Do Soldiers Really Have to Apply Human Rights Law in Military Operations?

The 4th Ruth Steinkraus-Cohen International Law Lecture: 16 May 2006

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I was immensely proud to be invited to deliver the 4th Ruth Steinkraus-Cohen International Law Lecture, not least because of the standing of my illustrious predecessors. I never had the opportunity to meet Ruth Steinkraus-Cohen but I understand that she was enthusiastic about the United Nations and about the works of Hugo Grotius. In this we share common interests. We will all recognise the extremely important role the United Nations plays in strengthening adherence to human rights throughout the world. I feel sure that if Ruth Steinkraus-Cohen had been able to be with us this evening she would have been interested in the title of my lecture.

Although the title of this series of lectures includes the term, 'international law' it is clear now that we cannot look at international law in isolation. In the subject-matter of this lecture international law has a direct bearing not only on cases brought within national courts but also on individual members of the armed forces. In the light of this I am sure you will understand why I will be concentrating on some cases decided in the courts of England and Wales and also on the effect of international and UK law on the actions of the UK armed forces.

Dr Reid, the former Secretary of State for Defence, gave a speech at the RUSI last month which he entitled '20th-Century Rules, 21st Century Conflict'.[1] In it he

[1] 3 April 2006, accessed at http://www.mod.uk/DefenceInternet/DefenceNews/DefencePolicyAndBusiness/Reid

said ‘I believe we need now to consider whether we-the international community in its widest sense-need to re-examine these conventions [existing treaties on the law of armed conflict]. If we do not, we risk continuing to fight a 21st Century conflict with 20th Century rules.’

He was speaking of three particular issues, international terrorism, pre-emption and internal intervention but the first of these is important for my talk tonight since this is concerned with the way in which soldiers actually use the force available to them. Dr Reid, quite rightly, drew attention to the fact that the law must keep up with developments, in this case the threats posed to States and their populations from those who ‘deliberately kill innocent men, women and children.’ By this he meant that international law should provide ‘effective mechanisms…to bring the perpetrators to justice.’

How it should do this will, no doubt, be debated among international lawyers for some time. For instance, how do you define an ‘international terrorist’[2] (is this the same as an ‘insurgent’?) what regime is he or she ‘entitled’ to on capture and what is meant by bringing ‘perpetrators to justice’ (kill them or bring them to a trial)?

[2] See UN General Assembly Resolution A/RES/60/1, para.83 (24 October 2005) in which the General Assembly stressed ‘the need to make every effort to reach an agreement on and conclude a comprehensive convention on international terrorism.’ A Draft Comprehensive Convention on International Terrorism is currently under discussion at the UN. One of the difficulties being encountered is that of an agreed legal definition of ‘terrorism’. See also the International Convention for the Suppression of Acts of Nuclear Terrorism, 13 April 2005. The European Convention on the Prevention of Terrorism 2005 and the Inter-American Convention Against Terrorism 2005 both derive the definition of the offence of ‘terrorism’ from previously existing ‘terrorism’ treaties.

The Secretary of State has drawn attention to a change from the relative certainty of the laws of war[3] to a situation where the law might be said to lag behind the events which it is meant to govern. On top of this is the growing recognition of the applicability of the law of international human rights during military operations.

How is the soldier to cope with this? Are we under 'legal siege' as a former Chief of the Defence Staff, put it recently?[4] Should we try and exempt our armed forces from the European Convention on Human Rights?[5] Do 'International laws hinder UK troops' as the Guardian headline of 4th April declared? It would be a sorry day if they did, given that the foreign and defence policy of the UK is, as Dr Reid stated, one of 'adherence to international law.'

I wish to concentrate on the role of international human rights law and the effects its applicability to military operations has on the work of soldiers. I will argue that such obligations do not, in real terms, add to the burdens of the soldier on the ground since the human rights obligations of the State are designed to ensure enforcement of them through national law. I will also argue that military commanders and private soldiers alike will actually be glad of such a body of law in an uncertain international legal environment.

The obligation on soldiers to protect the vulnerable during military operations is not, of course, new. It underlies the Geneva Conventions 1949 (their predecessors and their Additional Protocols of 1977). Thus, soldiers have had a long-standing duty

[3] Also referred to as international humanitarian law or the law of armed conflict.
[4] Hansard, House of Lords Debates, 14 July 2005, Col.1236. This debate contained some very thoughtful comments by former chiefs of the defence staff, particularly in relation to the difficulties faced by soldiers in an 'operational area'.
[5] See, for example, Mr Duncan-Smith, MP, Shadow Secretary of State for Defence (as he then was), *The Times*, 5 December 2000; Lord Guthrie, House of Lords Debates, 14 July 2005, Col. 1234. Compare Lord Garden, *ibid*, Col.1255.

to protect and respect the wounded and sick on the battlefield, prisoners of war and civilians.

The experience of World War II and the emergence of the United Nations itself led to various formulations of human rights. These were the Universal Declaration on Human Rights in 1948, the European Convention on Human Rights in 1950 followed by the International Covenant on Civil and Political Rights in 1966.[6] The latter two are treaties to which the UK is a party. Those who drafted, certainly the 1950 Convention, must have had in mind that it could apply during war since a State is permitted to derogate from the right to life in respect of lawful acts of war.[7]

Whilst the UK may have understood that the European Convention would apply if it was involved in war on its territory or even in another Convention State it probably did not consider it would apply when it was engaged in armed conflict outside the European area. Thus, during the Falklands War of 1982 the UK could have issued a derogation notice to the right to life under Art.15 of the Convention to permit killing through lawful acts of war but it did not do so.[8] Nor did it do so in respect of the Gulf war 1990-91, or Kosovo in 1999 or Iraq in 2003. A more subtle reason for not doing so might have been the view that enemy combatants, whilst

