

Erdemović: an International Humanitarian Law and Human Rights Law perspective

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Deadline of submission: 01/12/2010

Number of words: 17,818 (max. 18.000)

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ABBREVIATIONS

ACHPR	African Charter on Human and Peoples' Rights 1981
ACHR	American Convention on Human Rights 1969
AP I	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of International Armed Conflicts, adopted on 8 June 1977
AP II	Protocol Additional to the Geneva Conventions 12 August 1949, and concerning the Protection of Victims of Non-International Armed Conflicts, adopted on 8 June 1977
CA 2	Common Article 2 of the Geneva Conventions
CA 3	Common Article 3 of the Geneva Conventions
CAT	Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment 1984
ECHR	European Convention of Human Rights 1950
ECtHR	European Court of Human Rights
FN	Footnote
GC I	Geneva Convention (I) for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field 12 August 1949 ("GC I")
GC II	Geneva Convention (II) for the Amelioration of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea 12 August 1949
GC III	Geneva Convention (III) relative to the Treatment of Prisoners of War 12 August 1949
GC IV	Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War 12 August 1949
HR	Convention respecting the Laws and Customs of War on Land 18 October 1907 (the 'Hague Regulations')
HRL	Human rights law
IAC	International armed conflict

ICCPR	International Covenant on Civil and Political Rights 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICJ	International Court of Justice
ICL	International criminal law
ICRC	International Committee of the Red Cross
ICRC Guidance	Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, ICRC, May 2009 (see Bibliography for full citation)
ICRC Study	ICRC Customary IHL Database (see Bibliography for full citation)
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NIAC	Non international armed conflict
PoW	Prisoner of war
Rome Statute	Statute of the International Criminal Court 1998
UDHR	Universal Declaration of Human Rights 1958

INTRODUCTION

“Your Honour, I had to do this. If I had refused, I would have been killed together with the victims. When I refused they told me: “If you´re sorry for them, stand up, line up with them and we will kill you too”. I am not sorry for myself, but for my family, my wife and son, who then had (sic) nine months, and I could not refuse because then they would have killed me.”¹

So spoke Drazen Erdemović at his initial appearance before the ICTY in May 1996. This was the first case to come before the newly established court, and would prove to be a controversial starting point. The decision of the Trial Court² raised some important legal issues. The case was appealed, and these legal issues ultimately divided the Appeal Court.³

This thesis shall concentrate on one of the central issues dealt with in the appeal, namely whether duress constitutes a complete defence for the killing of innocent human beings. It shall focus on the majority judgement of Judge McDonald and Judge Vohrah. Unlike the other judges in the case, they narrowed the issue down to whether duress constitutes a complete defence to *combatants* for the killing of innocent human beings. They held that combatants cannot plead duress as a defence, only in mitigation. They argued that combatants should be expected to “exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened”⁴ and that “soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight.”⁵

This thesis examines both international humanitarian law and human rights law to determine whether these arguments can be supported in law.

¹ Erdemović Transcript, initial appearance hearing, 31 May 1996, IT-96-22-T.D241, p 9

² Prosecutor v Erdemović , Sentencing Judgement, Case No: IT-96-22-T, 29 November 1996

³ Prosecutor v Erdemović, Case no IT-96-22-A Judgement 7 October 1997, and Prosecutor v Erdemović, Case no: IT-96-22-Tbis, Sentencing Judgment, 5 March 1998

⁴ Erdemović, Joint and Separate Opinion of Judge McDonald and Judge Vohrah, Case No IT-96-22-A, para 84

⁵ Ibid

CHAPTER ONE

THE CASE

1.1 THE FACTS OF THE CASE

On 16 July 1995, Drazen Erdemović was 23 years old, and a low ranking soldier in the Bosnian Serb army. That day he, and seven others in his unit, were ordered to go to a farm at Pilicia in eastern Bosnia. Buses arrived containing muslim men and boys. Their hands were tied together, and they were dressed in civilian clothes. They were taken to a field adjacent to the farm buildings, and were lined up before Erdemović and his fellow soldiers, their backs towards them. The soldiers were ordered to shoot them. When Erdemović refused, he was told by a superior officer that he could either participate in the execution of the men, or line up with them and be shot himself. He faced a choice of being shot and adding one more to the number of those killed that day, as the men would be shot no matter what he did- or taking part in the firing squad. He chose to take part. He estimated that he killed about seventy people that day. The quote in the introduction above is Erdemović's description to the Court of his thought processes when he faced that choice: the thought processes of an ordinary young man, placed in an extraordinary moral dilemma.

Some months after the massacre, he told his story to a journalist who published it in *Le Figaro*. In the wake of the media storm, he was arrested and sent to The Hague to appear before the newly formed Tribunal.

In November 1996, Erdemović appeared before the Trial Chamber of the ICTY. He faced one count of crimes against humanity, and one count of war crimes. He pled guilty to the count of crimes against humanity, the more serious of the charges, under the caveat quoted above. He was sentenced to ten years in prison.

The case was appealed to the Appeals Chamber. One of the issues the Appeals Chamber was required to address was whether duress could afford a complete defence to a charge of crimes against humanity or war crimes, such that, if the defence is proved at trial, it results in an acquittal of the accused.

1.2 THE APPEAL CHAMBER'S VERDICT

The Appeals Chamber consisted of five judges. Three of the judges answered the question in the negative, that duress does not constitute a complete defence to the killing of innocents. The other two judges issued strong dissenting judgements.

1.2.1 The majority Judgement of Judge McDonald and Judge Vohrah

The majority judgement was issued by Judge McDonald and Judge Vohrah. Rather than answering the more general question of whether duress can be a complete defence in international law to the killing of innocents, they concentrated on a more specific issue, which they formulated as follows: in law, may duress afford a complete defence to a *soldier* charged with crimes against humanity or war crimes, where the soldier has killed innocent persons?⁶

They looked to Article 38 of the Statute of the International Court of Justice to determine what sources of law they may have regard to.⁷

Firstly, they considered customary international law to ascertain whether a rule on duress had been formed. They concluded, after an examination of the case law from previous international courts, that there was no consistent and uniform state practice, and no *opinio juris*, and that no customary rule therefore existed.⁸

Secondly, they examined general principles of law recognised by civilised nations. They found that the rules of the various legal systems of the world were largely inconsistent regarding the specific question they were addressing.⁹

⁶ Supra FN 4, para 32

⁷ Ibid, para 40

⁸ Ibid, para 55

⁹ Ibid, para 72

Having failed to find a rule, the Judges then looked to policy to try to find an answer. This approach was controversial,¹⁰ and was strongly criticized by Judge Cassese in his dissenting opinion.¹¹ The Judges said:

“we are concerned that, in relation to the most heinous crimes known to humankind, the principles of law to which we give credence have the appropriate normative effect upon soldiers bearing weapons of destruction and upon the commanders who control them in armed conflict situations.”¹²

They argued that one of the prime objectives of IHL is the protection of the weak and vulnerable, and that if national law denies recognition of duress as a defence in respect of the killing of innocents, the least ICL can do is match that policy, for it deals with murders of a far greater magnitude.¹³

The Judges’ view was that rather than allowing duress as a defence, it can be used in mitigation when it comes to sentencing by the court. This finding was again controversial, and criticized by Judge Cassese who argued that the point of criminal law is to punish behaviour which is criminal, and that:

“no matter how much mitigation a court allows an accused, the fundamental fact remains that if it convicts him, it regards his behaviour as criminal and considers that he should have behaved differently”.¹⁴

Judges McDonald and Vohrah rejected duress as a defence to combatants if it results in the killing of innocents. Towards the end of their Judgement they explain why they have narrowed the issue down to whether the defence is available purely to combatants:

¹⁰ See Shahabudden, Mohamed, Duress in International Humanitarian Law in Barea, Barberis et al, *Liber Amicorum In Memoriam of Judge Jose Maria Ruda*, Kluwer Law International 2000

¹¹ Dissenting Opinion of Judge Cassese, para 11 and 49

¹² *Supra* FN 4, para 75

¹³ *Ibid*

¹⁴ *Supra* FN 11, para 48

“we are of the view that soldiers or combatants are expected to exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened. Soldiers, by the very nature of their occupation, must have envisaged the possibility of violent death in pursuance of the cause for which they fight. The relevant question must therefore be framed in terms of what may be expected from the ordinary soldier in the situation of the Appellant.”¹⁵ (“paragraph 84”)

In paragraph 84, the Judges are making two claims regarding how they expect combatants to behave. Firstly, they argue that combatants are expected to “exercise fortitude and a greater degree of resistance to a threat than civilians, at least when it is their own lives which are being threatened”, in other words, that they should be braver than civilians. Secondly, that due to their occupation, combatants must have envisaged the possibility of a violent death, and must therefore be prepared to sacrifice their own lives in a situation where a civilian would not be expected to do so. The Judges did not cite any legal precedent for this.

1.2.2 The Opinions of the other Judges

What approaches do the other three Judges take?

1.2.2.1 *Judge Li*

Judge Li was the third majority judge.¹⁶ He addressed the wider question of whether duress can be a complete defence to the massacre of innocent civilians.¹⁷ He considered national law and the customs of different states to conclude that there is a general rule that duress can be a complete defence, providing certain requirements are met.¹⁸ However if

¹⁵ Supra, FN 4, para 84

¹⁶ Opinion of Judge Li

¹⁷ Ibid, para 1

¹⁸ Ibid, para 5: The requirements being (a) the act was done to avoid an immediate danger both serious and irreparable; (b) There was no adequate means of escape; and (c) the remedy was not disproportionate to the evil.

the act is a heinous crime, such as the killing of innocents, it cannot be a complete defence, it can only be pled in mitigation.¹⁹

He also looked to policy considerations to justify his argument that there should be an exception in respect of the killing of innocents. He argued that the purpose of IHL is to protect the innocent.²⁰ He was uncomfortable with the prospect that, if duress was allowed in relation to the murder of innocents, it could be used by criminals to justify their actions.

Although Judge Li concurs with the majority, there is no indication in his Judgement that he is of the view that the decision should apply to combatants only. He clearly envisages that the rule should apply to all, regardless of their background or profession.

1.2.2.2 Judge Cassese

Judge Cassese dissented from the majority opinion. The question he addressed was whether duress can be a defense to violations of humanitarian law involving killing.²¹

He carried out an examination of case law to conclude that there is no consistent state practice in relation to the matter. As a result, he argued, the general rule regarding duress must be applied, namely that it is a defence providing four criteria are met: that there is (1) a severe threat to life or limb; (2) no adequate means to escape the threat; (3) proportionality in the means taken to avoid the threat; and (4) the situation of duress should not be self induced.²² He stated that, in a case involving the killing of innocents, the third criteria of proportionality will be very difficult to meet. The issue would be left to the Trial Court to decide on the facts before it.²³

¹⁹ Ibid

²⁰ Ibid, para 8

²¹ Supra FN 11, para 18

²² Ibid, para 41

²³ Ibid, para 42

For Cassese, the fact that the accused is a combatant is only one of the factors to take into account in deciding whether the four criteria have been met. The rank of the serviceman would be of utmost importance, as the lower his rank, the lower the likelihood of his having had any real choice.²⁴ Other factors to consider would include whether the military unit to which the accused had voluntarily enlisted was purposefully intent on actions contrary to IHL; whether the accused knew or should have known of this when he enlisted; and whether the innocent victims would have been killed in any case, regardless of the actions taken by the accused.²⁵

Although Cassese envisages the fact the accused is a combatant is importance when deciding whether or not his criteria for the defence of duress have been fulfilled, he does not view it as a reason to apply a different rule to combatants than that applied to civilians.

