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The *War & Peace Journal* addresses issues across the whole spectrum human relations from Utopian peace to nuclear war. Its goal is to promote understanding of underlying issues of war in order to support peace. Academics, post-graduate students and operators of peace studies and of military arts and sciences are welcome to submit articles, notes, book reviews or comments on any subject related to these issues. The journal has three sections:

The Peace studies section pertains to all peace supporting issues ranging from conflict prevention to nation-building.

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These lists are non-exhaustive. If a field is not listed, the author simply needs to propose the
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EDITORIAL

Welcome to the *War and Peace Journal*, a print and electronic journal aiming at promoting ans sustaining peace through peace and strategic studies in order to foster understanding of human dynamics pertaining to conflict management.

The War and Peace Journal is an instrument by which academics dealing with nation building, peace studies, military and strategic studies, logisitics, tactics, peacekeeping, peacemaking, diplomacy and political sciences are welcome to share their research and publish their findings, theories, articles, notes or comments.

We welcome articles from across the world in every aspect of conflict management.

Louis-Philippe F. Rouillard
Director and Editor-in-Chief
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ETHICS, HUMAN RIGHTS AND INTERNATIONAL HUMANITARIAN LAW

by

Dr. Louis-Philippe F. Rouillard

Introduction

There is sometimes a view echoed by some 'operators', that is the military personnel on the ground – the 'real soldier'- that the law of armed conflict does not lend itself to actual application on the ground; that rules of engagement are too restrictive; that these rules apply only to the last conflict; that law has no place in the chaos of combat; and that even when it does have a place, it does not reflect the necessity of the situation. In effect, they see the law devoid of any value in itself; only as a constraint imposed by do-gooders far removed from the contemporary reality of real operations.

This brings some to adopt a minimalist view of the law of armed conflict (IHL). As a result, they act in a manner consistent with the minimal letter of the law, but eschew its actual spirit. By doing so, their actions might meet the legal requirements necessary to avoid public criticism or even prosecution, but nonetheless do not fully respect the intent of the law and the values that it encompasses. And sometimes, it simply does not meet even the minimal requirements: examples of the last decades from many modern armed forces in operations abound and do not need retelling here.

In effect, some armed forces members adopt a view whereby the IHL is an abstract concept that obliges conformity to satisfy people without first hand knowledge of the realities of operations and consequently base their decisions through mechanisms that permit to avoid sanctions rather than on decision-making processes based on the underlying intent and values of the law.

This essay will attempt to show the importance of changing this perception so that it can be internalised that the IHL is not a stand-alone benchmark requiring a minimal 'pass or fail grade', but rather a wider set of law that incorporates the values of professional soldiers and of its society at large. This internalisation aims at furthering comprehension that the actions posed in operations by serving personnel are a reflection of the nation he or she represents and are of paramount importance of mission success.

I will demonstrate this in three parts. First, I will show the link between the IHL, professionalism and ethical obligations, highlighting the links between civil society and service personnel. This will include a discussion contrasting military expectations and civilian expectations of service personnel's application of values. This will lead into my second point, where I will demonstrate how this translate into firm obligations for service personnel to conform to legal norms that are punctual, such as the IHL, and applicable at all times, such as international human rights. This will have me conclude by a

demonstration of the application of ethical values and principles in operations through the prism of the law.

While in no way a definitive essay on this topic, I aim at bringing the reader to the conclusion that the application of legal norms in operations, such as the IHL, is done not because the law stands on itself but because the law represents a wider set of values that must be respected in operations for the mission to have increased chances of success and service personnel the best odds of survival devoid of debilitating effects resulting from non-respect of these values.

Professionalism, Ethics and the IHL

At issue when establishing the foundation and the structure of service personnel is always to know what they consist of, as well as to what they do obey.

In the case of the Canadian Forces, these armed forces of Canada are established under the authority of Parliament through the *National Defence Act* (NDA)[1]. All members of the Canadian Forces, irrespective of component, are subject to the authority of its chain of command, up to and including the Chief of the Defence Staff (CDS)[2].

Since Canada does not have conscription[3], it falls under the definition of a "professional army", that is a volunteer army serving in accordance with terms of service out of which an individual can elect to continue or not, and the institution can decide to re-enrol the individual, or not. Serving under terms of services, this means that the continuous training and employment in garrison or on deployment gives them a continuous professional development.

While the terms of service of the Reserve force is separated by classes of service, whether on part-time service, full-time for a determined period or for a determine operations, the idea of a continuous professional development remains applicable to its service personnel.

But does this idea of continuous professional development translate into professionalism' as understood in the sense of a profession on par with those of prior

[1] *National Defence Act,* R.S.C. 1985, c. N-5. at article 14: "The Canadian Forces are the armed forces of Her Majesty raised by Canada and consist of one Service called the Canadian Armed Forces." These are constituted of two established component named the Regular force and the Reserve force (see NDA at article 15) and in an emergency, or if considered desirable in consequence of any action undertaken by Canada under the United Nations Charter or the North Atlantic Treaty, the North American Aerospace Defence Command Agreement or any other similar instrument to which Canada is a party, upon establishment by the Governor in Council, a third component called the Special force.

[2] *National Defence Act,* R.S.C. 1985, c. N-5. at article 18.

[3] Even under the *Emergencies Act*, R.S. C. 1985, c. 22 (4th Supp.) which includes at its Part IV the War Emergency situation, Canada cannot enacted conscription by mean of a regulation or order from the Governor General in Council. It must be made by act of Parliament.

'liberal professions', such as medical doctors or lawyers ? The question is not solely abstract as it does have important repercussions. Indeed, who is a professional member of the armed forces? What does in fact define this profession? Is only officership the heir to the notion of a military profession as managers of violence, or is it applicable as much to the non-commissioned members (NCM)? Regardless of the answer there, are solely those belonging to combat arms truly managers of violence or are all members of the armed forces members of the 'profession of arms'?

This is not an idle question as even *Duty with Honour: The Profession of Arms in Canada* proclaims:

> "… the defence of Canada and its interests remain the primary focus of the Canadian military profession and the volunteer professionals who serve in uniform. Indeed, the fundamental purpose of the Canadian profession of arms is the ordered, lawful application of military force pursuant to governmental direction. This simple fact defines an extraordinary relationship of trust among the people of Canada, the Canadian Forces as an institution and those members of the Forces who have accepted the "unlimited liability"[1] inherent in the profession of arms."[4]

Duty with Honour answers these questions by affirming that all officers and non-commissioned members, and all Regular force and Reserve force members become members of the profession of arms by swearing the Oath of Allegiance.[5] While a debate

[4] A-PA-005-000/AP-001, *Duty with Honour: The Profession of Arms in Canada*, Kingston: Canadian Defence Academy (2009), at 4. It defines the concept of unlimited liability which is understood at page 26 of *Duty with Honour* as being: "Unlimited liability is a concept derived strictly from a professional understanding of the military function. As such, all members accept and understand that they are subject to being lawfully ordered into harm's way under conditions that could lead to the loss of their lives. It is this concept that underpins the professional precept of mission, own troops and self, in that order, and without which the military professional's commitment to mission accomplishment would be fatally undermined. It also modifies the notion of service before self, extending its meaning beyond merely enduring inconvenience or great hardship. It is an attitude associated with the military professional's philosophy of service. The concept of unlimited liability is integral to the military ethos and lies at the heart of the military professional's understanding of duty."

[5] *Ibid*., at 11: "In Canada, an individual becomes a member of the profession of arms by swearing the Oath of Allegiance and adopting the military uniform, thus establishing an essential distinctiveness in Canadian society. Thereafter, members demonstrate their professionalism by

- embracing the military ethos;
- reaching and maintaining the point at which a member has achieved the requirements for first employment in an occupation and maintaining this qualification;
- pursuing the highest standards of the required expertise; and
- understanding, accepting and fulfilling all the commitments and responsibilities inherent in the profession of arms.

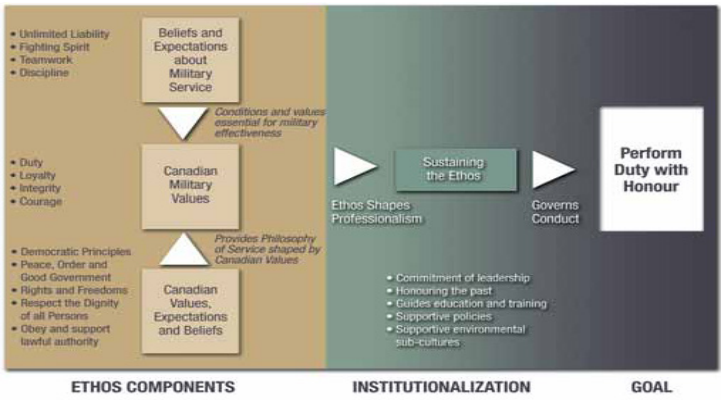
In the Canadian Forces, all non-commissioned members (NCMs), especially non-commissioned officers (NCOs), warrant officers (WOs), chief petty officers and petty officers (CPOs and POs), share leadership responsibilities and are required to master complex skills and gain extensive knowledge of the theory of conflict. Therefore, and in accordance with the criteria listed, all regular force members of the CF, regardless of rank, are members of the profession of arms. Although not necessarily on full-time service, primary reserve members are an essential component of the nation's military capability and meet the criteria, and thus are accorded professional status. On active duty, they assume the status and identity of full-time military professionals."

ranges in the academic world as to whether or not this inclusiveness is warranted or not[6], it will suffice for our purpose to adopt *Duty with Honour*'s all-encompassing view and to accept its criteria for determining what is a profession.[7] The criteria stated are that the:

> "profession of arms is distinguished by the concept of service before self, the lawful, ordered application of military force and the acceptance of the concept of unlimited liability. Its members possess a systematic and specialized body of military knowledge and skills acquired through education, training and experience, and they apply this expertise competently and objectively in the accomplishment of their missions. Members of the Canadian profession of arms share a set of core values and beliefs found in the military ethos that guides them in the performance of their duty and allows a special relationship of trust to be maintained with Canadian society."

In many ways, this reprises the historical and sociological criteria stated by many theorists regarding the nature of the military profession. Depending what armed forces are concerned and on the political regime in place, these criteria are generally understood at the individual level, with some differences depending on the theorist, as being manifested by specialized knowledge and skills, as well as an adherence to professional norms8.

These professional norms are understood in the Canadian context as being the values and beliefs found in the military ethos. This military ethos is understood as "the foundation upon which the legitimacy, effectiveness and honour of the Canadian Forces depend"[9] and consist of[10]:



[6] See English, A., *Professionalism and the Military - Past, Present, and Future: A Canadian Perspective* , paper prepared for the Canadian Forces Leadership Institute, May 2002, confronting the notions of Huntington, Jarowitz and Abrahamsson with the historical development of professions and the changing nature of the sociological concepts of the military profession.
[7] *Duty with Honour*, *supra*, note 4 at 10.
[8] Fitch, S., Military Professionalism, National Security and Democracy: Lessons from the Latin American Experience, (1989) IV (2) *Pacific Focus,* at 101.
[9] *Duty with Honour*, *supra*, note 4, at 25.
[10] *Ibid*., at 33.

As can be seen, the ethos govern conduct in order to perform the service personnel's duty with honour, but rests upon assumptions, namely a set of Canadian values attribute to the Canadian society at large, composed of expectations and beliefs, as well as a set of Military Service beliefs and expectations, both of which are transcended in a set of Canadian Military Values. These are the core values which guides service personnel actions and decisions.

In the word of *Duty with Honour*, this military ethos Reflecting national values and beliefs leads to a unique Canadian style of military operations — one in which CF members perform their mission and tasks to the highest professional standards, meeting the expectations of Canadians at large[11].

And here is where the Canadian Forces differ from many armed forces across the globe; the Canadian Forces are not only expected to abide by its military ethos, but also to apply a common set of values it shares with another institution responsible for all matters related to the national defence of Canada: the Department of National Defence.

Established under Article 4 of the *National Defence Act*[12], the Department of National Defence (DND) is under the responsibility of the Minister of National Defence (MDN) who is vested with power over the management and direction of the Canadian Forces and of all matters relating to national defence[13]. This being the case, the interaction between the two necessitates a common set of values under which to act.

However, since the DND is composed of public servants who fall under the rules of the public service under the *Public Service Employment Act* [14](PSEA), they are held to the values of the public service of Canada has affirmed in the *Values and Ethics Code for the Public Sector15*, itself a result of the *Public Servant Disclosure Protection Act[16]*.

In order to reconcile the two sets of ethical rules, the Deputy Minister of the DND and the CDS created of their authority the Defence Ethics Programme (DEP) in 1997 and this DEP produced a *Statement of Defence Ethics*; this *Statement of Defence Ethics* endured until the promulgation of the new *Department of National Defence and Canadian Forces Code of Values and Ethics* on 13 June 2012 which combined both Canadian Military Values and Public Service Values in a set of principles and

[11] *Duty with Honour*, *supra*, note 4 at 34.
[12] *National Defence Act, supra*, note 2 at article 3 : "There is hereby established a department of the Government of Canada called the Department of National Defence over which the Minister of National Defence appointed by commission under the Great Seal shall preside."
[13] *Ibid.* at article 4: "The Minister holds office during pleasure, has the management and direction of the Canadian Forces and of all matters relating to national defence and is responsible for: (a) the construction and maintenance of all defence establishments and works for the defence of Canada; and (b) research relating to the defence of Canada and to the development of and improvements in materiel. "
[14] *Public Service Employment Act*, R.S.C 2003, c. 22, ss. 12, 13.
[15] *Values and Ethics Code for the Public Sector*, 2 April 2012, available at http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?section=text&id=25049.
[16] *Public Servants Disclosure Protection Act*, S.C. 2005, c. 46.

obligations that both Canadian Forces members and DND employees must adhere to, including a new set of specific values, but the retention of the previous ethical principles[17].

Having been one of the primary drafters of this document, I can attest to the fact that while the terminology may differ in part from the previous *Statement of Defence Ethics*, and there is a shared set of principles and values more centered upon those of the public sector as a whole, this alters in no way the fundamental values by which service personnel must adhere to in their official role.

In example, if the concept of duty has not disappeared; it is encompassed as much in the value of stewardship and excellence of the new code; the concept of unlimited liability that underlines this obligation for serving personnel continues to exist. The fact that an emphasis on shared core values is amplified does not result in the setting aside of the core of the military ethos and of the Canadian military values; in no way does this abrogate the military values to which serving personnel are expected to conform.

The issue it brings to the fore, however, is that there is a perception by some that military morale and values have been eroded by the "transference of civilian values and management techniques to the Forces"[18]. However, even proponent of having a different set of values in the 1980s recognised that "An ethos which resulted in alienation of the Forces from the Canadian public or the civil service is regarded as highly undesirable"[19].

As we have seen, there are good reasons for this; the military ethos is composed, amongst others, of the Canadian Values. If it was otherwise, a divide would be created and the very armed forces which are supposed to represent and defend Canadian ideals would base itself on its own set of values for doing so and not on the wider set of beliefs and expectations that the citizens hold.

This is not a detail; it is a fundamental aspect of the bond of trust that must exist between all citizens forming civil society and those citizens in uniform that serve in the defence of all others.

The concept for an armed force within a liberal democracy is not new. Indeed, everyone and everything, from individual to corporations to states, have a trust account, much like a bank account. Some commentator states that this trust "is a function of two things: character and competence. Character includes your integrity, your motive, your intent with people. Competence includes your capabilities, your skills, your results, your

[17] *Department of National Defence and Canadian Forces Code of Values and Ethics*, 13 June 2013, wherein the three ethical principles are: Respect the dignity of all persons; Serve Canada before self; and Obey and support lawful authority. Its five specific values are: Integrity, Loyalty, Courage, Stewardship and Excellence. Available at http://www.ped.forces.gc.ca/dep-ped/code/code-eng.aspx.
[18] Kasurak, P., "Civilianization and the military ethos: civil-military relations in Canada", *Canadian Public Administration*, 25.1 (1982): 108-129 at 108.
[19] *Idem.*

track record. And both are vital."[20] Trust means confidence. And we have a limited amount of it available in our account. Each time that our competence and skills, or our character and moral rectitude, is tainted by an event, we withdraw some of our capital of confidence. When we reach a point where there is none to withdraw anymore, we can equate this with being morally bankrupted and armed forces are devoid of the trust of fellow citizens.

And this bond of trust between citizens and uniformed citizens does matter, as it impacts on the 'social capital' a nation has invested in, in the form of trained uniformed citizens prepared to defend the nation. Lack of moral rectitude will have a direct impact on morale and performance, and even more in retention and recruiting. Also, it will impact on the devolution of resources to the armed forces, which will further impact competence and morale. Once in this vicious circle, the bond of trust further dissolves and may take decades to rebuild.

In example, much has been published in relation to the unravelling of a "military covenant" between civil society and the military. The terminology of a military covenant originates squarely from the United Kingdom, where the British Army's Doctrine Publication 5 (ADP5) entitled '*Soldiering: the Military Covenant*' was put forth in 2000[21]. In short form, the military covenant is described as the moral basis of the Army's output. It describes how the concept of unlimited liability makes soldiering unique and what a (British) soldier should expect in return for surrendering some civil liberties while under the uniform[22]. It is important to mention that this is in essence an Army doctrine: it does not, by itself, apply to the Royal Navy or the Royal Air Force. However, it is understood that its principles do apply to all three services in the United Kingdom.

The Canadian Forces have adopted a concept very similar to that of the military covenant, but calls it instead the very Rousseauesque 'social contract'. In the Canadian Forces context, this is understood in *Duty with Honour* as being a "national commitment — *in essence a moral commitment* "23.

This view is interesting in itself since, as in the case of the military covenant for the United Kingdom where it is viewed as a '*psychological contract*', the social contract is viewed not as a legally binding contract, but as a '*moral commitment*'.

In the Canadian context, it is understood by the Canadian Forces as resting on the foundations of elements brought into the public eye by the *Standing Committee on National Defence and Veterans Affairs* (SCONDVA), which stated that this moral commitment to the Canadian Forces must be based on concrete principles24, including:

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[20] Huackabee, G., The Politicizing of Military Law- Fruit of the Poisonous Tree, (2009-2010) 45 Gonzalez Law Review at 611, citing Covey, Stephen M.R., *The Speed of Trust*, 2006, at 30.
[21] Tipping, Christianne, "Understanding the Military Covenant", *The RUSI Journal*, (2011) 153 (3), 12-15 at 12.
[22] *Idem*.
[23] *Duty with Honour, supra*, note 4, at 44.
[24] Standing Committee on National Defence and Veterans Affairs, *Moving Forward: A Strategic Plan for Quality of Life Improvements in the Canadian Forces*, October 1998,

being fairly and equitably compensated for their services, all members and their families being provided with ready access to suitable and affordable accommodations, as well as be provided with access to a full and adequate range of support services, receiving suitable recognition, care and compensation be provided to veterans and those injured, assuring reasonable career progression, being treated with dignity and respect and be provided with the appropriate equipment.

The Canadian Government in its response took note of the SCONDVA recommendations and reiterated its commitment to the Canadian Forces as an institution[25].

This clearly states the expectation of the institution of the Canadian Forces on behalf of its service personnel. It is an arrangement that is not dissimilar to that of the British military covenant or of most Western armed forces serving in liberal democracies. As a result, the young Canadian professional becoming a member of the profession of arms upon swearing of his Oath of Allegiance can expect fair and respectful treatment that extends as much to his or her terms of service as to the having the means attributed by civil society in order to accomplish the task given by the government. Therefore, there is an expectation of fairness from service personnel, for which civil society expect an output.

