Discussion

Can a Coalition Member Be Held Responsible for the Actions of Other Members?

Ruth Wedgwood:

I have a question for Professor Stein on your approach to the problem of the potential responsibility of one coalition member for the actions of other coalition members. This is probably a statement against interest because I'm not sure this is a good line of argument for the United States. Given the manner in which the idea of command responsibility has now been liberalized to include not only direct commanders in a wiring diagram but also responsibility for actors who may be under the effective control of a commander (I have in mind here the *Blaskic* case[1] where the fact that actions may have been taken by a paramilitary was not enough to exculpate Blaskic and indeed the extension of command responsibility to a broad range of civilian officials), don't you think there is some potential liability (I suppose we shall see in the International Court of Justice) by individual coalition members for the actions of others which they might indeed have been able to stop politically?

Torsten Stein:

Well, there might be. I take a three-stage approach. Where you have an international organization, States cannot hide behind the organization and say "we will not be responsible because it's the organization that's acting, not us." The organization has no penny to pay. You cannot say "well, this was something where the organization as such acted *ultra vires*, so we are not responsible." But if you have a situation like Operation Allied Force where you say NATO is not the "international tin council," then you can't use all those rules and say NATO is responsible. You have a group of individual nations. They agree to do something together, and now they are responsible. It would make

1. Prosecutor v. Blaskic, Judgement, I.C.T.Y. No. IT-95-14-T, Mar. 3, 2000.

sense. Also, for political reasons, let not the one who did it stand alone in the rain because the others were not in a position to do it. I don't see a clear rule in international law that says because you are all acting together, we can just choose one out of the coalition. There are little examples for that I think. That would not be a bad rule.

Ruth Wedgwood:

I would simply issue a note of caution. There are even arguments being made that UN peacekeepers should be responsible for not having prevented the Serbs from acting out. So the command responsibility may be going horizontal as well as vertical and therefore one should be careful.

Wolff H. von Heinegg:

When it comes to NATO operations there are a variety of different instruments in force for the member States of the coalition, but it's never NATO to whom it can be attributed. It's always the national States to whom a possible violation can be attributed. Politically there may be a problem. So what the NATO countries should do, rather than having a variety of rules of engagement (even though they are standardized), they should at least try to find a common denominator as regards their different legal obligations.

Torsten Stein:

We agree that in any given coalition there can be different legal standards, and if there was no pre-existing legal obligation then one will not be held liable even for the actions of coalition partners. But it would be an awkward case indeed if one asked a State to be in the coalition primarily because that State had not ratified certain conventions, such as the one on blinding laser weapons.

The United States and Protocol I

Yves Sandoz:

Has the United States de facto recognized Protocol I? If not, are there concerns remaining that prevent the United States from ratifying Protocol I?

David Graham:

I'll answer your second question first. Yes, I think there are still concerns that we have with specific provisions to Protocol I, and I won't go through those specific concerns. I think those have appeared in the public domain on a

number of different occasions. Those concerns are essentially of an operational nature.

I think there are inartfully drafted and very subjective provisions of Protocol I. Provisions that lend themselves to subjective judgments and would place commanders in a very tenuous position on the battlefield and subject to second-guessing. Just as various parties of Protocol I have expressed various interpretations of what those provisions mean in the form of statements of understanding and reservations, we have reservations with respect to whether they could ever be applied in an objective manner. I think that includes much of Protocol I given the fact that it was based on compromise and was very inartfully drafted. Those are the types of provisions that we still have reservations about because we think that it places commanders in situations that subject those commanders to subjective judgments. We can't give them clear guidance with respect to what those provisions mean.

As I said, we have met with coalition partners. We have agreed as to how we would interpret those provisions (in terms of developing consensus rules of engagement), how we would apply the use of force, and how we would not apply the use of force. But that doesn't mean that we still do not have serious reservations about some of the provisions of Protocol I.

Now with respect to your first question, I do not think that we are going to be the position of violating Protocol I because the rules of engagement that we come up with in a coalition environment will essentially reflect the interpretations that our coalition partners have with respect to the law of armed conflict. I don't see any commander that would knowingly force a coalition partner into a violation of Protocol I; knowing what governmental limitations might have been placed on that coalition partner by their capitals. I don't see that situation as occurring.