1.2.2.3 Judge Stephen

Judge Stephen was the second dissenting judge.²⁶ His Judgement concentrated upon examining common law case law regarding duress, to conclude that the exception in common law withholding duress as a defence for the killing of innocents is much criticized in those countries. He holds that, despite the position in many common law countries, there is a general principle of law allowing duress as a defence to the killing of innocents recognised by the world's legal systems.²⁷ The defence applies providing the criteria propounded by Judge Cassese are met.

There is no indication in Judge Stephen's Judgement that combatants should be treated differently from other members of society. He envisages that the rules on duress should apply to all.

²⁴ Ibid, para 45 and 51

²⁵ Ibid, para 50

²⁶ Dissenting Opinion of Judge Stephen

²⁷ Ibid, para 66

1.3 CONCLUDING REMARKS

In the Appeal Court's ruling, it is only the Judgement of Judge McDonald and Judge Vohrah which narrows the issue to be addressed by the Court down to one of whether duress constitutes a defence to combatants if it results in the killing of innocents. As their Judgement constitutes the majority judgement, this distinction is significant. However, their Judgement does not provide any legal justification for their assertions that soldiers should be braver than civilians, and more accepting of a violent death.

This thesis shall examine IHL and HRL in order to establish what these areas of law expect of combatants - do they require a combatant to be braver than a civilian, or more accepting of a violent death? Can this aspect of Judges Vohrah and McDonalds' Judgement be supported in international law?

CHAPTER 2

IS THE JUDGEMENT SUPPORTED BY INTERNATIONAL HUMANITARIAN LAW?

2.1 INTRODUCTION

IHL, also known as the law of armed conflict, or the law of war, comprises of a set of rules which have been formulated to limit the violence of war, with the aim of protecting those who are not, or who are no longer, participating in the armed conflict. The sources of IHL include the Geneva Conventions and Additional Protocols,²⁸ and treaties governing the use of weapons during an armed conflict.²⁹ In addition, there is an increasing body of customary international law.³⁰

The law which applies in an armed conflict varies according to whether the conflict is international, or is confined within the borders of a State. In order to determine what rights a combatant has, and what standards he must adhere to under IHL, it is therefore necessary to examine, in turn, the law which applies in an IAC and in a NIAC.

2.2 INTERNATIONAL ARMED CONFLICTS

2.2.1 The Status of Combatants in IHL as Compared to that of Civilians

IHL divides those involved in an armed conflict into three different groups: combatants,³¹ civilians,³² and civilians taking a direct part in hostilities.³³ Each group has different rights and protections.

²⁸GC I; GC II; GC III; GC IV, AP I; AP II; and AP III: Protocol Additional to the Geneva Conventions 12 August 1949, and relating to the Adoption of a Additional Distinctive Emblem, adopted on 8 December 2005

²⁹ For example: 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 as amended on 20 December 2001; Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 13 January 1993.

³⁰ See ICRC study

³¹ Article 43(1) API

³² Ibid, Article 50(1)

³³ Ibid, Article 51(3)

The definition of a combatant is contained in Article 4A GC III and Article 43(1) API.³⁴ Article 43(1) is the wider definition of the two, and includes members of all organized armed forces, groups and units which are under a command responsible to a party to the conflict. They must be subject to an internal disciplinary system.

Combatants have the right to participate directly in hostilities.³⁵ In order for them to partake of this right, they must distinguish themselves from the civilian population.³⁶ They must abide by the rules of IHL,³⁷ although violations of the rules do not deprive a combatant of his combatant status.³⁸ The right to participate directly in hostilities means that the combatant is a lawful target at all times unless he is, for example, *hors de combat*.³⁹

Civilians enjoy general protection against the dangers arising from military operations.⁴⁰ They enjoy a range of protection against attacks. Firstly, they are protected from deliberate attacks.⁴¹ Acts where the primary purpose is to spread terror or violence among civilians are prohibited.⁴² Attacks by way of reprisals,⁴³ and the use of civilians as military shields are also prohibited.⁴⁴ Secondly, civilians are not to be subjected to indiscriminate attacks.⁴⁵ Thirdly, parties to the conflict are under a duty to take constant care to spare the civilian population, civilians and civilian objects.⁴⁶ They must take precautions during an

³⁴ Also see Article 3 HR.

³⁵ Article 43(2) API and Article 3 HR

³⁶ Article 44(3) API

³⁷ See Fleck, *The Handbook of International Humanitarian Law*, para 311 p94, which argues that while the rule requiring combatants to abide with the rules of IHL is only mentioned briefly in Article 44(2) API, it constitutes a codification of a general principle of IHL, which has crystallized as customary international law.

³⁸ Article 43(2) API

³⁹ See below p18

⁴⁰ API Article 51(1)

⁴¹ *Ibid*, Article 51(2)

⁴² *Ibid*

⁴³ *Ibid*, Article 51(6)

⁴⁴ *Ibid*, Article 51(7)

⁴⁵ *Ibid*, Article 51(4) and (5), which define "indiscriminate attacks"

⁴⁶ *Ibid*, Article 57(1)

attack by doing everything feasible to verify that the objects to be attacked are military rather than civilian; and take precautions in the choice of means or methods of attack with a view to avoiding, or at least minimizing, incidental loss of civilian lives, injury to civilians or damage to civilian objects.⁴⁷ They must refrain from launching an attack which may be expected to cause loss of civilian life, injury to civilians or damage to civilian objects, which is excessive in relation to the concrete and direct military advantage anticipated; and must cancel or suspend an attack if this proves to be the case, or if the objective turns out to be civilian when it was thought to be military.⁴⁸ If a choice is possible between several military objectives with a similar military advantage, then parties to the conflict must choose the objective which will cause least danger to civilian lives and objects.⁴⁹

If a civilian takes a direct part in hostilities, then these protections do not apply. There is no definition of what constitutes taking a direct part in hostilities in treaty law.⁵⁰ The ICRC Commentaries define "direct" participation as:

“acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces.”⁵¹

While a civilian is directly participating in hostilities, he loses his protection as a civilian under IHL and becomes a legitimate target. He can therefore be lawfully killed. Once he stops directly participating, then he regains his protection.⁵²

IHL therefore supports the Judgment to some extent. Although it is legal under IHL to kill both combatants and civilians in an IAC, the circumstances in which they may be legally killed are very different. Combatants have the right to participate directly in hostilities and are a legal target at all times unless *hors de combat*.⁵³ Civilians may not be directly

⁴⁷ Ibid, Article 57(2)(a)

⁴⁸ Ibid, Article 57(2)(a)(iii); Article 57(2)(b) and Article 51(5)(b)

⁴⁹ Ibid, Article 57(3)

⁵⁰ See ICRC Guidance p 41

⁵¹ See para 1944

⁵² Article 57(3) API However, see ICRC Guidance, Section II(3), regarding civilians who assume a continuous combat function

⁵³ See below p18

targeted unless they are taking a direct part in hostilities, but may be killed, providing their deaths occur in accordance with the rules outlined above. The law therefore provides that combatants can legally be subjected to violence and death in situations where a civilian may not be.

Be that as it may, IHL does not provide that *any* violence against combatants, or *any* death of a combatant is legal. IHL extends protection to combatants who are *hors de combat*. It also restricts the means and methods of warfare which may be used against combatants.

2.2.2 Combatants who are *Hors de Combat*

A combatant is *hors de combat* if he is in enemy hands and has clearly expressed a wish to surrender, has been rendered unconscious, or is otherwise incapacitated by wounds or sickness. He cannot be made the object of an attack, provided that he abstains from any hostile act, and does not attempt to escape.⁵⁴ No vengeance can be taken against him, even if he fights up until the moment of surrender. Under customary law, those who are *hors de combat* must be treated humanely.⁵⁵ Murder is prohibited,⁵⁶ as is torture, cruel or inhumane treatment, and outrages upon personal dignity.⁵⁷ Corporal punishment is forbidden,⁵⁸ and so too are mutilation, medical or scientific experiments or other medical procedures not necessitated by the state of health of the person concerned.⁵⁹

Combatants who are parachuting from an aircraft in distress must not be made the object of an attack.⁶⁰ Once they reach the ground they are to be given the opportunity to surrender before being made the object of attack, unless it is apparent that they are engaging in a hostile act.

⁵⁴ Article 41 API; Article 23(c) HR and ICRC Study Rule 47

⁵⁵ ICRC Study, Rule 87

⁵⁶ Ibid, Rule 89

⁵⁷ Ibid, Rule 90

⁵⁸ Ibid, Rule 91

⁵⁹ Ibid, Rule 92

⁶⁰ API Article 42, also *ibid* Rule 48

Geneva Conventions I, II and III give more detailed protection to combatants who are wounded, sick or shipwrecked and combatants who are captured.

2.2.2.1 *Combatants who are Wounded, Sick or Shipwrecked*

The provisions protecting combatants who are wounded, sick or shipwrecked can be traced back to the very foundations of IHL, when Henry Dunant attended the Battle of Solferino in 1859.⁶¹

The basic rules are contained in Article 10 API, which provides that all wounded, sick and shipwrecked, to whichever Party they belong, shall be respected and protected. In all circumstances they are to be treated humanely and are to receive, to the fullest extent practicable, and with the least possible delay, the medical attention required by their condition. Article 11 provides protection for such persons' health and medical integrity.

Articles 10 and 11 are in effect a summarising of the more detailed protection given under GC I and GC II. GC I protects armed forces in the field, whilst GC II concerns the treatment of those at sea. The protection extended under both is similar. They require that members of the armed forces⁶² who are wounded and sick, are to be respected and protected in all circumstances. They are to be treated humanely and cared for by the party to the conflict in whose power they are in.⁶³ Any attempts upon their lives, or violence to their persons, is prohibited, in particular, murder, extermination, torture and biological experiments. They are not wilfully to be left without medical assistance or care, or be kept in conditions exposing them to contagion or infection. Wounded and sick combatants who fall into enemy hands are PoWs.⁶⁴

⁶¹ See Dunant, H, A Memory of Solferino, Geneva, 1862

⁶² It also protects those referred to in Articles 13 GC I and GC II

⁶³ This is also customary international law, see Rule 110 ICRC Study

⁶⁴ Article 14 GC I, Article 16 GCII

Under GC I, if a party to the conflict is compelled to abandon wounded or sick to the enemy, they must leave them with medical personnel and material to assist, as far as military conditions permit.⁶⁵

At all times, particularly after an engagement, parties to the conflict must, without delay, take all possible measures to search for and collect the wounded and sick and to protect them against pillage and ill treatment; to ensure their adequate care and to search for the dead and prevent them from being despoiled.⁶⁶ Reprisals against the wounded and sick are prohibited.⁶⁷

GC II contains provisions regarding military hospital ships, which have been built or equipped solely with a view to transporting the wounded, sick and shipwrecked.⁶⁸ They are never to be attacked or captured, and are to be respected and protected at all times.⁶⁹

These Treaty provisions give sick, injured and shipwrecked combatants the right to be treated humanely. They are not to be left, as they were at the battle of Solferino, to die or be murdered by enemy combatants or civilians. A combatant has the right to be removed from the battlefield, and to be given appropriate medical treatment. In the event that conditions dictate that the Party to the conflict must abandon him, they are under an obligation to ensure that he has medical care if possible. In the event that a combatant comes upon an injured enemy combatant, he must give the casualty such care as he has at his command, and must endeavour to hand him over to a medical unit.⁷⁰ If the injured combatant falls into enemy hands, then he is to be treated as a PoW, and is to receive medical care on a par with that given to the enemy's combatants.⁷¹

⁶⁵ GC I Article 12

⁶⁶ Article 15 GC I; Article 18 GCII and Rule 109 ICRC Study

⁶⁷ Article 46 GC I and Article 47 GCII

⁶⁸ GC II Chapter III

⁶⁹ Ibid, Article 22. This is on the condition that the names and descriptions of the ships have been notified to the Parties to the conflict ten days before the ships are employed.

