LEGAL RESTRAINTS IN NON-INTERNATIONAL ARMED CONFLICTS

By

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Abstract

Out of about 28 situations of armed conflict in 2011, only one was inter-state. All others were intra-state or non-international in nature. This trend calls into question the very definition of non-international armed conflicts and the extent to which International Humanitarian Law (IHL) applies to them. In addition to answering these questions, this article sets out practical and policy steps to ensure adherence to IHL during non-international armed conflicts.

Introduction

Most contemporary armed conflicts occur within States.[1] On the one hand, conflicts of this nature may be between the authorities of a State and non-State armed group(s). On the other hand, such a conflict may be between one non-state armed group and another. Such conflicts are referred to as non-international armed conflicts or internal armed conflicts.[2]

Notwithstanding their non-international nature, some aspects of international law are relevant when attempting to do a

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1. Sivakumaran, S. "Re-envisaging the International Law of Internal Armed Conflict" 22 **Eur J Int Law** 219 (2011) at 219.
2. On the question of which is the more appropriate expression, see the discussion between Sivakumaran and Blum in Blum, G. "Re-envisaging the International Law of Internal Armed Conflict: A Reply to Sandesh Sivakumaran" 22 **Eur J Int Law** 265 (2011) and Sivakumaran, S. "Re-envisaging the International Law of Internal Armed Conflict: A Rejoinder to Gabriella Blum" 22 **Eur J Int Law** 273 (2011).

comprehensive legal analysis of these situations of armed conflict. These relevant areas of international law include the law relating to sovereignty,[3] recognition,[4] secession,[5] succession[6] and protection of nationals abroad.[7] In addition, the parties involved are bound by certain principles of International Humanitarian Law; the focus of this paper.[8]

This paper does not set out to do an exhaustive analysis of all aspects of international law relevant to situations of internal armed conflicts. Rather, the paper is limited to three main objectives. Firstly, it identifies the types of confrontations that can be characterised as internal armed conflicts for the operation of international humanitarian law (also known as the law of armed conflict or the law of war).[9] Secondly, it highlights the most fundamental principles of international humanitarian law applicable in internal armed conflicts. Finally, it sets out the matters of practice and policy that do not only reduce the incidents of violations but also ensure that policy makers and most senior personnel fulfil their legal obligations (failing which they may be individually criminally liable).

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3. See for example, Green L. C. "Enforcement of International Humanitarian Law and Threats to National Sovereignty" 8 **J Conflict Security Law** 101 (2003).
4. Warbrick, C.: "States and Recognition in International Law" in MD Evans (ed) ***International Law*** (Oxford: Oxford University Press, 2006) at p. 224 discussing self determination.
5. Copp, D. "International Law and Morality in the Theory of Secession" 2 **The Journal of Ethics** 219 (1998).
6. Rasulov, A. "Revisiting State Succession to Humanitarian Treaties: Is There a Case for Automaticity?" 14 **Eur J Int Law** 141 (2003).
7. Green, above n 3 at 106 and 108.
8. Fleck, D.: "The Law of Non-International Armed Conflict" in D Fleck (ed) ***The Handbook of International Humanitarian Law*** (Oxford: Oxford University Press, 2009) p. 605.
9. Carswell, A. J. "Classifying the Conflict: A Soldier's Dilemma" 91 **International Review of the Red Cross** 143 (2009) at 144.

Confrontations that Amount to Non-international Armed Conflict for the Purposes of International Humanitarian Law

It is important to be able to distinguish between international and non-international armed conflict because of the differences in applicable law.[10] These differences are becoming less marked,[11] and some scholars have been calling for the elimination of the distinction.[12] Nonetheless, it suffices for our present purposes to note that "specific distinctions between the two still remain."[13]

Traditionally and prior to the codification of Article 3 common to the four Geneva conventions of 1949 (Common Article 3),[14] uprisings within a state were governed by International Law only if the situation deteriorated from rebellion to insurgency to belligerency.[15] Characterisation of civil strife as rebellion, insurgency or belligerency was determined by the duration, extent, purpose and intensity of the conflict.

