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'What may be most difficult to see is that to use law is also to invoke violence, at least the violence that stands behind legal authority … The reverse is also true – to use violence is also to invoke the law, the law that stands behind war, legitimating and permitting violence'. [David Kennedy]

Critically assess the accuracy of this statement with reference to **EITHER:** a) IHL (the *jus in bello*) **OR** b) the international law on the use of force (the *jus ad bellum)*.

I have chosen to critically assess the accuracy of this statement with reference to International Humanitarian Law (the jus in bello)

Introduction

"The strongest is never strong enough to always be the master, unless he transforms strength into right, and obedience into duty."[1] The very perspicacious Max Weber transposed that precept into its political analysis, acknowledging the state as the successful claimer over the monopolistic use of violence and as the respected legislator of that practice. Accordingly, for David Kennedy, laws of war has in fact become an instrument, even a weapon of its own, in the hand of political entities, to invoke and justify acts of violence. In Kennedy's understanding, laws of war would have lost their original role, turning into the Clausewitz principle, that is to say the continuation of political interests by other means[2]; the use of law to pursue war.

However, the application of International Humanitarian Law (IHL) to violent conflicts is sometimes considered to be apolitical. I evaluate Kennedy's assertion by comparing Kennedy's rationale to empirical cases of applied IHL. Assuming that IHL represents the 'least political' mechanism in regulating the use of force, then if IHL is shown to be political, Kennedy's assertion would be vindicated.

As the subject is vast, major issues must inevitably be left out of my discussion. First, I will praise the Kennedy's proficient analysis of law as a strategic tool for modern warfare. Second, I will highlight the limits of that reasoning, demonstrating the efficiency of International Humanitarian Law (IHL) to reduce violence in war. Finally, I will demonstrate that problems arise from the gap between legal and empirical aspects of warfare, specifically in cases of new wars and states' deviant behavior.

[1] **Rousseau** Jean Jacques, *The Social Contract*, Chapter 3: the right of the strongest, 1762, http://www.constitution.org/jjr/socon_01.htm#003 (04/03/2010).
[2] **Kennedy** David, Of war and Law, Princeton University Press, Princeton, 2006, p.132.

1) The legitimating of violence through International Humanitarian Law

In 1868, the St Petersburg Declaration for the regulation of armed conflicts was adopted. It corresponded to the first step in the process of conciliating "the necessities of war with the laws of humanity."[3] In Kennedy's eyes, that multilateral commitment represented the beginning of the legal construction of war (instead of its restriction), which symbolizes the decadence of the whole doctrine of law. In fact, instead of privileging pacific means to overcome the Hobbesian state of nature, it allowed certain forms of violence as legally acceptable.[4] Already, the Hague Convention of 1899 limited affliction to "superfluous suffering,"[5] that was extended to "unnecessary suffering"[6] in the Hague Conference of 1907. From then, causing suffering, deprivation of freedom or even death became legally legitimated. The drafting of the United Nations Covenant on Civil and Political Rights of 1966 (Covenant) exemplify that theory, stipulating that "lawful acts of war" are recognized, as long as they are not prohibited by article 6.[7]

Besides, as Detter points out, in times of war and war conflict, most of human rights treaties include safeguards which exclude the application of certain provisions.[8] The Covenant foresees to the Parties a derogation of its obligations "in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed."[9] As stated the Court in the Nuclear Weapons advisory opinion, "the protection of the International Covenant on Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Convention".[10] The Article 15 of the European Convention on Human Rights

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[3] **Bring** Ove, *Regulating Conventional Weapons in the future: Humanitarian Law or Arms Control?*, Journal of Peace Research, Vol. 24, No. 3, September 1987; p.275.
[4] **Kennedy** David, Of war and Law, Princeton University Press, Princeton, 2006, p.115.
[5] **Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land.** The Hague, 29 July 1899, art. 23, http://www.icrc.org/IHL.NSF/FULL/150?OpenDocument (10/04/10).
[6] **Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land**. The Hague, 18 October 1907, art. 23, http://www.icrc.org/ihl.nsf/FULL/195 (10/04/10).
[7] **Respect for Human Rights in Armed Conflicts**, Report of the Secretary General, UN Doc. A/8052, in **Meron** Theodor, *The humanization of humanitarian law*, The American Journal of International Law, Vol. 94 No.2 (April 2000), p.240.
[8] **Detter Delupis** Ingrid, *The Law of War*, University Press, Cambridge, 2000, p.161.
[9] **International Covenant on Civil and Political Rights,** G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, http://www.hrcr.org/docs/Civil&Political/intlcivpol4.html (10/04/10), art. 4.
[10] **Legality of the Threat or Use of Nuclear Weapons**, Advisory Opinion, I.C.J. Reports 1996, para. 25.