⁷⁰ See ICRC Commentary to GCI, Article 12 Para 2A

⁷¹ Article 10(2) API

2.2.2.2 *Combatants who are Captured*

One of the principal rights of a combatant in an IAC is that, if he is captured by the enemy, he becomes a PoW.⁷² He can be interned without any particular procedure, or for any particular reason, for the purpose of his internment is to prevent him from being able to directly participate in hostilities. He cannot be punished simply because he took part in the hostilities.

PoWs are in the hands of the Detaining Power which is responsible for them, not in the hands of individuals or military units.⁷³ Unlawful acts or omissions by a Detaining Power causing death or seriously endangering the health of a PoW are prohibited, and constitute a serious breach of the Convention.⁷⁴

If there is any doubt as to whether or not a person who falls in to enemy hands qualifies as a PoW, there is a presumption that they do, until such time as their status has been determined by a competent tribunal.⁷⁵ The right to be a PoW cannot be renounced.⁷⁶

Once a combatant is captured, he is bound only to give limited information to the capturer, such as surname and rank. He is not to be subjected to physical or mental torture, or to any threats or unpleasant or disadvantageous treatment of any kind if he refuses to answer questions.⁷⁷ He must be evacuated as soon as possible after capture to a camp situated in an area far enough from the combat zone for him to be out of danger,⁷⁸ and must not be unnecessarily exposed to danger whilst awaiting evacuation from the combat

⁷² Article 44(1) API, Article 3 HR and Rule 106 ICRC Study. Article 4 GC III lists those who qualify for PoW status.

⁷³ Ibid, Article 12; HR Article 4 and API Article 44(1)

⁷⁴ GC III Article 13

⁷⁵ Ibid, Article 5 and API Article 45(1)

⁷⁶ Ibid, Article 7

⁷⁷ Ibid, Article 17

⁷⁸ Customary law rules also require internment centers to be located away from the combat zone, and that those deprived of their liberty be provided with adequate food, water, clothing, shelter and medical attention- Rules 121 and 118 ICRC Study

zone.⁷⁹ Any evacuation must be conducted humanely and in conditions similar to the armed forces of the Detaining Power in their changes of station.⁸⁰

It is illegal to kill PoWs if holding them would impede or endanger military operations. If a person entitled to PoW status falls into enemy hands in unusual conditions of combat, making it impossible to evacuate him, then he is to be released and all feasible precautions taken to ensure his safety.⁸¹

PoWs must be humanely treated at all times, and protected at all times, particularly against acts of violence or intimidation, and against insults and public curiosity.⁸² They are entitled to respect for their persons and their honour,⁸³ and are to be given free maintenance and medical treatment if required.⁸⁴

PoWs may be interned, but there are strict rules regarding the conditions of internment. The premises must be hygienic, healthy and out of danger.⁸⁵ Their presence cannot be used to render areas immune from military operations.⁸⁶ They are to be given shelters against air bombardments and other hazards of war to the same extent as the local civilian population.⁸⁷ Information regarding the location of PoW camps is to be given to the other parties to the conflict, and the camps are to be clearly marked so as to be visible from the air.⁸⁸ They are to be quartered in conditions as favourable as those for the forces of the

⁷⁹ GC III, Article 19.

⁸⁰ Ibid, Article 20

⁸¹ API Article 41(3)

⁸² GC III Article 13

⁸³ Ibid, Article 14

⁸⁴ Ibid, Article 15

⁸⁵ Ibid, Article 22 and 23

⁸⁶ Ibid, Article 23

⁸⁷ Ibid

⁸⁸ Ibid, Article 23

Detaining Power.⁸⁹ They are to have access to medical care⁹⁰ and are to be kept in sanitary conditions.⁹¹

IHL makes allowance for the fact that a State may require its combatants who become PoWs to endeavour to escape.⁹² In the event that a PoW escapes successfully and is subsequently recaptured, he may not be punished.⁹³ An unsuccessful escape can only be punished by disciplinary action.⁹⁴ The use of weapons of war, especially against those who are escaping, or are trying to escape, constitutes an extreme measure and must always be preceded by appropriate warnings.⁹⁵

If a PoW is to be tried for an offence, then he is to be subject to the laws in force in the armed forces of the Detaining Power.⁹⁶ Any disciplinary punishment must not be inhuman, brutal or dangerous to the health of PoWs.⁹⁷ Escape, or repeated escape, is not to be deemed to be an aggravating circumstance if the PoW is subjected to trial by judicial proceedings.⁹⁸

In the event that the Detaining Power practices the death penalty, the PoW is to be informed as soon as possible as to which offences this applies to.⁹⁹ If the court is considering imposing the death penalty, they are required to take into account, to the widest extent possible, that the accused is not a national of the Detaining Power, is not bound to it by any duty of allegiance and that he is in its power as the result of circumstances independent of his own free will.¹⁰⁰ If the death penalty is imposed then the

⁸⁹ Ibid, Article 25, and Chapter II generally.

⁹⁰ Ibid, Articles 30 and 31

⁹¹ Ibid, Article 29

⁹² e.g. In the UK: Armed Forces Act 1955 s145(2)(a) (now repealed)

⁹³ GC III, Article 91

⁹⁴ Ibid, Article 92

⁹⁵ Ibid, Article 42

⁹⁶ Ibid, Article 82

⁹⁷ Ibid, Article 89

⁹⁸ Ibid, Article 93

⁹⁹ Ibid, Article 100

¹⁰⁰ Ibid, Article 87

Protecting Power must be informed, and the penalty cannot be enforced for six months after notification.¹⁰¹

If we compare the situation of a captured PoW to a captured civilian, or a civilian who has directly participated in the hostilities. Neither of these groups is entitled to be treated as a PoW. A civilian who is not directly participating in the hostilities, including those who commit an offence solely designed to harm the Occupying Power,¹⁰² are protected by GC IV. If they commit an offence then they may be incarcerated by the Occupying Power, and are entitled to some basic rights under GC IV.¹⁰³ However, they are a regular prisoner, in contrast with the special status of PoWs. Once the conflict has ended they must then be handed over to the Territorial Power, but may be required to serve the remainder of their sentence.¹⁰⁴

A civilian who has been directly participating is not entitled to the protection of GC IV,¹⁰⁵ but must instead rely on the fundamental guarantees contained in Article 75 API.¹⁰⁶ This contains the “bare bones” of fair treatment, such as the right to be treated humanely and to be tried by an impartial court.

It is therefore evident that the Conventions and Additional Protocols give significant protection to a combatant who is captured by the enemy. He is protected from the moment of capture.¹⁰⁷ He must be humanely treated at all times, and more often than not is entitled to standards of protection and care which are on a par with that accorded to the forces of the Detaining Power.¹⁰⁸ A captured combatant in an IAC is arguably given stronger, more detailed protection under GC III than a captured civilian is entitled to under GC IV. He is certainly given better protection than a civilian who is captured after directly participating in the hostilities.

¹⁰¹ Ibid, Articles 101 and 107

¹⁰² GC IV Article 68

¹⁰³ Ibid, Article 76

¹⁰⁴ Ibid, Article 77

¹⁰⁵ GC IV, Article 5

¹⁰⁶ Ibid, Article 45(3)

¹⁰⁷ GC III, Article 5

¹⁰⁸ For example *ibid*, Article 25

2.2.3 Restrictions on Means and Methods of Warfare

A further core principle of IHL is that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited.¹⁰⁹ This concept of limited warfare requires that a compromise must be reached between military requirements on the one hand, and humanitarian ones, on the other. It is, of course, intended to protect civilians, civilian property,¹¹⁰ and the environment,¹¹¹ but it also aims to protect combatants from the worst excesses of war.

2.2.3.1 Means of warfare

If we turn firstly to restrictions on the means of warfare. Article 36(1) API requires a Party to the Conventions, when engaged in the study, development, acquisition or adoption of a new means or method of warfare, to determine whether the proposed weapon is in accordance with IHL.

There have been agreements seeking to restrict the means of warfare since the 19th century. Many agreements seek to protect both civilians and combatants. The ICJ has stated:¹¹²

“humanitarian law at a very early stage, prohibited certain types of weapons either because of their indiscriminate effect on combatants and civilians or because of the unnecessary suffering caused to combatants, that is to say a harm greater than that unavoidable to achieve legitimate military objectives.”

The St Petersburg Declaration of 1868 is an example of this.¹¹³ It renounces the use in times of war of explosive projectiles under 400 grammes of weight. The preamble to the Declaration provides:

¹⁰⁹ See Article 31(1) API and Article 22 HR

¹¹⁰ See Articles 48 and 51 API, and Part IV API generally

¹¹¹ See Article 55 API and Principle 24 of The Rio Declaration on Environment and Development 1992

¹¹² Legality of the Threat or Use of Nuclear Weapons, ICJ, Advisory Opinion, 8 July 1996, para 78

¹¹³ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 grammes of weight, Saint Petersburg, 29 November and 11 December 1868

“That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;

That for this purpose it is sufficient to disable the greatest possible number of men;

That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;

That the employment of such arms would, therefore, be contrary to the laws of humanity.”

Other examples of treaties which protect combatants, include Hague Declaration II and III of 1899, which, respectively, prohibit the use of projectiles, the only object of which is the diffusion of asphyxiating or deleterious gases; and the use of bullets which expand or flatten easily in the human body (so called “dum-dum” bullets);¹¹⁴ and the Hague Regulation of 1907 which prohibits the use of poison or poisonous weapons.¹¹⁵

In more modern times, treaties have been ratified which seek to restrict the weaponry which can be used in an armed conflict. Some of these treaties are solely aimed at minimizing the suffering caused to civilians.¹¹⁶ However, several aim to protect both civilians and combatants. Examples of these include treaties prohibiting: the development and use of chemical weapons;¹¹⁷ the use of any weapon where the primary effect is to injure by fragments which escape detection by x-rays in the human body,¹¹⁸ the use of

¹¹⁴ Final Act of the International Peace Conference, The Hague 29 July 1899, Declarations II and III, also see ICRC Study, Rule 77

¹¹⁵ HR Article 23(a), and see also Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or other Gases and of Bacteriological Methods of Warfare, Geneva 17 June 1925 and ICRC Study, Rule 72

¹¹⁶ Such as Protocol III (on Prohibitions or Restrictions on the use of Incendiary Weapons) to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980; and the Convention on the prohibition of the Use, Stockpiling, Production and Transfer of Anti Personnel Mines and On Their Destruction, 18 September 1997

¹¹⁷ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 3 September 1992; see also ICRC Study, Rule 74

¹¹⁸ Protocol I (on non Detectable Fragments) to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects, 10 October 1980, see also ICRC Study, Rule 86

mines or booby traps to cause superfluous injury or unnecessary suffering;¹¹⁹ the use of blinding laser weapons;¹²⁰ and the development, use and stockpiling of cluster munitions.¹²¹

2.2.3.2 *Methods of Warfare*

The limitations on methods of warfare derive from three premises:¹²² firstly, that the choice of methods of warfare is not unlimited;¹²³ secondly, that it is prohibited to use methods of warfare of a nature designed to cause superfluous injury or unnecessary suffering;¹²⁴ and, thirdly, that the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.¹²⁵

There are several provisions in IHL which forbid acts which cause unnecessary suffering to civilians, examples include: the prohibition against acts where the primary purpose is to spread terror among the civilian population;¹²⁶ the prohibition against starving the civilian population;¹²⁷ and the prohibition against attacking or destroying objects indispensable to the survival of the civilian population.¹²⁸ There are also provisions in IHL, the purpose of which, is to protect combatants.

