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Human rights within the context of members of armed forces

One might be forgiven for thinking that the very nature of human rights is not a primary consideration for the armed forces of a State which has established them for at least one purpose, to fight a war on its behalf. The fighting of war necessarily involves loss of life, injury to individuals and the destruction of property. There is, it might be argued, little room to consider the human rights of those within the armed forces or those who come into contact with them during a war, whether of an international or of a non-international kind. To provide some amelioration of the condition of the victims of the war, to control the methods of war and to limit its consequences, particularly as they affect civilians or civilian objects, States have, over a period of time, agreed by treaty to a wide body of international humanitarian law.

International humanitarian law has been defined as

> 'international rules, established by treaties or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts and which, for humanitarian reasons, limit the right of Parties to a conflict to use the methods and means of warfare of their choice or protect persons and property that are, or may be, affected by conflict.'[1]

This international humanitarian law has been drawn up for application in time of war (or armed conflict as it is usually called in modern times).[2] It is not entirely clear whether international humanitarian law gives the soldier

[1] Y. Sandoz, C. Swinarski and B. Zimmerman, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (Geneva: International Committee of the Red Cross, 1987), p. xxvii. This link with an armed conflict is not, however, required in respect of genocide or crimes against humanity. See the Rome Statute 1998 of the International Criminal Court, Arts. 6 and 7 respectively.

[2] International humanitarian law comes into effect when the conditions of common Arts. 2 and 3 to the Geneva Conventions 1949 apply. These require an international or a non-international armed conflict to be in existence or a declaration of war (if the armed conflict is of an international character). See also Additional Protocol I 1977 (international armed

any 'rights' under it.[3] The general structure of this body of law is to impose obligations upon States, although individuals may take their benefit (such as by being treated as a prisoner of war) and those who infringe them may be personally liable. An important provision in the Geneva Conventions 1949, however, is that a [soldier] 'may in no circumstances renounce in part or in entirety the *rights* secured to [him] by the present Convention'.[4] These 'rights' within the Geneva Conventions 1949 (Geneva Convention for the amelioration of the condition of the wounded and sick in armed forces in the field, Geneva, 12 August 1949, in force 21 October 1950, 75 *United Nations Treaty Series* (UNTS) 31 ('First Geneva Convention 1949'); Geneva Convention for the amelioration of the condition of wounded, sick and shipwrecked members of armed forces at sea, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 85 ('Second Geneva Convention 1949'); Geneva Convention relative to the treatment of prisoners of war, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 135 ('Third Geneva Convention 1949'); Geneva Convention relative to the protection of civilian persons in time of war, Geneva, 12 August 1949, in force 21 October 1950, 75 UNTS 287 ('Fourth Geneva Convention 1949') are not of the same nature as those within human rights treaties. A soldier cannot enforce them directly through legal avenues as might be possible through human rights treaties.[5] While he is, for example, a prisoner of war he has the '*right* to make known to the military authorities in whose power [he] is [his] requests regarding the conditions of captivity'.[6] There is no corresponding 'right' to humane treatment although the detaining State

conflicts) and Additional Protocol II 1977 (non-international armed conflicts). Both these Protocols widen the applicability of international humanitarian law. See Art. 1(4) of the First Protocol.

[3] For a discussion of the meaning of 'rights' see J. Raz, 'Legal Rights' (1984) 4 *Oxford Journal of Legal Studies* 1 (who refers to the extensive literature on this topic); R. Higgins, *Problems and Process, International Law and How we Use it* (Oxford: Oxford University Press, 1994), pp. 96–110.

[4] The four Geneva Conventions 1949, Arts. 7, 7, 7 and 8 respectively. See also Arts. 6, 6, 6, 7 respectively ('rights which it confers on them') and the third and fourth Conventions, Art. 78 for further examples of where the term 'right' or 'rights' is used. Compare the fourth Geneva Convention, Art. 47: 'shall not be deprived . . . of the benefits of the present Convention'.