provides the same exemptions,[11] as well as the Article 27 of the American Convention on Human Rights.[12] For Buergenthal, the notion of public emergency comprehends also armed conflicts.[13] Free from pervasive Human Rights considerations, the law of war could then developed "many war-generative functions: the background rules and institutions for buying and selling weaponry, recruiting soldiers, managing armed force, […], to discipline the troops, to justify, excuse and privilege battlefield violence, to build the institutional and logistical framework from which to launch the spear."[14]

Furthermore, customary international law conditions the right of self-defense, through the principle of necessity and proportionality.[15] That is to say, it is possible to use force, but choosing the less harmful means of warfare in order to respect human rights.[16] It must be a proportional response to a prior armed attack.[17] In the *Public Committee against Torture in Israel v. the Government of Israel case*, the Court established that an "attack is proportionate if the benefit stemming from the attainment of the proper military objective is proportionate to the damaged caused to innocent civilians harmed by it.[18]" That notion of proportionality is then not only a utilitarian problematic of costs and benefits, but also a moral questioning in reference to the civilian casualties opposed to military or political objectives.[19] In the same perspective, Kennedy also criticizes the humanitarian aspect of UN sanctions regime and its "constitutional regime of legitimate justifications for warfare," [20] considering it biased by political interests.

This politicization of law is also criticized by third world countries which argue that the additional protections accorded to members of resistance movements, like in the Third Geneva Convention or the Martens Clause in the Additional Protocol 1, "benefit participants

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[11] **The European Convention for the Protection of Human Rights and Fundamental Freedoms** (Article 15), Rome, 4.XI. 1950, http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (10/04/10).
[12] **American Convention on Human Rights,** http://www.hrcr.org/docs/American_Convention/oashr6.html (10/04/10)
[13] **Buergenthal** Thomas 1981. 'To Respect and to Ensure: State Obligations and Permissible Derogations', pp. 72-91 in **Henkin** Louis, ed. The International Bill of Rights. New York: Columbia University Press, p.79.
[14] **Contreras** Francisco J., **de la Rasilla** Ignacio, *On War as law and law as War*, Leiden Journal of International Law, 2008, p.6.
[15] **Legality of the Threat or Use of Nuclear Weapons**, Advisory Opinion, I.C.J. Reports 1996, para. 41
[16] **The Public Committee Against Torture in Israel v. the Government of Israel,** HCJ 769/02, 13 Dec. 2006, para 40.
[17] **Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America),** I.C.J Reports, 26 June 1986., para. 176.
[18] **The Public Committee Against Torture in Israel v. the Government of Israel,** HCJ 769/02, 13 Dec. 2006, para 45
[19] **Contreras** Francisco J., **de la Rasilla** Ignacio, *On War as law and law as War*, Leiden Journal of International Law, 2008, p.5.
[20] **Kennedy** David, Of war and Law, Princeton University Press, Princeton, 2006, p.79.

in just war only."[21] In the age of immediate media coverage, world opinion is crucial and the legal qualification of facts will influence the perception of belligerents and the outcome on the battleground; "the legal battle has already become an extension of the military one."[22]

Finally, in the Kennedy's understanding, the "unnecessary suffering" principle that regulates also the arms legislation, grant a legal legitimating to many cruel weapons causing severe and widespread injuries, but authorized because providing a useful military purpose.[23] That relative limitation is based on a "balance between military interests and humanitarian considerations."[24] Weapons designed to injure soldiers with the injurious effects lasting, such as blinding laser weapons, are prohibited, whereas other abhorrent arms, such as Fuel Air Explosive weapon, are authorized because it permits, for example, to minimize collateral damage. In the Nuclear Weapons Advisory opinion, the Court declined to rule on the legality of the use of nuclear weapons in the extreme circumstances of self defense.[25] That demonstrates well the weaknesses of humanitarian international law.

