at IHL when determining who were to fall within the category of "civilians", when dealing with the alleged crime of intentionally directing attacks against civilians. It appears, however, that the Pre-Trial Chamber misinterpreted IHL when it concluded that "civilians" for the purposes of this article meant "civilians not taking an active part in hostilities, or […] a civilian population whose allegiance is with a party to the conflict that is enemy or hostile to that of the perpetrator".[107] It is submitted here that this is an incorrect interpretation of IHL. Although there is discussion as to whether or not one's own combatants are protected by IHL,[108] there can be no doubt that a party to an armed conflict can violate IHL in its dealings with civilians whose allegiance would be to the said party, or who could be regarded as neutral.

For example, for the purpose of proportionality, one also has to take into account one's 'own civilians'. Imagine that if the ICC would be seized of a case dealing with alleged disproportionate airstrikes as part of the International Security Assistance Force (hereinafter: ISAF) or Operation Enduring Freedom in Afghanistan, or NATO as part of Operation Unified Protector in Libya, and the concerning trial chamber were to apply the same view as that in *Katanga and Ngudjolo*. The civilian population in Afghanistan and Libya, respectively, would then not be included in the meaning of the word "civilian" for the purposes of an indiscriminate or disproportionate attack. Similarly, 'neutral civilians' such as (international) humanitarian or non-governmental personnel should be protected, even though these persons are not aligned with any party to the conflict.

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[105] ICTY, *Prosecutor v. Dusko Tadić*, Case No. IT-94-1-A, Appeal Judgement, 15 July 1999, paras 164–166. Earlier, in the *Čelebići* Trial Judgment, the ICTY had also addressed the nationality issue in a similar way. See ICTY, *Prosecutor v. Mucić et al*., Case No. IT-96-21-T, Judgement, 16 November 1998.

[106] Sassòli 2009; Sassòli and Olsen 2000; Compare Dörmann 2003, pp. 45–74.

[107] ICC, *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*, ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008 ("*Katanga* Confirmation Decision"), para 266 (footnotes omitted).

[108] See Jann Kleffner, Chap. 11 of this book. The Special Court determined in *Prosecutor v. Issa H. Sesay, Morris Kallon and Augustine GBAO*, SCSL-04-15-T, Judgement, 2 March 2009, paras 1108, 1452, 1453, that when a party to an armed conflict kills members of its own forces, this does not amount to a war crime because those killed were neither civilians nor persons *hors de combat* and as such could not benefit from the protection that IHL grants to both categories. This issue might also be addressed by the ICTY Trial Chamber seized of the *Prlić et al.* case, which has to determine whether the killing by the HVO of some of its Muslim members is a violation of the laws and customs of war.

The Pre-Trial Chamber's problematic take on allegiance becomes all the more clear when comparing the decision on the confirmation of charges in *Katanga and Ngudjolo* with that in *Banda and Jerbo* relating to the attack on the Haskinita camp of the African Union Mission to Sudan (hereinafter: AMIS).[109] In *Katanga and Ngudjolo*, the Pre-Trial Chamber held that the "war crime of pillaging under article 8(2)(b)(xvi) of the Statute requires that the property subject to the offence belongs to an 'enemy' or 'hostile' party to the conflict".[110] Hence, the pillaged property "must belong to individuals or entities who are aligned with or whose allegiance is to a party to the conflict who is adverse or hostile to the perpetrator".[111] Whilst the Pre-Trial Chambers dealing with the Haskanita situation did not go into the elements of the war crime of pillaging,[112] the standard as set out in *Katanga and Ngudjolo* would prove problematic indeed, if followed in *Banda and Jerbo* when dealing with the pillage of goods that were allegedly taken from personnel involved in a peacekeeping mission in accordance with the United Nations Charter. This would clearly leave the Trial Chamber in an impossible conundrum: the other crime charged is the allegedly unlawful attack of personnel involved in a peacekeeping mission, for which a finding of guilt requires that the AMIS soldiers were neutral, i.e. showed no allegiance to nor aligned with a party to the conflict in Sudan. For the accused to be found guilty of the crime of pillage, AMIS would, if the *Katanga and Ngudjolo* Pre-Trial Chamber reasoning were to be followed, have to have done precisely that.

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[109] *Banda and Jerbo* Confirmation Decision, *supra* note 90. The AMIS camp was situated in Darfur.

[110] *Katanga* Confirmation Decision, *supra* note 107, para 329.

[111] Ibid. The Pre-Trial Chamber explained that "part of the doctrine endorses the view that, as any war crime, the crime of pillage is committed against the adverse party to the conflict" and refers to Dörmann 2002, pp. 279, 280. The ICTY Prosecution in *Delalić* argued that one of the material elements of plunder, a term that is often used synonymously with pillage, was that the "accused unlawfully destroyed, took, or obtained any public or private property belonging to institutions or persons linked to the other side of the armed conflict." (ICTY, *Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-T, Closing Statement of the Prosecution, 25 August 1998). The Trial Chamber in that case held that "international law today imposes strict limitations on the measures which a party to an armed conflict may lawfully take in relation to private and public property *of an opposing party*" and that "the prohibition against the unjustified appropriation of *public and private enemy property* is general in scope" (*Delalić et al.* Judgement, paras 587–590; emphasis added. See also Dörmann 2002, pp. 273–275).

[112] Before the *Banda and Jerbo* Confirmation Decision, the ICC dealt with the same attack in the ICC, *Prosecutor v. Bahar Idriss Abu Garda*, ICC-02/05-02/09-243-Red, Decision on the Confirmation of Charges, 8 December 2010. The charges against Abu Gharda were not confirmed. In its decision, the Pre-Trial Chamber did not deal with the alleged crime of pillage.

14.5.4 Military Targets Versus Civilian Objects

In 2010, the ICC Prosecutor announced that his office had opened a preliminary examination into two actions by North Korea, "to evaluate if some incidents constitute war crimes under the jurisdiction of the Court".[113] These incidents are

> the shelling of Yeonpyeong Island on the 23 November 2010 which resulted in the killing of South Korean marines and civilians and the injury of many others; and […] the sinking of a South Korean warship, the Cheonan, hit by a torpedo allegedly fired from a North Korean submarine on 26 March 2010, which resulted in the death of 46 persons.[114]

Whilst the former incident could involve indiscriminate targeting or excessive collateral damage, it appears that the latter attack, which was directed at a military object, was legitimate under IHL. Because the ICC does not, for the time being, have jurisdiction over the crime of aggression,[115] any investigation into the death of these sailors of the South Korean naval forces would be futile.[116] Although it is possible that, on the one hand, the Prosecutor intended to use the press release as a means to influence the behaviour of the States concerned, it appears to indicate some confusion in the understanding of IHL in the Office of the Prosecutor, on the other. In any event, it is submitted here that IHL should not be (ab)used for political purposes because incorrect references to the law, like the example given, risk IHL becoming too strict and, as a consequence, being ignored by armed forces.

