

REPORTS AND DOCUMENTS

What's new in law and case law around the world?

Biannual update on national implementation of international humanitarian law* January–June 2016

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The biannual update on national legislation and case law is an important tool in promoting the exchange of information on national measures for the implementation of international humanitarian law (IHL).

In addition to a compilation of domestic laws and case law, the biannual update includes other relevant information related to accession and ratification of IHL and other related instruments, and to developments regarding national committees and similar bodies on IHL. It also provides information on efforts by the ICRC Advisory Service during the period covered to promote universalization of IHL and other related instruments, and their national implementation.

ICRC Advisory Service

The ICRC's Advisory Service on International Humanitarian Law aims to provide a systematic and proactive response to efforts to enhance national implementation of international humanitarian law (IHL). Working worldwide, through a network of legal advisers, to supplement and support governments' own resources, its four priorities are: (i) to encourage and support adherence to IHL-related treaties; (ii) to assist States by providing them with specialized legal advice and the technical expertise required to incorporate IHL into their domestic legal frameworks;¹ (iii) to collect and facilitate the exchange of information on national implementation measures and case law;² and (iv) to support the work of committees on IHL and other bodies established to facilitate the IHL implementation process.

* This selection of national legislation and case law has been prepared by Estefania Polit, Legal Attaché in the ICRC Advisory Service on International Humanitarian Law, with the collaboration of regional legal advisers.

Update on the accession and ratification of IHL and other related international instruments

Universal participation in IHL and other related treaties is a first vital step toward respect for life and human dignity in situations of armed conflict. In the period under review, twelve IHL and other related international conventions and protocols were ratified or acceded to by fifteen States.³ In particular, there has been notable ratification/accession to the Arms Trade Treaty (ATT). Indeed, seven States ratified the ATT in the first half of 2016, bringing the number of States Parties as of 30 June 2016 to eighty-six. In addition, four States have acceded to the Protocol on Explosive Remnants of War (Protocol V) to the Convention on Certain Conventional Weapons during the period in question.

Other international treaties are also of relevance for the protection of persons during armed conflicts, such as the Optional Protocol to the Convention on the Rights of the Child and the International Convention for the Protection of all Persons from Enforced Disappearance (CPPED).

The following table outlines the total number of ratifications of and accessions to IHL treaties and other relevant related international instruments, as of the end of June 2016.

Ratifications and accessions, January–June 2016

Conventions	States	Ratification/ accession date	Number of parties
1971 Convention on the Prohibition of Biological Weapons	Côte d'Ivoire	23 March 2016	174
1980 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	Bahrain	11 March 2016	123
	Côte d'Ivoire	25 May 2016	

- 1 In order to assist States, the ICRC Advisory Service proposes a multiplicity of tools, including thematic fact sheets, ratification kits, model laws and checklists, as well as reports from expert meetings, all available at: www.icrc.org/en/war-and-law/ihl-domestic-law (all internet references were accessed in December 2016).
- 2 For information on national implementation measures and case law, please visit the ICRC National Implementation of IHL Database, available at: www.icrc.org/ihl-nat.
- 3 To view the full list of IHL-related treaties, please visit the ICRC Treaties, States Parties and Commentaries Database, available at: www.icrc.org/ihl.

1980 Protocol II to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on Mines, Booby-Traps and Other Devices	Côte d'Ivoire	25 May 2016	95
1980 Protocol III to the Convention on Certain Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons	Bahrain	11 March 2016	113
1995 Protocol IV to the Convention on Certain Conventional Weapons on Blinding Laser Weapons	Bahrain	11 March 2016	107
	Lesotho	25 April 2016	
1998 Rome Statute of the International Criminal Court	El Salvador	3 March 2016	124
2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict	Guinea	8 April 2016	165
	Brunei	17 May 2016	
	Samoa	17 May 2016	
2001 Amendment to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects	Lesotho	25 April 2016	83
2003 Protocol V to the Convention on Certain Conventional Weapons on Explosive Remnants of War	Bahrain	11 March 2016	91
	Lesotho	25 April 2016	
	Montenegro	20 May 2016	
	Côte d'Ivoire	25 May 2016	
2006 International Convention for the Protection of All Persons from Enforced Disappearance	Sri Lanka	25 May 2016	52

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Conventions	States	Ratification/ accession date	Number of parties
2008 Convention on Cluster Munitions	Cuba	6 April 2016	100
	Palau	19 April 2016	
2013 Arms Trade Treaty	Lesotho	25 January 2016	86
	Peru	16 February 2016	
	Greece	29 February 2016	
	Cyprus	10 May 2016	
	Zambia	20 May 2016	
	Georgia	23 May 2016	
	Monaco	30 June 2016	

National implementation of international humanitarian law

The laws and case law presented below were either adopted by States or delivered by domestic courts in the first half of 2016. They cover a variety of topics linked to IHL, such as weapons, terrorism, missing persons, criminal repression, enforced disappearances, victims' rights and establishment of national committees or similar bodies on IHL.

This compilation is not meant to be exhaustive; it represents a selection of the most relevant developments relating to IHL implementation and related issues based on information collected by the ICRC. The full texts of these laws and case law can be found in the ICRC's National Implementation of IHL Database.⁴

A. Legislation

The following section presents, in alphabetical order by country, the domestic legislation adopted during the period under review (January–June 2016). Countries covered are Liberia, Mauritius, Peru, Sri Lanka and Togo.

⁴ See the ICRC National Implementation of IHL Database, available at: www.icrc.org/ihl-nat.

Liberia

*Firearms and Ammunition Control Act*⁵

On 12 May 2016, the House of Representatives of Liberia passed the Liberia Firearms and Ammunition Control Act of 2015, which regulates the possession and use of small arms and light weapons in the country.

The domestic gun control law was established with the purpose of preventing and reducing violence caused by small arms as well as their proliferation. Part II of the Act establishes a national small arms registry as well as the requirements to acquire licenses to possess, use, repair, manufacture, deal, broker, import, export, transit or transship small arms.

Part V of the Act provides for the conditions for brokering, export, import and transit of small arms, ammunition and other related materials. In every section, the law prohibits licensing for these activities when it is known, at the time of considering the application, that this material would be used in the commission of genocide, crimes against humanity or war crimes. The Act further prohibits the brokering, importation, exportation, transit or transshipment of small arms that could be used to commit or facilitate violations of IHL.

The Act prohibits the brokering, import, export, transit and transshipment of such material when it contravenes Liberia's international obligations, including the ECOWAS Small Arms and Light Weapons Convention, and includes an explicit ban on these activities where there is a risk of them resulting in "serious acts of gender-based violence or serious acts of violence against women and children under Liberian Laws".

Finally, the Act establishes the penalties for violations of its provisions, which can range from administrative sanctions to criminal penalties under the Penal Law of Liberia.

Mauritius

*Anti-Personnel Mines and Cluster Munitions (Prohibition) Act 2016*⁶

On 24 June 2016, the Parliament of Mauritius promulgated the Anti-Personnel Mines and Cluster Munitions (Prohibition) Act 2016, repealing the Anti-Personnel Mines (Prohibition) Act of 2015.

According to Section 2, the Act gives effect to the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction and the Convention on Cluster Munitions, domesticating both international instruments through one piece of legislation.

5 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7268B7747562B4E8C12581BE004BECA8&action=openDocument&xp_countrySelected=LR&xp_topicSelected=GVAL-992BUP&from=state.

6 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=644E983208B74E93C1258099003A5B43&action=openDocument&xp_countrySelected=MU&xp_topicSelected=GVAL-992BUP&from=state.

Section 4 establishes a number of offences related to both anti-personnel mines and cluster munitions, and establishes the corresponding penalties. The offences include the development, production, acquisition, stockpiling, retention, use or transferring to anyone, directly or indirectly, of any anti-personnel mine, cluster munition or explosive bomblet specifically designed to be dispersed or released from a dispenser affixed to an aircraft. Any person who in any manner assists, encourages or induces any other person to engage in any of the prohibited acts mentioned above is also held criminally responsible. The Act establishes that if these and other activities are performed for the purpose of detection and destruction of anti-personnel mines and cluster munitions, they will not constitute an offence.