[6] There are a number of other treaties. See, for instance, the UN Convention Against Torture and other Cruel, Inhuman and Degrading Treatment, 1984; European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987; the American Declaration of the Rights and Duties of Man 1948; American Convention on Human Rights 1969; African Charter on Human and Peoples' Rights 1981. For an example, see *Coard et al v United States*, Report No. 109/99, Case 10.951, Inter-American Commission on Human Rights, 29 September 1999.
[7] The 1950 Convention, Art.15 and see also its Sixth Protocol 1983; The 1966 Convention prohibits 'arbitrary' deprivation of life, on which international humanitarian law is the *lex specialis*, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Reports 66**,** para.25.
[8] An application was brought to the European Court of Human Rights relating to the sinking of the *General Belgrano* by the Royal Navy during the Falklands War. It was declared to be inadmissible due to the fact that it was lodged more than six months after the decision (1982) to sink the ship, *Ibanez and Rojas v The United Kingdom* (19 July 2000).

fighting, would not come within the jurisdiction of the UK in any event so there would have been no reason to derogate.

The bombing by a NATO aircraft of the TV studio in Belgrade in 1999 had unexpected consequences for human rights law. The relatives of those killed and those who were injured in the raid brought an application to the European Court of Human Rights alleging that the NATO States had breached the right to life of those killed.[9] In 2001 the Court decided that the case could not proceed further since the applicants had not been able to show that, at the time of the bombing, they had been 'within the jurisdiction' of a State party to the Convention.[10] The mere fact that NATO States had aerial supremacy over the airspace of Serbia/Montenegro was not sufficient to bring the victims of the raid within this jurisdiction.

The Court went on to hold that it might have done if a State has 'effective control of the relevant territory and its inhabitants abroad as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of the territory, exercises all or some of the public powers normally to be exercised by that Government.'[11] A further passage in the decision, no doubt, caused those who feared the imposition of human rights law during warfare to breathe more easily. It was that the Convention only applied 'in the legal space of the Contracting States.'[12]

[9] Those injured based their applications on Art.10 (freedom of expression) and Art.13 (right to an effective remedy). The case was concerned only with whether the applications were admissible under the Convention.' *Bankovic v Belgium [and other NATO States]* Application No.52207/99, (2002) International Legal Materials 517.
[10] Article 1 of the Convention on Human Rights requires that States party to it 'shall secure to everyone within their jurisdiction [the Convention rights].'
[11] Admissibility Decision, para.71.
[12] Para.80. The significance of this decision has been described as a 'watershed'. The Court of Appeal in *R (Al-Skeini et al) v The Secretary of State for Defence* 2005 WL 3464404 (CA (Civ Div) thought not. See Brooke LJ at para. 75 and Sedley LJ at para.194. See generally, R Wilde, 'The "Legal Space"

Yugoslavia was not a party to the Convention and States party to it probably thought that a war with a fellow Convention State was very unlikely.

This belief did not last long. In 2003 the UK, along with the USA, did something that had previously been thought as highly unlikely. It became an occupying power in Iraq until a new government could assume control. By doing so it thereby owed the inhabitants of Iraq obligations under the Hague Convention 1907 to 'restore, and ensure, as far as possible, public order and safety' and under the Fourth Geneva Convention 1949 to treat them 'humanely'.[13]

It was, perhaps, not surprising to see legal activity over whether the European Convention applied to UK armed forces in Iraq. The case of *Al-Skeini* and others was just such a case which came before the Court of Appeal in December 2005.[14] The ability of the applicants to bring an action in the courts in England was made possible by the implementation of the relevant parts of the European Convention on Human Rights in English law through the Human Rights Act 1988.[15]

The Court decided that, in certain circumstances, the 1998 Act applied to govern the activities of British soldiers in Iraq. Disagreement existed among the

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or "Espace Juridique" of the European Convention on Human Rights: Is it Relevant to Extra-Territorial State Action?' [2005] EHRLR 115.

[13] Regulations Annexed to the Hague Convention (IV) 1907, Art.43; Art.27 Geneva Convention IV 1949 respectively.

[14] *Ibid*. At the time of writing appeal has been made to the House of Lords but it has not been set down for a hearing.

[15] An action in the courts of Iraq was not possible, given the immunity of the MNF from the Iraqi legal process, Coalition Provisional Authority Order 17, CPA/ORD/17, 27 April 2004. Applicants would also be required to exhaust all domestic remedies should they wish to take the case to Strasbourg. In *R (Al Jedda) v Secretary of State for Defence* [2005] EWHC 1809 (Admin) Moses J, at para.49 concluded that 'the intention of the [Human Rights Act 1988] was to enable victims within the UK to enforce the same rights within domestic courts as those which they could enforce in Strasbourg.' See also *Re McKerr (AP)* [2004] UKHL 12, Lord Nicholls, para.34. Lord Hoffmann pointed out, at para.63, that the rights given by the Human Rights Act 1998 are 'domestic rights, not international law rights.' In *R v Spear et al* [2003] 1 AC 734, the House of Lords expressed doubts about whether *Morris v UK* (2002) 34 EHRR 1253 had been correctly decided, Lord Bingham, para.12, Lord Rodger, para.29. Compare the International Covenant on Civil and Political Rights 1966, which the UK has not implemented directly in English law.

judges whether this jurisdiction could extend from the protection of people detained by British soldiers to Iraqi civilians shot and killed on the streets of Basra.[16] The important point arising from this case is that, certainly when a civilian is in the custody of British forces, he is owed at least some of the Convention rights, even though Iraq was not within the *espace juridique* of the Council of Europe.[17]

A detainee who is killed, tortured or otherwise attacked while under detention by British soldiers is not in a 'legal black hole',[18] even if we ignore the European Convention. The soldier who carries out an assault on a detained civilian, any of those who actively encourage or order him to do so and even a military superior who fails to report such an incident could all be tried by court-martial for various criminal or disciplinary offences.