Firstly, perfidy is prohibited.¹²⁹ A perfidious act is one which invites the confidence of an adversary by leading him to believe that he is entitled to, or is obliged to, accord protection under IHL. Examples, listed in Article 37(1) API, include feigning of an intent to negotiate

¹¹⁹ Ibid, Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby Traps and other Devices

¹²⁰ Ibid, Protocol IV on Blinding Laser Weapons, 13 October 1995, also Rule 77 ICRC Study

¹²¹ Convention on Cluster Munitions, 30 May 2008

¹²² See Sassoli and Bouvier, *How Does Law Protect in War?*, ICRC, 1999

¹²³ Article 35(1) API and Article 22 HR

¹²⁴ Article 35(2) API; Article 23(e) HR and ICRC Study, Rule 70

¹²⁵ Preamble to the St Petersburg Declaration 1868, supra FN 113

¹²⁶ Article 51(2) API

¹²⁷ Ibid, Article 54(1)

¹²⁸ Ibid, Article 54(2)

¹²⁹ Article 37 API and ICRC Study, Rule 65

under a flag of truce, or of a surrender; and feigning of an incapacitation by wounds or sickness. Perfidy can be contrasted with ruses of war, which mislead an adversary or induce him to act recklessly, which are permitted.¹³⁰

Secondly, it is forbidden to order that there shall be no quarter (no survivors).¹³¹ The purpose of this prohibition is to prevent the combatant from being killed once they come under the power of the enemy.

2.2.4 Concluding remarks regarding IACs

During an IAC, a combatant has the right to take a direct part in the hostilities, with the result that he too can be legally attacked and killed. However, he is not subject to absolute war, he has protection against some kinds of weapon: those which are deemed to inflict unnecessary suffering on the combatant, going above and beyond the aim of simply weakening the military forces of the enemy.

The moment a combatant is *hors de combat*, whether due to being wounded, sick, or shipwrecked; captured or due to surrendering to the enemy; he is no longer a legitimate target and must be protected by the enemy State.¹³²

Violating many of these provisions constitutes a grave breach of the Conventions. Grave breaches include willful killing; torture and inhumane treatment; compelling a PoW to serve in the forces of a hostile power; and attacking a person in the knowledge that he is *hors de combat*.¹³³ The Parties to the Conventions are under an obligation to search for those alleged to have committed such grave breaches and to try them before their own courts, or hand them over for trial to other Parties.¹³⁴ Those who violate the provisions may be guilty

¹³⁰ Article 37(2) API and Article 24 HR

¹³¹ Article 40 API; Article 23(d) HR, and ICRC Study, Rule 46

¹³² Article 41 API

¹³³ See Article 50 GC I, Article 51 GC II; Article 130 GC III and Articles 11 and 85 API

¹³⁴ GC I Article 49; GC II Article 50; GC III Article 129; and AP I Article 88

of war crimes, and could face proceedings before the International Criminal Court.¹³⁵ They may also be liable to prosecution under the domestic law of the State concerned.

2.3 NON INTERNATIONAL ARMED CONFLICTS

The law distinguishes between different situations which can occur within the borders of a State: firstly, internal disturbances and tensions, such as riots and isolated and sporadic acts of violence, to which IHL does not apply.¹³⁶ Secondly, internal armed conflicts between a State's armed forces and armed factions within a State, or internal armed conflict between the factions. Thirdly, internal armed conflict between a State's armed forces and an organised armed faction which reaches the level required for AP II to come into operation.¹³⁷ Finally, armed conflicts defined in AP I Article 1(4), which are treated as IACs.

As already noted, most of the Geneva Conventions do not apply in NIACs. Historically,

“there were very few international rules governing civil commotion, for States preferred to regard internal strife as rebellion, mutiny and treason coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction. This dichotomy was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than community concerns or humanitarian demands.”¹³⁸

However in recent years, particularly since the forming of the ICTY, there has been a trend to extend the ambit of customary law into NIACs.¹³⁹

¹³⁵ See Rome Statute, Article 8

¹³⁶ See AP II, Article 1(2)

¹³⁷ AP II, Article I

¹³⁸ Prosecutor v Tadic', ICTY, Appeals Chamber Decision on Defence Motion for Interlocutory Appeal on Jurisdiction 2 October 1995, para 96

¹³⁹ Ibid

Treaty law relating to NIACs is contained in CA 3 and in AP II. CA 3 applies in all NIACs, whereas AP II only applies in those NIACs which reach the required threshold provided for in Article 1(2).

2.3.1 The Status of Combatants in NIACs

Unlike in IACs, treaty law relating to NIACs does not refer to the status of combatants, indeed the status of a combatant in a NIAC is controversial.¹⁴⁰ The participants in a NIAC are subject to the law of the State in which the conflict occurs, meaning they may not be rendered immune from prosecution. A member of a dissident armed force who kills a member of the regular armed forces may be prosecuted for murder, or other offences against the person. A member of the regular armed forces who kills a dissident or a civilian may also, potentially, face prosecution. The status of a combatant in a NIAC is therefore often unclear.

There is a strong contrast between IACs and NIACs regarding how IHL is enforced. In IACs, procedures are provided in the Conventions and AP I regarding how this should happen.¹⁴¹ In NIACs, CA3 provides only that the ICRC may offer to provide its humanitarian services, whereas AP II provides simply that its text must be disseminated as widely as possible.¹⁴² The enforcement of IHL during a NIAC is therefore very much dependent upon domestic law. Serious offences may fall under the jurisdiction of the International Criminal Court.¹⁴³

¹⁴⁰ See ICRC Guidance, p33, FN 52; and Hayashi, Nobuo; Continuous Attack Liability without Right or Fact of direct participation in hostilities: The ICRC Interpretive Guidance and Perils of Pseudo Status; International Humanitarian Law, Antecedences and Challenges of the Present Time, p 64

¹⁴¹ For example: API Article 86

¹⁴² AP II, Article 19

¹⁴³ See for example, Rome Statute, Article 8(2)(c) and (e)

2.3.2 Protection given by Common Article 3

CA 3 contains the minimum protection which is to be provided in NIACs. It states that 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 be treated humanely and without any adverse distinction based on race, colour, religion or faith, sex, birth or wealth, or any other criteria. In connection with these persons, it prohibits murder; mutilation; cruel treatment and torture; the taking of hostages; outrages upon personal dignity, in particular humiliating and degrading treatment; and the passing of sentences and carrying out of executions without previous judgement.

2.3.3 Protection given by Additional Protocol II

AP II gives more detailed protection than CA 3.

Article 4 contains fundamental guarantees for all who are not taking a direct part, or who have ceased to take a direct part in hostilities, and therefore applies to combatants. It applies whether or not their liberty has been restricted. They are to be treated humanely, without adverse distinction. It is prohibited to order that there be no survivors. It prohibits violence to life, health and physical or mental well being of such persons, in particular murder and cruel treatment such as torture, mutilation and any form of corporal punishment. It forbids collective punishments, the taking of hostages, outrages upon personal dignity and any threats to commit these acts.

With regard to the wounded, sick and shipwrecked, all are to be respected and protected.¹⁴⁴ In all circumstances they are to be treated humanely and are to receive medical attention.¹⁴⁵ Whenever circumstances permit, and particularly after an engagement, all possible measures are to be taken to search for and collect the wounded,

¹⁴⁴ Article 7(1) AP II

¹⁴⁵ Ibid, Article 7(2)

sick and shipwrecked, to protect them against pillage and ill treatment and to ensure their adequate care.¹⁴⁶

Turning to those who are captured by the enemy, a captured combatant has no right to become a PoW in a NIAC. If AP II applies, Article 5 provides some protection for those who are deprived of their liberty for reasons related to the armed conflict. It requires, at a minimum, that those who have been detained are, to the same extent as the local civilian population, to be provided with food and water and afforded health and hygiene safeguards and protection against the rigours of the climate and the dangers of the armed conflict.¹⁴⁷ The wounded and sick are to be given treatment.¹⁴⁸ They are not to be located close to the combat zone, and must be evacuated if they become exposed to the dangers arising from the armed conflict.¹⁴⁹ They are to be medically examined.¹⁵⁰ Their physical or mental health and integrity are not to be endangered by an unjustified act or omission.¹⁵¹

In relation to the prosecution and punishment of criminal offenses related to the armed conflict, no sentence may be passed and no penalty executed on a person unless pursuant to a conviction by an independent and impartial court.¹⁵²

It is clear that whilst AP II does not give the more detailed protection given under the Conventions and AP I, it still provides combatants with some basic protections in the event that they become *hors de combat*. However the protection of AP II is limited by virtue of the fact that it does not apply in most NIACs due to the high threshold which must be reached before it comes into operation.¹⁵³

¹⁴⁶ Ibid, Article 8

¹⁴⁷ Ibid, Article 5(1)(b)

¹⁴⁸ Ibid, Article 5(1)(a)

¹⁴⁹ Ibid, Article 5(1)(c)

¹⁵⁰ Ibid, Article 5 (1)(d)

¹⁵¹ Ibid, Article 5(1)(e)

¹⁵² Ibid, Article 6(2)

¹⁵³ Ibid, Article 1

2.3.4 Other Treaties which apply in NIACs

Some of the treaties concerning means of warfare apply in both IACs and NIACs. Examples include the Blinding Weapons Protocol 1995,¹⁵⁴ the Mines Protocol 1996¹⁵⁵ and the Land Mines Convention, where State Parties undertake never in any circumstances to develop, produce, or otherwise use, anti personnel mines.¹⁵⁶

2.3.5 Customary International Law in NIACs

Customary law provides some more protections for combatants in NIACs.

The rule that, whenever circumstances permit, each part to the conflict must take all possible measures to search for, collect and evacuate the wounded, sick and shipwrecked, is part of customary law.¹⁵⁷ Such persons are to receive the medical attention and care which they require with the least possible delay, and to the fullest extent practicable, with no distinction made apart from on medical grounds.¹⁵⁸ Each party to the conflict is to take all possible measures to protect the wounded, sick and shipwrecked against ill treatment and pillage of their personal property.¹⁵⁹

Those whom are *hors de combat* must be treated humanely;¹⁶⁰ murder is prohibited,¹⁶¹ as is torture, cruel or inhumane treatment and outrages upon personal dignity;¹⁶² corporal

¹⁵⁴ FN 120

¹⁵⁵ See amendment Article 1 dated 21 December 2001, 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, 10 October 1980

¹⁵⁶ See Convention on the Prohibition of the use, stockpiling, production and transfer of anti personnel tank mines and on their destruction, 18 September 1997, Article 1

¹⁵⁷ ICRC Study, Rule 109

¹⁵⁸ Ibid, Rule 110

¹⁵⁹ Ibid, Rule 111

¹⁶⁰ Ibid, Rule 87

¹⁶¹ Ibid, Rule 89

¹⁶² Ibid, Rule 90

punishment is forbidden,¹⁶³ and so too are mutilation, medical or scientific experiments or other medical procedures not indicated by the state of health of the person concerned.¹⁶⁴ Those deprived of their liberty are to be provided with adequate food, water, clothing, shelter and medical attention.¹⁶⁵

The prohibition against the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering, is customary law.¹⁶⁶ It is prohibited to use weapons which are by their very nature indiscriminate.¹⁶⁷

The prohibitions against the use of poisoned weapons;¹⁶⁸ biological weapons;¹⁶⁹ chemical weapons¹⁷⁰; expanding bullets;¹⁷¹ exploding bullets;¹⁷² weapons where the primary effect is to injure by fragments which are not detectable by x-rays and blinding laser weapons,¹⁷³ are customary law independently of treaty law.