[5] Depending upon the national law of a particular State he may, also, bring an action in the courts alleging a breach of international humanitarian law towards himself. See, for example, *Kadic* v. *Karadzic* (1995) 34 International Legal Materials (ILM) 1592. Compare the attempts by British former prisoners of war to bring an action in the courts of Japan seeking compensation for their treatment in Japanese prisoner of war camps during World War II (see chapter 5 below).

[6] The third Geneva Convention 1949, Art. 78.

is under an obligation to ensure this.[7] Too much can be made of the use or the non-use in the Geneva Conventions 1949 of the term 'right' as indicating a right given to an individual compared with an obligation imposed upon the State concerned.[8] The practical reality of the situation is that there are very limited means provided by these Conventions to a protected person to enforce the treatment of him which these Conventions require of the detaining State.[9]

In cases where an armed conflict is taking place international humanitarian law may, however, be relevant and enable an individual indirectly to enforce 'rights' given by this body of law under a relevant human rights treaty.[10] Human rights law has been developed largely for application in time of peace, although it was envisaged that it would also have some relevance during wartime.[11] In time of war (or, more accurately, in time of an international armed conflict) international humanitarian law has been declared to be, in certain instances, the *lex specialis* giving meaning to terms such as 'arbitrary', the right to life and the treatment of detainees in human rights treaties.[12] In turn, international human rights law has

[7] The third Geneva Convention 1949, Art. 13.

[8] The same is true of the use of the term 'is entitled to'; see, for example, the third Geneva Convention 1949, Art. 14(1). Compare Y. Dinstein, 'Human Rights in Armed Conflict' in T. Meron (ed.), *Human Rights in International Law* (2 vols., Oxford: Clarendon Press, 1984), vol. II, p. 347, who takes the view that 'many provisions in the four Geneva Conventions clearly create rights of states'. Dinstein is referring here to the rights of the State of which the victim is a national. The possessor of this 'right' will, unlike the victim of a breach of international humanitarian law, have a greater opportunity to enforce it (through diplomatic means).

[9] See R. Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2001), p. 28. This work provides an excellent account of the relationship between human rights and international humanitarian law.

[10] There is a considerable overlap of protection of individuals given by human rights treaties and to protected persons (or civilians) within international humanitarian law. For a rejection of the view by Columbia that the Inter-American Commission on Human Rights did 'not have competence, in the processing of individual petitions, to apply international humanitarian law', see Report No. 26/97, Case 11.142 (Columbia) at paras. 198–9. Compare *Coard* v. *United States of America* Report No. 109/99, Case 10.951, 29 September 1999; *Bankovic* v. *Belgium et al.* Application No. 52207/99, Admissibility, 12 December 2001, (2002) 41 ILM 517.

[11] The issue of whether human rights are founded upon the individual treaties or pre-existed them is well discussed by M. Craven, 'Legal Differentiation and the Concept of the Human Rights Treaty in International Law', (2000) 11 *European Journal of International Law* 489 at 493.

[12] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (1996) International Court of Justice. Reports of Judgments, Advisory Opinions and Orders, vol. I, 226 at para. 25. See also the 1950 Convention, Art. 15 in the case of a derogation from Art. 2 of the Convention; *Coard* v. *United States* (n. 10 above). This is discussed in more detail in chapter 5.

played a significant part in the development of international humanitarian law.[13]

In an application made by an individual to a human rights body reliance upon international humanitarian law may also be seen where the armed conflict was of a non-international nature. The Inter-American Commission on Human Rights has taken the view (in 1998) that

> 'it is primarily in situations of internal armed conflict that human rights and humanitarian law converge most precisely and reinforce one another . . . both common Article 3 of the Geneva Conventions [1949] and the American Convention on Human Rights [1969] guarantee these rights [the right to life and physical integrity] and prohibit extra-judicial executions, and the Commission should apply both bodies of law'.[14]

A breach of international humanitarian law is designed to lead to the trial and punishment of an individual perpetrator while a breach of a human rights treaty is intended to lead to the State being liable either to pay compensation to the victim[15] (along with the prosecution of an individual) or being called upon to change its practices.[16]

International humanitarian law and human rights possess sufficient differences to lead to the conclusion that they do not represent the same forms of legal protection to individuals while deriving from separate sources. Provost summed up the position well when he commented that

[13] See, for example, *Prosecutor* v. *Tadic* IT-94-1-AR 72, 2 October 1995, para. 97 (1996) 35 ILM 35; United Kingdom Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press 2004), para. 1.8 and for an excellent discussion of this issue, T. Meron, 'The Humanization of Humanitarian Law' (2000) 94 *American Journal of International Law* 239.

