

Books and reviews

1991 PAUL REUTER PRIZE

THE INTERNATIONAL LAW OF ARMED CONFLICT: PERSONAL AND MATERIAL FIELDS OF APPLICATION

The wealth of literature on international humanitarian law (IHL) has recently been further enriched by this work of Edward K. Kwakwa,* one of the two winners of the 1991 Paul Reuter Prize.

Undoubtedly, this book will become a “classic”, a major reference work for all who wish to understand, discuss and teach IHL, for it is refreshingly original in its handling of a subject that is not particularly original in itself. Right from the start, the author shows a great respect for the reader and is careful not to leave anything to chance: to avoid any misunderstanding he clarifies the legal terms and expressions used and is at pains to define the purpose and focus of the study. Each chapter dealing with the various aspects of humanitarian law begins with a brief introduction and concludes with a summary and partial conclusions; these are not only very useful for the hasty reader but also help by providing a continuity of thought linking one chapter to the next. It is immediately evident that in dealing with the various aspects of IHL the author has adopted a highly structured approach, with a logical progression from each subject to the next.

But there is more: although Kwakwa consults a wide range of critical sources, quoting the best known authors, he is never constrained by them but makes his voice heard, particularly in the most controversial areas.

The legal scholar’s close-knit analysis never lapses into pure academicism because the author carefully illustrates his remarks with examples and cases judiciously chosen from amongst the most recent conflicts.

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After giving a detailed historical account of the various IHL instruments since the Middle Ages, with reference to certain armed conflicts, and showing the advance of law with its successive achievements, marked for instance by

* Edward K. Kwakwa, *The International Law of Armed Conflict: Personal and Material Fields of Application*, winner of the 1991 Paul Reuter Prize awarded by the International Committee of the Red Cross, Kluwer Academic Publishers, Dordrecht, Boston, London, 1992, 208 pages.

the 1863 Lieber Code and the 1949 and 1977 Diplomatic Conferences, the author moves on to the *customary international law of armed conflicts*. He underscores the importance of custom in international legal practice and at the same time the difficulty in identifying its existence, especially in cases of armed conflict. Nonetheless certain general principles, such as those of military necessity, humanity, proportionality and distinction, are crystallized through the practice of State and non-State entities; the author analyses these principles while stressing the dichotomy between what belligerents say and how they actually behave on the battlefield. Decisions are taken by commanding officers and not by jurists. Hence the stress placed by the author on the usefulness of national military manuals, which he considers as an important source of customary law, and especially the need for scholarly studies to ascertain the formation of custom in the humanitarian law field.

When examining the *material field of application* of the law of armed conflicts, Mr. Kwakwa closely analyses Article 2 common to the four Geneva Conventions in the light of recent events. In particular, he distinguishes between conflicts without a declaration of war (Panama, Falklands/Malvinas) and conflicts involving total or partial occupation of the territory of a High Contracting Party. Then going on deal with wars of national liberation, the author demonstrates why Article 1.4 of Protocol I has given rise to so much controversy. To his mind, this provision should not apply exclusively to national liberation movements but should also include all groups and communities fighting for their right to self-determination. Here the author gives the term "peoples" a broad interpretation enabling the protection of *jus in bello* to be expanded to the greatest possible number of conflict victims.

By way of example, Mr. Kwakwa examines the question of the applicability of the law of war to the conflicts in Namibia and South Africa.

He concludes from this examination that, although Article 2 common to the Geneva Conventions may be cited as a customary principle, the same does not yet apply to Article 1.4 of Protocol I. However, the practice of States shows a clear trend towards treating captured members of liberation movements as prisoners of war as long as they are wearing distinctive uniforms and refraining from attacks on the civilian populace.

In logical sequence the author next considers the provisions relating to the *personal field of application* and the contentious issues to which they have given rise, stemming essentially from the traditional distinction between regular and irregular combatants. Concentrating on guerrilla warfare and combatant and prisoner-of-war status (notably Articles 43 and 44 of Protocol I), the author examines the differing interpretations given to these texts: he comes to the conclusion that they constitute the best possible compromise between the fundamental necessity to protect the civilian population, on the one hand, and the need for humanitarian protection of combatants, on the other.