The Status of Protocol I As Customary International Law

Fausto Pocar:

I would like to clarify my remarks regarding the status of Protocol I as customary international law. I didn't say that as a whole the Protocol is becoming or is customary law. I said that there is a trend towards recognition of the general value of Protocol I as evidenced by the increasing number of ratifications and some case law in international tribunals. However, I also said that the State practice is still showing areas in which this is not true, and I referred to major actors in international relations. I maintain one should take into account also the State practice of the States that have ratified the Protocol and

not only the non-ratifying States. Neither did I say that the practice of the ICTY is determinative. I only referred to arguments made by many scholars—including scholars in this room like Professor Greenwood—that referred to international case law as having been seen later on as determinative in debates, but this is not necessarily always the case. When I referred to the increase in number of State parties, I had in mind major actors as well because one of the States that has ratified Protocol I as recently as 1998 is the United Kingdom.

Leslie Green:

I only want to touch on the point of the number of ratifications. True, from the point of view of classical doctrine, there would have been a general attitude that perhaps 159 ratifications amounts to at least general international law. But when I look at those 159 ratifications, I'm not very concerned as to what Nepal thinks about the law of armed conflict nor what Iceland thinks. (I'm fascinated by the thought that Iceland recently signed a treaty of non-aggression and peace with Nepal. Somehow or another it doesn't sound very practical.) I'm much more concerned with the fact, not that the United Kingdom has ratified, but that the United States, China, and Israel have not ratified. What we have to count are those who are the contributors. If I'm looking at the law this evening, I don't care whether Switzerland has ratified a law of the sea convention. The same thing applies here. Who are the actors? If a number of senior actors don't play, then we can't call it general or universal international law.

Reprisals

Adam Roberts:

This is a question particularly directed at Judge Pocar and Colonel Graham. It touches on whether there may be a difference of emphasis between them regarding the issue of reprisals. In his paper, Judge Pocar referred to the problem of reprisals very briefly. Colonel Graham was quite right to suggest that the reservations that a number of States—and not only NATO member States but at least one other State—have made to Protocol I suggest that there is unease on this issue of reprisal and a desire to leave some room open for reprisals as a means of enforcing observance of the laws of armed conflict. This is an issue which can certainly arise in coalition warfare as evidenced in the 1991 Gulf operations where the senior partner in the operation was the United States. The United States felt an obligation to make clear that it would do

something if the other side violated fundamental norms, as Secretary of State James Baker communicated to Tariq Aziz on 9 January in Geneva with respect to the use of weapons of mass destruction. My question is very simply, what scope do you think is left within the law of armed conflict for reprisals and is that a problem in coalition operations?

David Graham:

The concept of reprisals—even if you restricted it to belligerent reprisals—is an extremely difficult concept. I think I can tell you without divulging confidential information that we have debated the issue of belligerent reprisals within the Department of Defense and between Defense and the Department of State extensively. I wish I could give you an easy answer with respect to what the position is on belligerent reprisals. I will tell you that I do not think the United States has renounced the right to engage in belligerent reprisals (apart from those categories of persons and property protected in the 1949 Geneva Conventions) given certain circumstances, but that's as far as I'm prepared to go. It's a difficult issue.

Fausto Pocar:

Unfortunately I am not able to fully answer this question. I touched upon it in my paper only to show that this is an area in which the debate is open. When I referred to the decision of the Trial Chamber in *Kupreskic*,[2] I was quite prudent to say that whatever consideration is given to this judgment it may play a role in developing the law. I won't say more because this question is now before the Appeals Chamber of which I am a member.

The Martens Clause and the Margin of Appreciation

Rudolf Dolzer:

Allow me to make a brief point regarding the *Kupreskic* case. The ICTY had to interpret Protocol I, Article 57's "feasible precautions" provision. (I think this is a very broad statute with a very broad wording). What the ICTY did was interpret "feasible precautions" in the light of the Martens Clause. In other words, you interpret a very broadly worded statute in the light of a very, very broad general clause.