The Act gives jurisdiction to a court in Mauritius in respect of offences committed outside the territory with regards to citizens of or ordinary residents in Mauritius, as well as in cases in which the following conditions are fulfilled: if the act affects or is intended to affect a public institution, a business or any other person in Mauritius; if the person is found to be in Mauritius; and if the person is, for any reason, not extradited by Mauritius, or there is no request to extradite that person.

Peru

*Legislative Resolution No. 30434 Recognizing the Competence of the Committee against Enforced Disappearances of the UN*⁷

On 14 May 2016, the Peruvian Congress passed a legislative resolution in which it approved the Declaration Recognizing the Competence of the United Nations Committee against Enforced Disappearances, after having ratified the CPPED on 26 September 2012.

The Declaration enables the Committee to receive and consider communications from or on behalf of individuals subject to its jurisdiction claiming to be victims of a violation of the provisions of the CPPED by the Republic of Peru, in accordance with Article 31 of the said convention.

*Law No. 30470 on the Search for Missing Persons during the 1980–2000 Period of Violence*⁸

On 22 June 2016, the president of Peru promulgated Law No. 30470 on the search for those who went missing during the 1980–2000 period of violence.

Article 2 provides for a humanitarian approach in the search process in order to relieve the suffering of the families, without excluding the determination of individual criminal responsibility. It prescribes the search process as encompassing forensic investigation, psychosocial support, identification of dead

7 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=C132B826D364E912C12581800046C02D&action=openDocument&xp_countrySelected=PE&xp_topicSelected=GVAL-992BUF&from=state.

8 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=23C5E44C4007B58FC1258009002E5B08&action=openDocument&xp_countrySelected=PE&xp_topicSelected=GVAL-992BUF&from=state.

bodies or human remains, and material and logistic support to the families of missing persons.

Article 3 recognizes the right of families of missing persons to know the fate of their missing relatives, including their whereabouts, or, if deceased, the circumstances and cause of their death, as well as the place of burial.

Article 6 further creates the National Register for Missing Persons and Burial Sites, with a view to individualizing information on missing persons and the circumstances behind their disappearance, as well as to supporting the search process.

Finally, the Second and Third Supplementary Provisions require the Ministry of Justice to create the National Plan for the Search for Missing Persons and to draft a law on the establishment of a genetic data bank of the disappeared.

Sri Lanka

*Prescription (Special Provisions) Act No. 5, regulating the right to pursue the recovery of immovable property due to the activities of any militant terrorist group*⁹

On 26 April 2016, the Parliament of the Democratic Socialist Republic of Sri Lanka passed this Act aimed at protecting the rights of rightful owners to reclaim their immovable property who were not able to do so as a consequence of the activities of militant terrorist groups between 1 May 1983 and 18 May 2009. It allows the said persons to institute such action before the courts within two years after the coming into operation of the Act.

Article 6 further interprets the notion of “activities of any militant terrorist group” as any act which is defined as a “terrorist act” in the Convention on the Suppression of Terrorist Financing Act, No. 25 of 2005, as amended by Act No. 3 of 2013.¹⁰ It further regulates the right of the disadvantaged person, defined in Article 6 as a “person who was unable to pursue his rights in a court in which he was by law enabled to pursue such rights as a result of the circumstances during the period commencing on May 1st, 1983 and ending on May 18th, 2009”, to claim his/her property, and the running of the statute of prescription or limitations.

9 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=74E6A6C69664EBE0C12581800049D7CF&action=openDocument&xp_countrySelected=LK&xp_topicSelected=GVAL-992BUB&from=state.

10 Article 5(2) of the Convention on the Suppression of Terrorist Financing (Amendment) Act, No. 3 of 2013:

- (a) an act which constitutes an offence within the scope of or within the definition of any one of the Treaties specified in Schedule I to this Act;
- (b) any other act intended to cause death or serious bodily injury, to civilians or to any other person not taking an active part in the hostilities, in a situation of armed conflict or otherwise and the purpose of such act, by its nature or context is to intimidate a population or to compel a government or an international organization, to do or to abstain from doing any act.

Togo

*Law No. 2016-008 on the Code of Military Justice*¹¹

On 21 April 2016, the president of Togo promulgated the Law on the Code of Military Justice, repealing Law No. 81-5 of 30 March 1981 on the same subject. The Code addresses various issues related to the organization and jurisdiction of courts, military criminal proceedings, military offences and corresponding penalties.

Article 2 establishes that the Code applies mainly to soldiers of the Togolese armed forces, members of military corps under the Ministry of Security, members of the operational reserve force, prisoners of war, civilians charged with military offences and civilians employed in military services and establishments.

Article 52 gives military jurisdiction the competence to prosecute violations of IHL committed by persons who are part of the military service/corps and also police and members of the military judicial police when they commit offences in their judicial police capacity. However, it subjects military justice to the control of the Supreme Court, in accordance with the provisions of the present Code, the Law on Judicial Organization, the Criminal Code and the Procedural Criminal Code.

The Code, in Title II, criminalizes a number of conducts by military members including insubordination, desertion, surrender, treason, pillaging, looting and destruction. Article 171 further punishes the misuse and abuse of distinctive emblems and signs in violation of the laws and customs of war, carried out by both civilians and members of armed forces.

Certain offences prescribed in the Code of Military Justice, such as the misuse of emblems and pillaging, are also criminalized by the Togolese Criminal Code, adopted on 24 November 2015, and could therefore be prosecuted as war crimes under the Criminal Code.

B. National committees or similar bodies on IHL

National authorities face a formidable task when it comes to implementing IHL within the domestic legal order. This situation has prompted an increasing number of States to recognize the usefulness of creating a group of experts or similar body – often called a national IHL committee or a national commission for IHL – to coordinate activities in the area of IHL. Such committees, *inter alia*, promote ratification of or accession to IHL treaties, make proposals for the harmonization of domestic legislation with the provisions of these treaties, promote dissemination of IHL knowledge, and participate in the formulation of the State's position regarding matters related to IHL. In January 2016, the Palestinian National Commission for the Implementation of IHL was established.

11 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=011C1CE311E3BE4CC1258180003FD4C5&action=openDocument&xp_countrySelected=TG&xp_topicSelected=GVAL-992BU6&from=state.

In addition, Kenya's National Committee was reconstituted on 10 June 2016, bringing the total number of national IHL committees across the world to 109 by June 2016.¹²

Kenya

*National Committee for the Implementation of IHL*¹³

On 10 June 2016, Kenya's National Committee for the Implementation of International Humanitarian Law, created in 2001, was reconstituted as prescribed in Gazette Notice No. 4135.

The main function of the National Committee is to coordinate and monitor the implementation of IHL in Kenya. One of its mandates is to advise the government on the ratification of IHL instruments and the corresponding reporting obligations. It also provides recommendations on existing and new legislation and is responsible for the coordination of IHL dissemination.

The National Committee is chaired by the solicitor-general from the State Law Office and Department of Justice, and is composed of representatives of the Ministries of Foreign Affairs, Defence, Home Affairs, and Sports, Culture and the Arts, the National Police Service, the commissioner-general of prisons, the Regional Delegation of the ICRC, and the Kenyan Red Cross Society.

Palestine

*Palestinian National Commission for the Implementation of IHL*¹⁴

On 13 January 2016, the Palestinian National Commission for the Implementation of IHL was established by Decree No. 2/2016.

The main function of the National Commission is to act as an advisory reference for the State of Palestine with regards to the implementation of IHL. Among its mandates are to coordinate the activities of the entities involved in the dissemination and implementation of IHL and to monitor and document violations of IHL provisions. It is responsible for reviewing laws and preparing draft laws to harmonize the State's actions with the principles and norms of IHL. The National Commission also contributes to improving the level of national expertise and capacity to apply IHL, and strengthening awareness of IHL

12 To view the full list of national committees and other national bodies on IHL, please visit the ICRC's related webpage, available at: <https://www.icrc.org/en/document/table-national-committees-and-other-national-bodies-international-humanitarian-law>.

13 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=7E3FDA204088F5B5C12581BE00500634&action=openDocument&xp_countrySelected=KE&xp_topicSelected=JPAA-9DWC8W&from=topic.