In this respect the Convention rights possessed by the detainee, who by virtue of his detention by British forces comes within the jurisdiction of the UK under the Convention, adds little to the existing obligations of the soldier to obey his military

[16] Compare Brooke LJ with Sedley LJ. Sedley LJ who was supportive of the wider view that jurisdiction could extend to 'the streets patrolled by British troops' but queried whether this would be consistent with *Bankovic* (Paras.206, 207). For the practical consequences of the wider approach to jurisdiction, see p.17 below. Certainly, the view of the Court of Appeal was wider than that of the Divisional Court, which had considered a British military prison in Iraq to come within 'a narrowly limited exception exemplified by embassies, consulates, vessels and aircraft,' [2005] 2 WLR 1401, para.287. He also considered the relationship between Art.43 of the Hague Regulations 1907 and the requirements of 'effective control of territory' at paras.196-198.

[17] The Secretary of State for Defence conceded this point in relation to Baha Mousa in *Al-Skeini et al* (see note 12) para.109. Brooke LJ (*ibid*) concluded that this point arose when Mr Mousa was arrested by British soldiers and therefore before he was taken to a military barracks. The hotel (although, perhaps not the military prison to which he was taken) was outside the *espace juridique* of a Council of Europe State, see Sedley LJ, para.185. An argument could be presented that the *espace juridique* refers not to the legal space of the State in whose territory foreign armed forces have established 'effective control' but that of the State which has brought inhabitants of the foreign territory within its jurisdiction. For the extra-territoriality of the 1966 Covenant on Civil and Political Rights see UN Human Rights Committee General Comment 31 (29 March 2004); Advisory Opinion of the International Court of Justice, *Legal Consequences of a Wall in the Occupied Palestinian Territory* 2004, paras.108-111; Separate Opinion of Judge Rosalyn Higgins who refers to the 'continued relevance of human rights law in the occupied territory,' para.25.

[18] The phrase was used by Lord Steyn, 'Guantanamo Bay: the Legal Black Hole' (2004) 53 International and Comparative Legal Quarterly 1.

law.[19] Given that he will be trained to understand the consequences of a breach of military law it is this law which will control his actions, if any law could, since he will be personally responsible for any breach. Whether a detainee has any rights under the Human Rights Act 1988, in addition to seeing his attacker prosecuted, is unlikely to be of any direct interest to the individual soldier.[20]

If we say, then, that in certain circumstances the Convention will apply to the acts of British soldiers outside the UK what consequences could this have? Soldiers are often required to kill those who take up arms against them. What then of the right to life given by the European Convention?

Where UK armed forces are operating abroad it is unlikely that enemy soldiers, with whom they are engaged, will be brought 'within the jurisdiction' of the UK so no Convention rights could be owed to them in any event. There would, for instance, be no requirement to carry out an independent investigation into the causes of the death. That is not to say that the British soldier could not be criminally responsible if he killed an enemy soldier by a prohibited means, for example, by the use of a dumdum bullet or by declaring that no quarter would be given.[21]

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[19] This term encompasses the criminal law (which includes offences under the International Criminal Court Act 2001, the Criminal Justice Act 1998, s.134 (torture) and, in theory, the Geneva Conventions Act 1957, military offences and any military orders, such as standing orders.

[20] In *R (Al-Skeini et al) v Secretary of State for Defence* British commanders gave evidence of the circumstances on the ground but none of the soldiers involved gave evidence. Compare, if the Ministry of Defence is sued as being vicariously liable for their actions. See note n.46 below.

[21] This would amount to a crime under English law, the International Criminal Court Act 2001, s.51. The UK military prosecuting authority will, no doubt wish to investigate such an allegation, not least with the objective of showing that the UK is not 'unwilling or unable genuinely to carry out an investigation and prosecution,' so as to give the International Criminal Court jurisdiction over the case, Rome Statute of the International Criminal Court 1998, Ar.17. Lord Garden pointed out that it would involve 'a catastrophic failure of the UK criminal law system for the ICC to assume jurisdiction. It is not helpful to worry our armed forces by suggesting otherwise,' House of Lords Debates 14 July 2005, col. 1255. During the Kosovo campaign in 1999 the International Criminal Tribunal for the Former Yugoslavia would have had jurisdiction to consider crimes within the jurisdiction of the Tribunal allegedly committed by NATO forces. See Final Report to the Prosecutor by the Committee

If the UK does not owe Convention right to enemy soldiers during battle does it owe, for instance, the right to life to its own soldiers? Suppose an order is given to 'fight to the last man'. This may be the province of war films rather than reality in a modern army but what of alleged negligence by superiors which leads to the deaths of soldiers through enemy action or even where the legality of the deployment itself is challenged. Just such a case reached the High Court in December 2005.[22] The relatives of a number of British soldiers killed in Iraq sought judicial review of the refusal to hold an inquiry into the 'circumstances which led to the invasion of Iraq.' The claimants argued that the right to life under Art 2 of the European Convention required an inquiry into the death of an individual within the jurisdiction of the UK. The Court decided, however, that the decision whether to go to war was a political one and an inquiry into the circumstances would be too remote.[23]

A similar situation may arise where a British soldier is killed by friendly fire. Whilst an inquiry is likely to follow it is difficult to say that the soldier has been deprived of his right to life by coalition armed forces since he is not within *their* jurisdiction (assuming that State is a party to the Convention). For the reasons given in the *Rose Gentle* case it would be difficult to argue that the UK has infringed his right to life.[24]

Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia (2000) 39 International Legal Materials 1257.

[22] *R (Rose Gentle and others) v the Prime Minister, the Secretary of State for Defence, the Attorney General* [2005] EWHC 3119. See also the coroner's inquiry into the deaths of 6 RMPs killed in Iraq, 31 March 2006. The coroner decided that they had been unlawfully killed. *Quaere* the relevant law.