This output can very well be to send these uniformed citizens deliberately in harm's way in order to accomplish the policies of its government. Service personnel expect that this will be done very carefully on a costs and benefits evaluation, without better solutions being available or having no other way out[26]. It does stand to reason that if one is liable in an unlimited manner up to and including forfeiting one's right to life, one would not want it to be done on a trifle or for petty reason. And if one has been

http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=1031525&Mode=1&Parl=36&Ses=1&Language=E. The recommendations in full are: "That the members of the Canadian Forces are fairly and equitably compensated for the services they perform and the skills they exercise in performance of their many duties. And that such compensation properly take into account the unique nature of military service.", "That all members and their families are provided with ready access to suitable and affordable accommodation. Accommodation provided must conform to modern standards and the reasonable expectations of those living in today's society.", "That military personnel and their families be provided with access to a full and adequate range of support services, offered in both official languages, that will ensure their financial, physical and spiritual well-being.", "That suitable recognition, care and compensation be provided to veterans and those injured in the service of Canada. Here the guiding principle must always be compassion.", "That members be assured reasonable career progression and that in their service they be treated with dignity and respect. In addition, they must be provided with the appropriate equipment and kit commensurate with their tasking." The Government's response to the report took note of the committee's recommendations and reaffirmed its "commitment to the Canadian Forces as a national institution." It went on to say, "The men and women of the Canadian Forces have made a tremendous contribution to their country. They deserve the respect and appreciation of their government and their fellow citizens."

[25] *Government Response to the Report of the Standing Committee on National Defence and Veterans Affairs (SCONDVA) on Quality of Life in the Canadian Forces*, 25 March 1999, on August 3, 2003.

[26] Giacomello, G., "In Harm's Way: Why and When a Modern Democracy Risks the Lives of Its Uniformed Citizens", *European Security*, (2007) 16 (2), 163-182.

injured during this task, one can reasonably expect to be cared for by the civil society that required this sacrifice.

Yet, many commentators mention an unravelling of the military covenant, or social contract. In the United Kingdom, the United States and in Canada, opposition or former opposition party(ies) now sitting in government, have clamoured that service personnel are not being provided with adequate equipment in adequate time; that wounded veterans or families of the Fallen are not treated with care, respect and compassion; or that the mission amounts to a misuse of personnel and is an encroachment of their right to life or to the quality of life they are to expect. In short, serving personnel are described as being used as commodities and veterans discarded and being let down[27]. Some argue that because of the disconnect between the armed forces and civil society, especially since the numbers of serving personnel have dwindled compared to the Second World War and Cold War eras, there is always less of a link between society as a whole and armed forces[28].

Yet, in the same breath it is argued that in western liberal democracies, civil society do not like the use of force as its nature since it is antithetical to their own liberal outlook and that if they must enter a fight, that their armed forces do so in a manner that reflect their own core liberal values[29]. As such, civil society questions increasingly the legitimate use of force[30]. Furthermore, the very same civil society has become ever more intolerant of casualties, especially when these are perceived as being unnecessary in light of misguided foreign policies[31].

In effect, while civil society supports the troops, that is the individual service personnel and the institutions in which they serve, they often disapprove of the mission in which they serve and of the foreign policies of government that directed those mission.

That is because contemporary civil society has been forged by the end of the Cold War and the receding of the direct threats against its civil liberties, like the menace of Nazism during World War II or that of communism during the Cold War. If anything, civil society wants the best “bang for the defence buck” as does the Swedish Armed

[27] McCartney, H., “The military covenant and the civil–military contract in Britain”,(2010) 86 (2) *International Affairs*, 411–428 at 411.
[28] *Ibid*. at 421, citing Hew Strachan, “Liberalism and conscription: 1789–1919”, in Hew Strachan, ed., *The British Army: manpower and society into the twenty-first century*, London, Frank Cass, 2000, at 13 .
[29] *Ibid*. at 414 citing Lawrence Freedman, *The transformation of strategic affairs*, Abingdon, Routledge, 2006, at 41.
[30] *Ibid*. at 413, citing Martha Finnemore, *The purpose of intervention*, Ithaca (NY), Cornell University Press, 2003 at 19 and Theo Farrell, *Norms of war: cultural belief and modern conflict*, Boulder (CO), Lynne Rienner, 2005 at 178.
[31] McCartney, *supra*, note 26 at 419, citing Christopher Dandeker, “Recruiting the All-Volunteer Force: continuity and change in the British Army, 1963–2008”, in Stuart A. Cohen, ed., *The new citizen armies: Israel’s armed forces in comparative perspective*, London, Routledge, 2010, for the British context, but which can certainly be accepted as applicable to most western liberal democracies.

Forces; forces that have not have to fight a war for nearly two centuries[32] or, if they must fight, that they do so in conflicts where they are expectations of zero casualties, such as in the Kosovo campaign[33].

This new framework can be seen in a very positive light where civilian expectations do in fact conform with the fairness expectations of serving personnel. If this is the case, then why is there a multiplication of accusation that there is an erosion of our social capital due to an unravelling of the moral contract?

The answer is not simple. In part, the root cause might be for some the desire to score political capital, but it is also because mistakes where made and these mistake ran much against the expectations of civil society and of service personnel. From the care provided to veterans wounded in Iraq and Afghanistan in Bethesda to the issues of the Nimrod vehicles being unsuitable to protect British army personnel, errors made by government in the treatment of their service personnel combined with a doubtful legitimacy of entering this conflict – in example the lack of weapons of mass destruction in Iraq or the doubts concerning the attachment of the Afghan government to western liberal democracy – have all create pressures and moral questions.

This state of affairs operates when western liberal democracies have never had such a well-educated population that internalizes civil society values and demand ethical conduct for the public sector, of which the armed forces constitute a large part[34]. Civil society's expectations have increase and now are on par with its knowledge. The education of the governing members of civil society and access to knowledge are now very much equivalent in and out of the public sector, rendering civil society apt at making its own judgement.

And this judgement includes a perception that entering a conflict must be done with prudence and legitimacy, and further creates expectation that the conduct of their service personnel will be done in conformity with civil society's values.

As we saw before, such values must form part of the armed forces' values and cannot depart from them; they must be aligned or the social contract would further be completely severed. The application of these values for armed forces therefore becomes military ethics, which is discussing the right and wrong actions of an armed force and its very real consequences of the lives of men and women[35].

[32] Catasu, B., and Gronlund, A., "More Peace for Less Money: Measurement and Accountability in the Swedish Armed Forces", (2005) 21 (4) *Financial Accountability & Management*, at 469.

[33] Burke, "Just war or ethical peace? Moral discourses of strategic violence after 9/11", (2004) 80 (2) *International Affairs*, 329-354 at 331, citing Micheal Ignatieff arguing that: 'from an ethical standpoint, it transforms the expectations that govern the morality of war … a war ceases to be just when it becomes a turkey-shoot … NATO could only preserve its sense of moral advantage by observing especially strict rules of engagement.' In Michael Ignatieff, *Virtual war*, London, Chatto & Windus, 2000 at 165.

[34] Erakovich, R., "A Normative Approach to Ethics Training in Central and Eastern Europe", (2006) 29 *International Journal of Public Administration*, 1229–1257 at 1231.

[35] Bonadonna, R.R., "Doing Military Ethics with War Literature", (2008) 7 (3) *Journal of Military Ethics*, 231-242 at 231.

These actions, right and wrong, must conform to expected behaviours and these behaviours are prescribe by rules, both written and unwritten. The unwritten rules are those expectations aligned on the moral rectitude expected of service personnel through their military values, while the written rules are those which are both internal (laws, a Code of Service Discipline) and external (international treaties and customary norms).

In the past, civil society has always expected its service personnel to behave with absolute honour at all times, but nonetheless has often turned a blind eye to less than honourable behaviour[36]. But, as we have seen, civil society's expectations have grown, and perhaps outpaced what armed forces can truly produce as an output answering this standard of behaviour.

Hence the emergence of military ethics, which is in part a species of the genus of professional ethics[37]. As we any other professional ethics, one of the criteria for its existence is that it answer to a specific conceptual framework, including a legal and regulatory framework. In the case of military ethics, this legal framework is formed by International Humanitarian Law (IHL).

Yet, ethics concerns itself not with the legality of an action, but with the notion of knowing whether this action is morally right or wrong. Since law in itself does not concern itself with the right or wrong approach, how does one reconcile the two?

This is where there is a case to examine whether the IHL respect military ethics and to demonstrate how the one relates to the other. The IHL is not as such an altruistic framework to prevent right and wrong: it is a preventative and repressive instrument to attempt to prevent violence continuing once the political objectives have been accomplished and to prevent escalation to levels too abhorrent for conscience of civil society.

Military ethics, the IHL and Human Rights

International Humanitarian Law, also called the Law of War in the much of the American and British literature and Law of Armed Conflict (LOAC) in other, is not a new concept. The idea that armed conflict between people of different clans, tribes, nation or even political affiliation within one of these has existed since early writings have recorded it.

For example, the Jewish tradition of combat is encapsulated in a large part in the Bible, even though Jewish commentators did not exactly agree on all the prerequisite prior to entering a conflict, some arguing that there is a requirement to favour peace up

[36] Mackmin, S., "Why Do Professional Soldiers Commit Acts of Personal Violence that Contravene the Law of Armed Conflict?", (2007) 7 (1) *Defence Studies*, 65–89 at 66.
[37] Cook, Martin L. and Syse, Henrik , "What Should We Mean by 'Military Ethics'?", (2010) 9 (2) *Journal of Military Ethics*, 119-122 at 119.

to the last possible moment and others affirming that this is not in any way a requirement[38]. But even in the customary approach to law that is taken through religious text, one aspect arises: the morality – of the ethics – to apply to battlefield situations[39].

Many jurists, by professional inclination, have a tendency to adopt the view that the law is the law and that morality has nothing to do with it. In the same vein, many a military professional professes that morality has nothing to do on the battlefield. Since lives of comrades and compatriots, and since political goals of the nation or the State are at play, winning with the fewest casualty to one's side is all that matters. Indeed, this view is an old one: Thucydides' work *The History of the Peloponnesian War* is often used to show the Melian Dialogues and is often taught in military colleges and academies around the world as the principle for realism in the theories of war and that, as such, morality has nothing to do with international relations, including its practical application through the use of armed force[40].

However, a careful reading of Thucydides contradicts this view. In fact, all implication of the ethics of strategic choices and their impacts on both the Athenians and allies are looked upon and questions by the very participants taking part in it. Nicias leading of the Syracuse expedition despite his own firm belief that it over-stretches Athenian forces and does not align with the aim of the war put in question the very moral question of the initiation of hostility and the manner in which an armed conflict is prosecuted. Here, the question is to know whether Nicias had exhausted all his ethical obligations toward his civilian leadership (the Athenian assembly) to head off the expedition[41]. This very question is asked obliquely in command and staff courses around the world to field grade and superior officers on course; yet, most come to the conclusion that it is not theirs to question why, but theirs to do and hopefully have the most of their command survive.

As we can see, tradition seems to have warranted to types of requirement: firstly, the question of whether entering a conflict is justified and secondly that of the manner in which the hostilities are waged. Through time, and (mostly, but certainly not limited to) Christianity, a tradition of 'Just War' evolved, comprised of two sets of principles: the first governing the resort to armed force (*jus ad bellum*) and the second governing conduct in the hostilities created (*jus in bello*)[42].

However, the tradition of just war is just that: a tradition. It is not a code of law that can be answered to in an interpretative manner by a judge and brought to appeal for further discussion. It is a amalgamation of concepts, not a legal prescription, even though one could make an arguable link between the precepts of canon law and the

[38] Broyde, M.J., "Battlefield Ethics in the Jewish Tradition", (2001) 95 *American Society International Law Proceedings* 82-99, at 94 and 95, opposing the Bible to the Sifri, one of oldest of the midrashic source books of Jewish law.
[39] *Idem*, at 93.
[40] Cook, M., "Thucydides as a Resource for Teaching Ethics and Leadership in Military Education Environments", (2006) 5 (4) *Journal of Military Ethics*, 353-362 at 353.
[41] *Idem*, at 358.
[42] McMahan, Jeff, "The Ethics of Killing in War", (2004) 114 *Ethics*, 693–733, at 114.

concepts of the just war tradition. This is even more the case when one considers that in Christianity many a legal commentator or philosopher have attempted to describe the provisions of this tradition[43].

Through time, rituals of battle – or their savagery, depending on the region and the epoch – evolved in a general set of traditions. In example, European warfare evolved invented and reinvented for itself the notion of honourable surrender where quarter is given. A notion nonetheless left to the quirks and desires of the nobility in charge and by no means regarded as obligatory. Similar notions certainly took root elsewhere; but so did the discretionary character of their implementation.

Through the industrialisation period, means of warfare evolved rapidly and permitted ever more carnage. Recognising that conflict was to be expected and that general limits would perhaps minimise the carnage, by the end of the 19th century actual treaties regulating the use of these means in war, such as the St-Petersburg Declaration of 1868, or regulating the entrance into a conflict and the means to be used, such as the 1899 Hague Convention, or the conduct to adopt in war, such as the 1864 First Geneva Convention led to the establishment of a body of law identifiable as that of the Law of War.

Of course, it remained mostly ineffective and attempts to remodel its content following this and that conflict, such as the 1906 Second Geneva Convention following the disastrous (for Russia) Russian-Japanese war of 1904 and the 1907 Hague Convention, could not prevent increases in means of delivery of death on the battlefield, including and up to artillery barrage literally altering the landscape of Belgium and the use of poison gases during the First World War.

Attempts were therefore done to actualise these laws and to regulate treatment of prisoners on the battlefield. The Third Geneva Convention in 1929 attempted just this and resulted in the biggest fiasco so far in World War Two, with Allied prisoners of war being literally worked as slaves by their Japanese captors and Russian prisoners of war starved to death by the millions in German captivity. Still, what seemed to captivate even more the attention of the world was the treatment of civilians, with estimates calculating that over 6 million Jews and 1 million Roma were exterminated through means of rounding up, mopping up, transporting and mass executing by various means, 'undesirables'.

After the Second World War and the immensity of the loss of life and the deliberate murderous rampage of some regimes, the Allies decide to convene military tribunals; for violations of the law of war by the occupiers in countries that suffered them and for major war criminals at Nuremberg.

[43] Ruys, T., "Licence to Kill? State-Sponsored Assassination under International Law", (2005) 13 *Military Law & Law War Review*, 1-50 at 23. For example, Ruys mentions both St. Thomas Aquinas and Sir Thomas More approving of the killing of a sovereign if he acts with cruelty in an evil manner in order to spare the innocent and punish those responsible for wars.

The idea of prosecuting for illegitimately causing the war and for conduct during the hostilities was not new: the peaces treaties issued in Versailles, St-Germain and Trinaon in 1919 and 1920 provided some mechanisms of this sort. However, there was no experience and real political desire to prosecute what was not entirely perceived as individual violations.

Indeed, what must be understood of the IHL is that it is a state obligation: applicable to a country. In order to oppose a legal constraint against an agent of that state, for example a junior officer or even a general officer, this state obligation must be internalised by the country ratifying the treaty creating the international obligation for the state to, for example, respect prisoners of war under its control. It is for that state to provide education and training to its agents, such as police persons and service personnel, and to punish violations of these obligations. With Nuremberg, following the Postdam Agreement, this regime that was before the province of the victor's justice evolved into a body of law now recognised and enforceable[44].

Then, a Fourth Geneva Convention was brought forth in 1949 and all three preceding ones were revised and updated. To this will be added two additional protocols in 1977 and a third protocol in 2005, while a myriad of legal instruments regulate particular technology (i.e. laser, cluster bombs) and prohibit military activities in precise locations (i.e. Antarctica and space).

However, as we can see, so far all these treaties have either been violated in some form or another or have not yet been tested. That is because the law is an instrument to be interpreted. And, usually, counsel will interpret it to the advantage of his or her client. In the case of the military, the envelope of interpretation often risk pushing because it is in the best interest of the forces desiring to use a mean of armed force to interpret it as such. And counsel will provide this measure of interpretation. Furthermore, interpretation of an action on the battlefield is often made after the fact and justice systems are often reticent to criticise ex post facto while not having first hand knowledge of the conditions and state of mind in which a battlefield decision is made.

Yet, justice systems are composed of jurists. And jurists are often the very elected members of our democratic assemblies, whether they are parliaments or congress or assembly. It is therefore sometimes disconcerting to note that there is a dissonance in the message coming one way and the message going the other; whether it is for the decision to enter a conflict or for the conduct during hostilities.

As mention before, many believe morality has nothing to do on a battlefield. But since we have not had the predicted apocalypse of Soviet forces crossing the Fulda Gap, it is hard to compare the cataclysm of the Second World War with current conflicts of choice, such as the invasions of Iraq (2003) and of Afghanistan (2001). Certainly, the intensity of combat and the type of conflicts are very different from symmetric forces meeting head-on with the objective of seizing a capital, decapitating it and replacing it

[44] Blumt, G., "The Laws of War and the "Lesser Evil", (2010) 35 *Yale Journal of International Law*, 1-69.

with an occupation force until ready to accept a method of governance on which the West agrees, under the careful quartering of the territories for the duration of the occupation under geostrategic pressures, such as the occupation of Berlin was.

And since many believe that morality has no place on the battlefield and that realism is the only doctrine of international relations that is relevant, they will also argue that morality has nothing to do with entering a conflict; whether as the aggressed or as the aggressor. As long as the international regime has blessed (even ex post facto) the use of armed force, then all is good and morality has not to be considered.

Yet, let us compare this for a moment with the preparatory phase that enlarged the Second World Ward, which most agree started in 1939 with the invasion of Poland, with some dissenting voices stating that in fact it started with the Japanese invasion of Chinese Manchuria in 1937, but which really reached its conflagration with the entrance of the United States into the war in December 1941.

Yet, much prior to this, the President of the United States, Franklin D. Roosevelt, had on January 6, 1941, announced in his Annual Message to Congress, his concept of "Four Freedoms", these being: freedom of speech and expression everywhere in the world; freedom to worship God in his own way everywhere in the world; freedom from want, meaning economic security and healthy peacetime life for all inhabitants everywhere in the world; and freedom from fear, translating into world-wide reduction of armaments so that no nation should be capable of physical aggression everywhere in the world[45]. This message was precursor to the *Lend-Lease Act* of March 11, 1941, which would in effect buoy the United Kingdom under the Nazi onslaught until the U.S. could be pulled in as clearly wished Roosevelt[46].

While this would be an excellent moment for realists to exercise their cynicism, this statement and its translation into an act of support for the United Kingdom clearly state a policy that the American president intended to pursue – and which he did. Furthermore, it did not stay as a message to Americans. On August 10, 1941, Roosevelt met with Prime Minister Winston Churchill off the coast of Newfoundland. From their "meeting at sea" emerged a document that became, for all intent and purposes, the policy statement of the entrance into war of the United States as an ally of the United Kingdom. From this meeting was issued a joint declaration named the "Atlantic Charter", proclaimed on August 12, 1941. Its clear statement of alliance of the Anglo-Saxon world is undeniably made against "aggression" and the "Hitlerite Government of Germany" calling "after the final destruction of Nazi tyranny (…) assurance that all men in all lands may live out their lives in freedom from fear and want" and that respect for "the right of all peoples to choose the form of government under which they live"[47].

[45] Borgwardt, Elizabeth, "When you State a Moral Principle, you are stuck with it", (2005-2006) 46 *Virginia Journal of International Law*, 501-562 at 517.
[46] *Lend-Lease*, Published Law 77–11, H.R. 1776, 55 Stat. 3034, enacted March 11, 1941.
[47] *The Atlantic Charter*, 14 August 1941.