The expression 'rebellion' was used to describe situations of short-lived or sporadic challenge to the legitimacy of

10. Byron, C. "Armed Conflicts: International or Non-International?" 6 **J Conflict Security Law** 63 (2001) at 63.
11. For example, under the Rome Statute of the ICC, most war crimes in international armed conflicts are also war crimes in non-international armed conflicts. See also, Zegveld, L.: ***The Accountability of Armed Opposition Groups in International Law***, Cambridge: Cambridge University Press, 2002 p. 33.
12. See for example Crawford, E. "Unequal before the Law: The Case for the Elimination of the Distinction between International and Non-international Armed Conflicts" 20 **Leiden Journal of International Law** 441 (2007).
13. Bartels, R. "Timeliness, Borderlines and Conflicts - The Historical Evolution of the Legal Distinction between International and Non-International Armed Conflicts" 91 **International Review of the Red Cross** 35 (2009) at 41.
14. Geneva Convention I for the Amelioration of the Condition of Wounded and Sick in Armed Forces in the Field, 1949; Geneva Convention II for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked members of Armed Forces at Sea, 1949; Geneva Convention III Relative to the Treatment of Prisoners of War, 1949; and Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949.
15. Bartels, n 13, at 48. See also Paulus, A. and Vashakmadze, M. "Asymmetrical War and the Notion of Armed Conflict – A Tentative Conceptualization" 91 **International Review of the Red Cross** 95 (2009) at 99 where it is stated that the notion of recognition of belligerency is obsolete.

government.[16] Falk described rebellion as "a sporadic challenge to the legitimate government."[17] Provided the government was able to speedily suppress the upheaval "by normal procedures of internal security",[18] the situation would not come within the purview of International Humanitarian Law.

The International Criminal Tribunal for the former Yugoslavia (ICTY) in *Prosecutor v. Dusko Tadić* observed that "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".[19] As such, under traditional international law, "a rebellion within the borders of a sovereign State is the exclusive concern of that state."[20] How the state dealt with the rebels was outside the scope of International Humanitarian Law.[21]

Where the government failed to effectively suppress the upheaval, it could change in status from a rebellion to an insurrection.[22] The change in status however occurred only if the legitimate government on its own accord decided to recognise the situation as an insurgency.[23] The recognition of insurgency did not however automatically introduce the provisions of International Humanitarian Law to the conflict. Rather, the

16. Wilson, H. A.: ***International Law and the Use of Force by Liberation Movements***, Oxford: Oxford University Press, 1988 p. 23.
17. Falk, R. A.: "Janus Tormented: The International Law of Internal War" in JN Rosenau (ed) ***International Aspects of Civil Strife*** (Princeton: Princeton University Press, 1964) p. 199.
18. *Ibid* p. 198, 199.
19. *Prosecutor v. Dusko Tadić*, (the *Tadić Decision*) 2 October 1995 ICTY, Case No. IT-94-1-AR72, para. 96. (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction).
20. Wilson, above n 16, p. 23.
21. Moir, L.: ***The Law of Internal Armed Conflict***, Cambridge: Cambridge University Press, 2002 p. 4.
22. See generally, O'Brien, W. V. " The Jus in Bello in Revolutionary War and Counter-Insurgency" 18 **Va. J. Int'l L.** 193 (1978).
23. Higgins, R.: "Internal War and International Law" in CE Black and RA Falk (eds), ***The Future of the International Legal Order*** (Princeton: Princeton University Press, 1971) p. 88.

provisions only applied if expressly conceded by the legitimate government.[24] The *de jure* government ordinarily would only recognise an insurgency where there was the necessity to establish formal relations with the insurgents so as to protect the interests of the government or those of a third state.[25]

If the insurgency was not suppressed, "the parent government or a third state could by declaration grant the insurgents recognition as a belligerent party."[26] According to Lauterpacht, four criteria had to be met before insurgents became recognised as belligerents:

Firstly, there must exist within the state an armed conflict of a general (as distinguished from a purely local) character. Secondly, the insurgents must occupy and administer a substantial portion of national territory. Thirdly, they must conduct hostilities in accordance with the rules of war and through organised armed forces acting under a responsible authority. Fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency.[27]

Following the recognition of belligerency, the principles of International Humanitarian Law became immediately applicable to the conflict. It is important to note that, even before upheavals reached the stage where International Humanitarian Law became applicable, municipal laws including human rights obligations remained in force.[28]

With the advent of the fourth Geneva Conventions of 1949, it no longer became necessary to formally recognise civil strife as insurgency or belligerency for International Humanitarian Law to

24. *Ibid* p. 88.
25. Cullen, A. "Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law" 183 **Mil. L. Rev.** 66 (2005) at 72.
26. Bartels, n 13, at 50.
27. Lauterpacht, H.: ***Recognition in International Law***, Cambridge: Cambridge University Press, 1947 p. 176.
28. Kalshoven, F. "Guerrilla and Terrorism in Internal Armed Conflict Conference: The American Red Cross--Washington College of Law Conference: International Humanitarian and Human Rights Law in Non-International Armed Conflicts April 12-13, 1983" 33 **Am. U. L. Rev.** 67 (1983).

come into operation between the parties. This is because Common Article 3 to the Geneva Conventions stipulates the application of international humanitarian law to "all armed conflict not of an international character".[29] Thus, irrespective of whether the armed conflict is a rebellion, an insurgency or belligerency, all the parties to all internal armed conflicts are bound to conduct hostilities within the minimum parameters set by International Humanitarian Law.

So as to improve upon the provisions of the 1949 Geneva Conventions, two additional protocols, Additional Protocol I[30] and Additional Protocol II [31] were adopted in 1977. Additional Protocol II "develops and supplements Common Article 3 to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application".[32] In particular, article 1 (1) of Additional Protocol II defines non-international armed conflicts as those:

> "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[33]

In all, while Common Article 3 applies to all internal armed conflicts, Additional Protocol II applies only to those that meet the objective criteria set out in its Article 1 (1). Thus, Additional

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29. Article 3 common to the Geneva Conventions 1949.
30. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.
31. Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (Additional Protocol II).
32. Article 1, Additional Protocol II.
33. Article 1, Additional Protocol I.

Protocol II has a more restrictive threshold of application than Common Article 3.[34] Common Article 3, however, does not define what is meant by armed conflict. This leaves room for ambiguity and subjective interpretation by parties to an armed conflict. The situation has however been ameliorated since the ICTY in the *Tadić Decision* stated that an armed conflict exists:

> whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, International Humanitarian Law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[35]

It is instructive that Additional Protocol II expressly declares that "internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature"[36] do not amount to armed conflicts. Thus, situations where individuals or groups of individuals openly express their opposition, their discontent or their demands to a government do not necessarily

34. Clapham, A. "Human Rights Obligations of Non-State Actors in Conflict *Situations*" 88 **International Review of the Red Cross** 491 (2006) at 497.
35. The *Tadić Decision*, para 70.
36. Article 1 (2) Additional Protocol II. For a discussion on available laws during disturbances, see Momtaz, D. "The Minimum Humanitarian Rules Applicable in Periods of Internal Tension and Strife" September **International Review of the Red Cross** (1998).

amount to armed conflict.[37] This remains the case even if the protests include isolated and sporadic acts of violence.[38] Human rights law apply to such internal disturbances but the disturbances remain outside the purview of International Humanitarian Law whether:

State repression is involved or not, whether the disturbances are lasting, brief with durable effects, or intermittent, whether only a part or all of the national territory is affected or whether the disturbances are of religious, ethnic, political or any other origin.[39]

Thus, for the general application of International Humanitarian Law including Common Article 3, an internal armed conflict may be said to exist whenever there is a protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. For the specific purposes of Additional Protocol II, an internal armed conflict exists where: (1) there is resort to armed force between a State and an armed dissident group or between armed groups; and (2) the group(s) are under responsible command; and (3) control a part of the state's territory such that they can mount sustained and concerted military operations; and (4) they are capable of implementing the provisions of Additional Protocol II.