14 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/implementingLaws.xsp?documentId=BC98C369DF153E87C125817F005325EE&action=openDocument&xp_countrySelected=PS&xp_topicSelected=JPAA-9DWC8W&from=topic.

principles among different circles. To attain these objectives, the National Commission cooperates with the ICRC, as established in Article 4.

The National Commission is chaired by the Ministry of Foreign Affairs and includes representatives from the General Secretariat of the Palestinian Liberation Organization, the Palestinian Red Crescent, the Supreme Judicial Council, the Ministries of Justice, the Interior, Education and Higher Education, and Health, the Commission of Detainees and Ex-Detainees Affairs, the Political and National Guidance Organization, the Legal Commissions of the National Assembly and Legislative Assembly, the General Directorate for Civil Defence, the Military Judiciary Authority, the Independent Commission for Human Rights, and civil society organizations concerned with IHL.

C. Case law

The following section lists, in alphabetical order by country, relevant domestic case law related to IHL and released during the period under review (January–June 2016). Countries covered are Colombia, Guatemala, Senegal and South Africa.

Colombia

*Decision No. C-084/16 (2016) on IHL and IHRL application to military prosecutions, Constitutional Court*¹⁵

Keywords: IHL application, military prosecution, human rights.

On 24 February 2016, the Colombian Constitutional Court decided that Legislative Act No. 1 of 2015 was constitutional. The Act amends Article 221 of the Constitution by including two subparagraphs that prescribe the applicability of IHL to the investigation and prosecution of violations perpetrated by members of the armed forces in the context of armed conflict.

A claim of unconstitutionality against the Act was filed by a number of petitioners who argued that the exclusive application of IHL in the investigation and prosecution of violations committed by members of the armed forces in armed conflict violates a fundamental pillar of the Constitution: the obligation of the State to investigate and prosecute serious violations of human rights, as provided under international human rights law (IHRL), as well as serious violations of IHL.

The Court established that the amendment of the Constitution as envisaged in the Act does not exclude the applicability of IHRL in the prosecution of members of the armed forces for violations committed during armed conflict. The Court emphasized that the universal and permanent obligation of the State to respect,

15 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=46229086E0DAE44EC12580D50054C9C0&action=openDocument&xp_countrySelected=CO&xp_topicSelected=GVAL-992BU6&from=state.

protect and fulfil human rights under IHRL forms part of the body of constitutional rules applicable in armed conflict, and further asserted the complementary character of these two legal frameworks.

The Colombian Constitutional Court therefore dismissed the claim, as the Act does not exclude the applicability of human rights, and thus confirmed its enforceability.

Guatemala

*Republic of Guatemala v. Esteelmer Francisco Reyes Girón and Heriberto Valdez Asig, High Risk “A” Tribunal, C-01076-2012-00021*¹⁶

Keywords: sexual violence, IHL application, war crimes.

On 26 February 2016, the Tribunal de Mayor Riesgo A. charged two former military officers with sexual violence and domestic and sexual slavery offences as well as several counts of homicide and enforced disappearances against indigenous women, when stationed at the Sepur Zarco military base in Alta Verapaz.

The Tribunal classified as a non-international armed conflict the situation at the time when the atrocities occurred and then analyzed the conducts of the military forces carried out against the Mayan population and in particular against Mayan Q'eqchi' women.

Article 378 of the Criminal Code punishes “Crimes against duties of humanity”, which includes both war crimes and crimes against humanity, as it refers to “acts against prisoners of war or wounded persons as a result of the hostilities [...]”, or “any other inhumane act against the civilian population”. The Tribunal held that the accused were responsible for crimes against the duties of humanity in the form of sexual violence, humiliating and degrading treatment and domestic slavery.

Further, the prohibition of “cruel treatment and torture” and “outrages upon personal dignity, in particular humiliating and degrading treatment” of civilians and persons *hors de combat*, as established under common Article 3 of the Geneva Conventions of 1949, was invoked by the Tribunal.

Finally, the Tribunal ordered a combination of individual and collective redress measures on behalf of the victims, including the incorporation of women's rights and prevention of violence against women into military education and training curricula.

16 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=1C57325B4F89A421C12581B00043C3DF&action=openDocument&xp_countrySelected=GT&xp_topicSelected=GVAL-992BU6&from=state.

Senegal

*Ministère Public c. Hisssein Habré, Judgment of 30 May 2016, Extraordinary African Chambers*¹⁷

Keywords: Extraordinary African Chambers, Hisssein Habré, universal jurisdiction.

On 30 May 2016, the Extraordinary African Chambers (EAC) of the Senegalese court system delivered the verdict in the case of *Ministère Public c. Hisssein Habré*, former head of State of Chad. The EAC sentenced Habré to life imprisonment for having perpetrated crimes against humanity, war crimes and torture against the Hadjerai and Zaghawa ethnic groups, the people of southern Chad and political opponents, in the period between 7 June 1982 and 1 December 1990.

On 4 July 2000, five months after the Senegalese Regional Tribunal of Dakar had indicted Habré on torture charges, the Court of Appeal of Dakar reverted the decision by declaring that tribunals were not competent to judge acts of torture committed by a foreigner outside Senegal. On 20 March 2001, a ruling from the Court of Cassation confirmed the judgment of the Court of Appeal.

As Senegalese courts had declared a lack of jurisdiction to prosecute the former head of State of Chad, the situation was referred to the African Union, which in 2006 mandated Senegal to try Habré in its territory “on behalf of Africa”.¹⁸ To this end, Senegal underwent a revision of its Constitution and criminal laws to enable the prosecution of Habré.

On 18 November 2010, as a response to the petition filed by Habré claiming his right not to be prosecuted based on the principle of non-retroactivity of the law, the Court of Justice of the Economic Community of West African States (ECOWAS) ruled that Senegal must try Habré through a “special or ad hoc procedure of an international character”.

Following the ECOWAS Court’s judgment, Senegal and the African Union signed an agreement on 22 August 2012 establishing the EAC – embedded in the Senegalese justice system – to prosecute the “person or persons” most responsible for international crimes committed in Chad between 1982 and 1990.

The trial began on 20 July 2015, and approximately one year later the EAC found Habré guilty of torture, of the crimes against humanity of rape, forced slavery, murder, massive and systematic practice of summary executions, kidnapping of persons followed by their enforced disappearance, torture and inhumane treatment, and of the war crimes of murder, torture, inhumane treatment and unlawful confinement.

The conviction represents not only the first time a former head of State has been tried and convicted in another State, but also the first universal jurisdiction case in Africa, as the crimes prosecuted were committed abroad and by a

17 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=A59DAF636BE1C348C12581BE003F356A&action=openDocument&xp_countrySelected=SN&xp_topicSelected=GVAL-992BU6&from=state.

18 See Decision on the Hisssein Habré Case and African Union Doc. Assembly/Au/3 (Vii), available at: www.hrw.org/news/2006/08/02/decision-hissene-habre-case-and-african-union-doc-assembly/au/3-vii.

foreigner, regardless of the nationalities of the victims. An appeal was filed against this judgment on 10 June 2016.

South Africa

*Decision No. 867/15, Minister of Justice and Constitutional Development v. Southern African Litigation Centre, Supreme Court of Appeal*¹⁹

Keywords: arrest warrant, immunities, ICC, Al Bashir.

On 15 March 2016, the Supreme Court of Appeal issued its decision in the case of *Minister of Justice and Constitutional Development v. Southern African Litigation Centre*. The decision follows the appeal filed by the minister against the order of arrest in the case of *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others*.

On 23 June 2015, the Gauteng High Court declared unlawful the conduct of the South African government when it failed to take steps to arrest and detain the president of Sudan, Omar Al Bashir.²⁰ Although the government argued that the basis for the immunity given to President Al Bashir was found in the provisions of the host agreement with the African Union, in terms of the South African Diplomatic Immunities and Privileges Act, No. 37 of 2001 (DIPA), the Court ordered his arrest by virtue of South Africa's domestic and international obligations.