An incident that occurred during the closing arguments in the *Lubanga* case is also worth mentioning in this regard. When asked by Judge Odio Benito about the relevance of sexual violence to the case,[117] Prosecutor Moreno-Ocampo answered that the OTP

> believe[s that] when a commander ordered to abduct girls to use them as sexual slaves or rape them, this order is using the children in hostility. […] [T]here's a border between

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[113] Office of the Prosecutor of the ICC Press Release, 'ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination' (6 December 2010) ICC-CPI-20101206-PR608, http://www.icc-cpi.int/menu/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr608 (last visited on 7 April 2012).

[114] Ibid.

[115] Whether or not the crime of aggression would be an issue concerning the Koreas, which are said to be still at war with each other because no peace treaty has ever been signed, is interesting food for thought, but lies outside the scope of this contribution.

[116] There is no doubt that the warship itself was a legitimate target. Since the dead and the injured, according to South Korea, were all "servicemen", and hence, were also legitimate targets, there is no proportionality issue. See the Letter dated 4 June 2010 from the Permanent Representative of the Republic of Korea to the United Nations addressed to the President of the Security Council, 4 June 2010, S/2010/281.

[117] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Transcript (ICC-01/04-01/06-T-356-ENG ET WT 25-08-2011 1-90 PV T), 25 August 2011 (hereinafter: "*Lubanga* Transcript"), p. 53, lines 15–25, p. 54, line 1.

> hostilities and no hostilities, and cooking could be a good example, maybe, but ordering to abduct girls in order to rape them is an order to – and use children in hostilities.[118]

Even though the concept of direct participation in hostilities[119] is subject to extensive debate,[120] there can be no doubt that this view of the OTP is contrary to what is to be understood as using children under the age of fifteen "to participate actively in hostilities",[121] and is thus a clear misstatement of IHL.[122] It would have the absurd consequence that these girls, besides falling victim to rape and possibly to sexual slavery, could also be legitimately targeted by an attacking force.[123] Unfortunately, the proposal to include the girls held as sexual slaves into the heading of active participation in hostilities was followed by Judge Odio Benito in her dissenting opinion to the *Lubanga* Trial Judgment.[124]

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[118] *Lubanga* Transcript, *supra* note 117, p. 55, lines 15–21.

[119] "Active participation in hostilities" (the wording used in Article 8(2)(b)(xxxvi) of the Rome Statute) is to be understood as synonymous with "direct participation in hostilities". See Dörmann 2002, pp. 378, 379; and ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Decision on the Confirmation of Charges, 29 January 2007; ICC, *Prosecutor v. Germain Katanga and Ngudjolo Chui*, Case No. ICC-01/04-01/07-717, Decision on the Confirmation of Charges, 30 September 2008.

[120] See the ICRC 2008 and the resulting academic debate in e.g. 42 *Journal of International Law and Politics* 3.

[121] The Interpretive Guidance states unequivocally that the notion of direct participation has evolved from, and is used interchangeably with, that of active participation: "The notion of direct participation in hostilities has evolved from the phrase "taking no active part in hostilities" used in [Common] Article 3. Although the English texts of the Geneva Conventions and Additional Protocols use the words "active" and "direct", respectively, the consistent use of the phrase "*participent directement*" in the equally authentic French texts demonstrate that the terms "direct" and "active" refer to the same quality and degree of individual participation in hostilities" (Melzer 2009, 43; footnotes omitted).

[122] The war crime of conscripting, enlisting or using child soldiers is found in Article 8(2)(b)(xxxvi) for international armed conflict and in Article 8(2)(e)(iv) of the Rome Statute for non-international conflict. It has to be added that another member of the OTP earlier during the closing arguments had correctly (from an IHL point of view) answered a similar question posed by Presiding Judge Fulford (*Lubanga* Transcript, *supra* note 117, p. 23, lines 8–18). Also the Prosecution's Final Brief is much more nuanced on this point (ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, OTP Final Brief, 20 July 2011, pp. 59–61). Whether the 'last expressed view', i.e. by the Prosecutor during the closing arguments, or the text of the final brief should be taken as the official view of the OTP, is not clear from the rules. However, the Prosecutor made very clear during the closing arguments that he believes that the former should prevail (see *Lubanga* Transcript, *supra* note 117, p. 55, line 25–p. 56, line 1).

[123] See Article 51(3) of Additional Protocol I, which states that "[c]ivilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities." Article 13(3) of Additional Protocol II provides that civilians are immune from direct attack "unless and for such time as they take a direct part in hostilities." See further *inter alia* Common Article 3 of the Geneva Conventions, Articles 8(2)(b)(i) and 8(2)(e)(i) of the Rome Statute.

[124] ICC, *Prosecutor v. Thomas Lubanga Dyilo*, Case No. ICC-01/04-01/06, Separate and Dissenting Opinion of Judge Odio Benito, 14 March 2012, paras 17–21.

The judgment itself does not conclude that girls used as sex slaves are considered to be actively participating in hostilities; it found instead that it need not pronounce on the matter.[125] However, it did significantly broaden the scope of active participation to acts that are considered as indirect participation.[126] In doing so, it stated that apart from "those on the front line (who participate directly)" also "the boys or girls who are involved in a myriad of roles that support the combatants", such as "finding and/or acquiring food", would be potential targets and thus needed to be protected by Article 8(2)(e)(iv) of the Rome Statute.[127] This approach risks victimising children in a twofold manner: firstly, by the fact that they would be child soldiers, and secondly, by removing their protective status against attack[128] when engaging in what otherwise constitutes mere participation in the war effort, which normally should not make them targetable.[129] However, this is precisely what the *Lubanga* Trial Chamber appears to do, when stating that

[125] ICC, *Prosecutor v. Thomas Lubanga Dyilo,* Case No. ICC-01/04-01/06, Judgment Pursuant to Article 74 of the Statute, 14 March 2012 ("*Lubanga* Judgment"), paras 629, 630.

[126] The Trial Chamber explained that "active participation" is not the same as "direct participation", when it held that: "The use of the expression 'to participate actively in hostilities', as opposed to the expression 'direct participation' (as found in Additional Protocol I to the Geneva Conventions) was clearly intended to import a wide interpretation to the activities and roles that are covered by the offence of using children under the age of 15 actively to participate in hostilities. It is noted in this regard that Article 4(3)(c) of Additional Protocol II does not include the word 'direct'." (*Lubanga* Judgment, *supra* note 125, para 627). However, this is not a convincing argument as the drafting history should only be resorted to if the language of the Statute is unclear, which is not the case. The Trial Chamber's reliance on treaty law does not make sense as (i) Additional Protocol II was not applicable to the armed conflict concerned (as the requirements by Article 1 of the said Protocol had not been met), ii) the subparagraph following the one referred to (i.e. Article 4(3)(d) of Addition Protocol (II) *does* include "direct", and (iii) the omission of a word in Additional Protocol II does not change the fact that the Rome Statute uses the wording "active participation". The Trial Chamber's reference to Triffterer's commentary does not support the finding in footnote 1801, nor does the article that said commentary refers to as this contains the *opinion* of the ICRC with regard to the draft text of the Optional Protocol to the Convention on the Rights of the Child concerning Involvement of Children in Armed Conflicts—a treaty that was adopted two years after the adoption of the Rome Statute. (See in this regard Louise Doswald-Beck, who held: "This provision reflects the prohibition in the 1977 Additional Protocols, rather than treaty developments since then. This was intentional as the negotiators of the Rome Statute based their reasoning on prohibitions that were considered to represent customary international law at the time, ie in 1998." Doswald-Beck 2011, p. 529).