[14] Report No. 26/97, Case 11.142 (Columbia) 13 April 1998, para. 147. The Commission found there to be an 'internal armed conflict' [*sic*] to be in existence and therefore common Art. 3 to the Geneva Conventions 1949 applied, at para. 202. See also *Abella* v. *Argentina*, Report No. 55/97, Case 11.137, 18 November 1997.

[15] This is the remedy available to the European Court of Human Rights established by the European Convention on Human Rights and Fundamental Freedoms 1950 (hereafter, the 1950 Convention). See also the practice of the Inter-American Commission on Human Rights, established by the American Convention on Human Rights 1969 set out in Report No. 26/97, Case 11.142 (Columbia) at para. 189. In para. 193 the Commission concludes that 'monetary compensation is not generally sufficient in a case which would have required a criminal investigation and the sanction of those responsible'.

[16] A further difference lies in the fact that (generally) international humanitarian law has been designed to protect the nationals of a State different from that of the State taking action. See the definition of 'protected person' in the Geneva Conventions 1949. This view has, however, been challenged by the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY). See, in particular, *Prosecutor* v. *Tadic*, Appeals Chamber Judgment IT-94-1-A, 15 July 1999, para. 166, (1999) 38 ILM 1518; *Prosecutor* v. *Delalic et al. (Celebici Case)* Appeals Chamber, 20 February 2002, para. 58.

there were 'significant differences between human rights and humanitarian law . . . each displays a peculiar richness and resilience likely to be weakened, if anything, by over simplistic or over enthusiastic attempts to recast one in terms of the other'.[17]

Some have thought this risk to be so serious that it might lead to a merger between the two systems 'to such an extent that it would become unpractical [*sic*] to apply them'.[18] This must surely be to overstate the case if the warning given by Provost is heeded and individual human rights treaties are considered in detail. To do so is to implant the concept of 'human rights' within its legal base. The International Court of Justice (ICJ) has stated that 'law exists, it is said to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered. Humanitarian considerations may constitute the inspirational basis for rules of law . . . Such considerations do not, however, in themselves amount to rules of law.'[19]

It should not be thought that the mere enactment into law (whether in an international or national form) of a 'human right' is sufficient, by itself, to guarantee the enjoyment of that right. Even if it is clear that the armed forces have denied an individual his or her rights there may, in some contexts, be many procedural or other impediments lying in the way of a remedy against the State involved. It may be that effort should be directed towards training members of armed forces to comply with the human rights obligations of their State.

Human rights in the armed forces

The detailed treatment of human rights is, generally, a post-World War II development. Although the term was little used in the context of the armed forces before then the soldier[20] was not wholly at the mercy of his military superiors acting to enforce military discipline. He would, most

[17] Provost, *International Human Rights*, p. 349.

[18] 'Application of International Humanitarian Law and International Human Rights Law to UN-Mandated Forces: Report of the Expert Meeting on Multinational Peace Operations' (2004) 86 *International Review of the Red Cross* 207, 211.

[19] *The South West Africa Cases* [1966] ICJ 1, paras. 49, 50.