In order to successfully convince the Court to grant the leave to appeal, the government additionally contended that the general immunity which a head of State enjoys stems from the provisions of customary international law and the provisions of Article 4(1)(a) of DIPA, which reads: "A head of state is immune from the criminal and civil jurisdiction of the Courts of the Republic, and enjoys such privileges as ... heads of state enjoy in accordance with the rules of customary international law."

The Supreme Court of Appeal agreed that head of State immunity exists under both customary international law and domestic law, but noted that the Implementation Act, which domesticates the provisions of the Rome Statute, excluded this immunity in relation to international crimes and South Africa's obligations to the International Criminal Court. Therefore, the Supreme Court dismissed the appeal.

19 Available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=06B21F9772B4B800C1257FB1002E7060&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

20 See Supreme Court of Appeal, *Southern African Litigation Centre v. Minister of Justice and Constitutional Development and Others*, 2015 (5) SA 1 (GP), 2015, available at: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/caseLaw.xsp?documentId=481F300878BA3075C1257F1E00386F19&action=openDocument&xp_countrySelected=ZA&xp_topicSelected=GVAL-992BU6&from=state.

Other efforts to strengthen national implementation of IHL

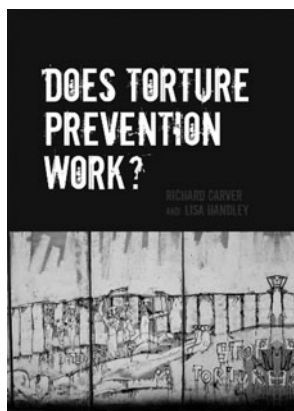
To further its work on implementation of IHL, the ICRC Advisory Service organized, in cooperation with respective host States, regional or sub-regional organizations, a number of national workshops and several regional conferences directed at engaging national authorities in the period under review.

Of particular interest was the Roundtable Meeting on the Progress towards Legally Binding Measures to Prohibit and Eliminate Nuclear Weapons, co-organized by the ICRC, the Institute for Security Studies and the International Law and Policy Institute, which took place on 17–18 February 2016 in Pretoria, South Africa. The event brought together government representatives from Austria, Botswana, Egypt, Ghana, Kenya, Malawi, Mauritius, Nigeria, Norway, South Africa, Switzerland and Zambia. The main topic on the agenda was nuclear non-proliferation and disarmament.

Another event of interest was the Fourth Regional Seminar on IHL National Implementation, jointly organized by the ICRC and the Office of the Attorney General and Department of Justice of the government of Kenya, from 7 to 9 June 2016 in Naivasha, Kenya. The seminar gathered civil servants from various ministries and departments of governments associated with the promotion and national implementation of IHL, including members of national IHL committees from Djibouti, Ethiopia, Kenya, Somalia and Tanzania. Among the topics reviewed during the seminar, particular attention was given to issues related to weapons treaty implementation, the obligation to respect and ensure respect for IHL, country reports, the ICRC 2015 Challenges Report, national IHL committees and the protection of cultural property.

A similar event was held in Abuja, Nigeria, from 28 June to 1 July 2016. The 13th ICRC-ECOWAS Annual Review Meeting on the implementation of IHL brought together governmental officials and national IHL committees from Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea Bissau, Liberia, Mali, Niger, Nigeria, Senegal and Togo. The conference dealt mainly with IHL and national implementation and other IHL-related issues, such as internally displaced persons, the protection of cultural property in armed conflict, and the ATT.

BOOK REVIEW



Does Torture Prevention Work?

Richard Carver and Lisa Handley*

Book review by Olivier Chow, Protection Coordinator for the ICRC Pretoria Regional Delegation for Southern Africa.

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Does Torture Prevention Work?, by Dr Richard Carver from Oxford Brookes University and Dr Lisa Handley, an independent scholar from the United States, is the first independent and global study of the impact of torture prevention measures. The research provides important new insights into the most effective ways to reduce incidences of torture. Carver and Handley led a team of researchers in fourteen countries, and asked them to look at torture and prevention mechanisms over a thirty-year period. Their research demonstrates that torture can be prevented.

This book is important not only because of its key messages and findings but also because it fills a significant gap in the research on torture, a practice that sadly remains a prevalent concern worldwide. There is indeed little extant scholarly analysis of the impact of preventive measures on torture. The legal literature tends to be normative and usually limits itself to what States are required to do, rather than what actually works in practice. Most of what is written about torture is found in country-specific studies, drafted by non-governmental organizations, with alerts that torture is endemic, but not generally explaining why preventive measures succeed or fail.

The book is divided into eighteen chapters, with two discernable sections. The first section is composed of the first three chapters, which introduce and explain the methodology set up for the research as well as the key findings. The second section includes chapters that look at the fourteen country-specific studies:

* Published by Liverpool University Press, Liverpool, 2016.

the United Kingdom, Chile, Hungary, Indonesia, Israel, Peru, South Africa, Georgia, Tunisia, Turkey, Ethiopia, India, Kyrgyzstan and the Philippines. The case studies are grouped into four main categories: countries that have seen consistent and sustained improvement (UK, Chile), countries where positive developments have stalled after initial success (Hungary, Indonesia, Israel, Peru, South Africa), countries that have made recent dramatic improvements which may or may not be sustained (Georgia, Tunisia, Turkey), and finally, countries where there has been no discernable sustained improvement over the years (Ethiopia, India, Kyrgyzstan and the Philippines). In the final chapter, the authors provide their conclusions.

This review will focus on the first section of the book, due to the importance and transversal nature of the research methodology and key findings presented therein. The methodology of the research combines quantitative and qualitative analysis to examine which torture prevention methods were the most effective during the period under review (1984–2014). The researchers identified sixty independent variables, which they divided into four main categories: detention, prosecution, monitoring and complaints mechanisms. These correspond to the main legal obligations contained in the main relevant international and regional treaties, as well as the key recommendations from human rights mechanisms.¹ In addition, the researchers added a variable about training in each of the categories, training being recognized as an important feature of torture prevention.

The authors came up with an index to measure the incidence of torture: the Carver-Handley Torture Score (CHATS), focusing on the frequency, geographical spread and severity of torture.² They used the torture definition contained in Article 1 of the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment³ – thus excluding ill-treatment and cruel, inhuman and degrading treatment (for example, poor material conditions of detention or the use of force during demonstrations). The authors point out the “human rights information paradox”: the significant rise in incidences of torture, which could index a rise in the phenomenon, is often connected to a better documentation and reporting of those incidences, and therefore to a shift by the government towards eliminating torture.

The key finding from the research is that torture prevention works. Detention safeguards have the highest torture prevention impact, followed by prosecution and monitoring mechanisms. The interesting finding is that complaints mechanisms had no measurable impact on torture prevention.⁴ The study found a significant gap between law and practice – particularly with respect to detention safeguards and investigation and prosecution of torturers, often determined by the political environment. The third main finding is that training has a positive impact in all areas: one of the chief recommendations is that

1 *Does Torture Prevention Work?*, pp. 34–35.

2 *Ibid.*, pp. 36–42.

3 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment, 1465 UNTS 85, 10 December 1984 (entered into force 26 June 1987).

4 *Does Torture Prevention Work?*, p. 3.

training should be targeted at improving professional skills, particularly at institutions like police academies, and that it should not be limited to information and dissemination about human rights norms, which is often the case in practice today. Importantly, no single measure alone is sufficient to prevent torture: a holistic approach to torture prevention is therefore necessary in order to create a conducive environment where torture is less likely to occur.

When detention safeguards are applied in practice, this has the highest correlation in reducing incidences of torture. Amongst all of them, abstaining from unofficial detention and the implementation of safeguards in the first hours and days after arrest are the most important means for preventing torture. In particular, notification of relatives or friends and access to a lawyer have the greatest effect in reducing torture, closely followed by access to an independent medical examination. The study also highlights the positive impact of reducing reliance on confessions, which for obvious reasons often leads to coercion and torture. Audio and video recording during interrogation are important but are not much used in practice.

When perpetrators are consistently prosecuted, the risk of torture diminishes. However, there is a huge gap between law and practice: while most countries criminalize torture, prosecutions are rare. One of the factors that came out of the study was whether complaints were lodged with prosecuting authorities. Other important factors are disciplinary sanctions against perpetrators and the absence of amnesty laws for perpetrators.