[23] See *Osman v United Kingdom* [1998] 29 EHRR 245. Collins J in *Rose Gentle* was prepared to hold that it was not essential for an individual at risk to be identified.

[24] See, however, *Osman v United Kingdom* in which it was decided that in an appropriate case a State may be liable for the actions of others if it had failed to take measures 'within the scope of [its] powers which, judged reasonably, might have been expected to avoid that risk.' Para.116. The deprivation of life need not, however, be carried out intentionally, *Stewart v United Kingdom* (1984) 39 DR 162 (Commission); *McKerr v United Kingdom* (2002) 34 EHRR 20, at para.110. The issue will turn on issues of causation and remoteness. A remedy might be provided by relatives suing the Ministry of

We should not be surprised about all of this even if it may be considered to be a new phenomenon. If we agree that our armed forces (like the police) should be accountable to the law (in so far as the law permits) for their actions it follows that this accountability applies in respect of the treatment of our own soldiers as well as civilians with whom they come into contact.

The detention of prisoners of war is a common feature of modern international wars. Their treatment is governed by the third Geneva Convention which, in effect, prohibits torture, degrading or inhuman treatment. Does human rights law add anything to this, given that these prisoners of war will be within the jurisdiction of a European Convention State? It is unlikely to require anything more of soldiers.[25]

The detention of civilians, which has been a feature of the so-called 'war on terror' is another matter. Certainly, in Iraq they would be 'protected persons' under the fourth Geneva Convention for the period of the occupation and thereby entitled to be treated humanely.[26] They are not to be subjected to any 'physical or moral coercion to obtain information…[or to] physical suffering.'[27]

Defence, see 'Sister to sue MoD over death of airman shot down in Iraq', *The Times*, 19 April 2006, although see *Mulcahy v Ministry of Defence* [1966] QB 732; *West v Ministry of Defence(Damages)* [2005] EWHC 1646. Lord Thomas of Gresford indicated that the Ministry of Defence had admitted liability for negligence in a case brought by the family of Sergeant Roberts who had not been supplied at the time of his death with the ceramic plates in his flak jacket, House of Lords Debates, 27 April 2006, col.268. A successful action for damages may not relieve the State of its obligation to investigate and prosecute in an appropriate case, *Khashiyev and Akayeva v Russia* (Application No.57942/00), Judgment, 24 February 2005, para.121.

[25] Their deprivation of liberty could be justified under Art 2(i)(b) of the European Convention. For the treatment of PoWs during the Iraq campaign onwards see *Operations in Iraq-Lessons for the Future,* Ministry of Defence, December 2003, p.52 which states that 'a small number of allegations were made of misconduct against prisoners of war by UK service personnel, which are currently under service investigation.'

[26] Technically this regime exists only for as long as there is an international armed conflict or occupation, although, arguably, afterwards under customary international law, J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge University Press, 2005) Rule 87. Following UN Security Council Resolution 1546, 8 June 2004, common Art.3 to the Geneva Conventions would impose similar obligations, assuming there exists there a non-international armed conflict. The Court of Appeal in *R (Al-Jedda) v Secretary of State for Defence* [2006] EWCA Civ 327

Again, it is unlikely that human rights law could add anything to this. A good example of the working of the relevant law here is the court-martial of Corporal Kenyon and other soldiers in 2005 for offences in relation to the ill-treatment of a number of Iraqi men who had been caught stealing items from Camp Breadbasket in Iraq. One of the soldiers involved had taken photographs of the scene and had left them for processing at a high street shop, which led to an investigation and the subsequent court-martial. The soldiers were convicted of a variety of military law offences. I think it fair to say that the result would have been exactly the same even if there was no such body of law known as human rights law. In other words, UK military law was perfectly adequate to enforce standards expected of any human rights instrument. The law of the UK, laws of war and human rights law all pointed in the same direction: that the individual Iraqi civilians should not have been treated in the way they were.[28]

But what human rights law can do is to simplify what may appear to be a confusing situation. Thus, soldiers will know that captured members of the enemy armed forces are to be treated as prisoners of war. But what of civilians who are caught after throwing rocks at British soldiers or who have taken part in looting? Are they 'protected persons' under Geneva Convention IV of 1949 or are they 'civilians' or have they lost their civilian status under Geneva law and therefore transformed into some form of 'unlawful combatant'? Do the Geneva Conventions (and their Protocols of 1977) apply at all? A simple solution for the benefit of the soldier is to say that any

(CA) decided that Resolution 1546 (2004), with its provisions for internment, took priority over the European Convention on Human Rights. Compare the position at Guantanamo Bay and see Inter-American Commission on Human Rights: Detainees in Guantanamo Bay, Cuba: Precautionary Measures (N.259), 28 October 2005.

[27] Fourth Geneva Convention 1949, Arts.31, 32. For the banning by the General Officer Commanding in April 2003, of hooding see Mr Ingram MP, Written Answers, 23 March 2006, Col. 534W.

[28] The offences charged were battery (a criminal offence), conduct to the prejudice of good order and military discipline, disgraceful conduct of a cruel kind and of an indecent kind (all of which are military offences). No issue of 'human rights breaches' arose.

person detained, whoever he or she is, is to be treated in the same way and that an investigation will be carried out if there is any evidence of a breach of the soldier's military law (which includes the criminal law of England and Wales). Unlike Geneva law, human rights law is not concerned with a particular classification of an individual.[29] This makes the position much easier for the soldier.

A real practical problem occurs where the detention is for more than a short period. Human rights law does require a judicial input into the lawfulness of the detention, subject to any overriding UN Security Council Resolution.[30] This can often be difficult for a military force operating in the territory of another State. The easiest course would be to hand individuals over to the territorial State. This may, however, cause a problem where, say, British forces are not confident that that the transferees would be treated in accordance with the human rights standards expected by the European Convention.[31] What can they do?