[20] This term is used throughout as a convenient way of referring to a member of the armed forces. It does not draw any distinctions between different roles played by soldiers, i.e. those who are trained to come into contact with the enemy and those who provide support functions, or military police. It could cover, for instance, border guards and troops of a ministry of internal affairs. For convenience, references to the masculine gender include the feminine except where the context provides otherwise.

probably, have had certain rights to make complaint about his treatment.[21] This right to make a complaint was, however, unlikely to have been an effective means of challenging what we would now think of as a breach of his human rights.[22] There was no objective standard of treatment, which a human rights treaty could provide, to which a soldier (in particular) was entitled. Although all armies would have operated under a system of military discipline different armies treated their soldiers differently. Military punishments varied and often reflected and exceeded the degree of severity of criminal sanctions available in the civilian courts. The infliction of the death penalty or of corporal punishment was not uncommon.[23]

Although the term 'human rights' of the soldier was not spoken of the armed forces would normally wish to treat its soldiers 'fairly' or with 'common humanity' if only to ensure recruitment of a sufficient number of soldiers or to retain those whom it had trained. Whilst these considerations might have been less pressing where the State conscripted those who would form its junior ranks, a certain degree of fair treatment of soldiers by those in authority over them was essential to ensure that the army acted with some measure of efficiency.

It is, perhaps, not too great an exaggeration to conclude that as the fundamental purpose of an army is to fight during an armed conflict an individual's needs are treated as subservient to this purpose. Where he is a volunteer he could be expected to have joined the armed forces with the knowledge that his interests would have to be subsumed to the greater interests of those armed forces. The armed forces possess another characteristic different in degree from all other forms of employment. This is its hierarchical structure based on rank and the obligation to obey

[21] For an example, see the Army Act 1881 (United Kingdom), s. 43. A number of other States followed the British example in their own military law. Within this family of military law there are few 'rights' as such given to soldiers, although there are many 'duties' placed on them. The 'rights' of soldiers should not be confused with 'privileges' given to certain groups of soldiers, usually dependent on rank. These 'privileges' can be withdrawn at any time. The pattern in the twenty-first-century German army has been to give soldiers a greater number of specific 'rights': see G. Nolte and H. Krieger, 'Comparison of European Military Law Systems' in G. Nolte (ed.), *European Military Law Systems* (Berlin: de Gruyter Recht, 2003), pp. 74–6.

[22] For the practical difficulties of low-ranking sailors making complaints of bullying in the Royal Navy in the 1920s see L. Gardiner, *The Royal Oak Courts Martial* (London, William Blackwood, 1965), p. 98 where such individuals were 'branded as sea-lawyers for laying complaints'.

[23] Tying a soldier to a gun carriage for long periods was practised during World War I. By 1881 in the British army punishments could not be of 'a nature to cause injury to life or limb', the Army Act 1881, s. 44 (apart from the death penalty).

orders given by a person more senior in rank or seniority to the recipient of the order. This requirement to obey orders has been described as 'the essence of efficiency in a military unit'[24] and it cannot be ignored when the acts of an individual soldier are being considered.

The armed forces of many States operate within this type of hierarchical structure with a broad distinction between commissioned officers, non-commissioned officers (NCOs) and the lowest ranking soldier. Although both categories of officers are required to show qualities of leadership commissioned officers will, generally, have received a longer period of education and will be expected to lead a greater number of men than NCOs. It is common for these officers to be recruited directly into the armed forces without progressing from the ranks of NCOs. In those States relying upon some form of conscription it is normally the case that commissioned officers will be volunteers, whilst the NCOs may be comprised of some conscript soldiers.[25] Within the broad category of commissioned officers and NCOs there will be a range of ranks, dependent upon seniority and aptitude.

Within a military structure this difference in rank brings with it different roles and responsibilities.[26] The requirement to obey orders without discussion, in an appropriate case, is considered vital to most (if not all) military systems.[27] A failure to obey an order from a soldier higher in rank will usually amount to a serious military offence. The need to endow the

[24] *R.* v. *Her Majesty's Attorney General for New Zealand* (Judicial Committee of the Privy Council, London, 17 March 2003) *per* Lord Scott at para. 41, who concluded that this relationship between superior and subordinate created a 'presumption of undue influence' in relation to a contract of confidentiality put to a soldier by his superior officer to sign. On this point Lord Scott dissented from the majority of the Board, who took the view that there 'was no order in the sense of a command which created an obligation to obey under military law', (Lord Hoffman at para. 20). See, generally, N. Keijzer, *Military Obedience* (Alphen aan den Rijn: Sijthoff & Noordhoff, 1978); M. Osiel, *Obeying Orders* (New Brunswick: Transaction Publishers, 1999).