Fundamental Principles of International Humanitarian Law Applicable in Internal Armed Conflicts

International Humanitarian Law applicable in armed conflict is a large corpus of legal provisions. These may nevertheless be reduced to several fundamental principles. The most basic of these principles have been codified in Common Article 3 and Additional Protocol II. Using the analogy of the 'law of The

37. Harroff-Tavel, M. "Action taken by the International Committee of the Red Cross in situations of internal violence" May - June **International Review of the Red Cross** (1993).
38. *Ibid.*
39. *Ibid.*

Hague' and 'the law of Geneva',[40] the rules of International Humanitarian Law would always fall into two categories:[41] Rules dealing with the means and methods of warfare and rules dealing with conduct towards civilians, non-combatants and other persons who are not partaking in the fighting or are out of action (*hors de combat*). Both categories of rules are however subsumed in the fundamental principles discussed below.

As noted by the International Court of Justice in the *Legality of the Threat or Use of Nuclear Weapons case*,[42] parties to an armed conflict are bound by the principles of distinction and the prohibition on the infliction of unnecessary suffering.[43] In addition, it is now well established that combatants are bound by the principle of proportionality.[44]

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40. The law of armed conflict is traditionally classified into the law of The Hague and the law of Geneva. While the law of The Hague deals with the conduct of war in relation to means and methods belligerents may lawfully apply in armed conflict, the law of Geneva deals with the protection of civilians and persons ordinarily classified as combatants but who have been rendered *hors de combat* by reasons such as being captured by enemy forces or being sick or wounded. See Cryer, R. and others: ***An Introduction to International Criminal Law and Procedure***, Cambridge: Cambridge University Press, 2010, p. 268; Cassese, A.: ***International Criminal Law***, Oxford: Oxford University Press, 2003, p. 47; McCoubrey, H. "The Concept and Treatment of War Crimes" 1 **J Conflict Security Law** 121 (1996) at 121.
41. Rosas, A. and Stenback, P. "The Frontiers of International Humanitarian Law" 24 **Journal of Peace Research** 219 (1987) at 221 where it is noted that "humanitarian law today includes elements of both the Law of Geneva and the Law of the Hague, as confirmed by the title of the 1974- 1977 Diplomatic Conference".
42. *Legality of the Threat or Use of nuclear weapons,* Advisory Opinion of 8 July, 1996.
43. *Ibid* para 78. For a discussion of the relevance of this advisory opinion to International Humanitarian Law, see Doswald-Beck, L. "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the legality of the threat or use of nuclear weapons" 37 **International Review of the Red Cross (1961 - 1997)** 35 (1997).
44. Sivakumaran, S. "Binding Armed Opposition Groups" 55 **International & Comparative Law Quarterly** 369 (2006) at 376, Henckaerts, J.M. and Doswald-Beck, L.: ***Customary International Humanitarian Law Volume I: Rules***, New York: Cambridge University Press, 2009 chapter 4.

The principle of distinction provides protection to civilians caught up in armed conflict." [45] In adherence to this principle, parties to an internal armed conflict are required to distinguish between military and civilian targets. This is to ensure that no attacks are carried out on civilians or civilian objects.

The principle of prohibition of the infliction of unnecessary suffering provides protection to combatants in an armed conflict. Parties to a conflict are not entitled to use weapons which cause injuries that are "superfluous in relation to the achievement of legitimate military objectives."[46]

The principle of proportionality prohibits combatants from carrying out indiscriminate attacks which will cause loss of life or injury to civilians.[47] In essence, this principle prohibits attacks that will result in damage, injury or loss to civilian or civilian objects where the civilian losses will be excessive in relation to any anticipated military advantage.