One course of action would be to set up a judicial process to deal with the lawfulness of those detained under its control and to try those who are alleged to have committed serious offences.[32]

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[29] Evidence suggests that the fact the Geneva Conventions were declared by the US Government not to apply to detainees in the so-called 'war on terror' led to confusion as to the standards by which they should be treated. See generally, K.Greenberg and J. Dratel (eds) *The Torture Papers: the Road to Abu Ghraib* (Cambridge University Press, 2005).

[30] European Convention Art.5(3),(4) and see the reference to *R (Al-Jedda) v Secretary of State for Defence* (2006) in note 26 above.

[31] See *Soering v United Kingdom* (1989) 11 EHRR 439. For the compatibility of the Afghan criminal law with international human rights treaties see Mr Alexander MP, Written Answers, 18 April 2006, Col. 71W and "*Justice for All" A Comprehensive Needs Analysis for Justice in Afghanistan*, Ministry of Justice, Kabul, May 2005, http://www.af/resources/aaca/cg+adf/justice_cg/LT_Gap%20(1).pdf which draws attention to the fact that some 90% of Afghans 'are more likely to look to community organisations for traditional justice than they are to approach the state system for modern justice,' p.12.

[32] An alternative would be to give Geneva law the status of the *lex specialis* over offences related to the armed conflict. Where it applies see, Additional Protocol I, Art.75. In respect of States not party to it, it is argued to reflect customary international law, Rules 99-103, J-M Henckaerts and L Doswald-Beck, *Customary International Humanitarian Law* (Cambridge, 2005). It is likely, however, that the same practical difficulties would apply, although this body of law is more sympathetic to civilians being tried

But imagine the difficulties of doing this outside the UK. Judges, lawyers, court administrators, appeal judges would all have to be provided. And what law would a detainee defendant be liable to? The law of his State, English law, a variation of these or some code of UN law?[33]

We will all be aware, however that around the world soldiers kill or ill-treat civilians in a variety of situations other than during an international armed conflict. Strictly, the Geneva Conventions apply only to an armed conflict. Human rights law does not possess any such limitation. It applies in all situations including, as we have seen, during time of armed conflict. Where the soldiers are acting within their own State there is no issue of whether the victims have come within that jurisdiction, which as shown above, is an issue when the fighting takes place abroad.

But there is a trend, on the part of human rights bodies,[34] to decide that an armed conflict is in existence. In this way they can draw upon the detail of the Geneva Conventions, which is, of course, a code of conduct setting out, in particular, prohibited methods of fighting in common Article 3. Indeed, the International Court of Justice[35] spoke of Art 3 as 'elementary considerations of humanity' and Pictet, the editor of the commentaries on the Geneva Conventions 1949, as a 'Convention in miniature'. It gives protection to those taking no active part in hostilities and to those who are no longer fighting. In effect, in interpreting the right to life, for instance,

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by military courts. It may be the only basis of law if the State has made permitted derogations from its human rights obligations.

[33] The issues are explored by B. Oswald, 'Model Codes for Criminal Justice and Peace Operations: Some Legal Issues' (2004) 9 Journal of Conflict & Security Law 253.

[34] Although not on the part of some politicians, who may argue that there is no civil war (or armed conflict) taking place.

[35] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (1986) ICJ Reports 14, para.218.

human rights bodies have tended to treat common Article 3 as the *lex specialis*-the specialist body of law to which reference can be made.[36]

Some have argued that human rights bodies have no mandate to consider Geneva law but I think it is helpful that they do for two main reasons. First, it ensures that 'Geneva law' is applied widely even if technically there is dispute over whether there is actually an armed conflict in existence. Secondly, it is a body of law well known throughout most of the world. The sight of ICRC delegates must be very re-assuring to many people in war-torn countries.

Where there is some form of civil disorder within a State in which the armed forces are required to 'fight' rebels of one sort or another it has become common to call this a 'dirty war'. I think this term should be deprecated. It tends to lead one to think that no law is applicable-hence the use of the adjective, 'dirty'. Moreover, the use of the term, 'war' can become the basis of an excuse for egregious acts on both sides.[37]

Whilst it may be difficult, in practical terms, to train rebels in the fundamental principles of common Art 3 of the Geneva Conventions and of human rights that same difficulty should not apply to soldiers. Soldiers spend a much longer period of their professional lives being trained for one task or another than most comparable professions. The armed forces can bring to bear a much greater degree of discipline on its members than a civilian employer could ever do and they should be able to take the benefit of guidance in the form of rules of engagement or otherwise.

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[36] *Case 11.137, Abella v Argentina,* Report No.55/97, 18 November 1997.

[37] It could, for instance, lead soldiers to believe they can use the same degree of military muscle as they would use in an international armed conflict. For an example see *Isayeva v Russia* (Application No. 57950/00), Judgment, 24 February 2005. See also N Lubell, 'Challenges in Applying Human Rights Law to Armed Conflict' (2005) 87 International Review of the Red Cross 737.

It seems axiomatic that soldiers serving with UN forces in one form or another should comply with human rights standards in their dealings with the inhabitants of the territory into which they are placed. Some States participating in UN operations are not parties to any human rights instrument and may be unused to operating within the parameters of one. Stories of misconduct by UN peacekeepers are, sadly, not rare. These range from sexual misconduct, unjust enrichment to assaults and worse. What can the UN do? It is, I believe unrealistic at the present time to think about some UN body being given by participating States the power to discipline directly any offending peacekeepers.[38] The UN can only then call upon the participating States to discipline their own soldiers concerned. I am sure there is considerable variation among States as to the thoroughness by which such action is taken. The way in which Canada dealt with the misconduct of some of its soldiers in Somalia is, perhaps, a lesson for all States facing a similar issue.[39]

Conclusions

It was not all that long ago when commanders hardly had to think about human rights obligations affecting the way in which they, or their soldiers, acted. This was not because they ignored them but merely thought of them as something else- Geneva Conventions or military law obligations or, indeed aspects of chivalry.