[127] *Lubanga* Judgment, *supra* note 125, paras 624–628.

[128] The ICRC has noted in this regard that even civilians forced to participate directly in hostilities and children under the lawful recruitment age may lose their protection against direct attack, but regain it once they no longer so participate. See ICRC 2008, p. 60 and Footnote 154.

[129] See Sandoz et al. 1987, para 1945 ("There should be a clear distinction between direct participation in hostilities and participation in the war effort. The latter is often required from the population as a whole to various degrees. Without such a distinction the efforts made to reaffirm and develop international humanitarian law could become meaningless. In fact, in modern conflicts, many activities of the nation contribute to the conduct of hostilities, directly or indirectly; even the morale of the population plays a role in this context").

children who indirectly participate form a "potential target".[130] It is submitted here that this is an erroneous circular reasoning. For those not directly participating cannot (legally) be targeted and thus cannot be considered as "potential targets". The protection afforded by IHL is based on this distinction, and if it were to take into account all the potential consequences of indiscriminate attacks, the purpose of this body of law would be lost and indeed worthless. The *Lubanga* Trial Judgment therefore could well set a dangerous precedent that could, regrettably, be referred to by those trying to broaden the scope of targetable persons. Whilst the intention of the bench was to broaden the protection for children recruited by parties to an armed conflict, its interpretation of the meaning of active participation could easily be abused.[131] The expansion of this IHL term, in order to be able to find one man guilty of an additional charge,[132] could in fact lessen the protection afforded to civilians, amongst whom are children, during armed conflicts. It would therefore be advisable if such judgments would make explicit reference to the fact that the explanation given to such a term that exists in both IHL and ICL was only done for ICL, and should not be interpreted for IHL purposes.

The discrepancies between legal findings and IHL are not limited to the law of armed conflict itself, but also extend to the realities on the battlefield, as examined next.

14.6 Discrepancies Between Legal Findings and Battlefield Reality

The role of the international tribunals as a means to enforce in retrospect—as opposed to the preventive working of the law—becomes especially clear when looking at cases where crimes against humanity are charged and pronounced upon.[133] The prohibition against committing war crimes and genocide is laid down

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[130] *Lubanga* Judgment, *supra* note 125, para 628.

[131] See in this regard also the warning given by Sivakumaran 2011, p. 230.

[132] For the charges of "conscripting and enlisting children under the age of fifteen years", an expansion would not have been necessary.

[133] ICL has unfortunately not been an effective deterrent for violations of IHL. For the International Military Tribunals, the ICTR and the Special Court this was, of course, impossible (at least with regard to the conflicts these tribunals related to), because they were established after the fact. The ICTY, however, was established before some of the worst violations (e.g. the killings in Srebrenica, the siege of Sarajevo and the ethnic cleansing in Kosovo) of the Balkan conflict occurred. Dieter Fleck observes that "[c]riminal sanctions are not the most decisive tool during military operations" and that "the prospect of being tried for war crimes by international tribunals post-conflict is still too vague to influence the behaviour of insurgents during combat" (Fleck 2003, p. 66). David Scheffer, on the other hand, gives a more hopeful account, when describing that there "already are signs of deterrence emerging from the work of the International Criminal Court" and that the fear of being taken to The Hague has an effect on war criminals. (Scheffer 2011, p. 6).

in comprehensive conventions; no such prohibition in a convention can be found for crimes against humanity, however.[134] Crimes against humanity comprise instead crimes such as murder, torture and rape that are committed as part of a widespread or systematic attack directed against a civilian population.[135] Because crimes against humanity are comprised of these underlying criminal acts, certain behaviour may qualify, in times of armed conflict, as both a war crime and as a crime against humanity. However, whilst certain acts, including rape and torture, are never excusable, the factual act of killing a person or forcibly transporting a person to another location can be legitimate under IHL, and does not necessarily amount to murder, or indeed to forcible transfer or deportation.[136] As aptly noted by Payam Akhavan, disregarding IHL in dealing with crimes against humanity "risks rendering crimes against humanity a legal utopia so divorced from reality that it becomes irrelevant to military commanders acting in good faith in combat situations".[137]

The ICTY, in defining whether a certain act constituted a war crime or a crime against humanity, initially chose a somewhat unfortunate direction.[138] Consider, for example, when the *Mrkšić* Trial Chamber found the accused guilty of crimes against humanity, even though the accused were determined to be responsible for the killing of members of Croatian armed forces. These members of the armed

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[134] On this issue and an effort to have such a convention created, see generally Sadat 2011.

[135] The "attack" does not refer to an attack within the meaning of Article 49 of Additional Protocol I. For the determination of what constitutes a civilian population, IHL is used as guidance. See ICTY, *Prosecutor v. Milan Martić*, Case No. IT-95-11-A, Appeal Judgment, 8 October 2008 ("*Martić* Appeal Judgement").

[136] Combatants and those directly participating in hostilities can legally be targeted (i.e. killed). Even the death of a civilian does not necessarily mean a war crime was committed, because this civilian may have been part of non-excessive incidental damage resulting from an attack on a military target (see e.g. Article 51(5)(b) of Additional Protocol I). With regard to deportation, see, *inter alia*, Articles 19 and 20 of the Third Geneva Convention, which deal with the obligation to evacuate POWs after their capture away from the combat zone.

[137] Akhavan 2008, p. 23.