To summarize, for Kennedy, the State is the "normal war-waging machinery"[26] and law has become a weapon used to defend its interests, a strategic instrument of war. Nevertheless, that position is arguable, as will demonstrate it the second part of this essay.

2) The regulation on the means and methods of warfare

As Detter describes war, "there is no other area where greater duties are imposed on individuals and no other activity in which they are exposed to more personal suffering."[27] Unsurprisingly, it is then following the bloodiest carnages that IHL has developed: The Red Cross Movement and Geneva Law were creating after the 1969 battle of Solferino, the American Civil War inspired the creation of the Lieber Code, the Second World War

[21] **Rosas** Allan, **Stenback** Par, *The frontiers of IHL*, Journal of Peace Research Vol. 24 No.3., September 1987, p.230.
[22] **Contreras** Francisco J., **de la Rasilla** Ignacio, *On War as law and law as War*, Leiden Journal of International Law, 2008, p.5.
[23] **Greenwood**, Christopher, *The Law of War (IHL)*, Chapter 25 in *International Law*, edited by **Evans** Malcolm D., Oxford: Oxford University Press, 2003, p.796.
[24] **Bring** Ove, *Regulating Conventional Weapons in the future: Humanitarian Law or Arms Control?*, Journal of Peace Research, Vol. 24, No. 3, September 1987, p.281.
[25] **Meron** Theodor, *The humanization of humanitarian law*, The American Journal of International Law, Vol. 94 No.2 (April 2000), p.241.
[26] **Detter Delupis** Ingrid, *The Law of War*, University Press, Cambridge, 2000, p.5.
[27] **Detter Delupis** Ingrid, *ibid*, p.3.

encouraged the creation of the Geneva Convention of 1949, and so on.[28] In fact, since the nineteenth century, the scope of IHL has been to introduce human dignity on the battlefield, embodying benevolent constraints on the conduct of belligerents, in order to reduce suffering and increase protections of the injured, the victims of war, prisoners and civilians**.** Following the Tehran International Conference on Human Rights of 1968, the UN General Assembly adopted Resolution 2444 (XXIII), entitled "Respect for Human Rights in Armed Conflicts," which recognized the necessity of applying basic humanitarian principles in all armed conflicts.[29] Thus, it is possible to distinguish a parallelism between human rights norms and the ones of humanitarian law, like between Article 7 of the International Covenant on Civil and Political Rights,[30] and Article 50 of the first 1949 Geneva Convention.[31] There is a reciprocal influence on both norms and a convergence in their humanitarian scope: the prohibition of torture and cruel, inhuman, or degrading treatment and punishment, arbitrary arrest and detention, and discrimination, as well as the guarantees of due process of law.[32] The Court's judgement in the Procesutor v. Laurent Semanza case can illustrate that matter of fact.[33]

States have been under the obligation to respect those international commitments. These commitments are in particular rules and principles emanating from customary international law and jus cogens. These are the great majority of the provisions codified in the Geneva Conventions,[34] ratified by 194 states (which are then almost universal binding treaties).[35] Some articles of Additional Protocol I (ratified by 168 states), such as article 51(5) B,[36] are also customary international law, as well as articles of Additional Protocol II (ratified by 164

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[28] **Meron** Theodor, *ibid*, p.243.
[29] **General Assembly Resolution 2444**, UN GAOR, 23d Sess., Supp No. 18, at 50, UN Doc. A/7218, pmbl, 1969.
[30] **International Covenant on Civil and Political Rights** , http://www2.ohchr.org/english/law/ccpr.htm (10/05/10).
[31] **Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949,** http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/fe20c3d903ce27e3c125641e004a92f3 (10/04/2010).
[32] **Meron** Theodor, *ibid*, p.245.
[33] **The Prosecutor v. Laurent Semanza**, case No. ICTR-97-20-T, International Criminal Tribunal for Rwanda, **Judgement of** 15 May 2003.
[34] **Meron** Theodor, *The Geneva Conventions as Customary Law*, The American Journal of International Law, Vol. 81, No. 2 (Apr., 1987), American Society of International Law, p. 364. For Meron, "many provisions of conventions Nos. I, II and II are based on earlier Geneva Convention, and thus have a claim to customary law status. Geneva Convention No IV […] is rooted only in the few provisions on the treatment of civilians in combat zones and occupied territories found in Articles 23, 25,27,28 and 42-56 of the Hague Regulations."
[35] http://www.icrc.org/Web/Eng/siteeng0.nsf/html/genevaconventions (11/04/2010).
[36] **The Public Committee Against Torture in Israel v. the Government of Israel,** ibid, para. 8**.**