To the individual soldier the human rights obligations of the State, of which he is an agent, may have little practical significance. His military law is likely to be uppermost

[38] See, however, the debate in the UN Security Council on this issue in which Mr Guehenno, Under Secretary General for Peacekeeping Operations explained the steps being taken by the conduct and discipline team at DPKO, S/PV.5379, 23 February 2006; Mr Pearson MP, Written Answers, 6 March 2006, col. 1180W. See also UN Security Council Resolution 1648 (2005). It does not necessarily follow that misconduct by UN force members will equate to a breach of an individual's human rights.
[39] Commission of Inquiry into the Deployment of Canadian Forces in Somalia. An issue which arose, in the course of the inquiry was whether Geneva Convention IV, 1949 applied in the area controlled by Canadian forces. There has been considerable debate about this.

in his mind-if he thinks about law at all. In writing the rules of engagement in the form given to each soldier his commanders should be able to spell out for him in basic terms when he can open fire, how he is to treat civilians and so on.[40] It seems to me important for commanders to ensure that these rules of engagement are consistent with all the international obligations (in which I include human rights obligations) of the State.[41] In this way we would not be expecting soldiers to worry about which law applies, his military law, law of armed conflict, human rights law, the law of a foreign State in which he is operating or the relationship between that State's law and the law of his own State.

The *Bankovic* and the *Al-Skeini* cases show that human rights claims can arise in the course of an international armed conflict. The fact that the victim needs to show that he is within the jurisdiction of the State which he claims has infringed his rights is a substantial restriction on his ability to hold a foreign State liable for his treatment. Certainly, the limits of the *Bankovic* case cannot be said to be settled yet, either at the European Court of Human Rights level[42] or in the English courts.[43]

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[40] Lord Thomas of Gresford drew attention to the fact that the rules of engagement were not changed after the armed hostilities against Iraq in 2003 had been concluded and when British troops were 'to act as an armed police force… [they] were given no fresh rules of engagement for many months,' House of Lords Debates, 16 February 2006, col. 1289. Although the rules of engagement are not law, as such, they are intended to provide guidance to the soldier so as to keep him or her within the law.

[41] See, for example, *McCann v United Kingdom* (1996) 21 EHRR 97 where English law on the actual use of force was broadly similar to Art.2(2) of the European Convention, para.155. National law and the European Convention were in harmony and so the soldier need only think about his obligations under the former. Compare, however, *Nachova v Bulgaria* (2006) 42 EHRR 43, para.150.

[42] See, for example, the European Court's judgment in *Issa v Turkey* (Application No.31821/96) 30 March 2005, para.75, which involved a military operation by Turkish armed forces lasting just under one month to pursue alleged terrorists who they believed were sheltering in northern Iraq. The Court did 'not exclude the possibility that, as a consequence of the military action, [Turkey] could be considered to have exercised, temporarily, effective overall control of a particular part of northern Iraq,' para.74. The Iraqi applicants were, however, unable to prove that 'the Turkish armed forces conducted operations in the area in question,' para.81. It is difficult to conclude that Turkish armed forces were in occupation of those parts of northern Iraq in which they were stationed. Compare *Saddam Hussein v Albania et al*, Application no. 23276/04, 14 March 2006 (inadmissible).

[43] For a very thorough analysis of the European Court of Human Rights judgements and those of the English courts see Brooke LJ in *R (Al-Skeini et al) v Secretary of State for Defence* (note 12 above). The English courts are required to 'take into account' the decisions of the European Court of Human

Even if we were to anticipate the principles in *Bankovic* being extended to situations where individuals come under the control of foreign armed forces[44] I doubt if this 'human rights element' will affect the soldier as an unacceptable burden. Independent inquiries into alleged wrongdoing on military operations, especially where a civilian is killed or injured are likely to be conducted as a result of the acceptance of the principle of accountability of our armed forces to the law.

In theory, investigations might be for different purposes-to determine whether criminal (or military law) charges might be brought or to conduct an investigation sufficiently robust to comply with the requirements of the European Convention. Although in many cases these different purposes will be amalgamated the issue will be *when* are these Convention inquires required, how wide-ranging should they be and how should they be conducted? In other words, should they cover deaths caused by British soldiers in the streets of Basra, should they look at the conduct of individuals beyond those who may (or could) be prosecuted and whether military investigators can be seen to be independent of the chain of command.[45] None of this

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Rights, Human Rights Act 1998, s.2(1). They do not have a free hand to determine the limits of Art.1 of the Convention. For the relationship between the English courts and the European Court see n.15 above.

[44] At the present time the Court seems determined to link 'jurisdiction' to control over *territory* rather than to control over *individuals*. It is understandable if the ability to 'exercise all or some of the public powers normally to be exercised by that Government' (*Bankovic*, para.71) is considered essential in interpreting 'jurisdiction' in Art.1. Compare *Ocalan v Turkey* (Application No. 46221/99) Grand Chamber, 12 May 2005, where the arresting officials and the applicants were both nationals of Turkey; *Coard v United States* (see n. 6 above) at para.37 (US armed forces operating within Grenada in 1983); HRC General Comment 31 relating to the International Covenant on Civil and Political Rights 1966, 'anyone within the power or effective control of that State party.'