This might seem just a principled declaration, but as the aptly title article of Elizabeth Borgwadt states: when you state a moral principle, you are stuck with it. And here, the United States and United Kingdom did not just state the kind of right they desired to see after the conclusion of the war in order to avoid the mistake of 1919. The *Atlantic Charter* affirmed the rights as they apply not to States but to "peoples" and to "all men in all the lands".

It is capital to remember here that the United States were not officially part of the hostilities and yet already the *Atlantic Charter* establishes the moral justification for supporting the combative United Kingdom against the Nazi steamroller. And this justification was not for states to enjoy prestige or dominate; instead, it was a statement to provide collective security and personal enjoyment within this prospective system. In effect, it was building the argument as to the justness of the entrance into war when the time would come for the United States, answering to the *jus ad bellum* principle of the just war tradition.

The problem with having just cause for entering a conflict is that it does not necessarily equates with justly conducting the hostilities once entered. And the tradition of justness is to be understood as being rightly conducted as opposed to wrongly conducted. In the theoretical analysis world of the just war tradition, it therefore comes to the conclusion, in Michael Walzer's words that the two sets of principles of the just war tradition are "logically independent. [Therefore] It is perfectly possible for a just war to be fought unjustly and for an unjust war to be fought in strict accordance with the rules."[48]

As a result, an unjust combatant is one that legally is a combatant but who fights on the side of a state not having met the criteria of *jus ad bellum* – therefore fighting for an unjust cause - while a just combatant is one that fights on the side of a state having met these criteria and therefore fighting for a just cause. Since *jus in bello* is independent of *jus ad bellum*, it therefore makes no difference as to the permissibility of an "unjust combatant" to fight; it is then the conduct in the fight that matters. This is a view criticised by some, certain authors deeming the conclusion untenable, but which is nonetheless largely accepted by armed forces and governments across the world49.

In the case of the *Atlantic Charter*, while discussion raged then as to its interpretation and the aim for the globalization of the rights and freedoms it proposed and contained, it can be stated as a minimum that these goals are certainly more a justification than the 'Hitlerite' demands that lead to the invasion of Poland. And since its statement was in existence prior to Imperial Japan's attack on American forces in the Pacific, one can safely extend its concepts to the aim of defeat of the Empire of Japan during the Second World War. As such, just cause can be attributed to the United States armed forces and its combatants.

[48] Walzer, Michael, *Just and Unjust Wars,* Harmondsworth, Penguin, 1977 at 21.
[49] McMahan, *supra*, note 42 at 693.

Accepting that combatants on both sides were perceived as legitimate combatants, both under international law of the time and under the independent understanding of the just war tradition, the justness of their cause nonetheless evokes different reactions and even more so when compared with the conduct.

The benchmark accepted is the IHL and provides a set of rules as to the manner in which one may cause harm to physical integrity, including the denial of the right to life, and to property. Its whole premise rest on the principle of humanity and this is enacted by something seen as "a triumvirate equation under which military necessity is framed by the prohibition of unnecessary suffering during the proportionate application of military force, in an effort to "humanize" a reality"[50].

While not making an infallible linear argument of causal relationships, one can nonetheless argue that it the case of the Second World War, for United States Armed Forces, there seems to have been a convergence between the stated aims of the conflict much prior to its government declaring its entrance into it and the fundamental reasons motivating the pursuing of the these goals. The conflict was construed by Roosevelt as based upon the entrenchment of rights and freedoms for "all men in all lands" and therefore gained the higher moral grounds to operate. Furthermore, as the victim of an armed aggression upon its armed forces in a belatedly declared war, the United States was given the entire grounds of *jus ad bellum* to react while Japan ran afoul of established conventions by declaring the war belatedly, whether by design or not, and by committing an act of aggression.

The *Atlantic Charter* not only incorporated Roosevelt's 'Four Freedoms', but also provided for a statement of political rights as a core value of the reason why the war would be fought, a vision of individuals in a new system of collective security as opposed to the previous one composed solely of the interests of States and emphasising the application of these principles domestically as much as internationally. All these elements "continue to inform our conception of the term "human rights"[51]. Simply said, America defined its war in terms of a fight for human rights.

At its roots, the principle of humanity rest precisely on the very first right of "all men in all lands"; the right to life. And the application of this very principle is fundamental to apply towards those who are *innocents*, in the Latin sense of the words '*not nocentes'*. *Nocentes* means "those who injure or are harmful"52. By contrast, innocents are those who do not injure or are harmless.

In the just war tradition, the innocents are therefore "morally immune" to attacks. This conference of status in the just war tradition is translated in the IHL in the distinction between combatants, who are *nocentes*, as they do pose a threat and

[50] Solomon, Solon, "Targeted Killings and the Soldier's Right to Life", (2007) *International Law Student Association Journal of International & Comparative Law*, 99-120 at 105-106.
[51] Borgwardt, *supra*, note 45 , at 506.
[52] McMahan, *supra*, note 42 at 695.

therefore lose their immunity and are liable to attacks, and *not nocentes*, the innocents who are noncombatants because they do not pose a threat[53].

Yet, as opposed to international human rights where the contemporary right to life cannot be arbitrarily denied[54], the IHL does provide for arbitrary deprivation of the right of life – for combatants and noncombatants alike. The proposition is not contrary to the existing IHL: indeed, the IHL provides clearly for the criteria or proportionality, whereby an attack on combatant that is deemed a military necessity and justifiable if it provides for economy of force even if collateral damage in terms of noncombatant are expected. The criteria of proportionality then demands that the military advantage gained from the attack be superior to the expected noncombatant casualties. The fact that miscalculation occurs and that collateral damages are much greater than anticipated is not at issue: it is the expectations prior to the attack being effected that matter. As long as noncombatants where not directly targeted and the expectation of proportionality were respected, it is permissible to deny arbitrarily noncombatant of their right to life[55].

And here is where the professional soldier must think beyond the narrow confines of the IHL, even though he is trained precisely in its application in the course of his professional activities, namely waging warfare upon the enemy combatants. The professional must remember that while he is subject to the IHL, he also remains an agent of the state and must continue to apply international human rights law, which are not suspended from their application during an armed conflict, with the exception of the provision that are permitted to be suspended under customary and treaty law. However, said professional should know that there are international obligations which he or she, as an agent of the state subject to international law and who will be held to account for transgressions of this body of law, that are present prior to the existence of an armed conflict and which continues during the time of conflict and which will further continue to exist after the conclusion of this conflict.

For Canadian service personnel deployed abroad, the IHL certainly applies. But so does the *International Covenant on Civil and Political Rights*, which is binding on States and therefore necessitates its agents to conform to its application, that clearly state that certain rights continue to apply even in times of public emergencies threatening the existence of the nation. Among these, the right to life, as we have seen, is paramount. Some positivist jurists will immediately signal that the *Covenant* only applies to "State Party to the present Covenant [and thereby has them] undertakes to respect and to ensure to all individuals *within its territory* ***and*** *subject to its jurisdiction*

[53] *Idem.*
[54] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, *entered into force* Mar. 23, 1976, accession by Canada 19 May 1976, at article 6, especially 6(2) which stipulates that: "In countries which have not abolished the death penalty, sentence of death may be imposed only for the most serious crimes in accordance with the law in force at the time of the commission of the crime and not contrary to the provisions of the present Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. This penalty can only be carried out pursuant to a final judgement rendered by a competent court".
[55] Solomon, *supra*, note 50 at 104.

the rights recognized in the present Covenant"[56]. Their interpretation of this sentence is that both conditions must be in force for the provision of the *Covenant* to be applicable. In this manner of thinking, the result would be that even though the United States has Taliban fighters thought to also be an Al-Qaida operative under its jurisdiction in Guantanamo Bay, its Attorney General argued that it was not on its territory and therefore these provisions did not apply[57].

In true Alberto Gonzalez fashion, the very same author of the infamous "torture memo" justifying the use of techniques in clear breach of international prohibition of torture under both international human rights law and the IHL, as well as under U.S. laws and which have been debunked[58], this conveniently ignores previous precisions by the United Nations Human Rights Committee, which is the international body responsible for the implementation of the *Covenant*, clarifying this sentence and affirming: ""a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State party, even if not situated within the territory of the State party" and that the International Court of Justice (ICJ) in its advisory opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories* recognized that the jurisdiction of States is primarily territorial, but concluded that the ICCPR extends to "acts done by a State in the exercise of its jurisdiction outside of its own territory"[59].

The International Court of Justice's decisions are binding and of the highest possible level of legal expertise. As a result, one is to accept the concept that the *Covenant* is indeed binding on states, even outside of their territory, where they have anyone within their power or under their effective control – even if not situated within the territory of the state at concern[60]. This includes during counter-insurgency operations after an invasion or when effected by invitation of a state, say in Iraq or in Afghanistan.

Having established that there is an interdependence between the IHL and international human rights law, we come to the conclusion that a state's agent member

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[56] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, at article 2.

57 "Reply of the Government of the United States of America to the Report of the Five UNHCR Special Rapporteurs on Detainees in Guantanamo Bay, Cuba", (2006) 45 *International Legal Material*, 742-767 at 743.

[58] Rouillard, Louis-Philippe F., "Misinterpreting the Prohibition of Torture under International Law: The Office of Legal Counsel Memorandum", *American University International Law Review*, 21 1 (2005): 9-42.

[59] Human Rights Committee, *General Comment No. 31* (2004), CCPR/C/21/Rev.1/Add.13,para. 10 and the International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, I.C.J. Reports 2004 (9 July 2004), where the ICJ reached the same conclusion with regard to the applicability of the Convention on the Rights of the Child (para. 113). As far as the Convention against Torture is concerned, articles 2 (1) and 16 (1) refer to each State party's obligation to prevent acts of torture "in any territory under its jurisdiction". Accordingly, the territorial applicability of the Convention to United States activities at Guantánamo Bay is even less disputable than the territorial applicability of ICCPR, which refers (art. 2 (1)) to "all individuals within its territory and subject to its jurisdiction".

[60] *Situation of detainees at Guantánamo Bay*, E/CN.4/2006/120, 27 February 2006, Commission on Human Rights, Sixty-second session, items 10 and 11 of the provisional agenda, at 6, para 11.

of its armed forces must abide by the provisions set by international instruments such as the *Covenant* and apply non-derogable human rights at all times, subject only to the *lex specialis* (specialised law) that is the LAOC, since as a general rule of law the specialised law will take precedence of the general (or more generally applicable) law.

Therefore, the right to life cannot be arbitrarily denied an individual by an agent of a state under international human rights law, unless superseded by the imperative of a specialised law which permits such denial. The IHL permits this explicitly, but only under the constraints of its principles of humanity.

But the right to life is not the only right protected by international human rights law. Other rights which cannot be suspended from being exercised are[61]: the protection against torture, cruel, inhuman and degrading treatments[62], the protection against slavery and servitude[63], the imprisonment on the ground of inability to meet contractual engagement[64], the protection against not being condemned for crimes that did not exist at the time of commission whether under national or international law[65], recognition before the law[66] and freedom of thought and of religion[67].

But, if a final doubt existed as to the application of human rights during armed conflicts, including universal[68] and regional human rights[69], one only needs to read the

[61] *International Covenant on Civil and Political Rights*, 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47, 6 I.L.M. 368, article 4(2) : 2. No derogation from articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18 may be made under this provision.
[62] *Ibid.,* at article 7, and which include protection against medical or scientific experimentation without free consent.
[63] *Ibid.,* at article 8(1) and (2).
[64] *Ibid.,*at article 11.
[65] *Ibid.,*at article 15.
[66] *Ibid.,*at article 16.
[67] *Ibid.,*at article 18.
[68] Understood as the International Bill of Human Rights from the United Nations: *Universal Declaration of Human Rights*, G.A. res. 217A (III), U.N. Doc A/810 at 71 (1948); *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, *entered into force* Jan. 3, 1976; *Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* G.A. res. 63/117 (2008); *Open-ended Working Group on an Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Draft Optional Protocol to the International Covenant on Economic, Social and Cultural Rights,* U.N. Doc. A/HRC/8/WG.4/3 (Apr. 4, 2008); *International Covenant on Civil and Political Rights,* G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, *entered into force* Mar. 23, 1976; *Optional Protocol to the International Covenant on Civil and Political Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 302, *entered into force* March 23, 1976; , G.A. res. 44/128, annex, 44 U.N. GAOR Supp. (No. 49) at 207, U.N. Doc. A/44/49 (1989), *entered into force* July 11, 1991; *United Nations, Economic and Social Council, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights*, U.N. Doc. E/CN.4/1985/4, Annex (1985).
[69] Such as those of the human rights instruments contained in the treaties, declarations and conventions of the Organisation of American States, the Council of Europe, the European Union and that of the African Union.

International Court of Justice decision in its Advisory Opinion on the *Legality of the threat or Use of Nuclear Weapons*[70].

Further, application of precise concepts of human rights law are recognised through the developing field of international criminal law. Canada has accepted the jurisdiction of the International Criminal Court and that of the *Rome Statute*, which it has internalised and rendered opposable to its agents by means of the *Crimes Against Humanity and War Crimes Act*[71]. For Canada's agents, as well as for any person subject to its jurisdiction, including government civilian employees, police personnel and service personnel, the act recognises three types of crimes under international law for which its agents might be prosecuted: genocide; crime against humanity; and war crime. Although the crime of aggression is include in the Rome Statute, as it has yet to be defined it is not integrated into the national order at this time but remains a matter of international law under customary law.

For our purpose, internalising an international treaty into a national law is the act by which a state makes international law applicable to persons under its jurisdiction. As the *Rome Statute* incorporates crimes recognised by the IHL and some also recognised under international human rights law, including crimes that are recognised as such under customary law, its is clear that for all Canadian service personnel at the very least, both under international and national law there are obligations part of the IHL and of international human rights law that must be respected.

The final element that allows for the interaction of the IHL with international human rights law is the IHL itself. Through its adoption of the *Marten's clause*, which is a statement of humanity attributed to Fyodor F. Martens, the Russian representative at the *Hague Convention* of 1899, and which was slightly modified in the *Hague Convention* of 1907 and reprised in another modified form in the *Geneva Conventions* of 1949[72]. In this last form, its states: "(…) Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages

[70] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 79 (July 8) at paragraph 25: "25. The Court observes that the protection of the International Covenant of Civil and Political Rights does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency. Respect for the right to life is not, however, such a provision. In principle, the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself."

[71] *Crimes Against Humanity and War Crimes Act*, R.S.C. 2000, c. 24.

[72] *Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. Geneva, 12 August 1949 at article 63 *in fine*; *Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*. Geneva, 12 August 1949 at article 62 *in fine*; *Convention (III) relative to the Treatment of Prisoners of War*. Geneva, 12 August 1949 at article 142 *in fine* and *Convention (IV) relative to the Protection of Civilian Persons in Time of War.* Geneva, 12 August 1949 at article 158 *in fine*.

established among civilized peoples, from the laws of humanity and the dictates of the public conscience."

While there remains a debate as to whether this is to be interpreted liberally or restrictively, the final part of the statement clearly links international law applicable in armed conflict with the concept of public conscience – therefore of morally acceptable conduct, regardless of the IHL being applicable by and of itself.

As a result, it is clear that agents of the state, service personnel must know the requirement for them to apply the very minimal norms contained in such international instruments. Training pertaining to the IHL is provided in most armed forces, but very little is said of human rights obligations.

Yet, this is of much importance. As seen above, entrance in an armed conflict – whether in a peacekeeping role, a peacemaking one, a nation-building coalition, a "war against terrorism", an international armed conflict or support operations by invitation of a foreign government – is, for liberal democracies, most often justify on the very premise that armed forces are sent to stop gross and widespread violations of human rights and to guarantee the future exercise of these very human rights though the establishment and support of a democratic government. In short, the justification is provided on a moral and ethical – not a solely legal – basis.

When done within the collective security system that is in force through the United Nations since 1945, this provides political and legal legitimacy as well as a moral justification for the use of force and the possibility of arbitrary denial of the right to life, and other infringements of physical integrity and of personal or public property, in accordance with applicable legal norms as understood under the IHL, even if contrary in principle to international human rights law.

For service personnel to comprehend their obligations under international human right law when deployed is to comprehend something more: the moral justification for their deployment in the first place. This creates the moral context framing the thinking of service personnel and represents a capital advance in the formulating of the mission. Instead of a political statement issued by the government of the hour stating the political goal of the use of armed forces, for service personnel it becomes the moral and legal basis upon which their role in the deployment rests. This, in turn, ensures the alignment of the moral and legal goals in all actions and decisions taken on the ground by the real "operators".

If framed in this perspective, then international human rights law becomes the overall frame of operations, and the IHL the operative legal basis within which bounds service personnel are to conduct themselves in the attainment of the larger objective of guaranteeing the exercised of universal and regional (if applicable) human rights. This, in turn, provides the moral guidance under which all operations are conducted.

As such, if actions and decisions made in the course of operations are in contradiction with the stated aim of bringing a larger enjoyment of human rights or if the methods proposed to bring this enjoyment of human rights are contradictory to human rights in the first place, then it becomes clear that either the stated political goal is dissonant with the public conscience or that the actions or decisions taken in the attainment of these goals are dissonant with the public conscience and should not be committed.

The link between this understanding and committing unethical behaviour cannot be overstated.

If a conflict is framed in another manner that does not include human rights at its basis and its respect, through international human rights law and the IHL, as a mode of operations, then the critical thought process of planners and operators will also be framed through another prism and will influence decisions and actions with diminished (or without) consideration for the minimal norms applicable to conduct and will most likely lead to unethical conduct that will disgrace the service, or part thereof, and impact on the trust of citizens toward their institutions and uniformed citizens.

The Importance of the Ethical climate and its Setting by Those with Vested Authority

The reasons why service personnel may commit acts of unnecessary violence, thereby violating positive legal norms as set in the IHL or international human rights, or commit acts defying public conscience, are more or less understood. There are most certainly elements of human psychology (predispositions, needs), sociology (notably anthropological group interaction dependent on cultures and sub-cultures) that creates the conditions that could become permissive to such conduct.

Some such conditions start from the general. Indeed, Colonel (Retired) David Grossman in his books *On Killing*[73] and *On Combat*[74], makes a point to state that 1% to 2% of society are sociopaths or psychopaths of varying degrees. It stands to reason that they may be drawn toward some aspects of military service in order to enjoy in their desires. Yet, soldiers are rarely permitted to stray from the unit's mission and go on a personal rampage. Therefore, we can deduct that authority and discipline can restrain and constrain in a large part such tendencies.

Context and given authority are other factors. The Milgram experiments have clearly shown the propensity of persons put in position of authority – even in a fictional context – to become brutal even without outside pressures – apart from boredom[75].

[73] Grossman, D., *On Killing: The Psychological Cost of Learning to Kill in War and Society*, New York, Back Bay Books, 2009.
[74] Grossman, D., *On Combat: The Psychology and Physiology of Deadly Conflict in War and in Peace*, Millstadt (IL) Warrior Science Publications, 2008.
[75] Mackmin, *supra*, note 36 at 81.

While this lends credence to a military axiom about soldiers having nothing to do, it would on itself hardly seem sufficient to explain disgraceful conducts such as those of Bagram and Abu Ghraib. And yet, this is exactly the context of the Milgram experiment.

And sub-culture can certainly be a factor. Psychologists contend that human are 'herd animals' and that in groups, such as in armed forces, the individual "is submerged in group acts in which" they have little investment, creating a 'group mind'. In a less fancy phrasing: peer pressure is intense[76]. An in the case of 'specialist units' – the elites – it is argued that "externally directed aggressive behaviour, which enjoyed a maximum of group condonence, tended to relieve the individual of any feeling of vulnerability"[77].