[138] That for a crime against humanity, the attack has to be directed against the "civilian population", indicates at the *ad hoc* Tribunals that it is the civilian population that is the primary object of the attack (see also Article 3 of the ICTR Statute). The victims of a crime against humanity need not be civilians *strictu sensu*, but can include persons *hors de combat* or those not afforded the protective status of civilians. (See ICTY, *Prosecutor v. Tihomir Blaškić*, Case No. IT-94-14-A, Appeal Judgement, 29 July 2004, para 113; *Martić* Appeal Judgement, para 313; ICTY, *Prosecutor v. Vlastimir Đorđević*, Case No. IT-05-89/1-T, Judgement, 23 February 2011, para 1591). In *Mrksić*, the Appeals Chamber overturned the Trial Chamber's Judgement in part, but—albeit for different reasons—concurred with the Trial Chamber that the jurisdictional prerequisites of crimes against humanity (before the ICTY) had not been established. The Appeals Chamber reasoned that the nexus between the acts of the accused and the attack on the civilian population was not established now that the perpetrators of the alleged crimes "acted in the understanding that their acts were directed against members of the Croatian armed forces", and as such, could not have intended their acts to be part of an attack against a civilian population. ICTY, *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, paras 42–44.

forces lay wounded in Vukovar hospital, and as persons *hors de combat* were certainly protected under IHL. Nevertheless, the Trial Chamber found the accused guilty of having attacked a civilian population, rather than convicting the accused for the war crimes of murder or torture of persons *hors de combat*, with which they were also charged. The Appeals Chamber overturned the Trial Chamber's finding and held that since the perpetrators of the crimes knew that their victims were *hors de combat*, they could not have intended their attack to be against a civilian population, and that a conviction based on violations of the law and customs of war (i.e. a war crime) was thus in order.[139]

Such a finding as that by the *Mrkšić* Trial Chamber (even when a conviction for a crime against humanity related to acts that are prohibited under IHL and could otherwise have been qualified as war crimes) does not necessarily have to result in problems, so long as the rulings are read with care and the opinions of the tribunals do not affect IHL. However, a certain ruling can easily be taken out of context, creating even further discrepancies between the relevant regulatory law and battlefield reality.

In the view of the author, it is even more problematic that some rulings qualify acts as crimes against humanity although they would be legitimate under IHL, thereby penalising the behaviour of warring parties in times of armed conflict, if such behaviour formed part of a larger, criminal plan.[140]

For example, in 2010, the Trial Chamber in *Popović et al.* pronounced on the alleged criminality of the forced retreat of Bosnian-Muslim soldiers[141] across the Drina River upon the advance of Bosnian-Serb VRS.[142] The Trial Chamber found the accused guilty of forcible transfer[143] as an inhumane act[144]:

> As for the military and those participating in hostilities, the circumstances were very different from those which their counterparts in Srebrenica had faced. The Trial Chamber is satisfied that, by 24 July 1995, these men would have been well aware of the reports of mass killing after the fall of Srebrenica. Their decision to flee cannot be categorised as a strategic one taken in military terms. Simply, they fled the enclave in fear for their lives.

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[139] ICTY, *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Appeal Judgement, 5 May 2009, Disposition, p. 169.

[140] For the relationship between crimes against humanity and war crimes, and the elements of crimes against humanity, see Cryer et al. 2010, p. 233 and further.

[141] The Bosnian-Muslim forces were part of the Armija Republike Bosne i Hercegovine (i.e. the Army of the Republic of Bosnia and Herzegovina; hereinafter: ABiH).

[142] *Vojska Republike Srpske*: the army of the Republika Srpska.

[143] Forcible transfer or forced displacement means that people are moved against their will or without having had a genuine choice. See ICTY, *Prosecutor v. Milorad Krnojelac*, Case No. IT-97-25-A, Appeal Judgement, 17 September 2003, paras 229, 233; and ICTY, *Prosecutor v.Milomir Stakić*, Case No. IT-97-24-A, Appeal Judgement, 22 March 2006 ("*Stakić* Appeal Judgement"), para 279.

[144] ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Judgement, 10 June 2010 ("*Popović et al.* Trial Judgement"), paras 955–961. The Trial Chamber did not find that this (also) constituted the crime of deportation, since it was not clear whether the Bosnian-Serb forces meant for the Bosnian-Muslim soldiers to cross a border when swimming across the Drina.

> That the majority chose to escape to Serbia to face surrender and detention as POWs evidences their desperation. While the VRS maintained that those men who surrendered their weapons would be exchanged with the VRS POWs held by the ABiH, it is clear that the able-bodied men had no faith in those words. The Trial Chamber is satisfied that the able-bodied men – civilian and military – fled the enclave because they had no other genuine choice but to do so. That was the only option left for them to survive.[145]

Nevertheless, during wartime, forcing the enemy to retreat across frontlines or state borders is perfectly legal, and is in fact one of the goals of waging war.[146] That retreating was exactly what the Bosnian-Muslims planned to do is demonstrated by the evidence presented before the Chamber in the form of a report by the ABiH general army staff, according to which "there were about 1260 soldiers and 250 able-bodied civilians in Žepa, as well as 650 soldiers from Srebrenica. Up to date, 163 soldiers have arrived in the free territory of Kladanj, whereas 14 soldiers have arrived in the area of responsibility of the 81st Army Division [in] Goražde. Around 1000 soldiers are still in the mountains around Žepa and are waiting for favourable conditions for retreating".[147]

If the VRS would have been allowed under IHL to attack and kill any member of the ABiH whilst the latter were defending Žepa, and moreover, when they were fleeing across the Drina,[148] how, then, can a crime have been committed if these persons were not shot and survived their retreat? This discrepancy between what appears to be a legitimate military action under IHL and criminal liability under ICL lies in the fact that the forcible transfer, for which the accused were found guilty, was charged and found to have constituted a crime against humanity.[149]

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[145] *Popović et al.* Trial Judgement, *supra* note 144, para 956 (footnotes omitted).

[146] A goal that has also been recognised in IHL given the fact that the forced movement of civilians across state borders *is a violation of IHL* (e.g. Article 49 of the Fourth Geneva Convention of 1949), whilst the forced movement of combatants during active hostilities, as well as when combatants are made POWs, *is in conformity with IHL* and, at times, even an obligation under these rules (e.g. Articles 19 and 111 of the Third Geneva Convention of 1949). It has also been recognised by the ICTY that POWs cannot be forcibly transferred or deported: *Stakić* Appeal Judgement, *supra* note 143, para 284. See also *Prosecutor v. Mile Mrksić and Veselin Šljivančanin*, Case No. IT-95-13/1-A, Judgment, 27 September 2007, para 458 (stating that "deportation cannot be committed against prisoners of war").

[147] *Popović et al.* Trial Judgement, *supra* note 144, para 736.

[148] Fleeing combatants remain legitimate military targets as long as they have not surrendered or otherwise fallen *hors de combat* (*nota bene*: also, after surrender, a POW can be shot when fleeing, i.e., when the POW attempts to escape from a POW camp; see Article 42 Third Geneva Convention, and Preux 1960, pp. 246, 247). Arguably, the principle of military necessity applied in a restricting manner or the principle of chivalry would limit to right to attack fleeing combatants. However, in itself such an attack on combatants would not be unlawful. See Hampson 1992, pp. 53, 54; and Hampson 1993.