It is prohibited to use incendiary weapons against combatants unless it is not feasible to use a less harmful weapon to render them *hors de combat*.¹⁷⁴

The prohibition against ordering that no quarter should be given is part of customary law,¹⁷⁵ as are the prohibitions against attacking those who are *hors de combat*,¹⁷⁶ and

¹⁶³ Ibid, Rule 91

¹⁶⁴ Ibid, Rule 92

¹⁶⁵ Ibid, Rule 118

¹⁶⁶ Ibid, Rule 70

¹⁶⁷ Ibid, Rule 71

¹⁶⁸ Ibid, Rule 72

¹⁶⁹ Ibid, Rule 73

¹⁷⁰ Ibid, Rule 74

¹⁷¹ Ibid, Rule 77

¹⁷² Ibid, Rule 78

¹⁷³ Ibid, Rule 86

¹⁷⁴ Ibid, Rule 85

¹⁷⁵ Ibid, Rule 46

¹⁷⁶ Ibid, Rule 47

attacking persons parachuting from an aircraft in distress.¹⁷⁷ Killing, injuring or capturing an adversary by resort to perfidy is also prohibited.¹⁷⁸

2.3.6 Concluding Remarks regarding NIACs

Whilst the protection given to a combatant who is *hors de combat* is not as extensive in a NIAC as in an IAC, it is clear from the above examination that combatants have the same basic legal protections. They are not permitted to become PoWs, but are still entitled to the basic necessities of life and to medical care should they be captured. In addition, as in IACs, they are protected from certain types of weapons and means of warfare.

2.4 THE MARTENS CLAUSE

Finally, mention must be made of the “Martens Clause”. This clause runs throughout IHL. It was first included in the Hague Convention of 1899,¹⁷⁹ and has appeared in the preamble to many treaties on the subject since then. A modern version of the clause is contained in Article 1(2) AP I, and reads:

“In cases not covered by this Protocol or by any 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.”¹⁸⁰

Thus, where the law is silent, principles of humanity must prevail. This clause has been referred to many times by courts and by law makers when interpreting IHL.¹⁸¹ It serves to protect all of those involved in an armed conflict, including combatants.

¹⁷⁷ Ibid, Rule 48

¹⁷⁸ Ibid, Rule 65

¹⁷⁹ Supra, FN 114

¹⁸⁰ Also see the preamble to APII

¹⁸¹ For example see supra FN 112, para 78

2.5 DOES IHL SUPPORT THE JUDGEMENT?

IHL allows for violence and deaths to legally occur in war. It accepts that both civilians and combatants will be wounded and killed. There remains a clear distinction between the law which applies in IACs and that which applies in NIACs.

In IACs, the provision for combatants to be legally killed is much wider than that for civilians, unless a civilian is directly participating in the hostilities. To that extent, the Judgement is correct: combatants are exposed to more danger than civilians, and can expect to be subjected to violence and threats to their life in situations where civilians can expect to be protected. In NIACs, the situation is less clear, and much will depend upon the domestic law of the State. Combatants do not necessarily have the right to directly participate in hostilities, and it is questionable whether they can be legally killed under IHL. Once *hors de combat*, IHL seeks to ensure that a combatant is not at the mercy of the enemy. He is then entitled to expect a certain standard of treatment, and is protected from violence, although the extent of this protection varies depending upon whether the combatant is participating in an IAC or a NIAC. A combatant also has protection, in both IACs and NIACs, from certain types of weapon, and from the basic provision that weapons should not cause superfluous injury or unnecessary suffering.

Not all violence towards combatants is legal during war. Combatants can expect protection under IHL as soon as they are wounded, captured or surrender. There are many situations where a combatant can be killed unlawfully. The Judgement is therefore not fully supported by IHL.

CHAPTER 3

IS THE JUDGEMENT SUPPORTED BY INTERNATIONAL HUMAN RIGHTS LAW?

3.1 INTRODUCTION

HRL applies both in times of peace, and in times of war.¹⁸² During wartime, there is an overlap between IHL and HRL. The relationship between these areas of law is complex, and much debated by academics.¹⁸³ HRL is contained in global and regional instruments,¹⁸⁴ and in customary international law.¹⁸⁵

Three general issues must be addressed before moving on to the main discussion.

The first concerns jurisdiction. In IHL, all High Contracting Parties agree to respect and to ensure respect for the Conventions in all circumstances.¹⁸⁶ Once it is accepted that an armed conflict is occurring, IHL applies to all of those involved to some degree. Jurisdiction under HRL is entirely different. The position varies according to each instrument,¹⁸⁷ but the obligation to respect HRL is much narrower and open to interpretation than IHL. A State is required to abide by the human rights instruments to which it is party in relation to individuals on its territory, but the rights owed by a State to

¹⁸² See supra FN 112, paras 24 and 25.

¹⁸³ See for example, Theodor Meron; How do Human Rights humanize the law of war? in Bergsmo, Morten, Human Rights and Criminal Justice for the Downtrodden, Essays in honour of Asbjørn Eide; Martinus Nijhoff Publishers; 2003.

¹⁸⁴ Global instruments include:
UDHR; ICESCR; ICCPR and CAT
Regional instruments include:
ECHR; ACHR and ACHPR

¹⁸⁵ See for example: Barcelona Traction, Light and Power Company Limited (Belgium v Spain), ICJ 5 February 1970, para 34

¹⁸⁶ CA 1; API Article 1

¹⁸⁷ For example, Article 1 ECHR requires High Contracting Parties to “secure to everyone within their jurisdiction” the rights and freedoms of the Convention, whereas Article 2 ICCPR, requires each State Party to “respect and to ensure to all individuals within its territory and subject to its jurisdiction” the rights under the Covenant.

individuals it interacts with on foreign soil are less clear.¹⁸⁸ In the UK, for example, the Supreme Court has held that British soldiers are not within UK jurisdiction for the purposes of the Human Rights Act 1998 when they leave their military base.¹⁸⁹

The second issue concerns who is obliged to protect human rights. The traditional view was that HRL places obligations on States, not individuals. Some commentators argue that this view is outdated or was never the case, and that non State actors, such as armed opposition groups, are also obliged to uphold HRL.¹⁹⁰ This debate is of particular importance in NIACs, and shall be discussed in more detail below.¹⁹¹

The third, and final, issue concerns the avenues available to individuals to enforce their human rights, for “human rights become a living reality only through appropriate procedures and mechanisms”.¹⁹² Some regional human rights instruments, such as ECHR, ACHR and ACHPR, have their own enforcement procedures.¹⁹³ Some provide for organisations which monitor the implementation of the instrument. These may contain a mechanism for individual complaints, although the decisions which they issue are generally not binding on the States in question.¹⁹⁴ Other instruments do not provide for any direct method of enforcement.¹⁹⁵ Where instruments do provide for enforcement procedures, there are often impediments to enforcing the rights in practice, for example,

¹⁸⁸ See *Loizidou v Turkey*, preliminary objections, Eur.Ct.HR, 18 December 1996, para 62, where the ECtHR held that what mattered was whether Turkey “exercise(d) effective control of an area outside its national territory.” See also *Bankovic v Belgium*, App. No. 52207/99, Eur.Ct.H.R. (2001), where it was held that the inhabitants of Belgrade were not within the jurisdiction of the European members of NATO during the aerial bombardment of the city in 1999.

¹⁸⁹ *R (on the application of Smith)(FC)(Respondent) v Secretary of State for Defence (Appellant) and another* 2010 UKSC 29

¹⁹⁰ Clapham, Andrew; *Human Rights Obligations of Non-State Actors*; Oxford University Press; 2006 p275-285

¹⁹¹ See p45

¹⁹² Tomuschat, Christian; *The Applicability of Human Rights Law to Insurgent Movements*; in Fischer, Froissant: *Krisensicherung und Humanitarer schutz - Crisis Management and Humanitarian Protection*; Berliner Wissenschafts Verlag; 2004 p 588

¹⁹³ See ECHR Section 2; ACHR Part II; and the Protocol to the ACHPR on the Establishment of an African Court on Human and People’s Rights 2004

¹⁹⁴ For example the Human Rights Committee under the ICCPR and the Committee against Torture under CAT.

¹⁹⁵ For example, UDHR

long time delays before a case is heard.¹⁹⁶ States may have enacted HRL into domestic legislation, and on a national level, an individual may have more success in protecting their human rights.¹⁹⁷

The human rights which are relevant to this discussion are the right to life, and the right to freedom from torture and inhuman or degrading treatment. The extent to which these apply to a combatant will vary according to whether he is operating in wartime or in peacetime.

3.2 THE RIGHT TO LIFE

The right to life is the most fundamental of human rights.¹⁹⁸ It can be found in several instruments, including Article 3 UDHR; Article 6 ICCPR and Article 2 ECHR.¹⁹⁹

3.2.1 The Right to Life during an IAC

During a war, it is accepted that a combatant may lose his life.²⁰⁰ Is it possible to reconcile this with the concept of a right to life, or does a combatant forfeit the right for the duration of the conflict?

The ECHR applies to both civilians and combatants.²⁰¹ The right to life is contained in Article 2. No derogation is permitted from Article 2, except in respect of deaths resulting

¹⁹⁶ For example, at the ECtHR as at 31 August 2010 there were 21,200 cases at the pre judicial stage, see http://www.echr.coe.int/NR/rdonlyres/8699082A-A7B9-47E2-893F-5685A72B78FB/0/Statistics_2010.pdf

¹⁹⁷ For example, in the UK the Human Rights Act 1998

¹⁹⁸ See Human Rights Committee General Comment 6 (1982), para 1, regarding Articles 4 and 6 ICCPR

¹⁹⁹ For ease, this thesis shall now concentrate on two human rights instruments: ICCPR and ECHR

²⁰⁰ See Chapter 2 and Article 43(2) API

²⁰¹ Engel and others v The Netherlands, ECtHR, 8 June 1976, where the ECtHR stated that “the Convention applies in principle to members of the armed forces and not only to civilians”, para 54.

from lawful acts of war.²⁰² A State is required to issue an official derogation notice in such a situation, otherwise the normal legal background applies.²⁰³

Turning to ICCPR, Article 6 states that “Every human being has the inherent right to life...No one shall be arbitrarily deprived of his life”. No derogations are permitted from this.²⁰⁴ Unlike the ECHR, there is no specific mention of whether, and to what extent, the right to life can be violated in wartime. The ICJ considered the matter in their Advisory Opinion on Nuclear Weapons. They stated:

“In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. 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.”²⁰⁵

Under both ECHR and ICCPR therefore, a combatant can be deprived of his life, without his right to life being infringed, but only as a result of lawful acts of war.

To what extent does a State have an obligation to protect the right to life of its combatants during an IAC? The ECtHR has held that, for the Court to find a State in violation of its obligation to protect life under Article 2 of the Convention, it must be established that:

“the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals ...and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.”²⁰⁶ (“the Osman test”)

²⁰² ECHR Article 15(2)

²⁰³ Article 15(3), and see *Isayeva v Russia*, ECtHR, Applic. no 57950/00, 24 February 2005, para 191, where the ECtHR stated “No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention. The operation in question therefore has to be judged against a normal legal background.”

²⁰⁴ Article 4(2) ICCPR

²⁰⁵ *Supra*, FN 112, para 25

²⁰⁶ See *Osman v The United Kingdom* ECHR (87/1997/871/1083), para 116

It can be profoundly difficult for parties to prove that a State had, or should have had, such knowledge.