The foregoing principles are reflected in Common Article 3 which provides that:

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

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

(a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;

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45. McCormack, T. L. H. "A non liquet on nuclear weapons — The ICJ avoids the application of general principles of International Humanitarian Law" 37 **International Review of the Red Cross (1961 - 1997)** 76 (1997) at 85.
46. *Ibid* at 85.
47. Henckaerts, J.-M.: "Proportionality" in A Cassese (ed) ***The Oxford Companion to International Criminal Justice*** (Oxford: Oxford University Press, 2009) p. 470.

(b) taking of hostages;
(c) Outrages upon personal dignity, in particular, humiliating and degrading treatment;
(d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
(2) The wounded and sick shall be collected and cared for.

In 1986, the International Court of Justice in the *Nicaragua case* emphasised that the provisions of Common Article 3 "constitute a minimum yardstick"[48] and reflect the elementary considerations of humanity referred to in the *Corfu Channel case*.[49] Article 3 thus applies to even low intensity conflicts.[50]

More applicable rules and legal provisions of International Humanitarian Law are contained in Additional Protocol II. For example, Article 4 of Additional Protocol II provides that:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.
2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever:
   (a) violence to the life, health and physical or mental well-being of persons, in particular, murder, as well

48. Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* US), Merits, Judgment, 1986 ICJ Rep. 14.
49. Corfu Channel case (UK *v.* Albania), Merits, 1949 ICJ Rep. 4.
50. Cassese, A.: ***International Law***, New York: Oxford University Press, 2004 p. 345.

as, cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular, humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) They shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) All appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) Children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) The special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) Measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

In addition to the provisions quoted above, there are several other specific rules of International Humanitarian Law that combatants and their commanders are presumed to know. If a party to an internal armed conflict violates International Humanitarian Law applicable in armed conflicts, she/he is liable to be tried for war crimes.[51]

One of the most legally significant aspects of International Humanitarian Law is that its application does not change the status of the parties to an armed conflict. Thus, the claims of an illegitimate or unlawful contender to control of government do not become validated by the provisions of International Humanitarian Law. Indeed, Common Article 3 to the Geneva Conventions emphasises that application of its provisions "shall not affect the legal status of the Parties to the conflict."

It is important that parties to armed conflict realise that individual criminal responsibility for war crimes is not dependent on who is at fault in starting or continuing the armed conflict.[52] What is more, ignorance of the applicable International Humanitarian Law is not a viable defence. Senior officers and commanders, including commanders-in-chief are particularly at risk of trial because, for practical reasons, international and internationalised war crimes tribunals focus on persons higher up the echelon. There are however practice and policy considerations that can reduce the cases of violation of International Humanitarian Law and also absolve a commander who does not order or condone such violation(s).

Practice and Policy Considerations

The best way to prevent violations of International Humanitarian Law is to avoid armed conflict altogether. This course of action is, however, not always available. Nevertheless, violations may be reduced if the combatants and all those involved in planning

51. Cassese above n 50, p. 47.
52. Bugnion, F. "Jus ad Bellum, Jus in Bello and Non-International Armed Conflicts" ***Yearbook of International Humanitarian Law*** 167 (2003) where it is demonstrated that the difference between jus in bello and jus ad bellum are applicable in non-international armed conflicts.

and execution of military operations are conversant with the applicable laws. At any rate, commanders must ensure that violations are not systemic. In the event of a violation, it must be standing policy that alleged violators would be promptly investigated and, if apparently liable, brought to trial.

The importance of training is brought to the fore by the fact that matters that may ordinarily be violations of human rights become war crimes when committed in the context of armed conflict. For example, members of armed forces and police in some African states have been known to inflict corporal punishments on civilians and even beat them with horsewhips and belts. As demonstrated by the recent judgment of the International Criminal Court in the *Lubanga case*, such abuses may be war crimes or may be evidence of war crimes. In considering the charges of war crimes before it in the *Lubanga case*, the International Criminal Court accepted evidence of punishment which involved the use of a 'kiboko'.[53]

Training on International Humanitarian Law has to take the cultural and educational backgrounds of the combatants into context. Training for combatants who come from a culture that allows the use of 'koboko'[54] for chastisement and punishment must necessarily be differently tailored from training for combatants from a culture that considers a raised voice as harsh chastisement and punishment. In addition, while officers may have very comprehensive and technical training, the other ranks may have sufficient general training to recognise situations that are potentially unlawful and the action to take when faced with such.