[149] In a decision on jurisdictional issues, the *Gotovina* Trial Chamber held that "as to the [Defence's] argument that the victims of deportation must be in the hands of a party to the conflict, the Trial Chamber recalls that crimes against humanity must be 'directed against any civilian population'. Article 5 of the Statute therefore applies to 'any' civilian population including one within the borders of the state of the perpetrator. There is no additional requirement in the jurisprudence that the civilian be in the power of the party to the conflict." (ICTY,

The Indictment alleged a joint criminal enterprise, the purpose of which, *inter alia*, was "to force the Muslim populations of Srebrenica and Žepa to leave the area".[150] The Prosecution submitted that the accused carried out several actions in pursuit of this JCE, one of which was "defeating the Muslim forces militarily".[151] Not only does IHL permit the military defeat of the enemy by parties to a conflict[152] (indeed, the way that the Prosecution alleged some of the actions taken by the accused seem to be in line with this legitimate goal[153]), but the intention of the Prosecution becomes clear when looking at one of the actions with which the accused Pandurević was charged in relation to a plan to militarily defeat the ABiH:

> [Pandurević] commanded and ordered forces involved, in the attack on the Srebrenica and Žepa enclaves from 6 July 1995 through 14 July 1995, knowing one of the main objectives of the attack was to force the Muslim population to leave the Srebrenica and Žepa enclaves.[154]

This makes perfect sense when it concerns a form of co-perpetration, like a JCE. A national criminal law example is helpful in illustrating the point made: when one drives a friend to a location, knowing that this friend will be committing a crime at that very location, the act of driving itself—although it might have been

(Footnote 149 continued)
Prosecutor v. Gotovina et al., IT-06-90-PT, Decision on Several Motions Challenging Jurisdiction, 19 March 2007, para 56). Akhavan considers the decision problematic because it does not apply IHL to the *actus reus* of deportation as a crime against humanity. He submits that "[t]he Chamber is clearly confusing the distinction between protection of civilians in occupied territory as distinct from combat situations, with the nationality of such civilians" (Akhavan 2008, pp. 33, 34). This indeed appears to be the case and could lead to the conclusion that civilians leaving an area where bombardments are taking place as part of legitimate combat operations against military forces and structures could be considered to be deported as a crime against humanity. However, in its Judgment, the Gotovina Trial Chamber found that the crime of deportation resulted from the fear installed into civilians as a result of unlawful attacks on civilian objects (*Gotovina* Trial Judgement, *supra* note 57, paras 1742–1763).

[150] ICTY, *Prosecutor v. Vujadin Popović et al.*, Case No. IT-05-88-T, Revised Second Consolidated Amended Indictment, 4 August 2006 ("*Popović et al.* Revised Second Consolidated Amended Indictment"), para 72.

[151] Ibid.

[152] According to the United Kingdom Manual on the Law of Armed Conflict, military necessity permits "a state engaged in an armed conflict to use only that degree and kind of force, not otherwise prohibited by the law of armed conflict, that is required in order to achieve the legitimate purpose of the conflict, namely the *complete or partial submission of the enemy* at the earliest possible moment with the minimum expenditure of life and resources" (United Kingdom Ministry of Defence 2004, pp. 21, 22; emphasis added).

[153] The accused Miletić, for example, was charged with having contributed to the military defeat of the Muslim forces by having "monitored the state of the Muslim forces before, during and after the attacks on Srebrenica and Žepa and communicated this information to his superiors […] and subordinate units". *Popović et al.* Revised Second Consolidated Amended Indictment, *supra* note 150, para 75.

[154] *Popović et al.* Revised Second Consolidated Amended Indictment, *supra* note 150, para 77.

done in line with all applicable traffic regulations—can constitute a criminal contribution to the crime.[155]

At the Special Court, however, the situation was in fact reversed. In the RUF case, the Prosecution alleged that the accused were part of a JCE that shared a common plan "to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone".[156] The crimes charged, including unlawful killings, forced labour, physical and sexual violence, the use of child soldiers and the looting and burning of civilian structures, were said to have been actions within the JCE, or to have been a reasonably foreseeable consequence of the JCE.[157] Here, the goal of the JCE appears to have been legitimate under international (humanitarian) law, but the actions taken in attaining that goal were violations of IHL.[158] Whilst the accused submitted that the common purpose of the JCE could not be considered as criminal, both the Trial Chamber and the Appeals Chamber rejected this argument, the latter of which ruled that

> the Trial Judgment indicate[s] that the Trial Chamber found a common criminal purpose which consisted of the objective to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas, and the crimes as charged under Counts 1 to 14 as means of achieving that objective. This accords with our holding in *Brima et al*. that the common criminal purpose of a JCE comprises both the objective of the JCE and the means contemplated to achieve that objective.[159]

The present author is not in favour of such a mixing of IHL and ICL notions.[160] Given the nature of the cases dealt with on the international level, it appears to be inevitable that IHL is used for situations which this very law was not originally meant to cover. Furthermore, charging someone with crimes against humanity

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[155] However, in a situation like Žepa, the motivation or intent appears to become important. A soldier engaging in an attack could be engaging in lawful action if he is unaware of the ultimate plan (of his superiors), but his acts would be unlawful if he would be aware of this. Factually, his acts would remain the same, however.

[156] SCSL, *The Prosecutor v. Issan Hassan Sesay et al.*, Case No. SCSL-2004-15-PT, Corrected Amended Consolidated Indictment, 2 August 2006 ("*Sesay et al*. Corrected Amended Consolidated Indictment"), para 36.

[157] Ibid., para 37.

[158] The author does not in any way want to justify other actions by the VRS than the one discussed above, in relation to the Srebrenica and Žepa case, such as the extensive killing of POWs and the forced displacement of civilians.

[159] SCSL, *The Prosecutor v. Issan Hassan Sesay et al.*, Case No. SCSL-2004-15-A, Appeal Judgement, 26 October 2009, para 305.

[160] In a dissenting opinion, the ICC Judge Kaul expressed his reservations to the expanded use of crimes against humanity. He considered that "a demarcation line must be drawn between international crimes and human rights in fractions; between international crimes and ordinary crimes; between those crimes subject to international jurisdiction and those punishable under domestic penal legislation. One concludes that the ICC serves as a beacon of justice intervening in limited cases where the most serious crimes of concern to the international community as a whole have been committed" (ICC, *Situation in the Republic of Kenya*, ICC-01/09, Decision Pursuant to Article 15 of the Rome Statute on the Authorization of an Investigation into the Situation in the Republic of Kenya, 31 March 2010, Dissenting Opinion Judge Kaul, para 65).

enables the prosecution of certain behaviour that, due to gaps in the protection afforded by IHL, would otherwise go unpunished.[161]

14.7 Consequences of an ICL Approach to IHL

Despite the discrepancies identified herein, judges have a "crucial yet delicate role" in applying IHL.[162] Crucial because of the manner in which the tribunals and courts decide on legal and factual questions affects the effectiveness of the law. Delicate because of the danger that the law or clarifications that are 'created' by the judges may alienate soldiers from the law that they have been taught (and understand). Moreover, it may undermine the ability of IHL to restrain belligerent behaviour and thereby limit the protection of potential war victims.[163] Judgments that