Rowe argues that it is possible to foresee a situation where a soldier may be deprived of his life during wartime, with the result that his State could be found to have breached his human rights. He cites an example of a commander who takes little care over his plans to attack an enemy military installation with large numbers of his own soldiers, expecting many of them to be killed in the attack. He argues that, if a reasonable commander would have determined that the loss of life to his own soldiers would clearly be excessive compared to the concrete and direct military advantage to be gained from the attack, then the combatants who were issued with such an order could argue that the order to attack infringed their right to life.²⁰⁷

However, there are significant difficulties with this example. Firstly, different commanders have different styles of commanding. Some may well ask their men to carry out attacks which other commanders would balk at, and regard as reckless. It may be however, that the commander's bravado pays off and the attack is successful, with the result that the troops gain a significant advantage which they would not otherwise have had. Secondly, it is very difficult for a court, or other body, to sit in judgement on a commander and argue that his decisions were not those which a reasonable commander would have made. It may be easy to say with hindsight that a particular order was reckless, but the court will have little idea of the pressures of the commander at the time, and what information he had about all of the variables, such as the fitness of his men, the number of enemy troops on the ground, the amount of ammunition they had. Thirdly, the test which Rowe suggests: whether the loss of combatants would be excessive compared to the concrete and direct military advantage to be gained from the attack, is the test which IHL requires to be applied in relation to civilians, not combatants.²⁰⁸ Under IHL there is no requirement on military authorities to take such precautions in relation to combatants. Fourthly, how would the link be shown between the commander's actions and the knowledge of the State, as provided for in the Osman test? Should the State be expected to note the actions and orders of all of its commanders, and thereby be found accountable if those actions are not up to standard? Surely this would place too great a burden on the State?

²⁰⁷ See Rowe, Peter; *The Impact of Human Rights Law on Armed Forces*, Cambridge University Press; 2006, p138

²⁰⁸ API Article 51(5)(b) and 57(2)(b)

Perhaps a better example of a State failing to protect the right to life of its combatants, is in relation to poor or malfunctioning equipment²⁰⁹ or lack of training. In the British case of *R (on the application of Smith)*,²¹⁰ Lord Rogers cites the example of a soldier who is killed by a roadside bomb, which penetrates the armour plating of his vehicle. He argues that any questions, such as whether the plating should have been stronger, or why that particular vehicle was being used, are political questions, not legal ones.²¹¹ However, if it can be shown that the test from *Osman* is met, then surely the State can be argued to have breached Article 2 of the Convention in respect of those combatants? In the UK there have been many inquests into the deaths of British soldiers in Iraq and Afghanistan.²¹² The results of these investigations, and any recommendations, are reported to the Ministry of Defence (MOD). If the MOD fail to act on the findings of such reports, and provide the troops with, for example, vehicles appropriate to the terrain,²¹³ or adequate training for the equipment the troops are to use,²¹⁴ then surely, if it can be shown that the faulty equipment represented a “real and immediate risk” to the life of its combatants, the test in *Osman* will be met, and the State can be found responsible for failing to protect the right to life of combatants who die in the future as a result of such faulty equipment.

The ECtHR views a State’s obligation to protect the human rights of a combatant differently from its obligation to protect those of a civilian. In the case of *Engel*, the Court stated it:

“must bear in mind the particular characteristics of military life and its effects on the situation of individual members of the armed forces.”²¹⁵

In that case the Court considered Article 5 ECHR (deprivation of liberty). It stated:

²⁰⁹ See for example <http://www.guardian.co.uk/uk/2009/oct/13/mps-criticise-troops-equipment-shortage>

²¹⁰ *Supra* FN 189

²¹¹ *Ibid*, para 127

²¹² For example: <http://www.guardian.co.uk/uk/2010/mar/09/afghanistan-inquest-female-soldier>, http://news.bbc.co.uk/2/hi/programmes/file_on_4/4075539.stm

²¹³ <http://www.guardian.co.uk/uk/2010/mar/09/afghanistan-inquest-female-soldier>

²¹⁴ http://news.bbc.co.uk/2/hi/programmes/file_on_4/4075539.stm

²¹⁵ *Supra* FN 201, para 54. See also *Chember v Russia* ECtHR, 7188/03, 3 July 2008, paras 49 and 50

“The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman.”²¹⁶

The Court has also drawn a distinction between a State’s obligations towards a combatant who has been conscripted, and those towards a combatant who has volunteered.²¹⁷

A State is therefore required to protect the right to life of its combatants, however it cannot be held responsible for deaths which occur lawfully under IHL. In addition, a combatant’s right to life is to be viewed in the context of military life. This means that there will often be a different threshold for civilians and combatants when considering their right to life.

Does a State have human rights obligations towards non-national combatants? For a State to be found responsible for breaching their human rights, non-national combatants must firstly be within the jurisdiction of the State.²¹⁸ This will be a major stumbling block in many situations, for example deaths by soldiers from friendly fire will mainly occur off base, and therefore out with the jurisdiction of the State.²¹⁹ In an armed conflict, most deaths of a non national combatant which occur within a State’s jurisdiction will occur when the non national combatant is in the custody of a State as a PoW. In that case IHL will apply.²²⁰

The death penalty is also relevant to the discussion of the right to life of a combatant during an IAC. The legal position is different regarding a State’s own combatants, and enemy combatants.

²¹⁶ Ibid, para 59

²¹⁷ See Chember, supra FN 215, para 50, and Lord Hope’s comments in Smith, supra FN 189, para 100

²¹⁸ See comments above regarding jurisdiction, p37-38

²¹⁹ http://news.bbc.co.uk/2/hi/uk_news/england/8647585.stm ; also see Smith, supra FN 189

²²⁰ For the difficulties of reconciling IHL provisions regarding PoWs and HRL, see Rowe, supra FN 207, p148-153

As regards a State's own combatants, national law and HRL will apply. Many States have abolished the death penalty during peacetime, however they may wish to revive it during wartime. The ECHR does not refer to the death penalty, however a subsequent Protocol to the Convention agrees to its abolition among the Member States of the Council of Europe.²²¹ The Protocol allows for the death penalty to be revived in time of war, providing a State is permitted to do so under national law.²²²

With regard to the ICCPR, in respect of countries which have not abolished the death penalty, it only allows for a sentence of death to be imposed in respect of the most serious of crimes, in accordance with the law in force at the time of the commission of the crime.²²³

Thus, it can be permissible under HRL for a State to impose a sentence of death providing that the State's national law permits it to do so. This applies equally to combatants and civilians.

For a combatant who is in enemy hands, and therefore a PoW, IHL would apply, and the application of the death penalty would be governed by GC III.²²⁴ For a sentence of death to be lawful under GC III, it must be permitted under the national law of the enemy State. One notable difference between Article 6(2) ICCPR and GC III in this respect, is that there is no requirement that the imposition of death sentences upon PoWs be for serious offences.²²⁵ An enemy combatant can therefore be executed for more minor offences under IHL, than may be permitted under HRL.

²²¹ Protocol no 6 to the Convention for the Protection of Human Rights and Fundamental Freedoms Concerning the Abolition of the Death Penalty, Article 1

²²² Ibid, Article 2

²²³ ICCPR, Article 6(2)

²²⁴ See above p23

²²⁵ See Articles 87, 99, 100 and 101 GC III and Rowe, supra FN 207, p141

3.2.2 The Right to Life during a NIAC

The complex relationship between IHL and HRL is particularly important in NIACs. Moir argues, “much of the humanitarian law applicable to internal conflict mirrors human rights provisions”.²²⁶

The basic legal situation in NIACs is the same as in IACs, namely that, providing a combatant is killed in accordance with IHL, the death will not violate HRL. Rowe argues that a practical method of determining whether a killing in a NIAC is lawful under IHL, is to ask whether it was caused in a way that is not prohibited by the Rome Statute. If so, it can be classified as a lawful act of war.²²⁷ However, the Rome Statute is not customary law, and does not contain a definitive code of all war crimes.²²⁸ Using this method to determine whether or not a killing was lawful, would mean that killings which are unlawful under customary international law, but not under the Rome Statute, would not be included.

In a NIAC, the issue of who is obliged to uphold HRL becomes crucial. The actors in such conflicts often comprise of a State, with its combatants on one side, fighting against one or more armed opposition groups. The State and accordingly, its combatants, will be bound to adhere to HRL, but to what extent do international human rights instruments bind the armed opposition groups who are involved in the conflict?

Some argue that the obligation to uphold human rights can be held against the State only, and cannot be held against armed opposition groups.²²⁹ Moir argues:

“Human rights obligations are binding on governments only, and the law has not yet reached a stage whereby, during internal armed conflict, insurgents are

²²⁶ See Moir, *The Law of Internal Armed Conflict*; Cambridge University Press; 2002; p 275

²²⁷ See Rowe *supra* FN 207, p180 and Rome Statute Articles 8(2)(c) and (e)

²²⁸ See, for example, Cassese, *International Criminal Law*, Oxford University Press, 2008, p95, where he argues that the Rome Statute’s definition of war crimes is narrower than customary international law, and does not include, for example, the use of weapons which cause unnecessary or superfluous injury, or are inherently indiscriminate, which, he argues, constitutes a crime under customary law.

²²⁹ See Zegveld, L; *Accountability of Armed Opposition Groups In International Law*; Cambridge University Press p 53

bound to observe the human rights of armed forces, let alone of opposing insurgents.”²³⁰

Others argue that this is no longer a valid assumption:

“If non-state actors have human rights, it appears logical that they must also have responsibilities, no different from the obligations insurgents have under international humanitarian law. There is a clear trend to subject non-state actors to human rights law”.²³¹

Tomuschat argues that a customary international law rule has formed, and cites numerous Security Council Resolutions which require armed opposition groups to put an end to human rights violations.²³² Security Council Resolutions are binding on the members of the UN,²³³ but to what extent are they indicative of customary international law? In their Nuclear Weapons Advisory Opinion, the ICJ considered General Assembly Resolutions, and noted that, even though they are not binding, they do have a normative effect, and in certain circumstances could provide important evidence for establishing the emergence of a rule or of *opinio juris*. The court stated that a series of resolutions may indicate a new rule.²³⁴ Following this reasoning, a series of Security Council Resolutions could be indicative of a new rule of customary international law, and indeed, as Security Council Resolutions are binding, in contrast to General Assembly ones, it could be argued that less evidence would be required to prove a new customary rule has formed. However it is likely that a court would require more than this to find that a customary rule had crystallised. In addition, such a rule would involve customary law binding not States, or state agents, but rather non State organisations and individuals directly, which would be controversial.

²³⁰ Moir, *supra* FN 226, p194

²³¹ Fleck, D; Humanitarian Protection against non State actors, in *Verhandeln für den Frieden- Negotiating for Peace: Liber Amicorum Tono Eitel* (Berlin: Springer 2003)

²³² See Tomuschat *supra* FN 192, p577 - 585, and see for example UN SC Resolution 1214 (1998) which “Demands that the Afghan factions put an end to discrimination against girls and women and other violations of human rights”.

²³³ UN Charter 1945, Article 25 and Chapter VII

²³⁴ *Supra* FN 112, para 70

Even if it is correct that the obligation to uphold human rights extends to armed opposition groups, it is difficult to envisage how this could be enforced.

Firstly, it may be that such groups are simply unaware of their obligations under international law. Secondly, a group may agree to apply IHL, and adhere to certain human rights standards,²³⁵ but to what extent are such groups capable of fulfilling the obligations they undertake?²³⁶ In a situation where a group has control of a particular area then they may be in a position to take measures to protect human rights, but often they simply will not have the discipline or authority to do this. Thirdly, the more formal enforcement mechanisms in the international HRL regime, such as courts, apply to States only. International organisations and NGOs may endeavour to engage such groups in agreeing to codes of conduct or declarations on the matter, but these are not enforceable. Fourthly, how would it be possible to hold an armed opposition group accountable? If a State is found to be in breach of HRL, it can be fined, or requested to change its practices, but how possible is this with an armed group? These are illegal organisations, perhaps with little, or no formal structure. They are not a business, and have no income to pay a fine. Who can force them to change their practices? Tomuschat argues that commencing criminal proceedings against the leader of an insurgent movement is an indirect remedy against the movement itself- if a political leader has to face criminal charges, it will often have a devastating effect on the movement.²³⁷ However, in prosecuting a leader, the law which applies will be criminal law, whether domestic or international, not HRL. Not all breaches of HRL are also breaches of criminal law. In addition, this presupposes that the leader of the group is indispensable to the survival of the group, which may often not be the case.