Monitoring bodies – understood broadly to include National Preventive Mechanisms under the Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment,⁵ but also civil society organizations and international bodies – have a direct effect in reducing torture. Additionally, the ability to carry out unannounced visits and to interview detainees in private are considered key elements. The impact of monitoring bodies in detention might, however, be less significant than expected, and the focus should be on police custody rather than on prisons, which are the focus of most monitoring bodies.

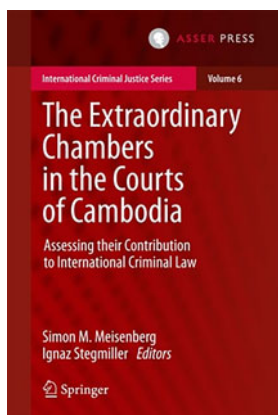
Complaints mechanisms do not have a measurable impact on the prevention of torture, unless there is a specific mandate to carry out investigations and refer cases to a prosecutorial authority.

In addition to the general conclusions mentioned above, there are some interesting yet – for some – unsurprising findings. These include poor quality of data concerning incidences of torture and related issues: poor data handling, shifting definitions of torture which make it difficult to compare data from one year to the next, and torture indicators that do not necessarily indicate much about the incidence of torture. The authors recommend that relevant treaty bodies be supplemented by a format for State recording of data on torture and ill-treatment. This would certainly be helpful.

5 Optional Protocol to the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment, UN Doc. A/RES/57/199, 9 January 2003 (entered into force 22 June 2006).

This book is important because it is the first evidence-based feedback on the many efforts of national and international actors in the field of torture prevention. The findings of the research can provide concrete and actionable material for those who work in the field of torture prevention, enabling them to focus on and invest in what works rather than only going along with a formatted response – which sadly is often the norm. It paves the way to a hopefully more tailored and efficient response. Careful attention should nevertheless be paid to context and environment analysis – the case studies highlight the discrepancies between contexts and the need to keep away from a one-size-fits-all approach. The book's message of cautious optimism will most certainly appeal to and comfort those who are actively involved in this delicate and sometimes frustrating work, where low-hanging fruits are few and far between.

BOOK REVIEW



The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law

Simon Meisenberg and Ignaz Stegmiller (eds)*

Book review by Katie Shea, Federal Prosecutor, Illegal Imports and Exports, Human Exploitation and Border Protection, Commonwealth Director of Public Prosecutions. Former legal intern in the Office of the Co-Prosecutors, ECCC.

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The Extraordinary Chambers in the Courts of Cambodia (ECCC) were established by a joint agreement between the United Nations and the Kingdom of Cambodia in 2006 to try senior leaders and those most responsible for crimes committed under international and domestic law during the era of Democratic Kampuchea from 1975 to 1979. Since its establishment, the ECCC has heard one case to completion and is currently deliberating in the second. The trial in Case 001, against Kaing Guek Eav (alias Duch), the former chairman of the S-21 security centre, closed in November 2009, and on 3 February 2012, following appeals by the accused and the co-prosecutors, the Supreme Court Chamber entered convictions against Duch for crimes against humanity and grave breaches of the Geneva Conventions of 1949,

* Published by T. M. C. Asser Press, The Hague, 2016.

sentencing him to life imprisonment.¹ Case 002, initially involving the four former Khmer Rouge leaders Nuon Chea, Khieu Samphan, Ieng Sary and Ieng Thirith, was severed into a series of smaller trials.² Ieng Thirith was found unfit to stand trial, and Ieng Sary died on 14 March 2013.³ On 7 August 2014, in Case 002/01, Nuon Chea and Khieu Samphan were found guilty of crimes against humanity and sentenced to life imprisonment.⁴ Appeals are currently under way in the Supreme Court Chamber while the Trial Chamber deliberates on the evidence heard in Case 002/02.⁵ Cases 003 and 004, in which Meas Muth, Ao An and Yim Tith have been named as charged persons, remain in the investigation stage.

The Extraordinary Chambers in the Courts of Cambodia: Assessing their Contribution to International Criminal Law, edited by Simon Meisenberg and Ignaz Stegmüller, draws together the contributions of academics and practitioners in international criminal law (ICL), many of whom have been directly involved with the ECCC at some point in the life of the Court. The book seeks to provide a positive, but appropriately critical, analysis of the often overlooked and undervalued contributions made by the ECCC to the development of ICL. In doing so, *The Extraordinary Chambers in the Courts of Cambodia* goes beyond the bare legal principles by also examining the Court's role and responsibility in Cambodian society and its broader implications for a country struggling to come to terms with its violent past and the daily realities of its challenging present.

Frequently, criticisms of the Court's composition, independence and unusual structure enable it to be dismissed from the ICL landscape. With mirrored national and international components (national and international co-investigating judges, national and international co-prosecutors) and a mixed composition of judicial officers in the three chambers,⁶ the Court has been troubled by allegations of interference and deadlocks in decision-making.⁷ Refreshingly, *The Extraordinary Chambers in the Courts of Cambodia* confronts these criticisms directly. Divided into three parts, the book first examines the history of the country, previous efforts at accountability for Khmer Rouge leaders and the challenges in establishing the Court. This introductory section is enriched by the contribution of Dr Helen Jarvis, who has long been embedded in the Cambodian landscape and witnessed first-hand the painful beginnings of the ECCC. Dr Jarvis' chapter introduces readers to the Cambodian reality and provides insight into the profound impact of the Khmer Rouge on national

1 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007-ECCC/SC, Case 001 Appeal Judgment, 3 February 2012, pp. 320–321.

2 See ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Decision on Severance of Case 002 following Supreme Court Chamber Decision of 8 February 2013, 26 April 2013.

3 ECCC, “Case 002”, available at: www.eccc.gov.kh/en/case/topic/2 (all internet references were accessed in July 2017).

4 ECCC, *Prosecutor v. Nuon Chea, Prosecutor v. Khieu Samphan*, Case File/Dossier No. 002/19-09-2007/ECCC/TC, Case 002/01 Judgment, 7 August 2014, pp. 579–580, 595–596.

5 ECCC, “Closing Statements in Case 002/02 Conclude”, 23 June 2017, available at: www.eccc.gov.kh/en/articles/closing-statements-case-00202-conclude.

6 *The Extraordinary Chambers in the Courts of Cambodia*, p. 22.

7 *Ibid.*, Ch. 3.

identity. This part goes on to provide a frank assessment of allegations of political interference, bias and corruption and the heavy weight of expectations on the Court. If occasionally repetitious, the historical background provided by the authors is effective in setting the scene for those unfamiliar with the Cambodian context. In his chapter, Jeudy Oeung does well also to highlight central issues for the Court: victim participation and legacy. Whilst acknowledging the imperfect and limited role of the civil parties in the trials to date,⁸ the authors place that participation in the context it deserves; in circumstances where there has been no truth and reconciliation commission and where former Khmer Rouge cadres still occupy places of responsibility in the country's leadership, holding the trials in the country where the atrocities took place has enabled 243,941 people to physically attend the trial in Case 001 and in the first part of Case 002.⁹ The impacts of this are recognized by the authors. In the context of legacy, this part of the book provides an intense criticism of the opportunities missed for a coherent approach by ECCC staff. It also delivers a frank assessment of capacity-building efforts to improve the Cambodian domestic legal system while recognizing the progress made and the central role of non-governmental organizations in spearheading initiatives for change.

The second part of the book considers the ECCC's substantive contributions to ICL. A thorough analysis of the trial judgments in Case 001, against Kaing Guek Eav,¹⁰ and Case 002, ultimately against Nuon Chea and Khieu Samphan,¹¹ elucidates the many legal questions ventilated, including issues of jurisdiction, the scope of joint criminal enterprise as at 1975–1979, and the legal characterization of acts as genocide. Nathan Quick's thoughtful review of the development of the law on forced transfer and deportation identifies the value of the Trial Chamber's judgment in Case 002/01 in confirming that any forced transfer is a criminal act in its own right.¹² Opportunities lost and taken to develop the law on sexual and gender-based violence at the international level are considered by Valerie Oosterveld and Patricia Viseur Sellers. Specifically, the authors examine the Court's approach to forced marriage and advances in the law, with both positive and negative elements. Recognition is given to the crucial role played by the lawyers for the civil parties in advocating for the investigation of forced marriage and forced sexual relations by the co-investigating judges. That advocacy led directly to the inclusion of the regulation of marriage as one of the five policies forming part of the common plan of a joint criminal enterprise

8 See Alain Werner and Daniella Rudy, "Civil Party Representation at the ECCC: Sounding the Retreat in International Criminal Law?", *Northwestern Journal of International Human Rights*, Vol. 8, No. 3, 2010; Marie Guiraud, *Victims' Rights before the Extraordinary Chambers in the Courts of Cambodia*, International Federation for Human Rights, Paris, November 2012.