[25] For an account of the Soviet armed forces in 1988, see C. Donnelly, *Red Banner: the Soviet Military System in Peace and War* (Coulsdon: Jane's Information Group Ltd, 1988) who shows that the 'great majority of junior NCOs in the Soviet Armed Forces' were conscripts.

[26] See, generally, N. Dixon, *On the Psychology of Military Incompetence* (London: Futura Publications, 1979). Dixon notes that 'since men are not by nature all that well equipped for aggression on a grand scale, they have to develop a complex of rules, conventions and ways of thinking which, in the course of time, ossify into outmoded tradition, curious ritual, inappropriate dogma and that bane of some military organizations, irrelevant "bullshit"' (p. 169).

[27] To understand the reality of military life in an all-volunteer army it is necessary to consider the 'power' of ordinary soldiers as a group who 'negotiate' their working relationships with superiors 'in which a relaxed interpretation of military law is traded-off for effective role performance': J. Hockey, *Squaddies: Portrait of a Subculture* (Exeter: University of Exeter

giver of the orders with some degree of status within the organisation has led to different forms of punishment where that individual (compared with a person of the lowest ranks) has been in breach of the military code of discipline. Thus, commissioned officers will, commonly, be treated differently from the lowest ranking soldiers. They will also have responsibilities not to abuse their status to influence, for example, the religious thinking of subordinates.[28] Military organisations will, usually, consider it inappropriate to treat all ranks equally in relation to certain aspects of military life.

The treatment of individuals on a basis of equality is, however, a fundamental principle of most, if not all legal systems. It certainly is in international law. International humanitarian law requires protected persons under the Geneva Conventions of 1949 to be treated without, for example, 'any adverse distinction based, in particular, on race, religion or political opinion'.[29] It is not surprising to see human rights treaties containing a similar message,[30] although such rights to equal treatment may not amount to a free-standing right. The right to equal treatment may also be given in other international instruments, an example being under the law of the European Union.[31] In addition, national laws may impose obligations of equal treatment in different ways.[32]

Differences in rank or seniority in the armed forces may lead to different treatment by military superiors of soldiers. This is usually more marked in armed forces than in comparable civilian occupations. Whilst it might

Press, 1986), p. 159. Where they feel they are being ordered to undertake unnecessary or petty duties they can be unco-operative without disobeying orders, see *ibid.*, p. 74 under the sub-heading 'Privates' Power and the NFI'. On active duty where their lives are being threatened the formality of the hierarchical structure is likely to be relaxed, *ibid.*, p. 101. See also chapter 5.

[28] See *Larissis* v. *Greece* (1999) 27 EHRR 329, para. 51.

[29] The fourth Geneva Convention 1949, Art. 27. See also the third Convention, Art. 16; second Convention, Art. 12; first Convention Art. 12; Additional Protocol I 1977, Art. 75(1); Additional Protocol II 1977, Art. 4.

[30] The International Covenant on Civil and Political Rights 1966 (hereafter '1966 Covenant'), Art. 3; the 1950 Convention, Art. 14 (and Protocol 12); American Convention on Human Rights 1969, Art. 1; African Charter on Human and Peoples' Rights, 1981, Arts. 2 and 3.

[31] See Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion, and working conditions, OJ 1976 No. L39 p. 40, 14 February 1976. See also the Convention on the Elimination of Racial Discrimination, 1966; Convention on the Elimination of All Forms of Discrimination against Women, 1979.

[32] See, for example, the Canadian Charter of Rights and Freedoms, 1982, s. 15; Constitution of the Republic of South Africa 1996, Chapter 2, s. 9.

be expected that soldiers of the same rank should be treated equally the need to enforce a hierarchical system within a military discipline structure normally ensures that senior non-commissioned or commissioned officers have certain 'privileges' denied to those inferior in rank. Volunteer soldiers may be treated differently from conscript soldiers, both within the same armed forces and as between different armed forces. The reason for this lies in the different nature of each type of military service.