I addressed some of these psychological and sociological, as well as others, in previous writings[78], and their truth appears to be supported by experience. And many an author has had a say as to the cause of inglorious behaviour, and most are more than likely right in some way or another as to the convergence of factors that can lead to unethical actions being committed or decisions being taken.

The question is therefore to know what can be a preventative measures can be implemented to diminish the odds of occurrence of actions that would be in contradiction to the proclaimed set of defence values.

This can be couched in theoretical terms, whereby the solution would be to adopt as a frame of reference either utilitarianism, having civilian employees of defence departments and of armed forces focus on achieving good consequences from a conflict or by adopting the deontological approach of Kant, by which it is one's duty to ensure ethical conduct in an armed conflict[79]. In the first, ethical actions brings out good results and uses individual to secure good consequences. In the second, the concept of duty demands ethical action for their own sake and people are to be treated as always with respect, not as means to an end, as a primary moral imperative.

But there is a more practical – that is, applied – method of doing; the instilment of the highest moral standards and indoctrination in applied ethics for all current and new service personnel and civilian employees working for the defence departments and armed forces. In the Canadian system, this is precisely the approach taken through its Defence Ethics Programme. It does not answer to a single set of theoretical framework, but rather adopts a larger values-based and distributed on-going programme of indoctrination.

And this is perhaps one of the better methods of bringing service personnel and civilian employees to adopt an ethical stance in their actions and decisions. If anything,

[76] *Idem*.
[77] *Idem.*
[78] Rouillard, Louis-Philippe, *Precise of the Laws of Armed Conflicts: With Essays Concerning the Combatant Status of the Guantanamo Detainees and the Statute of the Iraqi Special Tribunal*, iUniverse, Lincoln NE, , 2004 at Chapter 13.
[79] McMaster, H.R., "Remaining True to Our Values - Reflections on Military Ethics in Trying Times", (2010) 9 (3) *Journal of Military Ethics*, 183-194 at 187 and 188.

according to Brigadier General H.R. MacMaster who wrote as ISAF HQ Staff very recently, it does correlate with proposed theories such as that of Jim Frederick in his book *Black Hearts*[80], where he presents the following four factors as leading to unethical conduct[81]: ignorance; uncertainty; fear; and combat trauma.

One can see that the premise that the environment influences the risk of unethical conduct is subscribed to by both authors, and it is also the belief of this author that together they form a large portion of the factors contributing to a permissible context that slides into unethical conduct.

To inoculate soldiers against this, MacMaster proposes a concerted effort in four areas: applied ethics or values-based instructions; training that replicates as closely as possible situations that soldiers are likely to encounter; education about culture and historical experience of the people among whom a conflict is being waged; and lastly leadership that strives to set the example, keep soldiers informed and manages combat stress[82].

There is no doubt that training will help reduce fear and combat trauma, while education of cultural and historical experience of the country's inhabitants will address the question of ignorance, the point regarding uncertainty is not entirely covered in and of itself. Certainly, when speaking of leadership and keeping soldiers informed, this contributes to reduce uncertainty. Yet, it is perhaps not only the uncertainty in the conflict that is so much at play – although for personnel on the ground it is surely the primary factor – but uncertainty about the reasons of the mission and the commitment of service personnel and of civilians also has a part to play.

As with the example of the *Atlantic Charter* during the Second World War and its insertion in the moral and legal continuum that frame the conflict, certainty as to the moral foundations of a conflict has its part to play and transcends the concept of humanity found in the just war tradition. And this humanity is transposed not only in dealings with the general population and with enemy forces, but also the humanity for a state's own armed forces.

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[80] Frederick, J., Black *Hearts: One Platoon's Descent into Madness in Iraq's Triangle of Death*, Crown, 2010.

[81] McMaster, *supra*, note 79 at 187-188, as he states it: "First - ignorance. Ignorance concerning the mission, the environment or a failure to understand or internalize the warrior ethos or professional military ethic. This results in the breaking of the covenant or sacred trust that binds soldiers to our society and to each other; Second - uncertainty. Ignorance causes uncertainty and uncertainty can lead to mistakes, mistakes that can harm civilians unnecessarily. Warfare will always remain firmly in the realm of uncertainty, but leaders must strive to reduce uncertainty for their troopers and units; Third - fear. Uncertainty combines with the persistent danger inherent in combat to incite fear in individuals and units. Leaders must strive not only to reduce uncertainty for their troopers, but also to build confident units. Confidence serves as a bulwark against fear and fear's corrosive effect on morale, discipline, and combat effectiveness; Fourth - combat trauma. Rage is often a result of combat trauma. Fear experienced over time or a traumatic experience can lead to combat trauma. And combat trauma often manifests itself in rage and actions that compromise the mission."

[82] McMaster, *supra*, note 79 at 188.

One of the responsibilities of persons vested with authority, from a private first class or a lance-corporal to a marshal, is to preserve his or her own troops. This means of course the application of the military concept of economy of force, whereby one does not sacrifice unnecessarily personnel and materiel. But it is also to preserve the individuals forming this troop; the preservation of their own humanity.

As I wrote previously[83], admittedly without empirical data, and which is also said by other authors, there is a contention that whether justify or not under *jus ad bellum* and *jus in bello*, as well as being ethically justified, the act of killing damages one's humanity[84].

In order to protect this, it is the responsibility of the leadership, at all levels, to act in a manner that guides service personnel, even in the direst situation. Leaders must take a proactive stance and enact orders and directives that clearly acknowledge the context in which they must act and clearly state the restraints and constraints imposed by their values-based ethical system.

It is not a coincidence that many an unethical act in an operation or an unethical decision are first create because orders where unclear. From My Lai, where ambiguity about whether Lt. Calley was 'ordered' or not to kill all he sees in the village since they were expected to be hostile to a Sergeant saying to Master-Corporal Matchee to do what he wants with his prisoner short of killing him, it is the imprecision of the commands given – the poor leadership shown – that resulted in unethical actions at the tactical level that undermined the strategic objectives of the mission85.

Therefore, above all else, the primary element that must be in place to prevent unethical behaviour that will undermine a mission and impact on the humanity of service personnel is to create the proper ethical climate, indoctrinating all within a defence department and the armed forces, and then imposing the best leaders that has the proper competence and the proper values-based ethical frame of reference so that he or she enforces this at all time within the leadership structure.

A true leader in command of armed forces will show commitment to the ethics of waging warfare within a framework of reference that will truly circumscribe the operations he command in terms of its effect on supporting and enabling the exercise of human rights. He of she will abide by this as it will fully respect the legal obligations of the IHL but further reinforce the applicability of its *jus ad bellum* and *jus in bello* principle, such as military necessity, proportionality and discrimination between combatants and noncombatants. He or she will demonstrate fortitude and courage even in the most difficult situation to enforce the values for which the armed forces are

[83] Rouillard, *supra*, note 78 at Chapter 13. My phrasing is that it imposes a scar on the individual who commits the action, even when fully justified.
[84] French, S., "Sergeant Davis's Stern Charge: The Obligation of Officers to Preserve the Humanity of Their Troops", (2009) 8 (2) *Journal of Military Ethics*, 116-126 at 118.
[85] McMaster, *supra*, note 79 at 189.

committed to the fight, thereby preserving the mission and preserving the personnel deployed. By doing this, such a leader will have created and will necessitate to maintain the ethical command climate that will guide the mission.

Conclusion

As stated at the beginning, this article is solely a proposal to reframe the legal-ethical thinking, when looking at applied ethics in the context of the IHL and human rights, as a framework that must be coherent with its primary objective and its means of implementation, as well as to propose a method by which to achieve this implementation through the existing international legal system, including the collective security system, the IHL and international human rights.

Human rights are, at their core, freedoms to be exercised in accordance with the values fought for through collective or individual action. They are in constant evolution, but universal as such and therefore apply to all, in all lands. Any use of armed force should be made in the aim of permitting or re-establishing this free exercise of inherent rights based on the human person. International human rights provide the framework of operation for this enjoyment while the IHL states the operative method by which the use of force may be engaged in support of human rights. The values proclaimed by armed forces must therefore be aligned on these very human rights, or else there will be a dissonance between the objectives and the means.

An incoherent mission contradicting this aim will create uncertainty and a faulty ethical command climate, where mission success means acquiring a piece of ground or destroying enemy forces, but does not met the concerns of the political and strategic aims of the use of force.

Such a faulty ethical climate creates a permissible context of ensuring survival first, but not planning beyond the immediate end of armed hostilities. However, this in itself is incoherent. Since the use of armed forces is to force a state of affair that would be applicable in peacetime, in example sovereignty on a territory or stopping gross and widespread violations of human rights, winning the war without implementing proper means of winning the peace is a sure-fire way to ensure prolongation of the conflict, embitterment of the general population and undermining support toward one's strategic objective.

Embarking on a mission of this type will not only leave a state with armed forces diminished through casualties, both physical and psychological, but will destroy the very humanity which its armed forces are supposed to protect and help enforce. In such interventions, the best one can expect is an "honourable end to hostilities", a signature phrasing that usually means failure to attain mission success.

Even when there is convergence between the framing of the goals and the values underlying them, the means of implementation of these goals through the use of armed force must respect the IHL, in their larger form as accepted by the public

conscience. The means must be aligned on the goals and must therefore respect our values within the confines of the proper ethical command climate.

The burden placed upon leaders to create this ethical climate is enormous; but so is the responsibility to adhere to one's values. In a western liberal democracy, the uniformed citizen cannot be of a different set of values than that the citizen, otherwise the institution is leading its own private charge in the wrong direction and contradicts the public interest.

Whether at home or abroad, the uniformed citizens are vested with great responsibility through the devolution of trust by its government. Its values must be their first guidance and must be reflected in their application of legal norms.

THE PEACE CORPS AS A SUCCESSFUL UNITED STATES FOREIGN POLICY: A PHENOMENOLOGICAL ACCOUNT OF MY EXPERIENCES WITH AMERICAN PEACE CORPS VOLUNTEERS WHO SERVED IN GHANA BETWEEN 1971 AND 1978

by

Samuel Obeng*

Introduction

One of the most success stories of American foreign policy has been the Peace Corps. Volunteers of the corps have provided technical assistance to schools, hospitals, agricultural organizations/institutes, and vocational institutes, among others, and have by that projected United States' humanitarian image. The Peace Corps Program has also helped people outside the United States to understand United States' culture, and also helped Americans to understand the cultures of the countries in which the volunteers serve.

Earlier studies on the Peace Corps centered on identifying problems and looking for ways to make the Program work. For example, in his work on *Predicting the Success of Peace Corps Volunteers in Nigeria,* Walter (1965) discovered that whereas global ratings (by training faculty, assessment board, and interviewer), grades and peer ratings of volunteers, were not appreciably related to functioning overseas, scores on self-report measures (e.g., Ego Strength) were. Walter recommended the use of the self-report measures for screening and selection decisions. For his part, Harris (1973) analyzed criteria of performance and adaptation of 52 Peace Corps volunteers in Tonga who had received high overall evaluation, moderate to marginal overall evaluation, or who had terminated early. He discovered that basic character traits were the single most important class of variables, followed by general technical competence, cultural interaction, and interpersonal relations. Harris posited that there was the need for pooled judgments by competent people and for basic research to justify professional psychological services for the volunteers.

In 2006, the Peace Corps Program itself put together a book that carried stories from past volunteers and which reflected the volunteers' adventure, their cross-cultural exchange, their personal growth, and the deep friendships they forged. The project emphasized the success and some problems of the Program and projected a successful and an efficient way forward.

Other researchers looked at the Peace Corps and its impact on American foreign policy and how that impacted the Soviet leadership during the cold war. For example, Legvold's work on American policy in the Congo, Cuba, and Vietnam (quoted in Grunwald, 1972) noted how embarrassing success of the Peace Corps policy was to the Soviet leadership and how bold or unrelenting the Soviet Union was in its efforts to win friends and allies in Africa.

It is true to say, however, that as far as studies on the Peace Corps volunteers in Africa are concerned, most of such studies have focused on disease infestation, prevention, and treatment. For example, in their study of travelers' diarrhea in Morocco, Sack Froehlich, Zulich, Hidi, Kapikian and Greenberg (1979) corroborated the effectiveness of doxycycline prophylaxis in treating travelers' diarrhea. Moran and Bernard (1989) monitored the incidence of drug-resistant *Plasmodium falciparum* malaria in highly exposed expatriates (Peace Corps volunteers in West Africa) with the view of providing data to guide recommendations for travelers. They discovered the spread of *Plasmodium falciparum* malaria resistant to chloroquine prophylaxis "as far west as Liberia by the beginning of January 1989, with only limited risk in Sierra Leone and to the north and west of Sierra Leone." Finally, Pearce, Gerber, Gootnick, Khan, Li, Pino and Braverman (2002) discovered marked increases in serum total iodine concentrations, the prevalence of goiter, elevated serum TSH values, and elevated serum thyroid peroxidase antibody values in Peace Corps volunteers who were exposed to prolonged excess iodine. They also discovered that removal of excess iodine from the drinking water system led to a decrease in the prevalence of all

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What is missing in all the above-mentioned studies and other studies on the Peace Corps is the perspective of Africans who benefitted from the Peace Corps. This study attempts to fill that dearth of knowledge. It is important to note that the first group of Peace Corps volunteers to go overseas trained in Berkeley in the summer of 1961 and served for two years as secondary school teachers in Ghana (Smith, 1966). As Smith notes, forty-four of the volunteers completed the two-year term. Given Ghana's role as the first country to receive Peace Corps volunteers (even if such role involved being a recipient/beneficiary of the Program only), providing a Ghanaian's perspective of this global political, diplomatic and educational policy phenomenon is in the right direction.

Method

Data for this paper involve personal recollections (based on participant observation) of my encounter with five American Peace Corps volunteers — Anderson, Booth, Glatey, Beeman, and Green-Leaf — who taught Mathematics, Chemistry, and English Literature in Asuom Secondary School in the 1970s (between 1971 and 1978). The content of my experiences and the way they are framed and narrated are thus based on past lived-experiences (Husserl and Merleau-Ponty, 2001). In particular, they are based on the awareness I had while living through or performing the lived experiences—my active participation in classes taught by the volunteers, my observation and participation in the on-campus and off-campus lives of the volunteers, and on my observation and participation in the social lives of people who interacted directly and/or indirectly with the volunteers. In a way, I am the source of, and hence, an active participant in the creation and enactment of the data.

Theoretical Underpinnings

The paper is done within the framework of phenomenology (Husserl, 1963; 1989) — *the study of structures of consciousness as experienced from the first-person point of view*. Framing the study within phenomenology implies studying my conscious experience, as experienced by me, and analyzing the structure of the experience (that is, analyzing the kinds of experiences, the intentional forms and meanings of such experiences, the dynamics, and enabling conditions under which the experiences were lived). It also involves analyzing the structure of the perception, of ideas, of imagination, emotion, of wish/desires and of action (Smith, 2003; 2008). Specifically, I synthesize and analyze the ways I 'experienced' the social and professional lives of the five American Peace Corps volunteers. I attend to both the passive (vision or hearing) and active (e.g., walking, repairing motorbikes, etc.) experiences and then attempt to explicate the meanings they had in my lived experience as a teenage high schooler by attempting to answer pertinent questions relating to the type of experiences I had as their student, and the impact the experiences had on me and my classmates (with regards to academia, social life, work ethic and morality). I address the meaning of the volunteers' actions including their teaching (content, form, and tone), social lives, sense of time, commitment to work, even their walking, their default means of transportation (motorbikes), and their observed love lives. I also focus on the significance of the above-mentioned actions on my life even if such experiences appear subjective. Furthermore, I examine the conditions that helped to create and shape my experiences. The experiences I elucidate thus range from "perception, thought, memory, imagination, emotion, desire, and volition to bodily awareness, embodied action, and social activity, especially linguistic activity" (Smith, 2008).

Method of Analysis

I interpret my experiences from the point of view of cultural hermeneutics (Heidegger, 1962; Grondin, 1994; Willis & Jost, 2007; Lawrence, 2008) ─ that is, within social and linguistic contexts—and I analyze my experiences based on the type and conditions under which experience could be viewed as true, factual, or correct by paying attention to acts of behavior or observations that authenticate and confirm aspects of my experience, or acts of behavior or observations that refute them. Even though the basic premise of my study is phenomenological (how I experienced the volunteers), aspects of my experiences are ontological (a study of who the volunteers were), epistemological (the various kinds of knowledge I gained through my experience with them), logical (ways by which my reasoning was validated) and ethical (how I acted or should have acted based on my experiences with them.)

Results & Discussion

Four themes extracted from my lived experiences and analyzed below include: teaching, social lives, means of transportation, and linguistic activity. We begin by examining teaching.

1. *Teaching*

My first educational (pedagogical) encounter with an American Peace Corps volunteer was in September 1971. Our first day of Math class was fun but confusing. We came out of the classroom saying to one another *I wris-wris kontomire* 'We heard nothing but gibberish.' Our teacher's American English dialect was incomprehensible to most of us but fun to listen to. For most of us, it was our first time of hearing someone (in person) speaking with an American accent.

In those days we hardly watched American movies; most of the movies we watched were Indian and were probably in Urdu or Hindi. Even though we loved our teacher's accent and style of delivering his lecture, his English accent got in the way of our understanding of the content. The subject content, *algebra*, was new to most of us who came to secondary school from upper primary and lower middle school (grade 5 to 8). What we liked about the teacher was how simple and straightforward his teaching was. By the third week of class, he had learned to speak *slowly* and *more deliberately* and we had begun to listen more attentively and intently instead of just listening to and admiring his American style of speaking. We began to understand him by the end of the second month and there were no complaints about the Americanisms in his speech; in deed, we thought of him as the best teacher in the school. We liked his 'casual' style of teaching which made it easy for us to ask questions and hence relatively easy to understand the content of the subject matter. We began to draw parallels and made comparisons between him and our Physics teacher (a Dutchman) and the other Ghanaian teachers whom we saw as conservative, strict disciplinarians, and whose classes were boring and of whom we were often scared. One could tell by the nicknames we gave to the teachers, our perception of them, the emotional valency created by their persona, and the degree of confidence we had in them. Mike Anderson and Douglas Booth were both called 'King-of-the-Youth' we saw them as youthful, as thinking like us, and as possessing the qualities to be youth organizers or youth leaders. The Dutchman, our Physics teacher, was called 'You-Measure-Measure-Measure' because of his insistence that we measured everything we saw. We found him to be too strict and overly demanding; in fact, we saw his demands as senseless. The Ghanaian teachers had several names two of which denoted:

i. *Meanness* (*Kum-Nipa* 'Killer-of-Persons.') This teacher was a low-grade-awarding-happy individual who took great pride in giving low grades instead of helping us to understand the class; and

ii. (ii) *Lack of preparation for class* (*Yemfa-Nhye-Yen-Ho* 'Let-Us-Take-It-As-Is'). He was never prepared for his classes and was never able to find answers to our questions; instead, he always brushed such questions aside.

As with Michael Anderson and Douglass Booth, we found Curtis Beeman, Green-Leaf, and Glatey to be conscientious, highly sensitive to time (for they always came to class on time), and very committed to their work and to us—they never missed work. For their hard work and dedication to duty, they 'earned' the nickname *Honam-Pe-Adwuma* 'Bodies/Persons-that-loved-work.' The volunteers, by their actions toward work, created the love for hard-work in us. We had no reason to be late to class

because they were always on time; we could not complain about Math being difficult because they (Douglas and Michael) made it easy to understand. Despite Chemistry being seen at the time as complicated and the periodic table being seen as impossible to memorize, Curtis (1972-73) had come up with ways of making his class enjoyable rather than endurable. He created an atmosphere that involved us handling the lab equipment and taking part in the experiments instead of us being mere observers in the class — 'doing was knowing' and because we were active participants, we understood and knew Chemistry. Mr. Glatey was quiet, funny and approachable who, like Beemann, made Chemistry one of my best subjects. We knew he would be there for us and would always take his time to explain things to us so we were not afraid to ask questions despite our limited English vocabulary.