9 ECCC, "ECCC at a Glance", April 2014, p. 3, available at www.eccc.gov.kh/sites/default/files/ECCC%20at%20a%20Glance%20-%20EN%20-%20April%202014_FINAL.pdf.

10 ECCC, *Prosecutor v. Kaing Guek Eav alias Duch*, Case File/Dossier No. 001/18-07-2007/ECCC/TC, Judgment, 26 July 2010.

11 ECCC, *Chea, Samphan*, above note 4.

12 *The Extraordinary Chambers in the Courts of Cambodia*, p. 319.

in the Closing Order (indictment) for Case 002.¹³ The controversial finding that rape was not a crime against humanity in 1975 is considered, along with how that decision sits with the findings of the International Criminal Tribunals for the Former Yugoslavia and Rwanda.¹⁴ This part also provides some stern criticism of the Trial Chamber's application of the law concerning war crimes in the context of an international armed conflict.

In the third part, the authors examine how international criminal procedure has been developed as a result of the ECCC proceedings. Central to this is the recognition that the ECCC was essentially an experiment in mass-atrocity trials conducted according to the inquisitorial process. The natural corollary is that the Court was unable to draw upon the procedural decisions of the International Criminal Court or the *ad hoc* tribunals in resolving procedural struggles. The authors recognize the difficulties and the "pure mongrel"¹⁵ inquisitorial-adversarial hybrid that came about as being very particular to the Cambodian context. Rather than attempting to draw a definitive result from the inquisitorial experiment, the authors provide valuable analysis of the strengths and weaknesses of both procedural models, ultimately suggesting that any procedural model needs to be pragmatically tailored to the context and realities on the ground.¹⁶ Pragmatism and its limitations are considered later in the book in an examination of the severance decision in Case 002. Following the Trial Chamber's decision to sever the indictment in Case 002 into a series of "mini-trials" in an effort to expedite the proceedings and enable judgment to be rendered against the octogenarian accused, the authors examine the ramifications of that decision in terms of procedure and the fair trial rights of the accused.

An issue often central to international criminal trials, and discussed further in the book, is that of the fair trial rights of aged accused. In his chapter, Roger Phillips gives important consideration to the impact of advanced age and poor health upon the accused's ability to meaningfully participate in a trial. A key procedural point also developed in this part is the approach to torture statements and the use to be made of them under international law. The attention given to this issue is fitting in light of the central role that "confessions" played as a tool for Democratic Kampuchea's control of its citizens. Appropriately, the book closes with reviews of the role of victims in international criminal trials, the practicalities and limitations of the civil party approach adopted by the ECCC, and the mechanisms available to recognize and enforce victims' rights.

The limitations of the ECCC – and there are many – are readily acknowledged by the authors of *The Extraordinary Chambers in the Courts of Cambodia*. However, rather than allowing the imperfect nature of the proceedings to obscure their value, the authors seek, and find, the lessons to be learned from the controversial tribunal. *The Extraordinary Chambers in the Courts of*

13 *Ibid.*, p. 327.

14 *Ibid.*, pp. 334–347.

15 *Ibid.*, p. 430.

16 *Ibid.*, p. 432.

Cambodia is a thought-provoking work which will generate discussion among practitioners and contribute to the diverse, nuanced landscape for international law scholars, and its underlying theme of gradual, hard-won progress is one that is certainly familiar to students of ICL. The result is a generally optimistic volume that accords the ECCC its proper status in the fight against impunity and recognizes the potential role of hybrid courts in the future of criminal justice.

BOOK REVIEW



Compliant Rebels: Rebel Groups and International Law in World Politics

Hyeran Jo*

Book review by Ezequiel Heffes, Thematic Legal Adviser, Geneva Call; LLM, Geneva Academy of International Humanitarian Law and Human Rights; Lawyer, University of Buenos Aires School of Law.

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In the last few years, the role and status of rebel groups¹ have become essential topics of analysis and discussion for a better understanding of current international dynamics. Although contemporary public international law still seems to be predominantly State-oriented, it is undeniable that over the last few decades the increasing participation of rebel groups in the international realm has led to many discussions and complex debates. One of the primary concerns has been how to increase respect for humanitarian rules by rebel groups. Generally, difficulties related to compliance can be linked to various circumstances, such as the unwillingness of the parties to acknowledge that a situation of violence amounts to an armed conflict, the absence of an incentive for the parties to abide by humanitarian rules,² or rebels' lack of an appropriate structure or resources.³ In *Compliant Rebels: Rebel Groups and International Law in World Politics*, Hyeran Jo meticulously addresses some of these issues, taking into consideration the role of rebel groups in the international realm and focusing on the reasons as to why they might choose to comply with international norms.⁴ This topic is not merely a matter of legal theory, and has an impact on the everyday reality of international humanitarian law (IHL). As inquired by the author at an early stage of the book,

* Published by Cambridge University Press, Cambridge, 2015.

“why do some rebel groups comply with international standards of conduct in warfare, while others do not? Are rebel groups aware of international standards? When and why do they make conscious efforts to abide by international rules?”⁵

Running in parallel with an exponential increase of academic literature on the subject,⁶ the author took upon herself the task of putting together a detailed analysis of some of the most transcendental difficulties that affect legal compliance by rebel groups. The book’s central thesis is that “legitimacy-seeking” rebels are more likely to comply with international law than those which are “legitimacy-indifferent”.⁷

At this stage, it shall be noted that the number of studies – books and articles – on this issue has been growing for some time, both in the international law and international relations literature.⁸ Although this is probably the first time

- 1 Although the international law literature normally refers to “non-State armed groups”, “armed opposition groups”, “armed groups” or “armed non-State actors” indistinctively, this book review will use the term “rebel groups”, as chosen by Jo. According to her, this term is used to highlight “the fact that these groups are fighting government forces inciting rebellion, and to remind us that they usually ‘rebel’ against a set of existing norms, potentially including international rules”. *Compliant Rebels*, p. 37.
- 2 Krieger, for instance, affirms that “[a]ctual decisions to obey a legal norm result from a complex mixture of diverse motivations. Power relations as well as historical, political, social and anthropological conditions determine these motivations so that compliance is context-dependent.” Heike Krieger (ed.), *Inducing Compliance with International Humanitarian Law: Lessons from the African Great Lakes Region*, Cambridge University Press, Cambridge, 2015, pp. 4–5.
- 3 Olivier Bangenter, “Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not”, *International Review of the Red Cross*, Vol. 93, No. 882, 2011, p. 357. See also International Committee of the Red Cross (ICRC), *Improving Compliance with International Humanitarian Law – ICRC Expert Seminars*, October 2003, pp. 20–21, available at: www.icrc.org/eng/assets/files/other/improving_compliance_with_international_report_eng_2003.pdf (all internet references were accessed in August 2017); Ezequiel Heffes and Marcos Kotlik, “Special Agreements as a Means of Enhancing Compliance with IHL in Non-International Armed Conflicts: An Inquiry into the Governing Legal Regime”, *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014, p. 1201.
- 4 Due to the potential vastness of the subject, Jo cleverly narrows her analysis to rebel groups active in civil conflicts between 1989 and 2009. This is deliberate, and reflects the increasing amount of conflicts in which rebel groups have played a role in the last few decades.
- 5 *Compliant Rebels*, pp. 4–5.
- 6 See, among others, H. Krieger, above note 2; Sophie Rondeau, “Participation of Armed Groups in the Development of the Law Applicable to Armed Conflicts”, *International Review of the Red Cross*, Vol. 93, No. 883, 2011; Marco Sassöli, “Taking Armed Groups Seriously: Ways to Improve their Compliance with International Humanitarian Law”, *Journal of International Humanitarian Legal Studies*, Vol. 1, No. 1, 2010; O. Bangenter, above note 3, p. 357; Olivier Bangenter, “Internal Control: Codes of Conduct within Insurgent Armed Groups”, *Small Arms Survey*, Occasional Paper No. 31, November 2012, pp. 4 ff., available at: www.smallarmssurvey.org/fileadmin/docs/B-Occasional-papers/SAS-OP31-internal-control.pdf; Geneva Call, *In Their Words: Perceptions of Armed non-State Actors on Humanitarian Action*, 2016, available at: genevacall.org/wp-content/uploads/dlm_uploads/2016/09/WHS_Report_2016_web.pdf.
- 7 *Compliant Rebels*, p. 5.
- 8 See, for instance, the issue on “Generating Respect for the Law” of the *International Review of the Red Cross*, Vol. 96, No. 895/896, 2014; Anna Arjona, Nelson Kasfir and Zachariah Mampilly (eds), *Rebel Governance in Civil War*, Cambridge University Press, Cambridge, 2015; Katharine Fortin, *The Accountability of Armed Groups under Human Rights Law*, Oxford University Press, Oxford, 2017; Konstantinos Mastodorimos, *Armed Non-State Actors in International Humanitarian and Human Rights Law: Foundations and Framework of Obligations, and Rules on Accountability*, Routledge, London, 2016. Also, in 2011 the *International Review of the Red Cross* published two standing issues on the role of armed groups in the international sphere: see *International Review of the Red Cross*, Vol. 93, Nos 882 and 883, 2011. For further literature, see Ezequiel Heffes, “Armed Opposition Groups”, in Anthony Carty (ed.), *Oxford Bibliographies in International Law*, Oxford University Press, New York, 2016.