States), the Hague Regulations,[37] and, of our concern, Articles 2 and 51 of the UN Charter for the prohibition of the use of force and the right of self-defense. [38] Customary law is composed of opinion iuris, which refers to "the legal conviction that a practice is carried out "as of right"."[39] Moreover, IHL is also stated by accepted practice, general principles of law (not subject to the principle of reciprocity) and, "in a subsidiary role, judicial decisions and academic opinion".[40] Then, even if we cannot suggest that IHL exists upon a level sui generis on which normal principle of reciprocity in treaty obligations do not operate,[41] it is difficult to believe, as Kennedy asserts it, that all these international law sources that form IHL invoke violence, or are enough biased to constitute the continuation of political interests by other means.

International Humanitarian Law applies independently to the lawfulness of the resort to armed force and neutrally for both parties engaged in the conflict.[42] Since the Nuremberg Charter, the emphasis of IHL switched from states interests to the population and individual rights.[43] The Martens clause epitomizes that tendency. First introduced in the preamble of 1899 Hague Convention II, it was then recognized by the Military Tribunal of Nuremberg as a general clause,[44] and finally included in article 1 of the 1977 Protocol I. Thanks to that revalorization, the Clause could apply also to armed conflicts (in phase with common Article 3 of Geneva Conventions, applying also to all non international conflict as customary law)[45] and limits the arbitral power of States within their boundaries. In fact, it dispense justice to the right of people to defend themselves without losing the benefits of the laws of war, having "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."[46] The

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[37] **International Military Tribunal at Nuremberg**, *Case of the Major War Criminals*, Judgment, 1 October 1946, *Official Documents*, Vol. I, pp. 253–254.
[38] **Military and Paramilitary Activities in and Against Nicaragua** (Nicaragua v. United States of America), I.C.J Reports, 26 June 1986, paras. 187 to 201.
[39] **International Committee of the Red Cross**, *International Review of The Red Cross*, Volume 87, Number 857, March 2005, p.181.
[40] **Coubrey H.,** *IHL,: the regulation of armed conflicts***,** Dartmouth Publishing Company, 1990, p.31.
[41] **Coubrey H.,** *ibid*, p.191.
[42] **Coubrey H.,** *ibid*, p.1.
[43] **Meron** Theodor, *The humanization of humanitarian law*, The American Journal of International Law, Vol. 94 No.2 (April 2000), p.243.
[44] **Veuthey** Michel, *Guerilla et droit humanitaire*, Université de Genève, 1976, p.191.
[45] **Prosecutor v. Zejnil Delalic**, Case No.: IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia in the Trial Chamber, Judgement of: 16 November 1998, para 306.
[46] **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,** http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (10/04/2010).

preservation of individuals from violence can be exemplified, for instance, by the Delalic case. In fact, in that legal case, the International Tribunal prosecuted persons committing or ordering to be committed grave breaches of the Geneva Conventions of 12 August 1949 (such as torture or inhuman treatment, including biological experiments), against persons or property protected under the provisions of the relevant Geneva Convention.[47]

One of the main objectives of IHL is the limitation of unnecessary violence. First of all, it is through the limitation of the state's freedom in its choice of weapon, such as prohibiting weapons that are "incapable of distinguishing between civilian and military targets" or the ones that generate unnecessary suffering.[48] Article 35 of Protocol I not only prohibit "weapons, projectiles and material and methods of warfare which cause unnecessary suffering," but also methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment."[49] There is a link between disarmament and humanitarian law, as demonstrates it the ENMOD Convention[50] or the Convention on the Prohibition of Anti-Personnel Mines (ratified by 157 states).[51] That link is also emphasized by Article 50 paragraph 4 (B) of Additional Protocol I, which prohibits indiscriminate attacks "which employ a method or means of combat which cannot be directed at a specific military objective".[52] Furthermore, IHL has also codified customary laws of war protecting combatants, such as prohibiting perfidy or the no quarter principle.[53] This "Hague Law" and, more particularly, the Regulations Respecting the Laws and Customs of War on Land, fixed the rights and duties of belligerents in their conduct of operations in an international armed conflict. One should add to this the "Geneva Law" (the Conventions of 1864, 1906, 1929 and 1949), which protects the victims of war and aims to provide safeguards for disabled armed forces personnel and persons not taking part in the hostilities, to understand that IHL enables to channel violence during armed violence.