Prior to Green Leaf coming to Asuom, English Literature was feared and shunned. We saw it as a subject for the city people who knew more English than those of us in the village. Few months after Green Leaf arrived, we began hearing 'This Guy-man is the right guy. He makes Literature so easy. Now we know we shan't make Grade 9; we can make Grade One!' Grade one was the highest grade one could receive on the international exams and nine was the lowest grade. Green Leaf had, by his style of teaching, given us enough confidence and hope that we saw failure as not being an option. In particular, we saw ourselves as being capable of obtaining the highest grade in English Literature in the international exam. There was something obvious; students, who had Green Leaf, did much better in the international exams than those who did not. The volunteers, by their pedagogical styles, their creation of hope and confidence in us, and their hard work, helped us to love studying. Their actions paid off because they helped to raise academic standards in the school and the students and people in the village respected them for their contribution to society. If their mission was to educate, then the results spoke for themselves — *their mission was accomplished.*

2. Social Lives

My personal encounter with the Peace Corps volunteers went beyond the classroom. I met with them in the community, played Frisbee and the horn with some of them, and did the two-mile walk from Mr. Oduro's house to the school with them on several occasions.

I saw them as social beings who were down to earth and who were accepting of our culture (sometimes more than our Ghanaian teachers). They learned our politeness phenomena by making special effort to bow when greeting an elderly person, avoiding the use of the thumbs-up (which is the equivalent of using the middle finger in American culture) or greeting with the left hand (which is considered very disrespectful). Some of our Ghanaian teachers did the thumbs-up gesture to show how Western they had become to the irritation of the village elders some of who drew comparisons between the teachers and the volunteers who had acculturated and were thus highly respected.

I also experienced the love lives of some of the volunteers. One had a child with my cousin and another had a couple of girl friends who lived next to my house. In a culture that kept love a secret between a man and a woman, I observed a young

woman being kissed on the lips in public. Initially I saw this as an embarrassment and an affront to our culture but as time went by some of us learned quickly to do the same (even if not in the glare view of the public) to the annoyance and irritation of our Ghanaian teachers. Some of the older people in town were quick to shame anyone who did that because it was (and still is) seen as a taboo to kiss a woman in public. Students who tried to kiss in public were punished by the teachers and some were suspended from the school.

The volunteers who 'committed this offense,' however, got away with it because kissing in public was seen as part of their American culture and as 'guests,' that offense was unobjectionable by the local people. By 1974, young men and women who were not from the town began to kiss in public with little scolding from the public. This behavior was still unacceptable on the campus of the secondary school. One thing was very clear, the volunteers managed to influence an aspect of the local culture.

Another aspect of the volunteers' culture that I experienced and which impacted us as students was the tempo/speed of walking. In the local culture, walking fast was (and still is) associated with being crazy or unwise. Several communicative maxims such as *onante gyoligyoligyoli* 'S/he walks crazily/insanely' and *oba nyansafo na yesoma no nye nammon tenten* ['it is a wise child who is sent on an errand not the one with long strides;' that is, being wise is preferable to having long strides'] support this cultural phenomenon. By the end of Anderson's tenure, not only had some students imitated his style of walking which involved walking in long strides, several of the male students also walked fast. This cultural phenomenon was easily accepted even by some in the town. The nickname it attracted was *ko ntem bra ntem* ['lit. go quickly; return quickly' meaning *being on time*.] The style of walking was associated with getting things done on time and was viewed as acceptable even if the fast walker was viewed as unwise. Note however, that the local people themselves did not practice this style of walking.

3. Means of Transportation

Douglas Booth rode a motorbike and was viewed by us and more especially by the local people as someone who took a risk. Specifically, we saw him as putting his life in danger because we believed he was at risk of falling off his bike or being run over by the careless bob trailer drivers in the district. He neither fell nor was run over by a vehicle and so our Agricultural Science tutor also bought a bike. There was the expectation that the Agricultural Science teacher would be involved in one form of accident or another and that would act as a deterrent to those who copied the American way of life blindly. He did not have any accident either and that emboldened the students (including me) to get a ride home some afternoons after class. Several older people warned us not to ride with the teacher because we could fall and die; some even reported us to our parents that we were living dangerously and that it was a matter of days that a funeral would be held for one of us. My father cautioned me to be careful; he had confidence in the Agricultural Science teacher because he lived in our house and we saw him as a very responsible man. Two other volunteers who came after Booth also used bikes and students rode with them to school, setting aside fears of possible involvement in an accident. Thus, the volunteers had by their actions taught us

about motorbike safety and even though no one bought a motorbike, the fear that it was a reckless way of life no longer obtained.

4. Linguistic Activity

An important experience with the volunteers that impacted my life was language in social interaction. First, they spoke with an American accent which was considered cool by us (teenagers) at the time. We viewed the British dialect of English as being spoken with arrogance and students who attempted to approximate it were viewed by us (students and faculty) as arrogant but intelligent. The coming of the volunteers to my village school brought an expression *hey man*, which became in-vogue. What was interesting was that this expression underwent a semantic shift and was used to mean *be careful* or *watch out*.

For most of us, American English sounded very fast and mumbling and so it was common for us (students) to speak fast and mumble our words to impress our listeners of the Americanization of our English dialect. In particular, for us (the boys), speaking English the American way to a girl was a sign of being 'civilized' and cool. For the girls, speaking American English was a sign of being spoilt or of knowing about men or having had sexual partner(s).

Another experience we had with respect to language in social interaction was an attempt by some of the local people, the older men, to speak some 'English' to the volunteers. This practice gave rise to the saying 'Go-Come-Go-Come English' meaning English incompetence or English that involved minimal to no English. For the older women, the volunteers did not speak 'any language;' they spoke English. Whereas some had pity on the volunteers for not speaking the local language, others spoke Akan with them since they saw them as their children who had to be helped to communicate in a 'language.' Most of the volunteers studied the local language and became competent; a practice that led to maximum acceptance. Speaking Akan bestowed on the volunteers 'citizenship' and kinship (an adoptive consanguine) status. They were no longer viewed as *obroni* 'someone who comes from abroad or from beyond the horizon,' they were legitimate Akanfo (Akans.)

The most important experience I had with the volunteers on language in social interaction was relevance of functional language learning to surviving in a new culture. One day, Douglas Booth had malaria; but despite his illness he came to school. Diagnosing his illness was easy for everyone because he knew the right Akan vocabulary for describing the symptoms associated with the disease. Thus, as soon as he described the symptoms of his illness, it was easy to tell what the problem was (each of us had had malaria before) and we all knew how to treat it at the time (with Chloroquine, a 4-aminoquinoline drug). He got well to the relief of all of us. Not only did the volunteers' use of appropriate language in the right discourse context help resolve a health problem, it earned them respect among the students and the local people. The other Ghanaian non-Akan teachers had no excuse not to learn Akan if the American

volunteers had learned it and were using it appropriately. Indeed, such Ghanaian teachers were perceived as arrogant, snobs, and worthy of being spited.

Discussion and Conclusion

There is no doubt that the Peace Corps volunteers who taught in Asuom Secondary School from the early to late 1970s left a huge foot-print or mark in the school and in the community. As their student, the footprints they left behind have been permanent in my consciousness and have helped to shape my life. In particular, the volunteers were more than United States educational ambassadors; they left permanent impressions about United States social and cultural lives on me. The experience I had of them as dedicated selfless individuals was so deep rooted that to date despite being angry at times about race, ethnicity, and identity, I still view an American as an individual who works hard, who is not perturbed by difficult circumstances, and who is focused on achieving a targeted goal.

To date, I credit my success as an academic to the Peace Corps. The questions I often pose are: Had it not been for the Peace Corps volunteers, which graduate teacher would have accepted posting to my village to teach Math, Chemistry, Biology, and/or English Literature? Given the fact that Ghanaian graduate teachers posted to the school either did not accept such posting or accepted them but did not stay long enough to make any meaningful impact on the school's teaching mission, what would have happened to us with respect to the subjects that we so desperately needed help with?

With respect to cultural tolerance and acceptance, a footprint left by the volunteers was a lesson about not merely learning about unity but actually putting it into practice. Our culture became the volunteers' culture and what took place was close to what Cooper (1972) labeled *cultural crossing*. They became Akan by living and acting Akan. By so doing, they gained acceptance and respect as well as insight into our way of life. Their presence thus, taught me and my classmates about the need to do away with isms, xenophobia, and the unwholesome idea of *birds of a feather flocking together*. If these people who looked so different were accepting of us and us of them, then why can we not accept our own countrymen and women?

On the flip side, the Peace Corps volunteers indirectly left footprints of rebellion in us. Their casual style of teaching, of interaction, of love life, and of walking made us act contrary to our traditional norms. We spoke like them even though that was considered being a rascal by the Ghanaian teachers and the local people; we became open about having girlfriends or boyfriends even though our culture demanded such friendships be kept secret; and we walked like them even though walking fast was associated with not being wise. In the end, we changed society with them and through them.

Furthermore, a footprint left by the volunteers was that of invention, improvisation, and innovation. Looking at Douglas Booth improvise with dry cell batteries in order to start and operate his motorbike left a permanent impression on me;

one can make do with what one has if one is willing to try. As far as I was concerned, the cultural maxim of *onyame de me dee beba* 'God will bring mine at the appropriate time' was replaced with *anomaa antu a obua da* ['if a bird does not fly, it starves]' meaning, 'inaction leads to poverty.']

Finally, the most important footprint discussed in this paper is that on work ethic; that of not giving excuses but performing one's duty in order to make positive change. When it rained, the volunteers came to work even if that meant being wet. Never were any of them late to class or absent from school. By their actions, we learned the joy and satisfaction that came from hard work.

In sum, the volunteers positively impacted our society massively not with guns and bombs but with dedication, selflessness, and love for their country and for us. They proved beyond reasonable doubt that 'it is little sticks that start, sustain, and maintain fire not big timber.' Five young American Peace Corps volunteers achieved so much in five years in a little town in Ghana's Eastern Region, what neither the British colonial administration nor the United States' deadly bombs and clandestine operations could achieve in half a century in Africa.

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BOOK REVIEW ON ZBIGNIEW K. BRZEZINSKI, *THE GRAND CHESSBOARD: AMERICAN PRIMACY AND ITS GEOSTRATEGIC IMPERATIVES*, (NEW-YORK: BASIC BOOKS, 1997), 222 PAGES.

by

Victor Essimbe, **Ph.D.**

Introduction

The wind of democratization has affected States and countries throughout the World during the second half of the twentieth century. Africa, Eastern Europe and Russia made a slow but a significant political turn in the history. In Sub-Saharan African countries, national debates on the issue of democracy took place. In Russia, political and economic reforms determined the future of the Eastern-European regimes. The major implications of this movement were the collapse of the Communist ideology and the Soviet power as well. The United States so became the World lonely Superpower. It is in this context that Brzezinski wrote *The Grand Chessboard*.

Born in Poland and naturalized a US citizen, Zbigniew K. Brzezinski is a political scientist, and a public official figure in the Unites States. Professor of International Relations at Harvard and of American foreign policy at Hopkins University, he became an influential voice and contributor on US global political issues. As President Jimmy Carter's National Security Advisor, Brzezinski advocated a hard line toward the Soviet Communist regime in the former USSR. He resumed his academic career writing extensively on US strategic issues and the collapse of Communism[1].

In *The Grand Chessboard*, when offering his strategic analysis of Central Asia, Brzezinski emphasizes on the United States supremacy and the appropriate ways to consolidate it in the region. The author agrees with his predecessors Halford J. Mackinder on the "Heartland" theory"[2], and Karl Haushofer whose interest focused on Mackinder's notion of "Land power" vs. "Sea Power"[3]. He also agrees with Samuel P. Huntington who affirms that the US primacy prevents anarchy in the World, and is a guarantee of prosperity[4].

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[1] *Ideology and Power in Soviet* Politics (1962, rpr, 1976), *Between Two Ages* (1970), *The Grand Failure* (1989), *The Grand Chessboard* (1997).
[2] Brzezinski, (K.), *The Grand Chessboard: American Primacy and Its Geostrategic Imperatives* (New-York: Basic Books, 1997), p. 38.
[3] Hervig, (H.), "Geopolitik: Haushofer, Hitler and Lebensraum", p. 228.
[4] Brzezinski, op. cit., p.31.

With an expertise in International Affairs, the author exposes his vision of extending American supremacy in the 21th century. The collapse of Communism and consequently of the Soviet influence in Eastern Europe, has liberated the former socialist States from their ideological and political dependence on USSR. On one hand, those States amorced political and economic reforms in the Western standard. In Russia itself, President Mikhail Gorbatchev implemented the "Perestroïka"[5]; on the other hand, most of those independent States have their admission to the North Atlantic Treaty Organization (NATO) still pending. This is an opportunity for the United States to realize significant strategic advances in Central Asia in the post-Cold War period. But a critical question arises on how the United States could maintain its leadership in the region and with which strategy?

Brzezinski answered this question in presenting an analysis of power on the Eurasian continent. Everything from Europe to the North Pacific Ocean is the key of the World:

> "*A power that dominates Eurasia would control two of the World's three most advanced and economically productive regions […]. Eurasia accounts for about 60 percent of the World's GNP […]*" [6]

In order to make his point of view understandable, the author uses Mackinder's "Heartland theory".

In reference to Ronald Hee, Mackinder's vision of the World geopolitics has changed how politicians and military men viewed the World[7]. This perception influenced even Adolf Hitler to send German troops and logistics to the East against Russia, he added. It is a perception that, only recently, with the sudden collapse of the Soviet Union and the end of the Cold War, had seemed relevant enough to be part of the intellectual debate useful for the Superpower foreign policy. According to Ronald Hee, Mackinder saw history as a struggle between land-based and sea-based powers[8]. He concluded that sea and land-based powers would then struggle for dominance of the World, and the victor would be in a position to set up a World empire[9], and above all, the determining factor in this struggle is Geography. The "World-island" is the "landmass" of Euro-Asia, and the control of this continent by any one State would enable this State to organize the overwhelming human and material resources, to the detriment of the rest of the World:

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[5] Gorbatchev, (M.), *Perestroika*, (Paris: Flammarion, 1987).
[6] Brzezinski, op. cit., p.31.
[7] Hee, (R.), "World Conquest: The Heartland Theory of Halford J. Mackinder "In: *Journal V24N3*, (July-September, 1998).
[8] Hee, (R.), op. cit.,
[9] Ibid.

"*Who rules Eastern Europe commands the World-Island*
Who rules the World-Island commands the World."[10]

In addition, the author considered the ideas of one of Mackinder's must enthusiastic followers of the end of World War I, Karl Haushofer. Haushofer wrote widely on Geopolitics, and is said to have influenced Hitler's thinking. About Mackinder's theory, he said:

"*Never have I seen anything greater than few pages*
of geopolitical masterwork*."*[11]

In the 1920's, the German geographer Karl Haushofer used "Geopolitik" to support German expansion. Haushofer felt that densely populated *countries* such as Germany should be allowed and are entitled to expand and acquire the territory of less populated countries, such as Czechoslovakia and Poland. This concept known as "Lebensraum"[12] ,or "living space" was developed by Ratzel, who is called the founder of political Geography. Haushofer twisted Ratzel's theories to develop the pseudo-science of "Geopolitik"[13]. Haushofer's "Lebensraum" allowed the expulsion of lesser peoples to further the goals of the growing States.

Mackinder's theory has helped Brzezinski to elaborate alternatives for American leadership to be established, and the main proposal is to eradicate any competition from a State, or a group of States that could alliterate the US supremacy in Central Asia. It is also true that this decisive arbitrating role requires policies, expenses and sacrifices that the US public is not willing to make under ordinary circumstances. The author has identified the key countries in the role of "players" such as France, German, Russia, China, Japan, India, Great Britain and Indonesia. Others countries such as Ukraine, Azerbaijan, South Korea, Turkey and Iran are identified in the role of "geopolitical pivots"[14].

Brzezinski is not the only one to see The US global military dominance as imperative. In 1980, President Richard Nixon emphasized that the United States cannot win unless it recovers the geopolitical momentum of a superpower[15]. Like Kennedy and Johnson before him, Richard Nixon believes he cannot hold the White House for a

[10] Brzezinski, op. cit., p. 38.
[11] Haushofer, (K.), *Strategy and Diplomacy: 1870-1945*, (London: George A. & Unwin, 1983).
[12] Brzezinski, op. cit., p.39.
[13] Parker, (G.), "Geopolitics: Past, Present and Future", p. 46.
[14] Brzezinski, op. cit., p. 41.
[15] Nixon, (R.), *The Real War*, (New-York: Warner Books Inc., 1980), pp. 2f.

second term unless he holds Saïgon through the first[16]. An example of a threat that needed to maintain support for the Cold War levels military spending is Saddam Hussein, as suggested to President Bush the father by The National Security Council[17]. In sum, powerful elements in the US government have long held it necessary for the US to dominate the World military.

Today, and in reference to Paul H. Herbert[18], the United States has two related interests: the first is immediate, and concerns the former Soviet Union weapons of mass destruction and related technologies. This must not become a threat for the safety of the United States and its allies. Any loss of control over those weapons, and any proliferation of them to other States would constitute a potential threat. The long term interest is that the Central Asia, vast human, natural and material resources must not be dominated by a single power, whose values and interests are against those of the United States. Of course, the long-term interest depends on how the US will integrate the Eurasia into the community of secure democracies.

In reviewing *The Grand Chessboard*, we agree on the fact that Brzezinski drives American geopoliticians to an important moral commitment for the United States to preserve and maintain its power and leadership. But the natural questions are: does this book accomplish the purpose of the author? Are Brzezinski's arguments convincing?

When we consider the global environment of international relations, it is true that "anarchy"

was going to take place after the collapse of the Soviet power. Bipolarism and the Cold War were seen as guarantees of international security and key factors of equilibrium of forces in World geopolitics.

The rise of the United States as a sole Superpower in the World capable to maintain global order was not convincing. I believe the purpose of the author, focused on the imperative of sustaining the US leadership, and consequently its critical role to spread global democracy and security is not deceived. The purpose of the book has a positive impact today, and some current examples prove it. In 1999, Ukraine, one of the Eurasian "pivots" realized its "Orange Revolution"[19]. With the pressure from Western countries, and particularly the Unites States requesting deeper economic and political reforms, resulted the appointment of Victor Yushenko as a Prime Minister. Since the election of George W. Bush, the Ukrainian government continues to praise the US

[16] Ellsberg, (D.), "Papers on the War", (New-York: Simon & Schuster, 1972), p. 260.
[17] Clark, (R.), "The Fire This Time", (New-York: Thunder's Mouth Press, 1992), p. 23.
[18] Herbert, (P.), "Considerations For US Strategy in Post-Communist Eurasia" In: *Parameters, US Army War College Quarterly*, (Spring 1997), pp. 22-23.
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[19] Karatnycky, (A.), "Ukraine's Orange Revolution" In: Foreign Affairs, (March, April 2005), p. 35.
5

involvement in its successful democratic process. In addition, this government welcomes any US economic support that could facilitate the integration of the country into the World Trade Organization. Ukraine is also confident and assured for the United States' backing in case of Russia restarts its hegemonic ambitions over the country. This example is not the least to prove the accomplishments of the author's purpose.