Provision of manuals for combatants and their commanders is an essential part of the training on International Humanitarian

53. See *Judgement, Lubanga Dyilo, Situation in Democratic Republic of the Congo (ICC-01/04-01/06), Trial Chamber 1, March 14 2012* particularly p. 386 para 884 where evidence was given concerning the use of 'Kiboko' which is also known as 'koboko' in Nigeria.
54. Horsewhip.

Law.[55] An ideal training manual uses the language and illustrations the combatants are familiar with. The manual may be in two versions; a simplified version which combatants and officers may carry around and which complements a more comprehensive desktop version.

At any rate and as a matter of policy, the authorities in charge of a fighting force must ensure that violations are not widespread and systemic. In this regard, incidents of violation must be promptly investigated. If investigations reveal a prima facie case, the alleged violators must be promptly brought to trial.

A systemic pattern of violations plus a failure to investigate and bring alleged perpetrators to trial may lead to 'command responsibility'. In this event, senior commanders including commanders in chief may be held accountable for the violations committed by combatants.[56]

Moreover, under the principle of *aut dedere aut judicare*, other States may be able to exercise criminal jurisdiction over alleged violators who have neither been investigated nor charged by their own authorities. Under the principle, states have an obligation to prosecute or extradite persons who commit war crimes. As pointed out by M. Cherif Bassiouni and Edward M Wise, the evolution of the expression *aut dedere aut judicare* can be traced to an earlier "phrase used by Grotius: *aut dedere aut punire* (either extradite or punish)."[57] The scope of the more

55. See for example British Army, *Field Manual Volume I Part 10 Countering Insurgency*. See also British Army, *The Joint Service Manual of the Law of Armed Conflict* .

56. See generally, Vetter, G. R. "Command Responsibility of Non-Military Superiors in the International Criminal Court (ICC)" 25 **Yale J. Int'l L.** 89 (2000); Arnold, R. "Command Responsibility: A Case Study of Alleged Violations of the Laws of War at Khiam Detention Centre" 7 **J Conflict Security Law** 191 (2002); Rowe, P. "Military Misconduct during International Armed Operations: 'Bad Apples' or Systemic Failure?" 13 **J Conflict Security Law** 165 (2008); Bonafe, B. I. "Finding a Proper Role for Command Responsibility" 5 **J Int. Criminal Justice** 599 (2007).

57. Bassiouni, M. C. and Wise, E. M.: ***Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law*** Kluwer Academic Publishers 1995 p. 4. Cf. Kreß, C. "Reflections on the Iudicare Limb of the Grave Breaches

contemporary *aut dedere aut judicare* however differs from the Grotius's *aut dedere aut punire*, because the former demands adjudication and not necessarily punishment.[58] It suffices to emphasise that a State that fails to prosecute its own people may by that failure abdicate its jurisdiction.[59]

Furthermore, failure to investigate or try violators may be indication that, as contemplated by Articles 1, 17 and 18 of the Rome Statute of the International Criminal Court,[60] a State is unable or unwilling to try such offenders.[61] The International Criminal Court may then have jurisdiction to carry out investigations and trials instead of the unwilling or unable State.

Conclusion

As demonstrated by the Advisory Opinion of the ICJ on the *Legality of the Threat or Use of Nuclear* Weapons,[62] the *Inter arma enim silent leges*[63] proposition is thoroughly discredited by both human rights and International Humanitarian Law applicable in armed conflict. Using the example of the right not to be arbitrarily killed (the right to life) guaranteed by the International Covenant of Civil and Political Rights (ICCPR), the ICJ noted that:

Regime" 7 **J Int. Criminal Justice** 789 (2009); Wise, E. M. "Obligation to Extradite or Prosecute" 27 **Isr. L. Rev.** 268 (1993) at 276 for the view that the expression was in use before Grotius and can be traced to Baldus de Ubaldis.