> would effectively compel reasonable and law-abiding combatants to choose between heroic self-sacrifice, on the one hand, and criminal liability, on the other hand, are problematic in this regard. The danger is that, though perhaps inadvertently, these rulings would project judges' unrealistically high expectations onto combatants. The efficacy of international humanitarian law would suffer unless combatants, the primary bearers of protective duties, felt confident that it imposes just constraints on their belligerent action but does not amount to a "suicide pact".[164]

The international courts and tribunals play an increasingly important role in ensuring accountability for violations of IHL. At the same time, however, it is essential that their judgments "are based in law that commanders can reasonably apply in the course of military operations and promote continued adherence to IHL".[165] This is particularly so, because when an overly strict approach in retrospect would effectively leave military commanders—the most direct implementers of the law—unable to fulfil their obligations toward their troops and mandate, "there is a grave risk that they will simply disregard the law", which would then pose a real danger to those who need to be protected by IHL.[166]

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[161] At the international level that is, just as on the national level, in these situations, regular criminal charges, such as manslaughter and murder, could be brought.

[162] Hayashi 2006, p. 70.

[163] Ibid. Hayashi highlights the importance that a judicial decision "strike[s] a sensible balance between the legitimate interests of combatants and civilians alike".

[164] Hayashi 2006, p. 88.

[165] International Humanitarian Law Clinic at Emory University School of Law 2012, p. 3.

[166] Ibid.

Furthermore, reciprocity,[167] which historically has formed the basis of the adherence to IHL, could potentially be undermined by ICL.[168] Kenneth Anderson observes in this regard that "[u]ndermining the sting of reciprocity and replacing it with the mostly stingless future promise of post hoc justice has profound consequences for the incentives and disincentives in the conduct of war, which are only now beginning to express themselves on the battlefield".[169]

At the same time, IHL, to a certain extent, serves to legitimise the judicial process that aims to counter impunity. As noted above, none of the rules of IHL prohibiting certain behaviour that are now used to hold alleged perpetrators criminally liable were drafted and agreed upon with the kind of fighting in mind, which is often inter-ethnic and merciless, that is now attempted to be regulated—in retrospect, no less—with these rules. Whilst there have been numerous claims of violations by American and British forces in the 2003 Iraq war, or during ISAF operations in Afghanistan, there is little debate that (as a minimum) the majority of the attacks were conducted with the aim to comply with the rules for conduct of hostilities (and arguably, they indeed did so). Even during the 2006 Lebanon conflict and the 2008–2009 Gaza conflict, and despite much criticism and international condemnation and numerous incidents that raised serious questions, the Israeli operations by and large took place within the framework of IHL, i.e. they were regulated by IHL.[170] In these situations, IHL works in a restricting, as well as an enabling way: protection can then be afforded to those in need of protection, which is the way in which IHL was meant to work.

However, as soon as conflicts take on an ethnic dimension, it appears that IHL is not able to regulate such fighting. When the purpose of the fighting is contrary to the rationale of IHL, and when the aim of (one of) the parties is not to overcome the enemy militarily, but to attack a people for who they are or to ethnically cleanse a region, IHL cannot serve its restrictive purpose. In these situations, when IHL cannot work preventively, it appears to be relatively uncontested that IHL can nevertheless be used to punish in retrospect.[171] For example, in Rwanda in 1994, the fighting of the Rwandan Patriotic Front against the armed forces of the Hutu

[167] Reciprocity is described in the Max Planck Encyclopedia of Public International Law as "a basic phenomenon of social interaction and consequently a guiding principle behind the formation and application of law" (Simma 2012, para 1). This has long been foundational to international law, and—more specifically—to IHL. Sean Watts observes that "the existing law of war derives from a set of rules that are contingent on reciprocity. Contrary to common understanding, reciprocity strongly influences states' interpretation and application of the law of war." (Watts 2009, p. 365).

[168] Anderson 2009, p. 340.

[169] Ibid. Anderson explains that international criminal law operates *post hoc*, i.e. "after the fact" (p. 343).

[170] One could question the explanation given by Israel to certain provisions of IHL and the way the law was applied in practice. However, this does not detract from the fact that Israel used (its version of) IHL as a guidance during the operations (see e.g. The State of Israel 2010).

[171] It has, however, been suggested that in these cases it is important to 'label' the crimes in a fair way. See Van de Herik 2009 (However, the current author has a different view on the

government was suitable to fall under IHL and be regulated by it. This fighting has not been dealt with by the ICTR, however. The killing and raping that formed part of the genocide had nothing to do with the conduct of hostilities or with the need for the civilian population to be protected against the effects of warfare. Those countless deaths and rapes did not serve a military goal, and could not be justified by a military advantage.[172] Therefore, the charging of war crimes in order to prosecute alleged *génocidaires* has merely been a safety net to ensure conviction of the persons concerned. When doing so, one has to bear in mind, however, that the development of IHL through jurisprudence and the weight attached thereto for the purposes of the development of customary IHL, has consequences for this body of law itself. Potentially, then, the development of IHL by jurisprudence impacts greatly on the way that it can work preventively in the type of situations for which IHL was actually envisioned.

The conceptual differences between the relevant branches of international law, IHL, international human rights law and ICL, which deal in part with the same situations (i.e. the behaviour of individuals in times of armed conflict) and share the same terminology, can lead to developments and explanations of terms and concepts (e.g. the term "civilian" or "attack") in one of the branches that are not necessarily compatible with the rationale and/or concepts in the other branches. Due to the fragmentation of international law, care should thus be taken not to mix the various branches of law.

14.8 Conclusion

This discussion illustrates that despite the valuable contribution of the *ad hoc* Tribunals to the development of international humanitarian law,[173] it remains challenging to apply this branch of law correctly in criminal cases. Illustrative are

(Footnote 171 continued)
Mpambara case discussed in the aforementioned article and considers that in that case a conviction for war crimes would have been warranted).

[172] *Nota bene*: rape, of course, can never be justified by military advantage. A civilian death, however, does not necessarily mean that a war crime has been committed. Civilian casualties that are proportionate to the military advantage that is expected to be gained by the attack constitute legitimate incidental damage.