an exhaustive project on compliance of humanitarian norms by rebel groups has been undertaken, Jo's book should be viewed as part of this trend of publications. Based on a thorough practical analysis and a novel combination between political science and international law, it fills an important gap in the literature – and this is probably its most distinguishing feature, setting it apart from other relevant books on armed groups and international law.⁹ Jo has done a commendable job that is certainly welcome.

The analysis of rebel groups' compliance is organized into nine chapters, all of which offer a good amount of academic literature and practice. As the book offers an extensive theoretical framework as well as empirical evidence, a detailed review of each chapter is indeed impossible given the inherent limitations of a book review. Therefore, the present reviewer has selectively engaged with specific theoretical topics identified in the first four chapters.

The main challenges are presented in the general introduction. According to Jo, the first of these lies in rebel groups' strategic and military considerations, since IHL and human rights rules "prohibit the sort of actions that often serve the strategic interests of rebel groups – the sort of actions that may, at times, give them a competitive advantage over government forces".¹⁰ The second difficulty is related to the lack of participation of rebels in international law-making processes:

Nor have they ever been signatories to international treaties and conventions, such as the Geneva Conventions. Why would rebel groups follow rules they neither created nor signed on to? Although rebel groups do have obligations under international law even without consent, it is intriguing to observe that some groups voluntarily submit themselves to those rules.¹¹

In order to resolve these issues, Jo refers to rebel groups' pursuit of legitimacy in the eyes of political audiences that care about values consistent with international law at the domestic and international levels.¹² As she interestingly suggests, if rebels seek legitimacy "in the eyes of key audiences with preferences for rules consistent with international standards, then we are likely to see rebel compliance".¹³ In this sense, rebel legitimacy is defined as "support and recognition that a rebel group is a viable political authority".¹⁴

9 Zakaria Daboné has also recently explored the role of rebel groups, but addresses this topic exclusively within the international law realm. See Zakaria Daboné, *Le droit international public relatif aux groupes armés non étatiques*, Schulthess, Geneva, 2012.

10 *Compliant Rebels*, p. 6

11 *Ibid.* Although the lack of participation in the creation of customary international law is not particularly explored in the book, Jo refers later to the benefits of including rebel groups in the drafting of rules and laws. According to her, "[f]rom the rebel perspective, an opportunity to participate in this drafting process may serve as a powerful incentive and rationale to change behavior. The basic idea is that rights and obligations under the law must be balanced: if armed groups are to be subjected to certain obligations and responsibilities under international humanitarian law, then they should have rights to participate in law-making too." *Ibid.*, p. 256.

12 *Ibid.*, p. 13.

13 *Ibid.*, p. 19.

14 *Ibid.*, p. 27.

The second chapter of the book addresses whether these non-State actors are aware of international law and asks whether they are actually bound by this legal regime, and if so, why.¹⁵ With respect to the former question (do rebels know about international law?), Jo takes as an indicator certain formal commitments made by rebels.¹⁶ According to her, these can materialize in three possible ways: (1) participation in international negotiations as observers; (2) public expressions of willingness to abide by international law; and (3) the conclusion of agreements with international organizations, such as with the United Nations bodies, or with non-governmental organizations, such as Geneva Call. Regarding the latter question (are rebel groups bound by international law, and if so, why?), Jo differentiates between those rebel groups that explicitly consent to international norms, which are “without a doubt bound by international law”, and those that even without consent still “carry obligations to abide by humanitarian law” due to the customary nature of certain rules.¹⁷ Although the possibility of having rebel groups directly consenting to their international obligations is an interesting proposal, it is not further addressed in the book, even when it could be used as a tool to enhance their respect for humanitarian rules.¹⁸ Two additional points shall also be noted in this regard. Firstly, the author deals indistinctively with IHL and international human rights obligations, but these legal regimes present different features when dealing with rebel groups,¹⁹ and a more extensive analysis could have been useful.²⁰ Secondly, despite Jo initially affirming that “rebel groups without consent are bound by international law in a customary sense”, she then states:

The prevention of genocide, now accepted as a global norm, for example, clearly applies to rebel groups. The nature of international law-making restricts the participatory rights of rebel groups. Rebel groups do not take part in negotiating international laws and do not have institutional means to ratify the laws. Their obligations derive from being under the authority of a state party or by issue of the laws being natural laws applicable to all subjects of international politics.²¹

In these lines, Jo makes a distinction in the application of *jus cogens* rules and the rest of international norms. It remains unclear, however, why one framework

15 *Ibid.*, p. 36.

16 *Ibid.*, p. 48.

17 *Ibid.*, p. 46.

18 For an analysis of the participation of non-State armed groups in the conclusion of special agreements, see E. Heffes and M. Kotlik, above note 3.

19 For instance, in an excellent contribution, before discussing whether non-State armed groups are subject to direct international obligations, Daragh Murray has thoroughly explored whether they can possess international legal personality to be bound by these rules. Daragh Murray, *Human Rights Obligations of Non-State Armed Groups*, Hart Publishing, Oxford and Portland, OR, 2016, pp. 23–81.

20 *Compliant Rebels*, p. 39. There, Jo affirms that “[a] rebel group’s organizational structure will have implications for behavior regarding human rights in rebel groups. Depending on its level of authority, rebel leadership can order and incite rebel soldiers to commit violations of the laws of war.” For a similar approach, see *ibid.*, p. 45.

21 *Ibid.*, pp. 46–47.

would apply directly upon the non-State entity, while others would have to be accepted beforehand by the State fighting against the rebel group. Additionally, how these scenarios interplay with the abovementioned proposal on rebels directly consenting to their international obligations could have been further explored.

The third chapter is the most important theoretical part of the book. Here, Jo proposes her legitimacy-based theory of rebel compliance, according to which rebel groups with “legitimacy-seeking” features are more likely to comply with international norms than their “legitimacy-indifferent counterparts”. In the words of the author, for most rebels there is something to be gained by complying with international law: recognition, legitimacy and reputation. As she explains:

Recognition provides international credibility around the world, and thus a stronger strategic position for groups in their struggle against an opposing government at home. Legitimacy also gives rebel groups greater authority compared with their national government, especially in instances where the government itself lacks legitimacy to govern. Having a reputation as a complier with international law can earn rebel groups a medal of good citizenship in the long run.²²

In examining the constituencies of rebel groups, Jo interestingly suggests that both the government and international society play a role in making or breaking rebel compliance. This is the reason why a comprehensive analysis of rebel groups’ behaviour must take into account relevant interactions among rebels, governments and international actors.²³ The author affirms in this vein that these non-State actors do consider international law as legitimate when they have some expected political advantages to be gained by complying. Therefore, decisions to comply or not are mostly driven by the need to obtain legitimacy in order to ensure group survival.