58. Wise, above n 57, at 277.
59. See for example Ambos, K.: "The Legal Framework of Transitional Justice: A Systematic Study with a Special Focus on the Role of the ICC" in K Ambos, J Large and M Wierda (eds), ***Building a Future on Peace and Justice*** (Springer Berlin Heidelberg, 2009).
60. See generally El Zeidy, M. M. "Principle of Complementarity: A New Machinery to Implement International Criminal Law" 23 **Mich. J. Int'l L.** 869 (2001).
61. See also Blattmann, R. and Bowman, K. "Achievements and Problems of the International Criminal Court: A View From Within" 6 **J. Int. Criminal Justice** 711 (2008)at 713.
62. Note 42, above.
63. Literally "For among [times of] arms, the laws fall mute." Or In times of war, laws are silent.

> 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. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant,[64] can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself.[65]

The essence of the above quote from the ICJ Advisory Opinion is that the "ICCPR provision on the right to life must be construed by making a *renvoi* to humanitarian law".[66] In a non-international context, the question of making a *renvoi* to humanitarian law will only arise if there is an internal armed conflict as distinguished from internal disturbances.

Prior to 1949, the existence of an internal armed conflict and the consequent application of International Humanitarian Law could not come up until the State in turmoil had formally declared that an upheaval or rebellion had reached the status of insurgency or belligerency. However, since the codification of the Geneva Conventions of 1949, international humanitarian law becomes applicable once there is an armed conflict whether or not there is a formal declaration that such a conflict is occurring. The ICTY in the *Tadić* decision has defined armed conflict to be a "protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."[67]

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64. International Covenant of Civil and Political Rights (ICCPR).
65. Note 42, above.
66. Abresch, W. "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya" 16 **Eur J Int Law** 741 (2005) 744.
67. The *Tadić Decision* n 19 above.

The provisions of International Humanitarian Law applicable in armed conflict are numerous.[68] Amongst others, these provisions require that parties to an armed conflict must not attack civilians or civilian objects;[69] they must distinguish between military targets and non-military targets;[70] they must be humane and not harm persons *hors de combat*;[71] they must not use methods and means of combat that will cause superfluous injuries;[72] they must not be indiscriminate in attack and they must not recruit and use persons under fifteen years old for armed conflict.[73]

It is essential for parties to an armed conflict to train their combatants in the law of armed conflict (International Humanitarian Law applicable in armed conflict) and provide both simplified and comprehensive training manuals for them.[74] Cases of violations must be promptly investigated and tried. Otherwise, the top echelon may be liable to prosecution by another State or the International Criminal Court.

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68. Bothe, M. "Customary International Humanitarian Law: Some Reflections on the ICRC Study" 8 **Yearbook of International Humanitarian Law** 143 (2005).
69. Yihdego, Z. "Darfur and Humanitarian Law: The Protection of Civilians and Civilian Objects" 14 **J Conflict Security Law** 37 (2009).
70. Schoch, R. "UNHCR and the Afghan Refugees in the Early 1980s: Between Humanitarian Action and Cold War Politics" 27 **Refugee Survey Quarterly** 45 (2008).
71. Kalshoven, F. "Noncombatant Persons - A Comment to Chapter 11 of the Commander's Handbook on the Law of Naval Operations International Law Studies 1991: The Law of Naval Operations: Chapter X" 64 **Int'l L. Stud. Ser. US Naval War Col.** 300 (1991).
72. Kalshoven, F. and Zegveld, L.: ***Constraints on the Waging of War***, Geneva: ICRC, 2001.
73. Dupuy, K. E. and Peters, K.: ***War and children : a reference handbook***, Santa Barbara, Calif.: Praeger Security International, Contemporary military, strategic, and security issues,2010; Williams, J. "The international campaign to prohibit child soldiers: a critical evaluation" 15 **The International Journal of Human Rights** 1072 (2011).
74. Garraway, C. "The Use and Abuse of Military Manuals" 7 **Yearbook of International Humanitarian Law** 425 (2004).