The volunteer soldier

The conversion of armies from a conscript to a volunteer soldier base is becoming more common.[33] Where this is the case the terms of service must be sufficiently attractive to enable recruitment to take place of a sufficient number of individuals with the ability to train in the skills required. In addition, the conditions of military life must be such that trained individuals are encouraged to remain in the armed forces for a period acceptable to both the soldier and to his employers.

By enlisting in the armed forces the adult volunteer soldier must be taken to have consented to certain aspects of military life. It is not difficult to conclude that he has accepted that the military discipline system will apply to him, that he will have to follow orders, wear a uniform, attend parades and be called upon to take part in armed conflict should this occur during his military service. It is unlikely, however, that he will be given, prior to his recruitment, a list of activities that he will be required to perform as a soldier or the conditions under which he will live.[34] He will, for instance, not be required formally to agree, as part of his enlistment process, those activities in which he will take part and those in which he will not.[35] His knowledge of what military life is like will, most probably, be drawn from recruitment films, brochures or other publicity and from

[33] In Europe, Belgium, France, the Netherlands and Spain have ended conscription, respectively in 1992, 2001, 1996, 2001. It is expected that Portugal, Italy, the Czech Republic and Russia will act similarly in, respectively, 2003, 2006, 2006 and 2010: 'Human Rights and the Armed Forces' Seminar Information and Discussion Paper (Council of Europe, 5 December 2002), p. 3.

[34] The Optional Protocol on the Rights of the Child 2000, Art. 3(3)(c) requires that children under eighteen who volunteer for the armed forces must be 'fully informed of the duties involved in such military service'. *Quaere* whether this can be otherwise than in fairly general terms.

[35] It is possible that in some armed forces he will be recruited only for particular tasks or for service in particular locations. Thus, an army doctor may be recruited only to perform medical services and a chaplain or other religious adviser to perform religious activities for those professing his particular religious faith.

recruitment personnel. He may have heard of the nature of military life from serving or former soldiers. He is unlikely to be in the same position as a person who wishes to know the terms of a particular civilian employment before he commits himself to it. In an application for civilian employment he may be provided with a draft contract and a detailed job description along with the nature of any training to which he must submit himself.

It is difficult to conclude that, by the mere fact of joining the armed forces voluntarily, a person has consented to all the treatment to which he is subjected in the armed forces, or that he has waived those of his human rights available to him as a civilian. He will not have waived any specific human rights available to him by enlisting although those rights must be considered in a military context. No human rights instrument provides directly for this. The 'particular characteristics of military life' may, however, be taken into account and treatment which would amount to a breach of the human rights of a civilian may not draw the same conclusion if the individual is a soldier.[36] An example of this is the acceptance, certainly by the European Court of Human Rights, of military courts to try soldiers and, in appropriate cases, to deprive them of their liberty. It is difficult to imagine the Court accepting 'courts' established by civilian employers having the same consequences.

A particular aspect of this issue is the treatment of soldiers who admit to being homosexual or who are found to be such. A soldier in many States has, like a civilian, a right to a private life. This would encompass his sexual activities providing they were engaged in during off-duty hours and in private. Where it is well known that the armed forces of a particular State do not permit homosexuals to serve the question arises as to whether, by enlisting, a soldier has agreed that he may be dismissed should his homosexuality become known. Has he, in other words, consented to waive his right to a private life by joining the armed forces with knowledge of this attitude towards homosexuals? Should the answer be in the affirmative the mere fact of voluntary enlistment into the armed forces would carry great significance in the human rights obligations owed by the State to its soldiers, even if the attitude of the armed forces to homosexuals had been specifically brought to the attention of all recruits. In this case it might be expected that the State would be required to spell out clearly that by joining the armed forces the soldier's human right to a private life in so far as he admits to being a homosexual has been waived. The difficulty

[36] This is the case under the 1950 Convention. See *Engel et al.* v. *The Netherlands* (1976) 1 EHRR 647, para. 54.