US policy in Afghanistan has long been driven by the contingencies of the war on terror after 9/11 attacks on the United States. The military intervention in that country was a necessary swift action against the Taliban for harboring Al Qaeda, and a way for the US to reaffirm its presence in the region. Also, with the ejection of the Taliban government, Afghanistan enjoyed for the first time in history the fruit of democratic elections.

The war in Iraq was justified for three reasons:

1. The alleged possession of Weapons of Mass Destruction by the Iraqi government
2. Its alleged links with terrorists
3. Liberating Iraqis from the oppression and tyranny.

The foundations of this war are directly related to Brzezinski's view point on the responsibility of the Unites States as a sole Superpower. Constitutional debate is in progress. In the same line, Pakistan has the US support in the global war on terror. The Unites States have pressured on Syrian troops to withdraw from Lebanon to make possible a democratic process in the country. Taiwan can count on US support in case of China invasion. In Africa, slowly, Egypt is making progress towards democracy, allowing multiple candidates in the presidential elections. Libya stopped its nuclear program under the pressure of Washington.

Finally, the United States are involved in the Middle-East peace process between Israel and Palestinians: Israelis are withdrawing from Gaza. All these examples could be seen as the effect of Brzezinski’s recommendations on the US global hegemony.

Despite these accomplishments, there are still stumbling blocks and weaknesses that prove the US global strategy must be rethink. North Korea and Iran for example are still making the United States sleepless. Pyongyang government aimed to reactivate its nuclear program frozen in 1994 under an agreement with the United States. The reason is to make up for the electricity shortfall caused by the ending of oil shipment by the US government and its allies. In one hand, North Korea's nuclear threat represents a major escalation in tension between Pyongyang and Washington. In reference to Ari

Fleischer, the White House spokesman, this move was "regrettable"[20]. In the other hand, Iran has also resumed its nuclear activities. Both countries are suspected of running covert nuclear weapons programs, and remain increasingly defiant because it is also their right to produce nuclear energy. Both countries are described as "two high-stakes cases of nuclear brinksmanship- One in the Middle-East, the other on the Korean peninsula"[21].

Despite the similarities between both cases, the West approach is not the same. Iran is required to limit its nuclear activities in exchange for economic necessity, while North Korea must drop even its civilian nuclear power program. The connotation of both countries as an "Axis of evil" by the US administration is not to cease the crisis.

Democrats have had the opportunity to vow the "fiasco" or the failure of the US strategy policy in Iraq. Recently, former US President Jimmy Carter reaffirmed the fact that invasion of Iraq in 2003 was a big mistake, because it allowed the settlement of the radical Islamic groups, and increased a permanent threat on the American interests[22]. Could this statement determine the author to rewrite some sections or chapters of *The Grand Chessboard*?

Pakistan offers today more evidence for irony of global democracy. In fact, when the authorities did conform to Washington's democratic preference, and hold an election in October 2002, the results were unhelpful to the freedom of American military against jihadists in Northwestern Pakistan.

In reference to Donald K. Emerson, "the globalization of democracy by the United States has created nations which no longer are willing to simply follow the lead of the United States in foreign affairs, and it finds itself acting in an increasingly undemocratic manner"[23]. The Abu Grhaib and Guantanamo abuses on prisoners have caused a strong doubt on the capacity of the United States, the sole Superpower to handle human rights and the principles of the Geneva Convention. According to reports released by the military, the humiliating tactics used to break down the silent detainee began at Guantanamo. Josh White affirms that the interrogators at the US detention facility forced a stubborn to wear women's underwear on his head, confronted him with snarling military working dogs[24].

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[20] BBC News World Edition, Thursday, 12 December, 2002, 17: GMT.
[21] Kole, (W.), "Neither Iran, North Korea Blinking: In: *The Seattle Times*, Tues. Aug. 9, 2005.
[22] President Jimmy Carter's Allocution at the Georgia Navy Base, August 12, 2005.
[23] Emerson, (K.D.), "Global Spread of Democracy Poses New Challenge for US "In: *Yale Global*, January 29, pp. 1-2.
[24] White, (J.), "Abu Grhaib Tactics Were First Used at Guantanamo" In: The Washington Post, Thursday, July 14, 2005, p. Ao1.

Brzezinski once more should have to update his theory and emphasize on how the United States would conciliate its imperatives of leadership and security with the human rights.

Another origin of failure is the US unilateralism in the global strategy. The United States has ignored the role of the United Nations Organization during the second war in Iraq. If it is impossible to have order in the World without the US leadership according to the author, how could be the World without the United Nations Organization? Unilateralism cannot do it in foreign policy. It is regrettable that the US unilateralism in handling Iraq has completely broken down the credibility of the UN.

In order to succeed, it is important in the current circumstances for the Unites States to engage the World's major political powers in the sensitive global issues. The imperative is to build a true coalition of countries or allies, not reluctant or copted allies. According to Democrats, the United States must win over allies by sharing responsibility with those nations which answer the US call, and treat them with respect[25].They added that the United States must lead anyway but listen at the same time[26].

Like most major historical powers in the World, the potential criticisms toward the US foreign policy are endless. American military interventions are perceived as a sort of imperialism, especially in connection with the 2003 invasion of Iraq and Afghanistan. Since the end of World War II, and following the collapse of the Soviet Union and its satellite States, accusations of imperialism have almost leveled at the lonely remaining Superpower, the Unites States. One always refers to the “American Empire “in the contemporary debates surrounding the country. This argument seems hard to refute.

Anti-American sentiment is deep in the Muslim World and derives from what many around the World see as America's blind support of Israel. The US intervention in the Arab-Israeli conflict is widely seen as being unfair and against the Palestinians.

Another cause of resentment against the United States in the Middle-East is its support toward regimes in the middle-eastern countries such as Egypt, Saudi Arabia and Jordan which are seen as undemocratic governments. In Latin America, it has been alleged that the School of the Americas based in the US-owned Canal zone taught Latin American Officers torture techniques, to combat subversion throughout the Cold War without concern for human rights. America's treatment and use of international institutions such as the United Nations and the World Trade Organization, is often seen

[25] “The Democratic Platform for America” presented to the 2004 Democratic Convention, p. 9.
[26] “The Democratic Platform”, op. cit.

as self-serving and hypocritical in other countries. Some believe that the United States is not always committed to free trade as it professes to be. A recent study[27] reveals that the United States has a history of supplying funds to paramilitary groups usually called" freedom fighters" by donors and their allies, but regarded as extremists
or terrorists.

Perhaps, Brzezinski had not imagined that the greatest challenge the United States will face is the human rights in its global strategy process. This parameter seems to be one of the major cause of resentment against the sole Superpower that is supposed to handle the issue of human rights appropriately.

In his State of the Union message on 28 January 2003, President Bush said that the course of the United States was not depending on the decisions from foreign countries. During the presidential elections debates in 2004, he emphasized that the United States does not need the international approval to set up its foreign policy; but it is not true that a single country even a Superpower can succeed in the global policy without partners. Recently, a group of former ministers from Europe, Canada and the United States who are concerned about the current state of transatlantic relations, has given critical suggestions on how to convince Iran to stop its nuclear program. All of them agreed that "genuine transatlantic cooperation is the only path to viable solutions[28].

Brzezinski recognizes that he has "been critical of the Bush`s project on Iraq all along […]"[29]. This statement seems to be in contradiction with the purpose of *The Grand Chessboard*. This purpose is a call to America to set up its leadership around the World after the collapse of the Soviet Union. One of the reasons of the invasion of Iraq was the Bush's "pre-emptive war against terrorism and consequently the control of the region. So it is difficult to understand why Brzezinski did not approve the US military intervention in that country. I would suggest the author to add some major principles of partnership, moderation, respect of others and respect of human rights which are essential for leadership.

In the end, the basic argument of the "Heartland" theory echoed by the author of *The Grand Chessboard* is still relevant. Because of the long term influence of it, the United States is surely building up its supremacy and military presence in Central Asia

[27] "Wolfe, (A.), "The Great Game Heats Up in Central Asia In: *The Power and Interest News Report (PINR)*, 03 August, 2005.
[28] Albright, (M.), "How to Approach Iran" In: *The Washington Post*, December 13, 2004.
[29] Interview delivered by Brzezinski to Editor Nathan Gardels in summer 2004.

and around the World. A new kind of imperialism is already upon the World. But how consistent is it in terms of moral and human ethic?

There are still more challenges and stumbling blocks that the critical role of the United States as a sole Superpower is facing. Unilateralism and "extremist principles could only produce recklessness" in the global strategy[30].The United States must rethink its global strategy in taking into consideration the respect of the human rights, the necessity to create alliances, the imperative to share responsibilities with other regional powers, to avoid arrogance in international relations, and to weaken International organizations such the United Nations Organization.

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[30] Ibid.

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DEVELOPING COUNTRIES IN THE WORLD TRADING SYSTEM: GAINS AND HANDICAPS

by

Victor Essimbe, **Ph.D.**

Trade has grown twice as fast as the World output over the past decade or more. Nineteen of the World's top thirty exporters, counting the European Union as a single entity, are now developing countries. Seven of the top twenty recipients of foreign direct investment are in the developing World. Thus the developing countries have a very strong interest in the outcome of the global economic debates and negotiations.

The debate on the importance of free trade is as old as economics. In fact, the General Agreement on tariffs and Trade (GATT) 1947, these series of conventions were held to promote and regulate World trade, with the intention of reducing trade restrictions placed by nations-states. These conferences led to the establishment of the World Trade Organization (WTO) in 1995. The WTO then became part of the United Nations family and was designed to complete the work of GATT. Its objective was to help liberate free trade through legislation. Furthermore, it was given the power to settle disputes between nation-states and reduce protectionism.

After all, Adam Smith praised the virtues of openness and competition (1982: 424-426). An open international trading system has been of central importance for the development successes of the past several decades. In reference to Fred Bergsten, "Outward orientation" in developing countries would never have succeeded and would never have been attempted in the absence of relatively open markets around the World (2000).

Part one of the article is an overview of the challenges faced by the GATT and the WTO in relation to the free trade outcomes for the developing countries. Part two assesses the gains those countries have from the World Trade System. Part three is an analysis of the difficulties and the handicaps they face within the System, and suggestion on how to attempt to fix those problems.

In the current economic environment of globalization, trade plays an increasingly important role in shaping economic and social performance and prospects of countries around the World, especially those of developing countries.

The General Agreement on Tariffs and Trade (GATT) was set up in 1947 following the Second World War. This was in response to widespread view among developed countries, that the trade restrictions of the 1930s had reduced prosperity and the World would benefit from lower tariffs and trade liberalization. An initial 23 countries signed the Agreement in 1947.

The key principle of the GATT is non-discrimination (1). A set of rules governing trade between its members were laid down. Each contracting party is entitled to receive "Most Favored Nation Status" (2). The GATT is also committed to progressively reducing barriers to trade. Each country sets out a schedule of concessions on rates of import duties on specific goods negotiated with their principal trading partners.

The natural question is to what extent the concerns about the development of less developed countries were reflected in the evolution of the multilateral trading system from GATT to the establishment of the World Trade Organization (WTO)?

Almost a decade after its coming in force, the GATT appointed a panel of experts to examine the trade relations between developing countries and developed countries. The conclusion was that barriers of all kinds in developed countries to the import of products from developing countries contributed significantly to the trade problems of developing countries (Park,1999a: 3). One of the challenges faced by the GATT occurred in 1992 (Myers, 2004a: 66) in the banana market involving five Latin American countries: Colombia, Costa Rica, Guatemala, Nicaragua and Venezuela, all of them banana-exporting countries. Their request was to engage initial discussions on the framework of the GATT on the Community's proposed new common market regime for bananas (3). It focuses on the structure of the European Union imports from preferred and non-preferred suppliers in the transitional period, and evaluates the tariff equivalent that should be applied in 2006 on EU imports from non-preferred suppliers. The most vulnerable ACP (Africa Caribbean and Pacific Countries) would suffer from the new regulation unless they receive direct aids to make their banana products more competitive. Unfortunately the Community refused to enter formal consultations on the matter.

The experience of developing countries inside the GATT could be interpreted in two diametrically opposite ways. On one hand, it could be said that those countries had been repeatedly frustrated in getting the GATT to reflect their concerns. Tariffs and other barriers in industrialized countries on their exports were reduced to a smaller extent than those on exports of developed countries. Products in which they had a comparative advantage such as textiles were taken out of the GATT disciplines altogether. Agriculture, a sector of great interest to developing countries, was also subjected to a waiver and thereafter largely remained outside the GATT framework. In sum the GATT was indifferent, if not actively hostile to the interests of developing countries (Park, 1999b: 3).

The other interpretation is that the developing countries, in their relentless but misguided pursuit of import-substitution as the strategy of development, in effect "opted out" of the GATT (Carbaugh, 2005a: 180).

In spite of the trade liberalization efforts of the Tokyo Round (4) during the 1980s, World leaders felt that the GATT system was weakening. This concern led to the Uruguay Round which negotiations began in 1986(5). The Uruguay Round brought

about the biggest ever reduction in tariffs ad provided for the GATT to be replaced by the WTO in January 1995.

The WTO was endowed with a much strengthened mechanism for settling disputes between members. The GATT rules governing international trade in goods were retained as an integral part of the new organization, but additional agreements were added to cover other areas such as banana dispute.

The ACP countries early had most at stake in the proceedings of the WTO when it came to banana trade, because they stood to lose it entirely. The banana dispute was regarded by the WTO as exclusively between the USA and Latin American countries on one side, and the European Community (EU) on the other side. The ACP countries were accorded only third-party status, and thus placed in the same category as countries like Japan, which do not export bananas, but might have an interest in the wider implications of the case. This meant that the ACP countries were seriously handicapped in their attempts to present their case. They were not allowed to attend the organizational meetings, which decided on issues affecting the conduct of the case. They were allowed to attend only selected sessions and to make a brief statement and were denied the right to pose questions to the complainants on factual and legal matters (Myers, 2004b: 170).

Despite the confusing responses of the GATT and WTO to their first challenges in regard to the banana dispute, the interests of developing countries in the negotiations market access however are significant.

Efficient producers in developing countries have significant gains by negotiating with countries that provide high protection to their primary sectors and resource-based manufactures of agricultural origin. These are primarily industrial countries. These high levels of protection affect some of the goods where efficient producers have a strong comparative advantage. In 2000 for example, Argentina's exports of agricultural and agro-industrial products represented 21% and 30% of the total exports respectively (Nogués, 2002a: 4).

Both GATT and WTO have made significant strides toward achieving their principles and goals. Several prolonged rounds of negotiations produced major reduction in tariffs, subsidies and other trade barriers. Textiles and agriculture were exempt from GATT negotiations but are now within the aegis of the WTO. Because of inherent disadvantages of most developing countries in controlling their markets and prices of their exports commodities, the GATT promoted the Generalized System of Preferences (GSP). To help developing nations strengthen their international competitiveness and expand their industrial base, many industrialized nations have extended non-reciprocal tariff preferences to exports of developing countries. Under the GSP, major industrial nations temporarily reduce tariffs on designated manufactured imports from developing countries below the level applied to imports from other industrial nations. Trade preferences granted by industrial countries are voluntary. Those countries determine eligibility criteria, product coverage, the size of preference

margins and the duration of the preference (Carbaugh, 2005b: 231).

In practice, industrial countries rarely grant deep preferences in sectors were developing countries have a large export potential, thus developing countries often obtain only limited preferences where they have a comparative advantage (Carbaugh, 2005c: 231). In spite of the gains, many problems remain. Developing countries have difficulties generated by the WTO agreements and have problems of implementation. On the whole, the conclusion of the Uruguay Round and the formation of the WTO have benefited the rich industrial nations, and most of developing countries have lost out (Anderson, 2000a: 23). The handicaps that developing countries face in the international trade negotiations are associated to a number of issues: the lack of transparency of the WTO, the inadequate preparation of the developing countries for the negotiations and the nature of the WTO agreements.

Both GATT and WTO are accused of inherent biases namely the lack of transparency and participation. WTO is one of the most non-transparent of international organizations (Anderson, 2000b: 23). An even more serious change is that the World Trade Organization is even non-transparent and non-participatory for the majority of its own member States, notably the developing countries. This deficiency is due to the working methods and the system of decision making of the WTO system as well as the lack of capacity of the developing countries to effectively participate.

In practice the GATT and the WTO have been dominated by a few major industrial countries. Often, those powerful nations negotiate and make decisions among themselves, and then embark on an exercise of winning over (Anderson, 2000c: 23), sometimes through intensive pressure, a select number of the more important of influential developing countries. Most WTO members States may not be invited to the informal meetings and may not even know that these meetings are taking place, or what is happening there. When an agreement is reached among a relative small group, the decisions are rather easy to pass. The “system of decision by consensus” (Anderson, 2000d: 23) is also odd in its implementation. Even if a majority of developing countries that form the vast majority of WTO membership agrees, the issue is killed if only a few developed countries disagree. The “principle of one country, one vote” (Anderson, 2000e: 23) is rarely respected. By contrast, should the major powers, especially the United States, the European Union and Japan agree on a particular issue, while a sizable number of developing countries disagree, the major powers are likely to embark on a process which they call “building a consensus” (Anderson, 2000f: 15).

Obviously, the lack of transparency in the World Trading System, and especially in the WTO is so serious that many of the representatives of the member States are not given adequate information, and are not able to participate meaningfully. Further, manipulative devices are used to ensure that the decisions desired by the few members that dominate the system are achieved, while the policies or decisions that many or most developing countries want are ignored or have little chance of success. The above features of the World trading system explain why developing countries are at such an immense disadvantage, and why it is so likely that issues brought into or discussed at

the WTO are shewed and biased towards the interest of the major developed countries. But the inadequate preparation of developing countries is also the source of their difficulties.

First: they lack experience and management arrangements. In many developing countries, the responsibility of administering trade negotiations has been given to their foreign affairs ministries, and in some cases, this may have weakened the negotiations strength. Diplomats have not been trained to assess the economic dimensions of the increasing number of items that are being included in most negotiating agendas with industrial countries. As a consequence, they are more likely to agree to unbalanced outcomes (Nogués, 2002b: 19).

Second: most developing countries also lack of knowledge and trade negotiations skills. They are negotiating without an economic assessment for the probable economic consequences of the agreements they may end up signing (Nogués, 2002c: 19). This contrast with the situation of industrial countries that apparently know with precision what they want in the negotiations.

Third: another significant handicap for the developing countries is that they have no tradition of holding consultations among public offices and between the public and the private sectors for defining positions for the international trade negotiations. In the Uruguay Round for example, the developing countries acted more from the basis of binding unilateral reforms than from the basis of negotiating an exchange of concessions(Nogués, 2002d : 19). Now, many countries find themselves in the midst of several negotiations without the required institutionalized mechanism for private sector-public consultations, and this is a delicate problem.

Fourth: developing countries are facing difficult debt repayment problems which sometimes become interlinked with international trade negotiations. Debt repayment problems are not the best for the multilateral trading system. The previous comments illustrate some of the handicaps that face developing countries. It is apparent that some of them are serious enough to merit a reappraisal on how they should approach the trade negotiations. In all of the areas mentioned above, industrial countries hold positions that result in a negotiating edge over developing countries (Anderson, 2000g: 25).

Because of these lacks, what do developing countries miss in the World trading system? In other words, what should those countries gain if they were well prepared?

The developing countries have been unable to take advantage of any additional potential export opportunity, because they are also obliged to open up more deeply and in more sectors, threatening the survival of their local firms and farms (Anderson, 2000h: 25). The Uruguay Round was expected to bring some benefits to developing countries able to take advantage of certain changes, but even those benefits have not been significant thus far. Some examples illustrate our point of view.