[45] See generally, *McKerr v United Kingdom* (2002) 34 EHRR 20, paras. 108-161. It is clear that the obligation is upon the State to investigate in an appropriate case. It is not for a relative to start the proceedings. Investigations must also be carried out within reasonable time periods. It is 'not an obligation of result, but of means,' *Isayeva v Russia* (note 42 above) at para.212 and the kind of investigation may vary according to the circumstances,' *Bati v Turkey* (2006) 42 EHRR 37. It must be capable of determining whether the 'force used was justified and to the identification and [if not justified] punishment of those responsible,' *Finucane v United Kingdom* (2003) 37 EHRR 29. Despite the fact that the Northern Ireland, Turkish and Russian cases referred to situations within the respective territories of the States concerned it may be easier to follow the procedural requirements of investigations set out above where an individual dies in British custody compared with being killed in a fire-fight with British soldiers. *McKerr* referred, for instance, to the importance of the coroner's inquest

is new. The UK has been a party to the European Convention on Human Rights since it came into operation in 1953 and the conduct of soldiers in Northern Ireland has been considered by the Court on a number of occasions,[46] although this is the first occasion on which the UK has been an occupying power. It is largely because of this that the issue of the extent of the jurisdiction of the UK has arisen. Although there may have been delays[47] and acquittals[48] the number of other trials of soldiers is relatively small, at five.[49]

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held in Gibraltar in *McCann v United Kingdom* (see n. 41 below) and the 'importance of involving the next of kin of a deceased in the procedure and providing them with information,' para. 147. The situation where a State may not be in full control of its territory was considered in *Ilascu v Moldova and Russia* (Application No.48787/99) Judgment 7 May 2004 at paras.331, 333 and 335. The UK is able to co-operate with the territorial State in Iraq, certainly since UN Security Council Resolution 1546 (2004) and see UN Security Council Resolution 1637 (2005) which refers to 'close co-operation' between the Multinational Force and the Interim Government of Iraq. Subject to this it is clear, however, that 'neither the prevalence of violent armed clashes nor the high incidence of fatalities can displace the obligation under Article 2 to ensure that an effective independent obligation is conducted into the deaths arising out of the clashes involving the security forces,' *Ozkan v Turkey* (Application No. 21689/93) Judgment, 6 April 2004 para.319. There may be thought to be a clash of priorities- between protecting the morale of soldiers who are risking their lives and the need to carry out proper investigations. For the issue of whether investigations were merely manifestations of 'political correctness' see the letter from the Shadow Defence Ministers, *The Times*, 15 November 2005 and the response of the Attorney- General, *The Times*, 16 November 2005. For the difficulties faced by military investigators see *R (Al-Skeini) v Secretary of State for Defence* (note 12 above), Sedley LJ at paras. 137-141;*Chevchenko v Ukraine* (Application No. 32478/02), Judgment, 4 April 2006, paras.71 (*quaere* whether this is stated too widely) and 75; *Nachova v Bulgaria* (2006) 42 EHRR 43 (killing of conscripts) at para.167 *Bati v Turkey* (2006) 42 EHRR 37, paras. 133-; the direction to the court-martial by the Judge Advocate General to deliver not guilty verdicts, *R v Evans et al*, OJAG Case Reference: 2005/59, 3 November 2005, para.30 and the Statement made by Lord Goldsmith, House of Lords Debates, 27 April 2006, Col.262.

[46] See *Ireland v The United Kingdom* (1978) 2 EHRR 25; *Farrell v United Kingdom* (1983) 5 EHRR 466 (Commission); *McCann v United Kingdom* (1995*)* 21 EHRR 97. In *McCann* the Court found that the acts of the soldiers who had fired the fatal shots at suspected IRA members in Gibraltar did not give rise to a violation of the right to life, para.200, but that the circumstances surrounding the shooting did. There could have been no doubt that all those shot by soldiers in Northern Ireland were 'within the jurisdiction' of the UK and were owed, in consequence, the right to life under Art 2 of the Convention. A number of soldiers were also prosecuted in the courts of the UK, see, for example, *AG Reference for Northern Ireland's Reference (No.1 of 1975)* [1976] 2 All ER 937 (acquitted); *R v Clegg* [1995] 1 AC 482 (convicted). Similarly, those killed by the Russian armed forces in Chechnya were within the jurisdiction of the Russian Federation. See, for example, *Isayeva v Russia* (Application No.57950/00) Judgment, 24 February 2005; *Khashiyev and Akayeva v Russia* (Application No. 57942/00), Judgment, 24 February 2005. Actions for damages were pursued by those who alleged they had been injured by soldiers (or the relatives of those killed), in N.Ireland, Russia and in Kosovo (see *Bici v Ministry of Defence* [2004] EWHC 786 (QB)).

[47] Although not related specifically to any theatre of operations the average waiting time 'between a person being charged and appearing before a court-martial [in the Army] in 2005 is 307 days,' Written Answers 13 March 2006, Col. 1945W. See also the statement of the Attorney General on the delay in deciding that soldiers involved in the deaths of Sergeant Roberts and of Mr Zaher Zaher were not to be prosecuted, House of Lords Debates, 27 April 2006, Col. 262. The killing took place on 24 March 2003.

The most egregious breaches of human rights by armed forces occur nowadays during civil wars or civil disturbances. Here I believe the UN can continue to play an important role in encouraging States to become parties to human rights instruments in much the same way as the ICRC has done in respect of the Geneva Conventions and their additional protocols.[50]

Becoming a party to a treaty is only half the battle. The principles within the treaty must be incorporated into the training of soldiers (as with the Geneva Conventions) but in a way that does not confuse him or her. There is no point, for instance, telling soldiers that they must not engage in torture or inhuman treatment because of military law, Geneva Conventions and human rights instrument). Simply, they must not do it.