[173] Whether the ICC has contributed, or will contribute, in a similar significant way remains to be determined. Naturally, the establishment of the Rome Statute and the following reference thereto as an expression of customary law was very relevant. However, apart from the comments hitherto on the way the ICC has dealt with IHL until now, its contribution is likely to be less significant than those of the *ad hoc* Tribunals. The ICC is a treaty-based institution and thus will not need to conduct the same evaluations of the customary status of the individual criminal responsibility for violations of IHL, as done so by the Tribunals. Be that as it may, when seized of a situation that involves alleged crimes committed on the territory of a non-party State, it is submitted here that the ICC's chambers should conduct such an evaluation. At the time of writing, the chambers dealing with Sudan (*Haskanita camp*) have not done so, however.

findings in such cases on, e.g. the customary nature of the prohibition of belligerent reprisals. As discussed herein, this and other similar criticisms, are not insignificant. This contribution has also highlighted some findings that show a discrepancy between current international humanitarian law as applied in military operations and the law as applied by judges on the international level. Focusing solely on the alleged criminality of certain acts, coupled with a desire to counter impunity, can result in case law that—albeit understandable in the given situations—would restrict battlefield behaviour beyond current treaty rules of international humanitarian law, and even beyond its customary status. This, in turn, could affect the subtle equilibrium between the two diametrically opposed stimulants on which this law is based, namely military necessity and humanitarian considerations.[174] It is therefore important that those working in the field of international criminal justice are aware of the consequences their findings can have for humanitarian law, as well as for the reality that members of the military, whose conduct in times of armed conflict is guided by this law, have to work in. At the same time, it is important that such findings are always read in their proper context, so as to leave the protection afforded by humanitarian law intact and to preserve the value of this law as guidance for arms bearers in times of conflict. It is submitted that this is the desired outcome of applying international humanitarian law during international criminal trials. This is indeed more desirable, rather than making the law too strict, causing it to become 'unworkable', which would then have as a consequence that it cannot serve its very purpose: to regulate warfare.

References

Online Documents

Ferguson J (2010) Sudan rebels tell war stories over sheep feast. http://edition.cnn.com/2010/WORLD/africa/12/14/sudan.darfur.rebels/index.html. Accessed 2 Feb 2012

Henckaerts JM, Doswald-Beck L (2005a) ICRC study on Customary International Humanitarian Law. www.icrc.org/customary-ihl/eng/docs/home

Office of the Prosecutor of the ICC (2010) ICC Prosecutor: alleged war crimes in the territory of the Republic of Korea under preliminary examination. http://www.icc-cpi.int/menus/icc/press%20and%20media/press%20releases/press%20releases%20(2010)/pr608. Accessed 7 April 2012

Literature

Akhavan P (2008) Reconciling crimes against humanity with the laws of war: human rights, armed conflict, and the limits of progressive jurisprudence. J Int Crim Justice 6(1):21–37

[174] Dinstein 2010, p. 5.

Anderson K (2009) The rise of international criminal law: intended and unintended consequences. Eur J Int Law 20(2):331–358
Bartels R, Wagner N (2008) Prosecutor v. Galić: commentary. In: Klip A, Sluiter G (eds) Annotated leading cases of international criminal tribunals 15—The International Criminal Tribunal for the former Yugoslavia, vol 14. Antwerp, Intersentia, pp 683–701
Bianchi A, Naqvi Y (2011) International humanitarian law and terrorism. Hart Publishing, Oxford
Bothe M (2004) The historical evolution of international humanitarian law, International Human Rights Law, Refugee Law and International Criminal Law. In: Fischer H et al (eds) Crisis management and humanitarian protection: Festschrift fur Dieter Fleck. BWV, Berlin, pp 37–45
Boyle T (2001) Proportionality in decision making and combat actions. In: Hector M, Jellema M (eds) Protecting civilians in 21st-century warfare: target selection, proportionality and precautionary measures in law and practice. Wolf Legal Productions, Nijmegen, pp 29–37
Combs N (2010) Fact-finding without facts: the uncertain evidentiary foundations of international criminal convictions. Cambridge University Press, Cambridge
Cryer R (2006) Of custom, treaties, scholars and the Gavel: the influence of the International Criminal Tribunals on the ICRC Customary Law study. J Confl Secur Law 11(2):239–263
Cryer R et al (2010) An introduction to international criminal law and procedure, 2nd edn. Cambridge University Press, Cambridge
Danner A (2006) When courts make law: how the international criminal tribunals recast the laws of war. Vanderbilt Law Rev 59:1–68
Darcy S (2010) Bridging the gaps in the laws of armed conflict? International criminal tribunals and the development of humanitarian law. In: Quénivet N, Shah-Davis S (eds) International law and armed conflict: challenges in the 21st century. T.M.C Asser Press, The Hague, pp 319–337
Dawson G, Dixon M (2006) The protection of states' national security interests in cases before the ICTY: a descriptive and prescriptive analysis of Rule 54 *bis* of the rules and procedure and evidence. In: Abtahi H, Boas G (eds) The dynamics of international criminal justice. Martinus Nijhoff Publishers, Leiden, pp 95–141
Dinstein Y (2004) The conduct of hostilities under the law of international armed conflict. Cambridge University Press, Cambridge
Dinstein Y (2010) The conduct of hostilities under the law of international armed conflict, 2nd edn. Cambridge University Press, Cambridge
Dörmann K (2002) Elements of war crimes under the Rome Statute of the International Criminal Court. Cambridge University Press, Cambridge
Dörmann K (2003) The legal situation of 'unlawful/unprivileged combatants. Int Rev Red Cross 85(849):45–74
Doswald-Beck L (2011) Human rights in times of conflict and terrorism. Oxford University Press, Oxford
Fenrick W (1997) International humanitarian law and criminal trials. Transnatl Law Contemp Probl 7:23–44
Fenrick W (1998) The development of the law of armed conflict through the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. J Armed Confl Law 3(2):197–232
Fleck D (2003) International humanitarian law after September 11: challenges and the need to respond. Yearb Int Humanit Law 6:41–71
Fleck D (2008) The handbook of international humanitarian law, 2nd edn. Oxford University Press, Oxford
Graditzky T (1999) War crime issues before the Rome diplomatic conference on the establishment of the International Criminal Court. UC Davis J Int Law Policy 5:199–218
Green L (1999) The international judicial process and the law of armed conflict. Chitty's Law J Family Law Rev 47:1–36
Greenwood C (1998) The development of international humanitarian law by the International Criminal Tribunal for the former Yugoslavia. Max Planck Yearb U N Law 2:97–140

Greenwood C (2001) Belligerent reprisals in the jurisprudence of the International Criminal Tribunal for the former Yugoslavia. In: Fischer H et al (eds) International and national prosecution of crimes under international law: current developments. Anro Spitz, Berlin, pp 539–557

Greenwood (2004) Command responsibility and the *Hadzihasanovic* decision. J Int Crim Justice 2(2):598–605.