The fourth chapter represents the bridge between this theoretical framework and empirical evidence. Since legitimacy-seeking motivations of rebel groups are, according to Jo, the most important determinants of their possible compliance, she underlines three possible indicators to understand their level of respect: (1) the existence of a political wing within a rebel organization; (2) a secessionist aim with clear governance objectives in an autonomous region; and (3) foreign support under the influence of human rights groups.²⁴ These elements serve to provide an indication that the group is “legitimacy-seeking”, and constitute a novel argument as to why rebels comply with international rules.

Although this proposal seems helpful towards having more respected legal regimes, the author also refers to the link between the non-State entity and the domestic law of the State against which it is fighting. In this sense, when dealing with the first indicator, Jo recognizes that if opposing governments allow rebel

22 *Ibid.*, pp. 64–65.

23 *Ibid.*, p. 70.

24 *Ibid.*, p. 93.

groups to enter the political sphere, “rebels will then have less incentive to resort to violence unnecessarily”.²⁵ The practical consequences of considering this, however, are not thoroughly envisaged. To that end, certain real-world scenarios are difficult to solve under this proposal. For instance, it is unclear how recognition by governmental authorities might operate in complex conflicts that take place in the territory of a given State between a rebel group and a third State. Which opposing government should recognize the rebel group as a political party to enhance its compliance? Moreover, even if this theory could apply to certain contexts, it is difficult to imagine that every State will recognize a rebel group as having some sort of legitimacy under its domestic legal system; and during an armed conflict, would a rebel group be allowed to present candidates for an election while hostilities are still active? Finally, would this political acceptance also recognize as lawful certain acts that naturally challenge the sovereignty of States, such as the establishment of courts by rebel groups or their provision of education in the territories under their control?²⁶

In any case, based on the abovementioned indicators, Jo presents three hypotheses that are worth noting. Firstly, that rebel groups with political wings are more likely to comply with international norms; according to Jo, this prospect would be stronger if these political wings had a firmer control over the groups’ military sections. Secondly, that rebel groups with secessionist aims are more likely to comply with international law. Since these non-State entities can establish social relations with civilians because of family or ethnic ties, the expectation is that groups with social relations are more likely to refrain from violence against civilians. Thirdly, Jo argues that rebels who rely on foreign sponsors with human rights organizations are more likely to comply with international norms. Those groups that open themselves to organizations such as the International Committee of the Red Cross (ICRC) or Geneva Call, according to Jo, are more likely to make commitments to international law, and therefore positively change their behaviours.²⁷

Since there is a vast number of humanitarian rules that could be studied in light of these hypotheses, Chapters 5, 6 and 7 narrow the empirical analysis of the book to three main humanitarian issues: the killing of civilians, the use of child soldiers, and rebel groups’ decisions with regard to granting the ICRC access to their detention facilities.²⁸ At the centre of Jo’s inquiry is the source from which the book draws its information: the Rebel Groups and International Law database, which was exclusively built for the book project and includes both qualitative and quantitative information about rebel groups’ institutional “and

25 *Ibid.*

26 Jan Willms, “Courts of Armed Groups – a Tool for Inducing Higher Compliance with International Humanitarian Law?”, in H. Krieger, above note 2, p. 150. For a practical approach to the provision of education by non-State armed groups, see PEIC/Geneva Call, *Workshop on Education and Armed Non-State Actors: Towards a Comprehensive Agenda*, 2015, available at: www.genevacall.org/wp-content/uploads/dlm_uploads/2015/12/Geneva_Call_Paper1.pdf.

27 *Compliant Rebels*, pp. 110–111.

28 *Ibid.*, p. 24.

organizational profiles, and their humanitarian and human rights behaviors”.²⁹ The study of these issues is well researched and structured, and every chapter thoroughly combines a general factual approach with a specific case study in which the author shows how the abovementioned indicators influenced the group’s respect for the law.³⁰ Chapter 8 compares and contrasts these three topics, highlighting as a common finding that achieving strategic legitimacy influences rebel groups’ decisions to comply with international norms in specific ways. The final chapter serves as a conclusion.

As can be seen from Jo’s research, some rebel groups actually care about international law, and compliant rebels should not be seen as a rare phenomenon. Groups complying with international law are indeed numerous, specifically among those legitimacy-seeking groups with articulated norms and ties to domestic populations. Contrary to the conventional thinking that rebel groups are violent and constantly breach humanitarian rules, the present book argues that some rebel groups are not only aware of international law but are also committed to adhering to its rules, and often try to “advance their rebellion by exploiting the normative structure of international law”.³¹ Although a more detailed analysis on the legal framework would have been useful (particularly on the reasons why rebels are bound by this legal regime), *Compliant Rebels* still represents an excellent addition to the literature dealing with generating respect for humanitarian rules, and one that is unique in its scope and fresh in its approach. For the purpose of better protecting victims in conflict situations, rebel groups should not be ignored, but should rather be further studied and engaged.

29 *Ibid.*, pp. 83 ff. When building her database, it shall be noted that Jo takes different sources into account. For instance, as explained by her, “Their Words”, the database of Geneva Call that compiles the commitments made by rebels, “was essential in the analysis of rebel commitment to international law”, see p. 279.

30 Jo also acknowledges the possible lack of information related to some specific issues, such as detention access. As she recognizes, “[s]everal difficulties complicate accurate observation and measurement of detainee treatment. Some rebel groups rarely detain, opting instead to kill or conduct hit-and-run operations; others detain, but do so in remote places.” *Ibid.*, p. 188.

31 *Ibid.*, p. 238.

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CORRIGENDUM

“Rahmatan lil-’alamin” (A mercy to all creation): Islamic voices in the debate on humanitarian principles – CORRIGENDUM

Abdulfatah Said Mohamed and Ronald Ofteringer

doi:10.1017/S1816383115000697. First published online
by Cambridge University Press, 2 December 2015.

The text of the above article by Abdulfatah Said Mohamed and Ronald Ofteringer originally stated on page 832 that the Code of Conducts for Muslim Humanitarian Relief Organizations elaborated by the Turkish Humanitarian Relief Foundation (İnsan Hak ve Hürriyetleri ve İnsani Yardım Vakfı, IHH) in 2009 was the first draft document for the dialogue between the Organization of Islamic Cooperation (OIC) and the Islamic NGOs from its member States and therefore disseminated more widely. It should instead have specified that the Islamic Charter of the Work of Goodness, a project of the Geneva-based Cordoba Foundation, was discussed with Islamic charities already in 2006 at a conference in Doha, and was equally presented in the OIC-Islamic NGO consultations. Both documents informed the subsequent discussions in The Humanitarian Forum, and the dialogue between OIC and NGOs.

In addition, please note that the following document name has changed: the Islamic Charter of the Work of Goodness changed its name in 2015 to the Charter of the Work of Goodness.

Reference

Abdulfatah Said Mohamed and Ronald Ofteringer, “Rahmatan lil-’alamin” (A mercy to all creation): Islamic voices in the debate on humanitarian principles’ in *International Review of the Red Cross*, 2015, doi: 10.1017/S1816383115000697.

CORRIGENDUM

War and security at sea: Warning shots – CORRIGENDUM

Vincent Bernard, Editor-in-Chief

doi:10.1017/S1816383117000443. First published online by Cambridge University Press, 2 October 2017.

The text of the above editorial by Vincent Bernard referred to “the Falklands War”. This should have instead read “Falklands/Malvinas war”, with the disclaimer that the designation as such does not imply official endorsement, nor the expression of any opinion whatsoever concerning the legal status of any territory, or concerning the delimitation of its frontiers or boundaries.”

Reference

Vincent Bernard, ‘War and security at sea: Warning shots’ in *International Review of the Red Cross*, 2017, doi: 10.1017/S1816383117000443.