2. Prosecutor v. Kupreskic et al., Judgement, I.C.T.Y. No. IT-95-16-T, Jan. 14, 2000.

The Martens Clause is reworded in the Protocol I. It says "[i]n cases not covered."[3] Now I'm not quite sure what it means, "in cases not covered," but I would be very careful to apply the Martens Clause in areas that are more or less specifically addressed in the Protocol. Otherwise I would probably not apply the Martens Clause. But even if I would in principle think it might be applicable in terms of applying Article 57 in the context of criminal justice, if you add the Martens Clause, you would come into a sphere of vagueness that in most domestic constitutional systems would probably be quite near to the borders that probably constitutional lawyers would find acceptable.

My remark as to margin of appreciation was meant as follows: those who have to apply Protocol I or customary law have to apply it under specific circumstances—sometimes very short-term, sometimes without very specific knowledge. I think the ICTY should do more. I would be happier if the ICTY had not supplemented Article 57 with the Martens Clause, but with a sense and spirit of the margin of appreciation approach. In other words giving some benefit of doubt to those who act under the circumstances in which they have to act. Now why do I say so again? I say so mainly not because I am sympathetic to those who are before the ICTY at the moment as very few of us are, but I think we have to keep in mind that those rules will have to be accepted. I take the ICTY very seriously. I think there is a very good chance that the jurisprudence of the Tribunal in the long-term will have a considerable influence depending upon its persuasiveness. What I'm concerned about is if the Tribunal for very good or excellent reasons comes down with an interpretation of the law that will make it difficult next time for those who are on the different side and in similar circumstances, then I think indeed those very hard cases would make very bad law.

The Relationship Between Human Rights Law and the Law of Armed Conflict

Natalino Ronzitti:

The International Court of Justice in its *Nuclear Weapons* advisory opinion has said that humanitarian law is *lex specialis* vis-à-vis human rights law, so in some cases you have to apply human rights law. This is a problem for European countries; it's not a problem for the United States. For European countries it's a real problem because we have a European Convention on Human Rights. There is a case before the European Court of Human Rights for

3. Protocol I, Article 1(2).

violation of the Convention on Human Rights during Operation Allied Force. This is important also for an occupying army or also for peacekeeping operations. We cannot say that we will not apply the European Convention because in this case individuals are under the jurisdiction of the State that is occupying its territory or having its troops on their territory. So for the European States it's a very important issue. How is it possible to address this issue in a coalition?

David Graham:

I appreciate that comment Professor. I understand that you're subject to the European Convention on Human Rights and I understand that the European Court is now making a determination as to whether or not it will assume jurisdiction of the case against NATO countries for Operation Allied Force. If the European Court assumes jurisdiction, my question becomes does it apply human rights law? Does it apply the law of armed conflict? Does it apply a combination of the two? Is, in fact, the European Court on Human Rights going to make rulings with respect to the law of armed conflict and interpret the law of armed conflict? To me that's a fairly scary proposition.

My concern also is that when you combine elements of human rights law and the law of armed conflict, it makes my job of advising military commanders a very difficult job. I know what the law of armed conflict is. When I ask very, very bright people to tell me what international humanitarian law is, I get some very good answers. The problem is that they're all different. Everybody has his or her own idea with respect to what international humanitarian law is. Professor Stein has said that we have seen the transformation of the law of armed conflict into simply an element of humanitarian law. Well, that's an uncomfortable proposition for me as well because it makes my job in advising commanders a very difficult job in terms of understanding what their obligations are. That's something that continues to trouble me. I think it's something that we need to take a long hard careful look at.

Torsten Stein:

I just want to comment on one point of Colonel Graham's statement. It's absolutely clear that the Strasbourg Court will apply the European Convention and nothing else if they take up the case.[4]

4. See Professor Greenwood's paper in this volume.

Fausto Pocar:

The European Court has managed to apply the European Convention on Human Rights and nothing more than that. But of course the problem—the relationship with the law of war —arises in any case because the Convention says that the state of war does not exclude the application of the Convention. So the problem of combining the Geneva conventions and the European Convention on Human Rights does exist for States that are parties to both.

