Chapter 10
Armed Conflict and Law Enforcement: Is There a Legal Divide?

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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

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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