Tackling the question of mercenaries, Mr. Kwakwa believes that Article 47 of Protocol I provides the best definition of them to date. After

setting this question in its historical context and illustrating his analysis by numerous examples in Africa, he then proceeds to make a very interesting examination of national legislation on the subject in a few countries — the United States, the United Kingdom, Angola — and of the relevant provisions in the 1972 Convention of the Organization of African Unity and that adopted by the United Nations in 1989. In conclusion, noting that the treatment of mercenaries varies from one country to another, the author hopes that in the future States will grant combatant and prisoner-of-war status to mercenaries who behave in accordance with IHL.

The chapter on *reprisals* is one of the most significant illustrations of the author's method: definition of reprisals in public international law, differences between reprisals in time of war and reprisals in peacetime (counter-measures), the law prior to and since the First World War, and specific developments of the law by the 1949 Conventions and especially the Additional Protocols. The author focuses mainly on reprisals against civilians, civilian objects, cultural objects and places of worship, etc. Although in his assessment he considers that the 1949 Geneva Conventions' prohibition on reprisals has become part of customary law, this is not the case for the Protocols. By way of proof he adduces the fact that no State party to these Protocols has incorporated the new provisions into its military manual.

Furthermore he believes that the frequent recourse to reprisals is due to an absence of effective institutional structures to implement IHL and cites as examples of such inefficacy the system of Protecting Powers, the International Fact-Finding Commission with its limited mandate and even diplomatic pressure brought to bear during an armed conflict. The author regrets that the international community is not yet ready to abandon reprisals, but does feel that certain prohibitions on reprisals against the civilian population and objects which are indispensable to their survival are likely to pass into the corpus of customary international law.

Another major chapter deals with the *implementation and enforcement* of IHL. The author begins by describing the mechanisms for implementation of IHL at the international level (the International Fact-Finding Commission, Protecting Powers, ICRC) and then at the national level (dissemination, military manuals, legal advisers, etc.) before going on to analyse questions of implementation involving national liberation movements.

In his general conclusion, the author points out that States, by signing the Conventions and Protocols, have undertaken to respect and ensure respect for them in all circumstances. The challenge in the years to come will be attempting to reconcile humanitarian interests with military necessities, and humanitarian values with the political will of States. Dissemination remains a priority and the author considers that it would be appropriate for the international community to draft a set of norms prescribing the minimum actions required of States in fulfilment of their obligation to disseminate IHL.

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While being both a manual on humanitarian law and a personal critical assessment, Mr. Kwakwa's book is also very well written: the clarity of style makes it as easy to read as a novel. At a time when the teaching of IHL has higher priority than ever, we can but hope that this work will be translated into other languages.

LA HUMANIZACIÓN DE LA GUERRA

International humanitarian law and the armed conflict in Colombia

Alejandro Valencia Villa, joint winner of the 1991 Paul Reuter Prize, has published "La humanización de la guerra",¹ a work in which he examines from the historical, legal and political standpoint the development of international law and the law of armed conflict in his native Colombia. The book is intended to demonstrate from both a legal and historical perspective that implementing the basic principles and rules of humanitarian law allows better protection for civilians in a situation of ongoing guerilla activity. This book is in fact a passionate and convincing appeal for ratification by Colombia of the Protocols additional to the Geneva Conventions.

There is a certain similarity of approach between Valencia Villa and his fellow prize-winner Edward K. Kwakwa. Like Kwakwa, Valencia Villa is at pains to spell out the concepts of international law, and specifically international humanitarian law, that are sometimes confused in his country. Also like Kwakwa, he makes a point of sketching the history of humanitarian thought from ancient times up to the nineteenth century, with particular emphasis on the role played by three figures in Latin American history. The first is Simón Bolívar, *el Libertador*, who during the conflicts that broke out after Colombian independence proposed, negotiated and signed a treaty in 1820 with Pablo Morillo to regulate the conduct of hostilities — one of the first agreements of its kind. This was followed by a covenant governing the treatment of civilians, exchange of prisoners and burial of the dead. The second figure is Andrés Bello whose major work "*Principios de derecho de gentes*" in 1832 had a great impact on both military commanders and legislators in terms of the protection of women, children, the elderly, the wounded and the sick. Finally — again like Kwakwa — Valencia Villa devotes space to Francis Lieber, whose Lieber Code for the US army in 1863 marked the first attempt to lay down rules to make civil wars more humane.

¹ Alejandro Valencia Villa, *La humanización de la guerra — Derecho internacional humanitario y conflicto armado en Colombia*, Ediciones Uniandes, Tercer Mundo Editores, Bogotá, 1991, 202 p.