Leslie Green:

I find myself very much in agreement with Colonel Graham, because from my point of view international humanitarian law is the Geneva conventions. This is treaty armed conflict law. We also have customary armed conflict law. Armed conflict law is *lex specialis*. It has been created to deal specifically with armed conflicts. If I look at the European Convention on Human Rights, it relates to a peace situation. It relates to a situation of a country dealing with its own subjects or perhaps those who are present within its territory. That was the basic view that the Convention originally took. The fact that the Court has perhaps extended it, in the same way that the Canadian Supreme Court has extended our own Charter of Rights, does not change the law. It is not the role of the European Court of Human Rights to deal with issues that are outside the field of human rights. The issue of the law of armed conflict is *lex specialis*, which applies even if the Convention on Human Rights is *lex generalis*, which I don't think it is.

Michael Bothe:

It comes as a surprise to me that we are back to this old issue of humanitarian law and human rights. Professor Green, you know what you said was wrong. We made every effort from 1974 to 1977 to have a good mix of human rights and humanitarian law. Article 75 of Protocol I and the human rights provisions of Protocol II are human rights provisions. They are drafted according to the international covenants. Their purpose is to a certain extent to exclude the suspension of the guarantee which is possible according to the European Convention on Human Rights; to reintroduce those guarantees and to make them in a certain sense immune against this type of suspension. This double guarantee or double protection of victims by humanitarian law and by human rights law was always with us. This is not new.

There is nothing like a *lex specialis*. These are two overlapping areas of international law. Now when you have overlapping areas of international law, you will get into difficult situations at some point. I think the case which is

pending before the European Court of Human Rights is one of those difficult situations where you have also as a matter of fact a very old question. The relationship between the right to life and the right to kill in warfare. It's a very fundamental issue. It pops up from time to time at places where you might not have expected, but there is nothing shocking and nothing new about it. Perhaps it's an opportunity to rethink the issue. This is the fundamental side of it.

The Court has to decide the issue on a technical level because the Court will have to apply the European Convention. There the problem is whether actual fighting is something that is meant to be "subject to the jurisdiction" of a party to the Convention, or whether the scope of protection of the Convention as it is formulated really covers actual fighting. It covers action in the context of an occupation, but actual fighting is different. This would be my problem if I were a judge there. Is this really something which is within the scope of protection of the European Convention?

Leslie Green:

Professor Bothe, I know you were *Rapporteur* of that Committee. I sat in on that Committee. But I would remind you that what we did in that Committee was to take certain human rights and make them part of armed conflict law. They were taken out of the generality of human rights law from the point of view of military operations and made part of Geneva law because they appear not in a human rights document but in a Protocol attached to the Geneva conventions. They are now part of armed conflict law. They are to be considered from the point of view of the operation of the law of armed conflict, not in the light of human rights law. They may be in Pictet's definition of international humanitarian law, which he said was the Geneva conventions, but from that point of view I think you go too far in retaining it as a separate concept when it has become part of the *lex specialis* of the law of armed conflict.

Rudolf Dolzer:

To me the issue of the law of armed conflict or humanitarian law is to some extent a semantic issue in terms of interpreting the law. It is a matter of strict interpretation of the relevant treaties. The European Court will interpret the case before it in terms of its law, not more and not less.

Professor Bothe indicated that there is a serious question whether the European Convention was meant in the first place to address war or war-like situations. I would think that is not the case. The universal human rights conventions will have to interpret human rights laws in their own light. I think that we will come to the general issue of which is the more specific law.

The law of armed conflict is probably more specific, but there may be instances where the two bodies of law have to be interpreted in the light of each other. That would be a very specific issue to be determined in the light of the very specific case, but in principle one would have to assume that the law of armed conflict is much more specific than human rights law.

Fausto Pocar:

I would like to make a simple point on the relationship between human rights law and humanitarian law. We are discussing the question of the European States, but the question is not only European. We should not forget that many countries in the world—about 150 now—are parties to the UN Covenant on Civil and Political Rights. The Covenant's provisions on these matters are more or less going in the same direction as the European Convention. So the problem of combining the treaty obligation that was mentioned by Professor Bothe still exists and exists also for the United States because the United States is a party to the Covenant. So it's a point that should be stressed.