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[47] **Prosecutor v. Zejnil Delalic**, Case No.: IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia In the Trial Chamber, Judgement of: 16 November 1998, para. 175.
[48] **Legality of the Threat or Use of Nuclear Weapons**, Advisory Opinion, I.C.J. Reports 1996, para. 75.
[49] **Protocol Additional to the Geneva Conventions of 12 August 1949,** *ibid.*
[50] 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, http://www.icrc.org/web/eng/siteeng0.nsf/html/p0811 (12/05/10).
[51] http://www.icbl.org/index.php/icbl/Universal/MBT/States-Parties (12/05/2010).
[52] **Protocol Additional to the Geneva Conventions of 12 August 1949,** *ibid.*
[53] **Convention (IV) respecting the Laws and Customs of War on Land and its annex**: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, http://www.icrc.org/ihl.nsf/FULL/195 (10/04/10), Article 23.

As I have demonstrated in this part, IHL aims at limiting unnecessary suffering or protecting combatants and civilians during armed conflicts. That vision is quite at the opposite of Kennedy's understanding. However, it is possible that the application of IHL is complicated by the contextual evolution of modern warfare. The third part of that essay will analyze the main disruptive features of that dissonance.

3) The controversial compliance of international humanitarian law to the modern wars

For Aldrich, laws of war are obsolete and cannot be effectively applied to current guerilla warfare and mixed civil and international conflicts: the new conflicts are different from the ones the conventions relied on, which provides a valid justification for states to not applying those conventions.[54] For many scholars, fundamental articles of the Geneva Conventions have no condition and no exact definition for the characterization of such a huge material scope (international armed conflict and non-international armed conflict) and personal scope (that will be analyze in the third paragraph of this part).[55] Firstly, the notion of non-international armed conflict, as defined by Common Article 3, is not clear,[56] and the definition of Article 1 (2) of the 1977 additional protocol II is also subject to different understandings.[57] It has been interpreted in the *Prosecutor v. Tadic* case through two criteria: a minimum level of intensity that must be reached (as the use of military force by the government) and the involvement of non-governmental groups in the conflict, considered as "parties to the conflict" (meaning that they possess organized armed forces).[58] But, as it is possible that an isolated act of violence may threaten world peace and because most of guerilla warfare rely on "sporadic act of violence", it is not obvious what is the threshold to match with a non international armed

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[54] **American Society of International Law Proceedings,** *Human Rights and Armed Conflict: conflicting views*, Vol. 67, No.5, Washington D.C, April 1973, p.141. Aldrich was a deputy adviser from the Department of State.

[55] **International Committee of the Red Cross (ICRC)** Opinion Paper, March 2008, http://www.icrc.org/web/eng/siteeng0.nsf/htmlall/armed-conflict-article-170308/$file/Opinion-paper-armed-conflict.pdf (10/05/10). p.4.

[56] **Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.** ibid, Common Article 3 applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties*".

[57] **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977,** http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/d67c3971bcff1c10c125641e0052b545 (10/04/2010). Art. 1(2): "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts".

[58] **The Prosecutor v. Dusko Tadic**, IT-94-1-T, 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, para. 561-568

conflict. Maybe the classification of an 'armed conflict' will depend largely on whether it is considered international or non-international.