In a NIAC, the question of whether the armed group against whom a combatant is fighting has the obligation to uphold human rights law, is unresolved. Much will depend on the group itself, how organised it is, and how desirous it is to be accepted as a member of the international community. One thing is certain, and that is that in a NIAC, a combatant cannot depend on insurgent groups to protect his human rights.

²³⁵ See San José agreement between El Salvador and Frente Farabundo Martí para la Liberación Nacional, 26 July 1990, UN Doc. A/44/971-S/21541 dated 16 August 1990

²³⁶ See Clapham, *supra* FN 190, p 272

²³⁷ Tomuschat, *supra* FN 192, p 590

3.2.3 The Right to Life during Peacetime

As in wartime, any death of a combatant in peacetime should be viewed in the context of the military and the military life.²³⁸ Most deaths which occur in peacetime, will not be as a result of a deliberate act by the State, but shall instead be due to recklessness or negligence. The difficulty will arise in proving the link between a combatant's death and the State's involvement.²³⁹

3.3 THE RIGHT TO FREEDOM FROM TORTURE

The right to freedom from torture encompasses the prohibition of seven distinct forms of conduct: torture, cruel treatment, inhuman treatment, degrading treatment, cruel punishment, inhuman punishment and degrading punishment.²⁴⁰ The right is enshrined in several human rights instruments, including Article 5 UDHR; Article 7 ICCPR, Article 3 ECHR and CAT.²⁴¹ It is a *jus cogens* norm.²⁴²

The right to freedom from torture is non derogable,²⁴³ and cannot be deviated from even during times of war and public emergency. It therefore applies irrespectively of whether the conflict is an IAC or a NIAC. The conduct of the victim is irrelevant.²⁴⁴ Torture and inhuman and degrading treatment are war crimes,²⁴⁵ and constitute grave breaches of the Conventions.²⁴⁶ There is no requirement that the perpetrator be acting in an official

²³⁸ Engel, supra FN 201

²³⁹ Osman, supra FN 206

²⁴⁰ See Jayawickrama, Nihal; *The Judicial Application of Human Rights Law, National, Regional and International Jurisprudence*; Cambridge University Press; 2002, p 298

²⁴¹ Articles 1, 2 and 4

²⁴² See Furundija (Appeal) ICTY Appeals Chamber, 21 July 2000 (case no IT-95-17/1-A), para 111 which held that Article 1 CAT, which provides a definition of torture, reflects customary international law.

²⁴³ See ICCPR Article 4(2), ECHR Article 15(2) and CAT Article 2(2). See also Human Rights Committee General Comment 20 (1992) Para 3

²⁴⁴ See *Chahal v United Kingdom* 1996 23 EHRR 413, para 79

²⁴⁵ See Rome Statute Articles 8(2)(a)(ii) and 8(2)(c)(i) and (ii)

²⁴⁶ See GC I Article 50, GC II Article 51, GC III Article 130, and AP I Articles 11 and 85

capacity for them to be found guilty of torture.²⁴⁷ For a State to be found guilty of breaching an individual's rights under Article 3 ECHR and Article 7 ICCPR, it is necessary to show a link between the perpetrator and the State.²⁴⁸

In a NIAC, with respect to the armed opposition against whom the combatant is fighting, the same issues arise as discussed above,²⁴⁹ namely whether these groups are legally obliged to protect a combatant's right to freedom from torture. Clearly, individual perpetrators can be held to account under ICL.²⁵⁰

The right not to be subjected to inhuman and degrading treatment has special significance in relation to combatants, particularly during peacetime. There are many incidences when a combatant may be subjected to conduct, which to a civilian would constitute inhuman and degrading treatment. Examples include, requiring a combatant to clean toilets with a toothbrush, or to cut grass with a pair of scissors.²⁵¹ How does this equate with a State's obligations under HRL?

In *Chember*,²⁵² the ECtHR considered whether Article 3 had been breached regarding a combatant who had been forced by his superiors to perform hard physical exercise when his superiors knew that he had been suffering from problems with his knees. The Court held:

“Many acts that would constitute degrading or inhuman treatment in respect of prisoners may not reach the threshold of ill-treatment when they occur in the armed forces, provided that they contribute to the specific mission of the armed forces in that they form part of, for example, training for battlefield conditions.”²⁵³

²⁴⁷ This is customary international law, see *Kunarac and others*, ICTY AC, Case no. IT-96-23-T, 12 June 2002, paras 146 and 147

²⁴⁸ See comments above regarding *Osman*, p40

²⁴⁹ See Section 3.2.2

²⁵⁰ *Supra* FN 245

²⁵¹ See *Rowe* *supra* FN 207, p70

²⁵² *Supra* FN 215

²⁵³ *Ibid*, para 49

The Court continued:

“Nevertheless, the State has a duty to ensure that a person performs military service in conditions which are compatible with respect for his human dignity, that the procedures and methods of military training do not subject him to distress or suffering of an intensity exceeding the unavoidable level of hardship inherent in military discipline”²⁵⁴

Therefore, to subject a combatant to torture, as defined in Article 1 CAT, is prohibited, as it is with civilians. However, when it comes to the more grey area of inhuman and degrading treatment, a combatant is required to endure situations, which in a civilian context would constitute a breach of human rights.

3.4 DOES HRL SUPPORT THE JUDGEMENT?

It is evident from this examination that the application of HRL to combatants is complex. A State is obliged to protect both the right to life of its combatants, and their right to freedom from torture. However, such rights must be viewed in context. If an armed conflict is occurring, then IHL operates as the *lex specialis*, and, at all times, a combatant’s human rights are to be viewed in the context of military life. HRL can require a combatant to endure acts which would constitute a breach of a civilian’s human rights. It does treat combatants differently to civilians. However, as with IHL, it still gives protection to combatants. A combatant continues to have a right to life, even in war. Torture is always prohibited. Even where a combatant is expected by HRL to endure harsher conditions than a civilian, the boundaries of such endurance are not limitless.²⁵⁵

²⁵⁴ Ibid, para 50

²⁵⁵ Ibid, para 50-53

CHAPTER 4

WHAT ARE THE IMPLICATIONS OF THE JUDGES' DECISION TO RESTRICT THEIR JUDGEMENT TO COMBATANTS ONLY?

4.1 INTRODUCTION

By restricting their Judgement to apply to combatants only, Judges McDonald and Vohrah are setting a higher standard of behaviour for combatants to adhere to in a situation of duress, than that which they expect from a civilian. They are effectively taking a 'broad brush' approach, in that they find that combatants, as a group, cannot plead the defence, no matter what the particular circumstances of their case are. Such circumstances must instead be pled in mitigation. What are the consequences which flow from this?

4.2 IS A CIVILIAN'S LIFE WORTH MORE THAN A COMBATANT'S?

According to the Judgement, a combatant who is forced at gun point to murder innocents must, in order to avoid criminal responsibility, refuse, and sacrifice himself; whereas, a civilian in exactly the same situation, may potentially rely on the defence of duress. This implies that the civilian's life is worth protecting, when the combatants is not. The law is potentially willing to excuse or justify²⁵⁶ the civilian for killing, but not the combatant. The Judges' argument is that, because of his job, the combatant must have at least have expected a violent end, and must therefore be prepared to die.

Is it possible to find justification in IHL or HRL for such a distinction between the "value" placed on the life of a civilian and the "value" placed on the life of a combatant?

²⁵⁶ There is debate over whether the defence duress constitutes an excuse or a justification, see for example: Huigens, Kyron: Duress is not a justification; 2 Ohio St. J. Crim. L. 303

4.2.1 International Humanitarian Law

Firstly let us turn to IHL.

In an IAC, a soldier has the right to directly participate in hostilities,²⁵⁷ and consequently becomes a legitimate target for enemy combatants himself. The law accepts that he may be killed during the course of the armed conflict by an enemy combatant, without that enemy combatant acquiring criminal responsibility for the killing.²⁵⁸ However, as has been examined above²⁵⁹, if a combatant is *hors de combat*, he becomes a protected person under the Conventions, and is no longer a lawful target. An enemy combatant who kills a combatant in these circumstances commits a war crime.²⁶⁰

If a combatant is killed by any one other than an enemy combatant, then the killer may incur criminal responsibility for the killing.²⁶¹ If a civilian becomes directly involved in hostilities, and kills a combatant, then that civilian may be held criminally liable, providing that they have no defence.²⁶² Alternatively, if a combatant is killed by another combatant, who is not an enemy combatant, then the non-enemy combatant may be criminally liable, again providing he has no defence.²⁶³

There are therefore several situations where the law protects the life of a combatant, or where IHL and/or ICL, provide that the death of a combatant is unlawful.

²⁵⁷ AP I, Article 43(2)

²⁵⁸ *Ibid*

²⁵⁹ Chapter 2

²⁶⁰ See Rome Statute Articles 2(a)(i); b(vi); and (xi); (c)(i) and (ix)

²⁶¹ This is so because, under IHL, in an IAC, only combatants have the right to take a direct part in hostilities (Article 43(1) AP I), (meaning that they can kill other combatants and civilians taking a direct part in hostilities without incurring any criminal responsibility) and therefore any other person who kills a combatant does so unlawfully (providing of course that they have no defence for the killing). See also Rome Statute Article 2 (b) (xi) and (c)(ix)

²⁶² See Rome Statute Article 2 (b)(xi) and (c)(ix) and Essen Lynching case (Heyer Erich and others, British Military Court sitting at Essen, 22 December 1945, in LRTWC I 88-92), where civilians were found guilty of killing PoWs

²⁶³ See for example <http://www.guardian.co.uk/uk/2010/oct/24/friendly-fire-sniper-could-face-manslaughter-charge>. In such situations, IHL does not apply, rather it will be the domestic law of the states concerned or international criminal law.

As was discussed in Chapter 2,²⁶⁴ civilians enjoy general protection against the dangers arising from military operations.²⁶⁵ They are not to be made the object of attack.²⁶⁶ The reality of war, however, is that innocent civilians are killed. IHL accepts this fact, and allows for civilian deaths, without the killers incurring criminal responsibility for the deaths, provided that the deaths occur according to specified rules.²⁶⁷ Civilians who take a direct part in hostilities lose the protection afforded by Chapter II of API, and become legitimate targets for such time as they take a direct part.²⁶⁸

As was discussed in Chapter 3, the situation in a NIAC is less clear. There are no treaty provisions giving combatants the right to directly participate in hostilities. It is unclear under international law, whether combatants or civilians can be killed legally. Both CA 3 and AP II extend protections to those who are not taking an active part in hostilities, and therefore apply equally to both civilians, and to combatants who are *hors de combat*.

IHL does therefore attach different “values” to combatant and civilian lives. However this changes if a combatant is captured, sick, wounded or surrenders. If that happens, the “value” of his life arguably becomes equal to that of a civilian’s, for once he becomes a protected person under the Conventions, attacks against him are unlawful. He cannot be made the object of attack, in the same way as a civilian cannot be made the object of attack.²⁶⁹ In addition, attacks against him by persons other than enemy combatants, such as civilians taking a direct part in hostilities, may be deemed unlawful at any time during hostilities.