A lowering of Northern countries' industrial tariffs may benefit the developing countries with a manufacturing export capacity. The phase-out of the Multifiber Arrangement(5) was supposed to be the aspect of the Uruguay Round to most immediately benefit the developing countries, or at least the countries that export the products implemented in

the Agreement. The Agreement on agriculture was supposed to result in the reduction of agricultural subsidies in the North, and this was expected to improve the market access of developing countries that export agricultural products. The weaker developing countries, without much export capacity were not expected to benefit much at all from the Uruguay Round. Several countries especially in Africa, but also including Indonesia were projected to suffer absolute losses from the Agreements. For agriculture, many developing countries are in danger of having their food security and farmer's livelihoods come under threat.

Given the serious challenges faced by developing countries in implementing their Uruguay Round commitments and in dealing with improper implementation by the developed countries, the natural question is what should be done?

Obviously there should be a review of many of the agreements with a view to amending them. The overall review process of the WTO's Agreements should provide an opportunity to rectify their defects. The review process would in itself be a massive task, involving analysis of the weaknesses of the various agreements, assessments of how they have affected or will affect developing countries, proposals to amend them, and negotiations on these proposals.

In his writings Bhagirath Lal Das (7) has shown a good indication of the enormity of the task. He sees the necessity to amend the Agriculture and Food Security Agreement. In most developing countries, small farmers form a large part of the population. Their livehoods and products are the main basis of Third World economies. These livehoods could be threatened by agricultural liberalization under WTO's Agricultural Agreement. To deal with this problem the former Ambassador to the GATT suggests that in developing countries, food produced for domestic consumption and the products of small farmers should be exempted for the WTO's disciplines on import liberalization, domestic support and subsidies.

The nature of the World Trade Organization negotiations and the environment in which they take place are constantly changing, and too complex for any one government ministry of a developing country to handle. Experience has shown that developing countries have generally not been effective in the WTO, either in pursuing their own proposals or in defending themselves against the proposals of others. They have been succumbing to pressures from the major developed countries and making concessions from them. Since the mid-1980s, the developed countries are proceeding with a new confidence in their capacity to solve their economic problems by proper coordination of their own macroeconomic policies. In this respect, the role of the developing countries is seen as very diminished. As a result, Bhagirath L.D. recognized that the problems of the developing countries are now at best seen as minor irritants to be dealt with, as issues at the fringe and not at the center stage (Bhagirath: 1980a).

All this calls for an effective and strong decision- making process in the developing countries. The interests of the country in respect of specific issues have to

be identified in a rational and firm way, and this will lead to a stronger will to pursue them in any forum. The former India's Ambassador sees a need for a new form of institution in each developing country to handle their specific issues and provide input into the decision-making process (Bhagirath: 1980b).

Such an institution should be in the form of a commission comprising three member of experience and integrity he adds. The commission should take up specific issues, examine various aspects and hold wide consultations, and it should be independent of any specific ministry (Bhagirath: 1980c).

Our overall assessment of the few gains and more handicaps of the developing countries in the World trading system show how they are continuously being disadvantaged by the WTO, its rules and its sytem. The system itself upholds the weak bargaining position of those countries and the grave inequities in negotiating capacities. People of developing countries are still the main victims of continuous distortion of World trade.

Pressuring and forcing countries to liberalize trade at their risks, and investment before they can sensibly or practically do it is the real distortion of the multilateral trading system. The sooner the political leaders and trade representatives of developed countries realize this, the better. Obviously, the developing countries cannot escape from liberalization. Even if the World trading system needs to be repaired, leaders of those countries must take the matter seriously, and representatives for future trade negotiations should be well prepared.

Endnotes

1. Article III of the Agreement bans discrimination between member-States in the administration of any form of quantitative restrictions, except in certain narrowly defined circumstances.
2. “Most-Favored-Nation (MFN) stipulates that countries cannot normally discriminate between their trading partners. It grants special favor such as lower customs duty rate for one of their products. All members should be granted the same favor.
3. The new common market regime for banana import in the European Union is a two-step process towards a tariff-only system that should enter into force no later than January 1st, 2006.
4. The Tokyo-Round (1973-1979, 99 countries, reduced non-tariff trade and improved and extended the GATT system.
5. The Uruguay Round (1986-1994), 125 countries, created the WTO to replace the GATT treaty.
6. The Multifiber Arrangement allowed Northern countries to place quotas on imports of textiles, clothing and footwear.
7. Bhagirath Lal das was India's Ambassador to the GATT, and served as Director of the international trade programs.

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THE RESPONSIBILITY IN INTERNATIONAL CRIMINAL LAW - VIEW OF THEORY AND PRACTICE OF SERBIAN CRIMINAL LAW -

by

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DEFINITION AND ELEMENTS OF THE CRIMINAL RESPONSIBILITY

1. Responsibility of a state

The principle of individual (personal) criminal responsibility[1] for the criminal offence that represents the violation of the rules of international law is generally accepted in international criminal law of today. However, it is still disputable in theory whether a state (as a collective) should also be responsible for crimes against international law. This question seems reasonable, since crimes against international law are most frequently committed during war, armed conflict or occupation on the behalf and for the account of a particular state.

Therefore, it has been discussed whether political, civil and criminal responsibility of a state for crimes against international law[2] should exist along with the responsibility of an individual. Actually, political and civil responsibility of a state emerges from the illegal acts of its institutions (authorities). Furthermore, every state in the international community of today has got certain obligations whose breach draws certain form of responsibility i.e. liability for punishment and requires specific forms of punishment such as: compensation, economic penalties, international condemnation and even military or humanitarian intervention to be applied.

Nevertheless, a series of reasons that support the introduction of criminal liability of a state for crimes against international law is pointed out in legal theory. It is considered that the state, as well as the persons that act on its behalf, should bear criminal liability for serious violations of international law, which are placed in the category of criminal offences according to the general opinion of civilized nations due to their graveness, brutality and disparagement of human life. A state should not be allowed to remain unpunished for the most serious forms of crimes against international law because the individuals who unite in order to form states immeasurably amplify the possibilities to cause evil.

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[1] D.Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007. p.16.

[2] N.A.Combs, Guilty pleans in international criminal law, Stanford, 2007. pp. 178-193.

It is also emphasized as a logical and rational argument that not only individuals but states as well should be responsible for the gravest crimes that violate the rules of international law, such as crime against peace and crime against humanity. Otherwise, the purpose of criminal punishments and the aims of repression could not be accomplished, since the actual threat of recidivism (repeated perpetration of the same criminal offences) would continue to exist in the unpunished state[3].

The fact that world peace and security of mankind are predominantly threatened, not by individuals but by the states themselves and their attitudes and activities, is often pointed out as a final argument that would justify the introduction of criminal responsibility of a state for crimes against international law. Since this threatening of peace is actually derived from the state's power, the measures intended to prevent and suppress criminality in international relations that would affect only individuals, could not lead to the required result[4].

In spite of numerous reasons that speak in the favor of state's responsibility under international criminal law, the present level of society's development does not allow such form of liability to be accepted. According to the ancient Roman maxim: *societas delinquere non potest*, it is accepted that a legal person (including a state) cannot be a perpetrator and, hence, cannot bear criminal responsibility. A state could bear criminal responsibility only if its guilt could be declared, which is impossible. That is the reason why even the Nürnberg Judgment recognizes the standpoint that the perpetrators of crimes against international law can be only natural persons and not legal entities such as states[5].

2. Responsibility of a natural person

Criminal responsibility of individuals as natural persons under international criminal law, includes a group of subjective circumstances that determine the mental state of the perpetrator and his psychological attitude towards the crime against international law he has committed[6]. Due to such circumstances, the perpetrator can be considered as mentally competent and guilty. Accordingly, criminal liability under international criminal law is also comprised of three elements (paragraph 25. subpart 1. of The Rome Statute from 1998.). These are[7]:

1) being above the age of 18,

2) mental competence and

[3] M.Seršić, Međunarodnopravna odgovornost država, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, No. 1, 1999. pp.12-22.
[4] More : N.Jorgensen, The Responsibility of States for International Crimes, Oxford, 2000.
[5] D.Radulović, Međunarodno krivično pravo, Podgorica, 1999.pp.91-93.
[6] Lj.Lazarević, Komentar Krivičnog zakonika Srbije, Beograd, 2005. pp.67-71.
[7] Lj.Jovanović, D.Jovašević, Krivično pravo, Opšti deo, Beograd, 2003. pp.154-158.

3) guilt.

These elements of criminal responsibility are assessed in each individual case according to the time of conduct of the actual criminal offence. As such, they represent the grounds of subjective and personal (individual) criminal responsibility, which is a precondition for the enforcement of penalty to the person who committed some of the crimes against international law.

Furthermore, it is prescribed in paragraph 27. of The Rome Statute that it shall apply equally to all persons without any distinction based on their official capacity[8]. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility nor shall it, in and of itself, constitute a ground for reduction of sentence. For that reason, immunities based upon national or international laws (in accordance with the provisions of The Vienna Convention) do not represent an obstacle for The International Criminal Court to exercise its jurisdiction[9].

3. Mental competence

Mental competence represents a group of subjective or intellectual elements (elements of consciousness) and elements of will that enable the perpetrator under international law to reason (to understand the significance of his act) and to make decisions (to control his acts). It is the foundation (basis) of guilt and stands for "general previous capability" of a person to be responsible for the crime against international law he has committed. Nevertheless, mental competence can be excluded or more or less significantly diminished, depending on the presence of particular mental disorders and their impact on the psychological capabilities of the perpetrator. Legally relevant mental disorders include the following[10]:

1) permanent or temporary mental illness,

2) temporary mental disorder and

3) mental retardation.

If it is confirmed that the perpetrator under international law was mentally capable at the time of conduct, which is the precondition for the enforcement of punishment, the presence of his guilt should also be assessed. Guilt is a psychological relation of the offender towards the committed crime against international law as an act of his own.

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[8] D.Derenčinović, Inplementacija materijalnopravnih odredbi Statuta stalnog Međunarodnog kaznenog suda (Rimski statut) u hrvatskom kaznenom zakonodavstvu, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2, 2003. pp.877-906.
[9] V.Đurđić, D.Jovašević, Međunarodno krivično pravo, Beograd, 2003. pp.59-63.
[10] D.Jovašević, Krivično pravo, Opšti deo, Beograd, 2006. pp.485-487.

Guilt is present when the offender is aware of the act, the consequence and the causal relation between them as well as of all the essential characteristics of the committed criminal offence.

Depending on the forms of perpetrator's consciousness and will, legal theory is familiar with two forms of guilt[11]:

1) premeditation and

2) negligence.

4. Premeditation

In paragraph 30. of The Rome Statute the psychological element is defined within the frames of individual criminal responsibility (which is set in the provisions of paragraph 25 of The Statute) by saying that criminal responsibility exists if criminal offence is committed with intent and knowledge. This means that the perpetrator has to own consciousness and knowledge about the circumstances of his act or about the fact that the consequence of the act will emerge from the expected sequence of events. This provision indicates that The Rome Statute is familiar only with premeditation as a form of guilt of the offender against international criminal law. Still, the institution of responsibility of a superior allows the military or civil superior to be responsible even when acting negligently for the criminal offences committed by his subordinates (persons under his control or supervision)[12].

Premeditation (*dolus*) is comprised of two fundamental elements. These are: a) consciousness, awareness, knowledge of the committed criminal offence, i.e. of all the characteristics of its essence and b) will or determination to cause the foreseen consequence of the act. The majority of crimes against international law are committed by premeditation as the form of perpetrator's guilt. But, some crimes against international law can be committed only by premeditation in the narrow sense, i.e. direct or special premeditation.

This type of premeditation includes the intent of the perpetrator as the highest and the most intensive form of conscious and willing determination of a person's act towards the causing of the consequence. At the end, it is worth saying that, besides mental capacity and guilt, The Rome Statute explicitly determines the age of the perpetrator (above 18 years) at the time of conduct as a precondition for criminal responsibility of the offender against international criminal law[13].

[11] B.Petrović, D.Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. pp.223-232.
[12] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp.318-321.
[13] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.172-174.

GROUNDS FOR EXCLUDING CRIMINAL RESPONSIBILITY

The precondition for the offender against international criminal law to be liable for punishment is the presence of his criminal responsibility at the time of conduct. Nevertheless, The Rome Statute is familiar with several circumstances (grounds) that exclude criminal responsibility. Among these grounds, one can also find some circumstances that particular national criminal legal provisions generally do not consider as grounds for excluding criminal responsibility but as grounds for excluding criminal act in general or as grounds for remittance of punishment.[14]

The Rome Statute is familiar with several grounds for excluding criminal responsibility. The following grounds are enumerated in paragraph 31.[15]:

1) mental incompetence,

2) intoxication,

3) self-defense and

4) extreme necessity.

In paragraph 32, The Rome Statute describes mistake of fact and mistake of law as grounds for reducing criminal responsibility of the offender against criminal law, whereas in its paragraph 33 two more grounds of this kind are mentioned. These are:

1) superior orders and

2) prescription of law.

In legal theory, the following circumstances are also considered as grounds for reducing criminal responsibility[16]:

1) an offence of minor significance, since the jurisdiction of international criminal courts (tribunals) is established only for grave, serious, and long lasting violations of international humanitarian law,

2) the fact that the offender against international law is under 18, when international judiciary authorities cannot have jurisdiction over such offender, but national judiciary authorities can,

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[14] U.Eser, Na putu ka međunarodnom krivičnom sudu – nastanak i temeljne crte Rimskog statuta, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No.1, 2003. pp.133-163.
[15] D.Derenčinović, Inplementacija materijalnopravnih odredbi Statuta stalnog Međunarodnog kaznenog suda (Rimski statut) u hrvatskom kaznenom zakonodavstvu, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2, 2003. pp.877-906.
[16] V.Đurđić, D.Jovašević, Međunarodno krivično pravo, Beograd, 2003. pp.60-61.

3) the fact that a criminal offence is not prescribed as such by the law, when the act is not considered as punishable under national or international criminal law if at the time of conduct it has not been prescribed as such by a criminal law (national criminal legislation) or by an international legal document,

4) the fact that criminal offence was committed with victim's consent, if such criminal offence includes the absence of victim's consent as its essential element (for example, rape, forced labor, forced deportation of the population) and

5) the fact that criminal offence was committed under coercion i.e. duress (meaning that the victim was coerced by threat of grave and permanent (irreversible) consequence such as murder or bodily harm and had no actual power to prevent the consequence of the offence).

The following circumstances are also pointed out as grounds for reducing criminal responsibility for a crime against international law[17]:

1) the consent of the victim,

2) diplomatic immunity,

3) military necessity during an armed conflict,

4) lawful repression-contra measures and

5) the *tu quoque* argument.

1. Mental incompetence

Mental incompetence is the first ground for excluding criminal responsibility not only under national but under international criminal law as well. This term means that an offender against international criminal law was unable to reason (i.e. to appreciate the unlawfulness of his act) and to make decisions at the time of conduct due to mental illness or disorder that disabled him from appreciating the unlawfulness or the nature of his behavior as well as from coordinating his behavior with the behavior that is legally acceptable.

The above said indicates that mental incompetence is comprised of two fundamental elements[18]:

1) the biological and

[17] B.Ivanišević, G.Ilić, T.Višnjić,V.Janjić, Vodič kroz Haški tribunal, Beograd, 2007. pp.157-164.
[18] P.Novoselec, Opći dio kaznenog prava, Zagreb, 2004. pp.214-216.

2) the psychological.

The biological element of mental incompetence consists of mental disorder, i.e. certain forms of disorders that affect normal conduction of perpetrator's psychological processes. Such mental disorder can emerge as[19]:

1) permanent or temporary mental illness,

2) temporary mental disorder and

3) mental retardation.

The psychological element of mental incompetence includes two types of incapacity (incapability/incompetence):

1) incapacity to reason-being unable to understand the factual, the legal and the social significance of the committed criminal offence against international law or, as it is called in the Rome Statute, "incapacity to appreciate the unlawfulness of one's conduct" and

2) incapacity to make decisions-being unable to control one's conduct to conform to the requirements of his consciousness.

Such incapacity (incompetence) is assessed during criminal procedure with the help of findings and opinion given by psychiatric expert witness (paragraph 31, subpart 1 point "a" of The Rome Statute). Here should be pointed out that although The Rome Statute intends to define a considerable amount of fundamental terms and institutions of the general part of international criminal law, it fails to mention the institution of "substantially diminished mental competence" (recognized by the majority of contemporary national criminal legislations).

Substantially diminished mental competence is a psychological condition of the perpetrator at the time of conduct that, due to a certain form of mental disorder, leads to substantial (significant) diminishment (but not to complete exclusion) of the capacity to reason or to make decisions. The fact that The Rome Statute is not familiar with the institution of substantially diminished mental competence does not represent an obstacle for the Court Chamber to take this circumstance (i.e. grade of guilt) into account in determining the punishment for the perpetrator and treat it as an extenuating circumstance in accordance with paragraph 78. subpart 1. of The Rome Statute (which has generally been applied in the up to now practice of the Hague Tribunal).

[19] M.Goreta, Osvrt na koncept smanjene ubrojivosti koji se primenjuje na Međunarodnom kaznenom sudu za područje bivše Jugoslavije, Društveno istraživanje, Zagreb, No.1, 2003. pp.247-258.

2. Intoxication

The second ground for reducing criminal responsibility under international criminal law is defined in paragraph 31. subpart 1. point "b" of The Rome Statute. It includes intoxication or inebriation (meaning the presence of contemporary mental disorder of the perpetrator, which has been induced in a specific manner). This ground is fulfilled when the perpetrator was brought to the condition of intoxication or inebriation (by alcohol or drug abuse or otherwise) that destroyed his capacity to appreciate the unlawfulness or the nature of his conduct, or his capacity to control his conduct to conform to the requirements of law.

In this case[20], offender's capacity to reason or to make decisions at the time of conduct is not excluded because one of the forms of mental disorder is indicated, but due to the intoxication or the inebriation of the offender himself. Namely, perpetrator's mental competences (capacities) are excluded because of the effects of alcohol, drugs or similar intoxicating substances. This means that at the time of conduct the perpetrator is in the condition of intoxication, i.e. inebriation, in which he does not possess a completely preserved capacity to understand the significance of his act or to control his conduct. But, the use of this institution under international criminal law requires that the perpetrator was brought to the condition of intoxication without his guilt and without his active contribution.

Actually, The Rome Statute explicitly forbids this institution to be applied if the perpetrator voluntarily caused his state of intoxication and committed a criminal offence in such state. In such situation, there is an institution in legal theory known as *actiones liberae in causa* (acts that have been voluntarily caused but not voluntarily committed), which means that the perpetrator voluntarily brought himself to such condition, being familiar with the risk of commencing the act that represent a crime against international law but disregarding it due to intoxication. Criminal responsibility of such perpetrator cannot be excluded.

3. Self-defense

Self-defense[21] is a ground for excluding criminal responsibility provided by paragraph 31. subpart 1. point "c" of The Rome Statute. There is self-defense if the perpetrator committed a crime against international law in order to repel a concurrent unlawful attack on his person or the person of another. In view of that, self-defense, as a ground for excluding criminal responsibility, is interpreted as "individual self-defense" and not as "collective self-defense" that is recognized as the right of every state by

[20] B.Petrović, D.Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. pp.211-213.
[21] D.Jovašević, Krivičnopravni značaj instituta nužne odbrane, Pravni zbornik, Podgorica, No. 1-2, 1998. pp. 128-143.

paragraph 51. of The UN Charter. This ground for reducing criminal responsibility requires that the following conditions are met[22]:

1) That crime against international law is committed by a person who is acting reasonably (rationally),

2) That the person committed the offence in order to defend himself or another person or, in the case of war crimes, in order to defend property which is essential for their survival or property which is essential for accomplishing a military mission.

