Chapter 4

Individual Responsibility under National and International Law for the Conduct of Armed Conflict

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1. Introduction

Ove Bring has over the years devoted much attention, as diplomat, teacher and researcher, to the subject of humanitarian law. I thought it fitting to write a chapter in this festskrift to Ove, on the subject of individual responsibility for breaches of the international laws of armed conflict. The subject is large and complicated. The applicable law is also fragmented: there are now many treaties governing different aspects of the conduct of armed conflict. Moreover an understanding of national criminal law is also necessary. Even where states accept the same obligations to criminalize particular behaviour, and to prosecute suspected offenders, they apply different jurisdictional rules regarding the extent to which they are prepared to apply their criminal law to acts committed outside of their territory.

The subject is also something of a ‘moving target’ and this makes it even more difficult. Humanitarian law has developed considerably in the last 15 years, and is still

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1 For a fuller discussion see the major study of state practice made by the ICRC, J.M. Henckaerts and L. Doswald-Beck (eds.), Customary International Humanitarian Law, vol. I Rules, (Cambridge University Press Cambridge, 2005). Henckaerts and Doswald-Beck responsibility for violations (Rule 149); the obligation to make full reparation (Rule 150); individual criminal responsibility (Rule 151); command responsibility (Rules 152–153); the duty to disobey a manifestly unlawful order (Rule 154); criminal responsibility for superior orders (Rule 155); war crimes (Rule 156); universal jurisdiction over war crimes (Rule 157); national prosecution of war crimes (Rule 158); amnesties at the end of non-international armed conflicts (Rule 159); non-applicability of statutory limitations to war crimes (Rule 160); international co-operation in the investigation and prosecution of war crimes (Rule 162). See also A. Obote-Odora, The Judging of War Criminals: Individual Criminal Responsibility under International Law, (University of Stockholm, Stockholm, 1997), S. R. Ratner and J. S. Abrams, Accountability for Human Rights atrocities in international law: Beyond the Nuremberg Legacy, (Clarendon, Oxford 1997) and E. Van Sliedregt, Criminal Responsibility of Individuals for Violations of International Humanitarian Law (Cambridge University Press, Cambridge, 2003).
in the process of being developed by the adoption of treaties, and by the case law of national and international tribunals.

The subject is a moving target in another sense because the nature of warfare is changing, and this obviously influences the types of offences which are committed. The applicability of the laws of armed conflict depends upon the legal definition of an ‘armed conflict’ being satisfied. However, with the rise of non-territorial, transnational so called ‘asymmetrical’ conflicts, between those categorized as ‘terrorists’ and regular forces, the line between war and peace, and zones of war and zones of peace, is unclear.

In the circumstances, it is not possible to cover the subject as a whole. The purpose of my chapter is simply to sketch out the development of individual responsibility, and make some critical comments.

2. A Brief Historical Overview of Individual Responsibility for Breaches of the Law of Armed Conflict

Lawyers, like generals, have a tendency to prepare for the future by trying to avoid the mistakes of the past. New types of threat often take them by surprise. The laws of armed conflict, as with most of international law, have come into being in a piecemeal fashion. Treaties have been designed to deal with the gaps in protection which have become apparent during the last conflict. To understand the present system of individual responsibility for breaches of humanitarian law it is therefore necessary to know something of its history, and so I will begin by noting some of the most important developments in this respect. Having said this, it is important to avoid the error of historicism: in this case, the idea that we are progressing inexorably through the growth of legal regulation to a higher degree of compliance with the law, and/or a higher degree of civilization.

While armies have routinely massacred defeated enemies and pillaged, raped and murdered the civilian population, the history of warfare in the middle ages and onwards to the beginning of the nineteenth century also gives many examples of war leaders who punished, at least periodically, acts of vengeance committed by their soldiers in conflicts against combatants hors de combat, or atrocities committed against the civilian population. Restraint in warfare, and punishment of those who did not practice restraint, was also advocated by certain classical writers, such as Grotius and Gentili. Military leaders could have good pragmatic reasons for following such moral, humanist rules, inter alia the importance of maintaining discipline in one’s own forces, attempting to secure reciprocity of treatment of one’s own combatants and trying not to alienate too much the civilian population of occupied territory. But in general it is