4.2.2 Human Rights Law

As was examined in Chapter 3, during an armed conflict, a State may derogate from some human rights. In respect of the right to life, this is only permitted in so far as is allowed by

²⁶⁴ See above p15

²⁶⁵ AP I, Article 51(1)

²⁶⁶ Ibid, Article 51(2) and 52(1)

²⁶⁷ See above p16

²⁶⁸ Ibid, Article 51(3) and ICRC Guidance

²⁶⁹ AP I Article 41(1), Article 42 and Article 51(2)

IHL.²⁷⁰ With regard to both civilians and combatants, the duty to protect their right to life only endures whilst they are within the jurisdiction of the State. The precise extent of a State's duty to protect the human rights of its combatants during an armed conflict is unclear, but must be viewed through the prism of military life.²⁷¹

In peacetime, the State owes both combatants and civilians a duty to ensure that their right to life is not infringed, although, again, where combatants are concerned, account is to be taken of the peculiarities of military life.²⁷² In peacetime this is likely to include the inherent perils involved in the training of combatants and the regular use of dangerous weapons.

Therefore, it can also be said that HRL does differentiate between the "value" of a combatant's life and that of a civilian's. The combatant's right to life is always to be viewed within the context of military life. This will normally mean that he can be expected to endure harsher conditions than that which a civilian should be expected to endure.²⁷³

4.2.3 Conclusion

IHL and HRL do value the life of a combatant differently from that of a civilian at times. In IHL, combatants are lawful targets, but then, so are civilians, providing that they are killed in accordance with IHL. In an IAC, combatants, in contrast to civilians, can be directly targeted by enemy combatants, and their lives can therefore be described as being "worth less" than civilians'. However, if they become *hors de combat*, for whatever reason, their lives are arguably "worth" the same as a civilians. As soon as a civilian takes a direct part in hostilities, then they lose their civilian protection and they too become lawful targets.²⁷⁴

In HRL, the obligation to protect a combatant's right to life must always be viewed in the context of military life. A State could be found to have infringed a civilian's right to life, but not to have infringed a combatant's in the same circumstances.

²⁷⁰ ECHR Article 15(2) and ICCPR Article 4(2)

²⁷¹ See above p42

²⁷² Engel, supra FN 201

²⁷³ Engel, ibid, para 59

²⁷⁴ AP I Article 51(3) and AP II Article 13

However, even though there is a distinction, in both IHL and HRL, between the value of combatant and civilian lives, neither take a “broad brush” approach, as Judges McDonald and Vohrah do, to the value of a combatant’s life. In both IHL and HRL, the status of the combatant at a certain moment in time, or the particular circumstances of a combatant at that time, are the important factors in determining the rights and protections the law accords to a combatant.

4.3 IS IT JUST TO TREAT ALL COMBATANTS IN THE SAME WAY?

A further difficulty with the Judgement, is whether it is just to treat all combatants in the same way. The finding that all combatants are unable to rely on the defence of duress, means that no account can be taken of the particular circumstances of that combatant until he has been found guilty, when they can be looked at in mitigation.

A person can become a combatant for different reasons and through different means. They may volunteer to be a combatant, or they may be forced to join through conscription; in extreme cases, people can be abducted and forced to join an army.²⁷⁵ Some States provide thorough training, including education in IHL. In others training can be limited or non-existent. Can a well-trained volunteer be expected to react in the same way to a situation of duress as a reluctant, ill-trained conscript?

What about combatants of different ranks - should a low-ranking, inexperienced soldier be expected to react in the same way as a well-educated, commissioned officer, with many years experience?

What about child soldiers? Although States are under an obligation to take all feasible measures to ensure that children do not take a direct part in hostilities, and are to refrain

²⁷⁵For example: <http://www.guardian.co.uk/katine/2010/aug/31/uganda-child-soldiers>, and <http://www.bbc.co.uk/news/world-africa-10947791>

from recruiting children,²⁷⁶ children continue to take on combatant roles in many countries. Can they be expected to react to duress in the same way as an adult combatant?

Should the law treat combatants from such different backgrounds in the same way? Is it just for the law to deny the defence of duress to all of them simply because they are combatants? Surely this results in the law being unreasonable and inflexible?

The Judges would argue that the exact circumstances of a particular combatant can be taken into account in mitigation of his sentence.²⁷⁷ It is at that stage, once the combatant has pled guilty to the crime, that factors such as the age of the combatant, his education, his training and his experience, can be examined by the court and can be used to determine a fair sentence. However, as Cassese argues in his Judgement,²⁷⁸ this still results in the individual being found guilty of a criminal act, no matter what sentence he is given. Even if the court finds that the circumstances were such that no punishment is justified, the effect of a criminal conviction is that society is labeling the conduct as unacceptable. A criminal conviction can have many consequences: affecting employment prospects; and whether a person can get a visa to visit a foreign country,²⁷⁹ in addition to the purely psychological impact.

4.4 SHOULD CIVILIANS WHO TAKE A DIRECT PART IN HOSTILITIES BE TREATED MORE LENIENTLY THAN COMBATANTS?

A further consequence of the Judgement is that it means that civilians who are taking a direct part in hostilities may be able to rely on a defence of duress when a combatant could not.

²⁷⁶ See Article 38 Convention on the Rights of the Child 1989 and Article 77 API. Both of these treaties set the minimum age a person can take a direct part in hostilities or be recruited into the armed forces, to fifteen, however the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict of 25 May 2000, increases the age to 18. The Rome Statute also sets the age of criminal responsibility at 18 (Article 26).

²⁷⁷ Supra FN 4, para 85

²⁷⁸ Supra FN 11, para 48

²⁷⁹ For example: US Immigration and Nationality Act s212(2)(A)

As previously touched upon, there is debate about what constitutes directly participating in hostilities.²⁸⁰ The ICRC advise that fighters who are not members of the armed forces of a State, and are not therefore combatants,²⁸¹ but have a continuous combat function, lose their protection as a civilian against attack for the duration of the time that they have such a function.²⁸² Could the Judgement be extended to include such fighters within the definition of a combatant? If so, on what basis would this be done?

The Judge's argument is that combatants are to be treated differently, because they should be braver than civilians, and more expectant of a violent death by virtue of the job they do. Is this also true of other kinds of fighters who do not qualify as combatants?

A combatant should have had military training and training in the laws of war and international law.²⁸³ A member of an organised armed group may well have had no such training.²⁸⁴ On this basis, perhaps a fighter should be treated as a civilian and entitled to rely on the defence of duress. However, if this is the case, what message does it send out to combatants, that a member of, for example, the Taliban, can plead the defence when they can not?

4.5 WHAT OPTIONS ARE AVAILABLE TO A COMBATANT IF HE IS INVOLVED IN A CONFLICT WHERE INTERNATIONAL CRIMES ARE OCCURRING?

Bailliet²⁸⁵ argues that denying the defence of duress to combatants requires that a combatant must ensure that they are never placed in a situation of duress during humanitarian violations, and that the best way for them to do this is by way of desertion or

²⁸⁰ See above p17 and ICRC Guidance

²⁸¹ See API Article 43(1)

²⁸² See ICRC Guidance p70

²⁸³ API Article 83

²⁸⁴ Although under Article 83 API, their State is under an obligation to disseminate the Conventions and AP I and to encourage the civilian population to study it.

²⁸⁵ See Bailliet, Cecilia; Assessing Jus Ad Bellum and Jus in Bello within the Refugee Determination Process, contemplations on conscientious objectors seeking asylum 20 Geo. Immigr. L. J. 337 at p18

draft evasion. She argues that States must therefore provide protection within their asylum policies to those combatants who flee from such situations.

However, for some combatants, particularly those who have been forced to join, desertion or draft evasion may not be a realistic option,²⁸⁶ meaning that in a situation of duress, to act lawfully, the Erdemović decision requires them to sacrifice themselves.

4.6 CONCLUSION

There are clearly some important consequences which flow from restricting the decision in Erdemović to combatants only.

Firstly, it infers that combatants' lives are not worth as much as civilians', which is not necessarily the case in IHL or HRL. Secondly, it infers that members of armed groups, whose status in an armed conflict is that of civilians taking a direct part in hostilities, may be able to plead duress when a combatant could not. Finally, requiring all combatants to adhere to one standard of behaviour is unrealistic, and fails to take into account the many different ways that a person can become a combatant, and the particular circumstances of a combatant. This can be taken account of in mitigation, but this still results in a criminal conviction for the combatant, which may be unjust and unreasonable in the circumstances of the case.

²⁸⁶ For example, *supra* FN 275

CONCLUDING REMARKS

Let us return to Drazen Erdemović, standing in a field at the farm that day. He has been ordered to shoot unarmed, innocent civilians - unquestionably a war crime. He has been offered a choice by his superior officer - to obey the order, and become a war criminal; or to disobey, and lose his life in a futile gesture, which will make no difference to the civilians he has been ordered to kill, who will be killed anyway.

Judges McDonald and Vohrah argue that, as a combatant he must have envisaged the possibility of violent death in pursuance of the cause for which he fights.²⁸⁷ However, as has been shown, the circumstances where he may be legally killed are not unlimited. There are many international laws protecting his life.

It is impossible to imagine what it would be like to be placed in Erdemović's shoes that day. Is it a scenario that a combatant could possibly be trained for? When Erdemović volunteered to be a soldier, he may well have imagined that he would lose his life while doing his job, however, it is unlikely that he envisaged that he would be ordered to commit a war crime, with the alternative of being shot by his fellow soldiers if he failed to comply. The circumstances that Erdemović found himself in were far from the normal demands of military service. Despite this, in order to remain within the confines of the law, the Judgement requires him to go beyond his normal duty, including his duty to die fighting for his country, and sacrifice himself.

Certainly, we may hope, as the Judges do, that an individual combatant will chose to sacrifice himself rather than kill innocents, but ultimately, he is a human being. In such an incomprehensible situation, there is no compelling reason why all combatants should be legally required to sacrifice themselves, particularly where the innocent victims will be killed anyway, regardless of what they do.

We cannot expect all combatants to become heros or martyrs in circumstances as extreme as those which arose in this case. As Cassese argues:

²⁸⁷ Supra FN 4

“Law is based on what society can reasonably expect of its members. It should not set intractable standards of behaviour which require mankind to perform acts of martyrdom, and brand as criminal any behaviour falling below these standards.”²⁸⁸

Instead a court must be allowed to examine all of the facts of a case to determine whether the defence of duress can be made out. If a court is able to consider all the variables, such as age, rank, education and training of an accused combatant, it will surely reach a more just and reasoned decision, than a court which has its hands tied as the Erdemović decision requires. The Judges’ argument that such factors can be considered in mitigation are unsatisfactory, as it would involve finding that the accused was guilty of the crime.

The definition of duress contained in Article 31(d) of the Rome Statute makes no distinction between civilians and combatants. Instead it is more in accordance with the proportionality test argued for by Cassese in Erdemović.²⁸⁹ It requires that, for a person to avoid criminal responsibility by reason of duress, they must commit the act necessarily and reasonably, in order to avoid a threat of imminent death, or of continuing, or imminent serious bodily harm against that person, or another person. The person must not intend to cause any greater harm than the one to be avoided. This is surely a better solution, rather than requiring all combatants to adhere to one standard.

To require all combatants to behave as heroes in circumstances which have descended from ‘normal’ warfare which they were trained for, into horror, is unrealistic and unjust. In such cases, combatants should be permitted to argue duress as a defence, with their combatant status being one factor to be considered, for, at the end of the day, as Robert Burns so aptly wrote, “A man’s a man for a’ that”:²⁹⁰ we are all only human.

²⁸⁸ Supra FN 11, para 47

²⁸⁹ Ibid, para 50

²⁹⁰ The Collected Poems of Robert Burns; Wordsworth Editions Limited; 1994; p328

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