Hampson F (1992) Proportionality and necessity in the Gulf conflict. Am Soc Int Law Proc 45:45–58

Hampson F (1993) Means and methods of warfare in the conflict in the Gulf. In: Rowe P (ed) The Gulf War 1990–91 in International and English Law. Routledge, London, pp 89–110

Hayashi N (2006) The role of judges in identifying the status of combatants. Acta Societatis Martensis 2:69–92

Heinsch R (2007) Die Weiterentwicklung des Humanitären Völkenrechts durch die Strafgerichtshöfe für das ehemalige Jugoslawien und Ruanda. BWV Verlag, Berlin

Heintschel von Heinegg W (2003) Criminal international law and customary international law. In: Zimmermann A (ed) International criminal law and the current development of public international law. Duncker & Humblot, Berlin, pp 27–47

Henckaerts JM, Doswald-Beck L (2005b) Customary international humanitarian law: Rules, vol 1. Cambridge University Press, Cambridge

International Committee of the Red Cross (ICRC) (2008) Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law. Int Rev Red Cross 90(872):991–1147

International Humanitarian Law Clinic at Emory University School of Law (2012) Operational law experts roundtable on the Gotovina Judgment: military operations, battlefield reality and the judgment's impact on effective implementation and enforcement of International Humanitarian Law, Emory IHL Clinic ("Emory IHL Clinic"). http://www.law.emory.edu/fileadmin/NEWWEBSITE/Centers_Clinics/IHLC/Gotovina_Meeting_Report.pdf

Kalshoven F (2003) Two recent decisions of the Yugoslavia Tribunal. In: Vohrah LC (ed) Man's inhumanity to man: essays in honour of Antonio Cassese. Kluwer Law International, The Hague, pp 481–509

Kalshoven F (2004) From international humanitarian law to international criminal law. Chin J Int Law 3:151–153

Kalshoven F (2011) Constraints on the waging of war: an introduction to international humanitarian law. Cambridge University Press, Cambridge

Kolb R, Hyde R (2008) An introduction to the international law of armed conflicts. Hart Publishing, Oxford

Kress C (2001) War crimes committed in non-international armed conflict and the emerging system of international criminal justice. In: Dinstein Y (ed) Israel yearbook on human rights, vol 30. Martinus Nijhoff Publishers, The Netherlands, pp 103–179

Kuhli M, Günther K (2011) Judicial lawmaking, Discourse theory, and the ICTY on belligerent reprisals. Ger Law J 12:1261–1278

Melzer N (2009) Interpretive guidance on the notion of direct participation in hostilities under international humanitarian law. ICRC, Geneva

Meron T (1998a) The Hague Tribunal: working to clarify international humanitarian law. Am Univ Int Law Rev 13:1511–1517

Meron T (1998b) War crimes law comes of age. Am J Int Law 92:462–468

Meron T (1998c) Panel commentary: War crimes tribunals: the record and prospects: the contribution of the ad hoc tribunals to international humanitarian law. Am Univ Int Law Rev 13:1383–1411

Mettraux G (2009) The law of command responsibility. Oxford University Press, Oxford

Neuner M (2002) The power of international criminal tribunals to produce evidence. In: Roggemann H, Šarčevićeds P (eds) National security and international criminal justice. Kluwer Law International, The Hague, pp 163–193

Oppenheim L (1952) International law: A treatise, volume II - Disputes, war and neutrality, 7th edn. Edited by Lauterpacht H, Longmans Green & Co., London
Office of the Prosecutor of the ICTY (2000) Final report to the prosecutor by the Committee established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia. Int Legal Mater 38:1257–1283 ("Final Report to the Prosecutor")
Pictet J (ed) (1958) Commentary: IV Geneva Convention relative to the protection of civilian persons in time of war. ICRC, Geneva
Pictet J (1966) The principles of international humanitarian law. ICRC, Geneva
Preux J (1960) Commentary on the Geneva Convention of 12 August 1949, vol 3. ICRC, Geneva
Raimundo F (2008) General principles of law in the decisions of international criminal courts and tribunals. Martinus Nijhoff Publishers, The Hague, pp 73–164
Report of the Study Group of the International Law Commission (2006) Fragmentation of international law: difficulties arising from the diversification and expansion of international law, UN Doc. A/CN.4/L.682, 13 April 2006
Rogers A (2004) Law on the battlefield. Manchester University Press, Manchester
Sadat L (ed) (2011) Forging a convention for crimes against humanity. Cambridge University Press, Cambridge
Sandoz Y (2009) The dynamic but complex relationship between international penal law and international humanitarian law. In: Doria J et al (eds) The legal regime of the ICC: essay in honour of Prof. I.P. Blishchenko. Martinus Nijhoff Publishers, Boston, pp 1049–1071
Sandoz Y et al (eds) (1987) ICRC Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. ICRC, Martinus Nijhoff Publishers, Dordrecht
Sassòli M (2009) Humanitarian law and international criminal law. In: Cassese A (ed) The Oxford companion to international criminal justice. Oxford University Press, Oxford, pp 111–120
Sassòli M, Olsen LM (2000) The judgment of the ICTY Appeals Chamber on the merits in the *Tadic case*. Int Rev Red Cross 82(839):733–769
Schabas W (2001) Introduction to the International Criminal Court, vol 2. Cambridge University Press, Cambridge
Scheffer D (2011) All the missing souls: a personal history of the war crimes tribunals. Princeton University Press, Princeton
Simma B (2012) Reciprocity. In: Wolfrum R (ed) Max Planck encyclopedia of public international law, vol 32. Oxford University Press, Oxford
Sivakumaran S (2011) Re-envisaging the international law of internal armed conflict. Eur J Int Law 22(1):219–264
The State of Israel (2010) Gaza Operation investigations: second update, July 2010. http://www.mfa.gov.il/NR/rdonlyres/1483B296-7439-4217-933C-653CD19CE859/0/GazaUpdateJuly2010.pdf
Sluiter G (2009) 'I beg you, please come testify': the problematic absence of subpoena powers at the ICC. New Crim Law Rev 12(4):590–608
Sofaer A (1988) The rationale for the United States decision. Am J Int Law 82:784–787
United Kingdom Ministry of Defence (2004) The manual of the law of armed conflict. Oxford University Press, Oxford
United States Department of Defense (1992) Conduct of the Persian Gulf War (final report to congress). Int Legal Mater 31:612
Van den Herik L (2005) The contribution of the Rwanda Tribunal to the development of international law. Martinus Nijhoff Publishers, Leiden
Van de Herik L (2009) A quest for jurisdiction and an appropriate definition of crime: Mpambara before the Dutch Courts. J Int Crim Justice 7:1117–1132
Van Schaack B, Slye R (2007) International criminal law and its enforcement: cases and materials. Foundation Press, New York
Wagner (2003) The development of the grave breaches regime and of individual criminal responsibility by the International Criminal Tribunal for the Former Yugoslavia'. Int Rev Red Cross 85(850):351–383

Watts S (2009) Reciprocity and the law of war. Harv Int Law J 50(2):365–434
Werle G (2009) Principles of international criminal law, 2nd edn. TMC Asser Press, The Hague
Witteveen M (2010) Closing the gap in truth finding: from the facts of the field to the judge's chambers. In: Smeulders A (ed) Collective violence and international criminal justice: an interdisciplinary approach. Intersentia, Antwerp, pp 383–411
Wuerzner C (2008) Mission impossible? Bringing charges for the crime of attacking civilians or civilian objects before international criminal tribunals. Int Rev Red Cross 90(872):907–930