Where, however, he is to carry out military operations in a situation in which the Geneva Conventions do not apply a potentially dangerous situation will arise since it may be unclear how those the soldier comes into contact with should be treated. His military law will, of course, continue to apply but the human rights obligations of his State are likely to be significant in two ways. I have argued above that all civilians,

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[48] See the case of Trooper Williams (referred to by the Attorney General in House of Lords Debates, 16 February 2006, Col. 1294) where the prosecution at the Crown Court offered no evidence (on which see House of Commons Library Research Paper 05/75, 11 November 2005, pp.55-56) and, following a direction of the Judge Advocate General, seven soldiers were found not guilty (see note 45 above). Acquittals of soldiers often leads to suggestions that the soldiers should never have been prosecuted and that their prosecution has had a negative effect on morale, see the Shadow Secretary of State for Defence, House of Commons Debates, 7 November 2005, cols. 22-23. In both the Trooper Williams case and in the direction by the Judge Advocate General in *Evans et al* there was no suggestion that the prosecutions should not have been brought.

[49] On 27 April 2006 the Attorney General gave statistics (correct as at 7 November 2005) as follows. 'More than 80,000 members of the British armed forces have served in Iraq. There have been 184 investigations since the start of operations in Iraq-these cover all types of incidents-100 of those relate to incidents where British forces were fired on by insurgents and returned fire; 164 investigations were closed with no further action; two investigations are still with the service police; five are awaiting trial, one is being considered by the chain of command, five are with prosecuting authorities, three cases were dealt with summarily by commanding officers and five cases have been dealt with by the courts,' House of Lords Debates, 27 April 2006, col.274. It is not clear how many of these investigations were sufficiently robust to comply with the duty to investigate an alleged breach of the right to life. See, for example, *R (Al Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401 at para.340.

[50] See, for example, General Assembly Resolution, A/RES/60/149, 15 December 2005, paras.2, 3. See also the Responsibility to Protect Resolution, A/RES/60/1, 24 October 2005, paras.119, 122.

whoever they are, should be treated in accordance with the human rights obligations of the State when they come into the custody of soldiers.

The fact that decisions of human rights bodies are published *can* have a significant effect on the practice of States. In this regard the Inter-American Commission on Human Rights has played a major role in setting standards for armed forces particularly those in South America and in providing compensation to those affected by the actions of the soldiers of some States.[51]

Where an individual claim can be brought before a human right body at least three significant consequences follow. The first is that the victim (or a group of victims) of a breach of human rights by a soldier can learn, following an effective investigation, how the death came about. Secondly, he may be awarded compensation (or 'just satisfaction'). The third is that a State can be held accountable for the actions of its soldiers and it may take steps to prevent such an infringement in the future. Thus, the death of Baha Mousa at the hands of British forces in Iraq in 2003 was the subject of a Human Rights Act claim in the English courts[52] and will be the basis of a court-martial of the soldiers involved later this year.[53] Given that a trial of the soldiers concerned will be an important element of an effective investigation the normal pattern will be for a criminal trial to take place (if the evidence justifies it) before a human rights claim can be decided.[54]

[51] See generally, P.Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006), chapter 6.
[52] *Al-Skeini et al v Secretary of State for Defence* (see note 12 above). Technically, it was an application for 'judicial review of the Secretary of State's alleged failure and/or refusal: (i) to conduct independent inquiries into the deaths of the deceased, (ii) to accept liability for those deaths and (iii) to pay just satisfaction,' [2004] EWHC 2911, Rix LJ, para.2.
[53] *Ibid*, Brooke LJ, paras.20, 31, 171.
[54] *Ibid*, para.179.

Finally, some may be tempted to say that human rights law (as an aspect of international law) hinders UK troops, as the Guardian headline indicated last month. I do not believe this to be the case. When, over a series of cases before the European Court of Human Rights starting in 1996, the UK court-martial procedure was altered radically great concern was expressed in some quarters. Experience has shown that the present court-martial system (which will be further altered should the Armed Forces Bill 2006 gain the Royal assent) is in a very healthy state as a result of such changes.

The Armed Forces Bill is designed, in part, to deal with one issue which arose in the Trooper Williams case, namely the continuance of an investigation and possible prosecution within the civilian court system once a commanding officer had dismissed a case. The Bill provides that the military police must refer serious cases directly to the Director of Service Prosecutions.[55] This will have the effect that the decision not to prosecute will be made by a legal authority independent of the chain of command and will go some way to ensure the independence of investigations required under the Convention.

It seems clear to me that if we (or indeed, any other State) wishes to encourage other States to ensure that their armed forces act within, at least basic principles of human

[55] Clause 116 (Bill as printed 25 April 2006). This is designed to ensure that the military justice system is not prevented from trying a soldier through the dismissal of a case by his commanding officer. See also House of Commons Select Committee on the Armed Forces Bill, oral evidence, 19 January 2006, Q7. In theory, the transfer of cases from military to civilian jurisdiction, as happened in the Trooper Williams case and that of the case against soldiers in respect of the killing of Sergeant Roberts and of Mr Zaher (see House of Lords Debates 27 April 2006, Col.262) could recur should the Bill receive the Royal Assent. This would, however, only be likely to happen if the Director of Service Prosecutions and the Attorney General agreed that the case should be brought within a civilian court where the offence (such as murder) attracted concurrent jurisdiction between the two systems. See the Attorney General's arguments for deciding to transfer the case involving the killing of Sergeant Roberts and of Mr Zaher to the civilian system, House of Lords Debates, 27 April 2006, Col. 262.

rights, we must be seen to be complying with our own international human rights obligations.

'Human rights' and, in particular, the European Convention on Human Rights can get a bad press in the UK. I hope, however, you will agree with me that this should not be the fate of the topic I have discussed tonight. In concluding I should like to adopt the words of Mr Justice Elias who said, in giving judgment in *Bici v Ministry of Defence* (2004)[56] 'The British Army can justifiably be proud of the operation it carried out in Kosovo…It displayed professionalism and discipline of the highest quality…But soldiers are human; from time to time mistakes inevitable, and even the most rigorous discipline will crack…The Queen's uniform is not a licence to commit wrongdoing, and it has never been suggested that it should be. The Army should be held accountable for such shortcomings…a proper system of justice requires no less.'

Thank you.

[56] See note 46 above.