In certain situations, the internationalization of a conflict is also controversial. In *Tadic*, The Court held that a conflict may become international if the rebel group is acting as the 'agents' of another state,[59] in reference to the distance between the Bosnian forces (VRS) and the Republic of Yugoslavia.[60] However, the support that Federal Republic of Yugoslavia (FRY) gave to the Bosnian Serbs in Bosnia Herzegovina changed over the course of the conflict. The Appeals Chamber decided that the conflict was international, whereas a subsequent decision by the International Court of Justice (ICJ) diminished the direct role of the FRY in supporting the *Republika Srpska* and the VRS (Bosnian Serb Army). For the ICJ, the latter were not organs of the Federal Republic of Yugoslavia and did not exercise effective control over operations in which certain crimes were committed.[61] Consequently, the conflict was not regarded anymore as international and grave breaches provisions of the fourth Convention were inapplicable. It is then not clear if IHL apply only to the conflict between the parties *belonging* to States rather than all conflicts in the territory and if IHL, applicable in international armed conflicts, continues to apply to surviving internal conflict.[62]

The same ambiguities remain for the definition of international armed conflicts. In *Delalic,* the Trial Chamber relied on the Fourth Geneva Commentary, which stipulates that "[a]ny difference arising between two States and leading to the intervention of members of the armed forces" correspond to an international armed conflict, without considering the length of the conflict or its intensity.[63] Art. 1 of the Protocol I enlarges the provision for international armed conflicts of Common Article 2,[64] adding to those circumstances "armed conflicts

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[59] **The Prosecutor v. Dusko Tadic**, No IT-94-1-A, 15 July, 1999, International Criminal Tribunal for the Former Yugoslavia, Appeals Judgement, para. 84.

[60] **The Prosecutor v. Dusko Tadic** IT-94-1-T, 7 May 1997, International Criminal Tribunal for the Former Yugoslavia, para. 587

[61] *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), International Court of Justice*, I.C.J. Reports 2007, para. 388.

[62] **Stewart** James G., *Towards a single definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict*, International Review of the Red Cross, June 2003 Vol. 85 No 850, http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/5PYAXX/$File/irrc_850_Stewart.pdf (10/04/10), p.21.

[63] **Prosecutor v. Zejnil Delalic**, Case No.: IT-96-21-T, International Criminal Tribunal for the Former Yugoslavia In the Trial Chamber, Judgement of: 16 November 1998, para. 208.

[64] **Convention (II) with Respect to the Laws and Customs of War on Land and its annex**, ibid, Article 2: In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.

[waged] against colonial domination and alien occupation and against racist regimes in the exercise of […] self-determination."[65] These new dispositions introduce an element of *ius ad bellum* in the *ius in bello*, that is to say a possible partial judgment on the existence of an internal racist regime [66] and a subjective interpretation on the applicability of the Convention depending on the motivations that inspired the fighters of a non-governmental guerilla war.[67] Moreover, the statute of that liberation wars remains unclear, but seem to be equated with full scale international conflict in the frame of that Protocol.[68] The statute of these irregular combatants must also be analyzed.

The Hague Regulations and 1949 Geneva Conventions defined the four conditions for a party to a conflict to be protected by the laws of war. Respectively, it stated that the party to the conflict must be commanded by a person responsible for his subordinates, shall have a distinctive sign recognizable at a distance, must carry arms openly and conduct operations in accordance with the laws and customs of war. Then, "all combatants are obliged to distinguish themselves from the civilian population while in preparation for or engaged in an attack,"[69] However, in modern warfare, a great part of fighters have no choice, maybe because of the huge technological asymmetry between parties, than to not fulfill the Geneva definition of combatants.[70] In that case, unlawful combatants, if they do not qualify for Art.4 of the 1949 fourth Geneva Convention[71], "shall nevertheless be treated with humanity and, in case of trial, shall not be deprived of the rights of fair and regular trial"[72]. In the case of internal conflict, Common Article 3 applies. As stipulates Article 50 of the Additional Protocol I, "in case of doubt whether a person is a civilian, that person shall be considered to be a civilian." However, countries, like United States or Israel, did not ratify Additional Protocol I and do

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The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

[65] **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,** ibid.

[66] **Coubrey H.,** *International Humanitarian Law: the regulation of armed conflicts***,** Dartmouth Publishing Company, 1990, p.25.

[67] **Contreras**, ibid, p.3.

[68] **Detter Delupis** Ingrid, ibid, p.51.

[69] **Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977,** http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/f6c8b9fee14a77fdc125641e0052b079 (10/04/2010), Article 44(4).

[70] **Greenwood**, Christopher, *The Law of War (IHL)*, Chapter 25 in *International Law*, edited by **Evans** Malcolm D., Oxford: Oxford University Press, 2003, p.789.

[71] **Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949,** http://www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6756482d86146898c125641e004aa3c5 (10/05/10), Article 4.

[72] **Ibid,** Article 5.

not accord the same protection for the detention of what they consider "illegal enemy combatants"[73]. As Gill explains it, "the Supreme Court in *Hamdi*[74] relied on IHL in a selective way", justifying his detention on the basis of the prisoner of war regulation of the Third Geneva Convention, but without applying the same rules for his treatment, for instance, avoiding restriction on his interrogation.[75] In Committee Against Torture in Israel v. the Government of Israel, A. Barak established that a civilian taking "a direct part" "during hostilities" loses its protection granted to a civilian from attack, but is not consider as a combatant and consequently has no protection in reference to that status.[76]

To synthesize, because the warfare parameters changed between the moment IHL has been codified and the actual framework, IHL suffers problems of adaptation to the new context and its use can be subject to controversy.

[73] **Gill** Terry, **Van Sliedregt** Elies**,** *Guantánamo Bay: A Reflection On The Legal Status And Rights Of 'Unlawful Enemy Combatants'*, Utrecht Law Review, Volume 1, Issue 1 (September) 2005, p. 53

[74] **Hamdi, et Al, v. Rumsfeld, Secretary of state, et al,** No. 03-6696, 542 U.S. 507, Supreme Court of the United States, 2004. p.13: Justice O'connor: "Hamdi contends that the AUMF does not authorize indefinite or perpetual detention. […] The United States may detain, for the duration of these hostilities, individuals legitimately determined to be Taliban combatants who "engaged in an armed conflict against the United States." If the record establishes that United States troops are still involved in active combat in Afghanistan, those detentions are part of the exercise of "necessary and appropriate force," and therefore are authorized by the AUMF" (But the latter "do not qualify as status determination under the Third Geneva Convention"). **Gill**, ibid, p.50)

[75] **Gill** Terry, **Van Sliedregt** Elies**,** *ibid*, p.49.

[76] **The Public Committee Against Torture in Israel v. the Government of Israel,** HCJ 769/02, 13 December 2006, para. 31.

Conclusion

To conclude, there is an asserted link between International Humanitarian Law and Human Rights. Without doubt, IHL's aim is to limit violence, not to justify the use of force. Despite these good intentions, as Meron asserts it, "there is no agreed upon mechanism for definitively characterizing situations of violence."[77] The partition between non-international, international and internationalized conflicts is problematical as well as the temporal definition of these conflicts; the territorial line of separation between the battleground and pacified zones is vanishing; the distinction between combatants and non combatants disappears.[78] As epitomizes the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY), even the attribution of protected status evolve, not being bound anymore to the notion of nationality but simply attributed to an adverse party, to face easily new ethnic or religious conflicts.[79]

In fact, most of the recent armed conflicts, as in Sierra Leone, Somalia or Sudan have been particularly perilous for the civil population. It is that transformation of modern warfare which complicates the applicability of International Humanitarian Law. For scholars, it is more the complexity arising from a "perennial tension between military necessity and humanitarian endeavor which generates that ambiguity."[80] As Kennedy asserts it, by prohibiting certain means and methods of warfare, IHL allows others. However, as has been demonstrate during this essay, it is essentially the gap between theory and praxis which creates a teleological ambiguity of the law of war and enables dubious legitimating of violence.

Finally, Kennedy's statement is then objectively wrong in its attribution of responsibilities, as IHL did not fail to meet its obligations. However, Kennedy is subjectively right, as the application of International Humanitarian Law in recent armed conflicts has favored the invocation and legitimisation of violence.

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[77] **Meron** Theodor, *The humanization of humanitarian law*, The American Journal of International Law, Vol. 94 No.2 (April 2000), p.264.
[78] **Contreras** Francisco J., **de la Rasilla** Ignacio, *On War as law and law as War*, Leiden Journal of International Law, 2008, p.5.
[79] **Prosecutor v. Mucić et al. (Čelebići case)**, Judgement, Case No. IT-96-21-A, International Criminal Tribunal for the Former Yugoslavia, 20 February 2001, para. 73.
[80] **Coubrey H.,** *International Humanitarian Law,: the regulation of armed conflicts***,** Dartmouth Publishing Company, 1990, p.12.

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