Therefore, this institution is applied not only in the case of self-defense, but in the case of "necessary help" i.e. defense of another person, as well. Moreover, the use of this institution has been expanded, since it does not refer only to the protection of life and physical integrity but also to the protection of property (however, not in all situations, but only when the protection of such property is of existential importance or essential for accomplishing a military mission, which indicates the use of "war necessity"),

3) That the offence is committed with the intent to protect the mentioned values from an imminent (actual or impending) and unlawful (illegal) use of force and

4) That the offence is committed in a manner proportionate to the degree of danger to the person or the other person or property protected.

However, the fact that a person was involved in a defensive operation conducted by military forces does not in itself constitute a ground for excluding criminal responsibility. Accordingly, the use of self-defense under international criminal law differs from its use under national criminal legislations in two aspects[23]:

1) international criminal law allows this institution to be used not only in the case of personal rights' protection, but also when the property of the perpetrator or of another person (presumably a person who is close to him) is protected and

2) the character of the military mission is irrelevant for the use of this institution.

4. Extreme necessity

[22] D.Jovašević, Nužna odbrana i krajnja nužda, Niš, 2008. pp.99-106.
[23] More : J.G.Knoops, Defenses in contemporary criminal law, Ardsley, 2001.

The institution of extreme necessity[24] is defined in paragraph 31. subpart 1. point "d" of The Rome Statute. It represents a particular ground for excluding criminal responsibility under international criminal law. Extreme necessity is present if the perpetrator committed a criminal offence in order to repel from his person or the person of another a concurrent unprovoked danger that could not be otherwise repelled, and the damage inflicted does not exceed the damage threatened[25]. This means that a person who commits a crime against international law under the following conditions is not considered as criminally responsible[26]:

1) That the perpetrator was under duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against him or another person. Such duress may either be made by other person or persons or constituted by other independent circumstances that are beyond perpetrator's control,

2) That the duress should either have occurred or be imminently threatening the perpetrator or another person. Namely, the duress that is repelled in this manner can come from other persons or from other circumstances that are beyond perpetrator's control and

3) That when repelling the duress the perpetrator acts necessarily and reasonably provided that the harm he caused is not greater than the one sought to be avoided in this manner.

5. Mistake

The Rome Statute deals with mistake of fact and mistake of law in its paragraph 32. Both cases include an incorrect or an incomplete knowledge (awareness) of a particular circumstance. Mistake of fact is present when the error refers to a factual circumstance that constitutes the essence of a crime against international law. On the other hand, mistake of law represents a misconception related to the unlawfulness of the committed crime against international law.

Mistake of fact excludes criminal responsibility if the perpetrator does not hold a correct and complete perception of the psychological element, i.e. the element of intention or consciousness that constitutes the essence of a particular crime against

[24] M.Babić, Krajnja nužda u krivičnom pravu, Banja Luka, 1987. pp.78-92.
[25] Extreme necessity is used under international criminal law when the following conditions are met: 1) that a person committed a criminal offence under the circumstances that include a direct threat of grave and permanent consequence for life or physical integrity of that person, 2) that there was no other appropriate means to repel such threat 3) that the damage inflicted does not exceed the damage threatened and 4) that the person did not willfully contribute to the situation that forced him to act under extreme necessity or coercion.
[26] A.Kaseze, Međunarodno krivično pravo, Beograd, 2005. pp.282-284.

international law. Accordingly, mistake of fact excludes perpetrator's premeditation. It can appear in two forms[27]:

1) as an error related to a particular circumstance that represents an essential characteristic of a crime against international law-mistake of fact in the narrow sense and

2) as an error related to a particular circumstance that excludes the unlawfulness of the act.

Such circumstance, known as mistake of fact in the broader sense, stands beyond the essence of a criminal offence, but is of criminal legal nature. If it existed in reality, it would exclude the unlawfulness of the committed criminal offence.

Mistake of law[28] or mistake in the use of law (provided by paragraph 32 subpart 2 of The Rome Statute) is related to perpetrator's decision upon whether his behavior represents a crime against international law. It can exclude criminal responsibility in the following cases:

1) when perpetrator's mistake can exclude his premeditation, i.e. if the perpetrator was not aware or did not appreciate at the time of conduct the psychological element required by a particular criminal offence and

2) when the mistake excludes perpetrator's guilt, i.e. in the case of superior orders or prescription of law (Paragraph 33. of The Rome Statute).

6. Superior order and prescription of law

The last ground for reducing criminal responsibility under international criminal law is provided by paragraph 33. of The Rome Statute. It includes:

1) superior order and

2) prescription of law.

To be more precise, according to this explicit provision, the fact that a crime against international law has been committed by a person pursuant to an order of a military or civil state authority or prescription of law does not relieve that person of criminal responsibility unless[29]:

[27] B.Petrović, D.Jovašević, Krivično (kazneno) pravo Bosne i Hercegovine, Opći dio, Sarajevo, 2005. pp.163-166.
[28] D.Jovašević, O pojmu pravne zablude u krivičnom pravu, Glasnik AK Vojvodine, Novi Sad, No. 9, 1997. pp.311-327.
[29] P.Novoselec, Opći dio kaznenog prava, Zagreb, 2004. p.491.

1) the person was under a legal obligation to obey orders of the Government or the superior in question,

2) the person did not know that the order was unlawful and

3) the order was not manifestly unlawful.

However, it is explicitly pointed out that orders to commit genocide or crimes against humanity are to be considered as manifestly unlawful, which means that it is not possible to apply this ground for reducing criminal responsibility when dealing with the gravest crimes against international law. Still, this ground can be applied when excluding criminal responsibility for war crimes.

RESPONSIBILITY OF A SUPERIOR (COMMAND RESPONSIBILITY)[30]

Under international criminal law as well, subjective criminal responsibility, based upon age, mental competence and guilt, represents a precondition for the enforcement of criminal sentences to the offenders against international criminal law. This is personal (individual) subjective responsibility that excludes criminal responsibility for the acts of another person i.e. objective responsibility. After having taken into consideration all the examined personal and material evidence, the international criminal judiciary authority in charge has to assess whether all psychological elements (elements of consciousness and elements of will) were encompassed by the offender (perpetrator or accomplice) at the time of conduct in each particular case. That is a rule.

However, the nature and the character of crimes against international law caused one more ground for punishing the perpetrators of these criminal offences known as the responsibility of a superior. A consistent terminological definition of this term has not yet been established in legal theory. Hence, the following terms are being used: superior responsibility, responsibility for conduct of subordinates, indirect superior responsibility, responsibility for failure to act and liability of a commander for the acts of his subordinates. This form of criminal responsibility under international criminal law is nowadays provided by paragraph 28. of The Rome Statute[31].

1. Historical development of responsibility of a superior

The first indicators of the existence of responsibility of a superior as a special form of criminal responsibility (responsibility *sui generis*)[32] can be found much earlier. It

[30] There are authors who prefer to use terms such as “commanding” responsibility, responsibility of a superior, responsibility of a commander and responsibility for the act of another person instead of the term “command” responsibility.
[31] B.Lukšić, Genocide and command responsibility, Zbornik Pravnog fakulteta u Splitu, Split, No. 4, 2001. pp. 283- 291.
[32] Ž.Burić, Zapovjedna odgovornost, Hrvatska pravna revija, Zagreb, No. 11, 2004. pp.75-79.

the year 1439. the French king Charles VII announced an order from Orléans, according to which "each commander or his deputy is responsible for maltreatments, felonies or misdemeanors conducted by the members of their military units".

The Hague Convention dating from 1907 was the first written international legal source to prescribe obligations as well as responsibilities of military commanders for the conduct (act and failure to act) of his subordinates. It is explicitly prescribed by paragraph 1. of its Annex 4 that militia or volunteer corps needs to be commanded by a person responsible for his subordinates if intending to obtain the status of a lawful party to the conflict and to enjoy the legal protection provided by the Hague Convention. Moreover, paragraph 43. of The Hague Convention prescribes the duty of the commander to take all the necessary measures in his power to restore and ensure, as far as possible, public order and safety, as well as the laws in force in the occupied territory[33].

Further, theoretical and practical development of responsibility of a superior[34] under international criminal law is linked to the case of General Tomoyuki Yamashita, the commander of Japanese forces at the Philippines, who was accused by The USA Military Commission in 1945 of crimes committed on battlefields in the Far East during The World War II, since "the crimes were so widespread that Yamashita must have known about them, but he neglected and failed to fulfill his duty as a commander to supervise the conduct of his army by allowing it to commit serious crimes and violate the laws of war". The court found General Yamashita guilty as charged and sentenced him to death by hanging executed on February 23rd 1946.

Liability of a commander for the acts of his subordinates was explicitly implemented in a national criminal legislation for the first time by The US Army Field Manual adopted in 1956. Responsibility for acts of subordinates is clearly defined in paragraph 501 of The Manual. Former Yugoslavian Manual on implementation of the provisions of the international law of war in the armed forces of former SFR Yougoslavia adopted in 1988.[35] was familiar with the same form of responsibility-responsibility for the acts of the subordinates.

Some cases of responsibility for the acts of subordinates are enumerated in paragraph 21. of The Manual[36]:

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[33] D.Dereničnović, Kritički o institutu zapovjedne odgovornosti u međunarodnom kaznenom pravu, Zbornik Pravnog fakulteta u Zagrebu, Zagreb, No. 1, 2001. pp. 23-44.

[34] When the nature of responsibility of a superior in concerned, a consistent standpoint has not yet been established in legal theory. So, according to the theory that originates from common law, responsibility of a superior is considered as a form of responsibility for a crime committed by another person (i.e. by a subordinate). This standpoint is adopted in the practice of The Hague Tribunal and The Rwanda Tribunal as well. According to another standpoint, responsibility of a superior represents responsibility for a particular criminal offence that differs from the crime committed by a subordinate. Actually, this is the case of responsibility for failure to act, i.e. for failing to conduct the necessary supervision by the commander.

[35] Official Military Gazette of SFR Yougoslavia No. 10/1988

[36] I.Brkić, Zapovjedna kaznena odgovornost i načelo zakonitosti u međunarodnom kaznenom pravu, Hrvatska pravna revija, Zagreb, No. 8, 2001. pp.80-82.

1) A military commander is personally responsible for the violations of the laws of war if he knew of could have known that forces or individuals under his command were preparing to breach those laws, but failed to undertake measures to prevent it,

2) A military commander is personally responsible if he knows that the breach of the law of war has already been committed but fails to accuse the persons responsible for such violations of laws.

3) A military commander who is not empowered to accuse these persons and who failed to report them to the military commander in charge is also personally responsible and

4) A military commander is responsible as a perpetrator or as an inciter if, by failing to undertake measures against the perpetrator under international law, enables his subordinates to continue the commission of such criminal offences.

Subsequently, Protocol 1 Additional to the Geneva Conventions on the protection of the victims of international armed conflicts of 1977. also mentioned responsibility of a superior in its paragraph 86. subpart 2. According to this provision, the fact that a criminal offence that represents the breach of the Conventions was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility under the following conditions[37]:

1) if they knew, or had information that should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and

2) if they did not take all feasible measures within their power to prevent or repress such act.

Paragraph 7. subpart 3. of The Statute of The Hague Tribunal[38] also deals with responsibility of a superior. To be exact, the fact that a crime against international law was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was involved with the commission of such act or had committed it and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators there of.

[37] F.Bačić, Zapovjedna odgovornost (posebno sa osvrtom na ratne zločine prema Ženevskim humanitarnim konvencijama), Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No. 2, 2001. pp. 139-146.

[38] The accused person is individually responsible if he or she really knew or had a reason to believe through the reports he or she received or otherwise that the troops or other persons under his or her control were preparing to commit or committed such offences, but the accused person failed to undertake necessary and reasonable steps to prevent such offences (The Judgment of The International Tribunal for Former Yugoslavia in case IT-96-217 from November, 6th 1998).

Responsibility of a superior is defined in the same way by paragraph 6. subpart 3. of The Statute of The International Tribunal for Rwanda located in Arusha, Tanzania.

All the above mentioned sources of international criminal law clearly indicate that responsibility of a superior does not represent a form of objective responsibility for committed criminal offence. Namely, the character of this form of responsibility has two layers[39]:

1) responsibility for failure to act and

2) responsibility for acting negligently.

Therefore, a military or other superior cannot be responsible for a criminal offence committed by his subordinate just because of the fact that he was "superior to his subordinate who was the direct perpetrator", but it should be confirmed in each individual case that he knew or could have known that the subordinate was about to commit a crime against international law or had done so and failed to take the necessary and reasonable measures to prevent such acts or to conduct an appropriate procedure after having been informed about them.

2. Responsibility of a superior according to The Rome Statute

Entire paragraph 28. of The Rome Statute from 1998. is dedicated to responsibility of commanders and other superiors. A military commander or person effectively acting as a military commander is criminally responsible for crimes against international law committed by forces under his effective command and control, as a result of his failure to exercise control properly over such forces, in two situations[40]:

1) when he either knew or, owing to the circumstances at the time, should have known that his forces were committing or about to commit such crimes or

2) when he failed to take all necessary and reasonable measures within his power to prevent the commission of such crimes or to submit the matter to the competent authorities for investigation and prosecution.

The superior shall also be criminally responsible for the criminal offences committed by his subordinates under his effective control, as a result of his failure to exercise control properly over such subordinates in the following cases[41]:

[39] M.Sasssoli, A. Bouvier, How Does Law Protect in War, Geneve, 1999. pp.696-699.
[40] B.Kozjak, Zapovjedna odgovornost u međunarodnom i hrvatskom kaznenom pravu, Odvjetnik, Zagreb, No. 5-6, 2001. pp.37-40.
[41] B.Brkić, Zapovjedna kaznena odgovornost – mogući teoretski i praktični aspekti, Hrvatska pravna revija, Zagreb, No.2, 2002. pp.111-116.

1) when the superior either knew, or consciously disregarded information which clearly indicated that the subordinates were committing or about to commit such crimes,

2) when the crimes concerned activities that were within the effective control and responsibility of the superior and

3) when the superior failed to take all necessary and reasonable measures within his power to prevent the commission of the crimes or to submit the matter to the competent authorities for investigation and prosecution.

According to the standpoints adopted in legal doctrine, several conditions have to be fulfilled cumulatively in order to constitute responsibility of a superior[42]:

1) that an individual or an entire military unit, subordinated to a particular military superior or political superior in the state hierarchy, committed a crime against international law within the jurisdiction of the permanent International Criminal Court whose seat is at The Hague,

2) that the subordinate (who is the direct perpetrator) was under his superior's effective control at the time of conduct, i.e. that the superior had actual power over the subordinate,

3) that the superior neither ordered the commission of a crime against international law nor participated in it as a co-perpetrator or an accomplice,

4) that the superior either knew or, owing to the circumstances at the time, could have known that his subordinate was committing or about to commit a crime against international law and

5) that the superior failed to undertake all the necessary and reasonable[43] measures within his power to prevent the commission of a crime against international law or to initiate criminal prosecution of the perpetrator if the criminal offence had already been committed.

3. Responsibility of a superior according to the criminal law of The Republic of Serbia

Criminal legal system of The Republic of Serbia decisively supports the standpoint according to which criminal responsibility as a personal (individual) and subjective responsibility of a perpetrator or an accomplice represents the ground for

[42] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.186-191.
[43] This is a special form of failure to act comprised of failing to undertake necessary and reasonable measures against the direct perpetrator of crimes against international law.

enforcement of penalties and other criminal sentences. Apart from subjective criminal responsibility, the latest Criminal Code from 2005. is familiar with the institution of responsibility of a superior as well.

Actually, responsibility of a superior as a form of "objective" responsibility is also provided by the Statute of the permanent International Criminal Court and can be applied by national judiciary authorities in criminal proceedings against the persons who committed some of the criminal offences from Chapter 34. of The Criminal Code entitled "Criminal Offences Against Humanity And Other Rights Guaranteed by International Law".

In accordance with these solutions, the new Criminal Code of The Republic of Serbia[44] from 2005. actually stipulates criminal responsibility and liability for punishment in the case of "responsibility of a superior" in its paragraph 384. under the title "Failure to Prevent Crimes against Humanity and other Values Protected under International Law". In fact, this provision stipulates a particular crime against international law that is comprised of failure to act. There are several forms of this criminal offence.

This legal provision also stipulates a particular form of criminal responsibility of a person who does not undertake the necessary measures to prevent the commission of the following criminal offences against humanity and other rights guaranteed by international law[45]:

1) genocide,

2) crime against humanity,

3) war crime against the civilian population,

4) war crime against the wounded and sick,

5) war crime against the prisoners of war,

6) employment of prohibited means of warfare,

7) unlawful killing and wounding of enemy,

8) unlawful appropriation of objects from bodies,

9) violation of protection granted to bearer of flag of truce/emissary,

10) cruel treatment of the wounded, sick and prisoners of war and

[44] Official gazette of the Republic of Serbia No. : 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009. More: D.Jovašević, Krivični zakonik Republike Srbije sa uvodnim komentarom, Beograd, 2007.
[45] D.Jovašević, Međunarodna krivična dela – odgovornost i kažnjivost, Niš, 2010. pp.186-191

11) destroying cultural heritage.

These acts actually represent the preparation for the commission or the commission of the gravest criminal offence of today.

The first form of this criminal offence can be committed by a military commander or a person who in practice is discharging such function. It is therefore a criminal offence that can be committed only by a perpetrator with particular characteristics i.e. *delicta propria.*

This criminal offence includes the following three elements[46]:

1) that the perpetrator was aware or conscious of the fact that other persons were conducting preparations or directly committing the enumerated crimes against international law,

2) that crimes against international law were committed by the persons who entered the forces within the perpetrator's command or control and

3) that the perpetrator did not undertake (failed to undertake) the measures that he could have and was obliged to undertake in order to prevent the commission of the abovementioned crimes against international law, which actually resulted in their commission.

The punishment prescribed for this criminal offence is the same punishment that would be imposed on the direct perpetrator of some of the enumerated crimes against international law.

Hence, the fact that some of the above mentioned criminal offences were committed by a subordinate does not absolve his superior from criminal responsibility.

The second form of this criminal act from paragraph 384. of The New Criminal Code of The Republic of Serbia is related to the failures of other superiors to act, which resulted in the commission of the mentioned crimes against international law. This criminal offence requires that three following elements are met[47]:

1) that the perpetrator knew or was aware of the fact that other persons were preparing or directly commencing the commission of the enumerated crimes against international law,

[46] V.Đurđić, D.Jovašević, Krivično pravo, Posebni deo, Beograd, 2006. pp-336-337.
[47] M.Despot, Omisivna krivična dela kao ratni zločini, Jugoslovenska revija za međunarodno pravo, Beograd, No. 1-2, 1996. pp.165-176.

2) that these crimes against international law were committed by perpetrator's subordinates, i.e. the persons who were subordinated to him in the execution of their tasks and

3) that the perpetrator did not undertake (failed to undertake) the measures that he could have and was obliged to undertake in order to prevent the commission of the above mentioned crimes against international law, which actually resulted in the commission of these acts.

The punishment prescribed for this criminal offence is the punishment of imprisonment that can be imposed on the direct perpetrator of one of the enumerated crimes against international law. If one of the forms of this criminal offence was committed by negligence as a form of guilt, an imprisonment of six months to five years is prescribed.

THE COMMON CRIMINAL DESIGN (THE JOINT CRIMINAL ENTERPRISE)

When criminal responsibility is concerned, a special form of responsibility for crimes against international law called common criminal design[48] , common purpose[49] or joint criminal enterprise has lately been more and more frequently discussed in the theory and even more in the practice of international criminal law.

These standpoints (theories) are based upon the fact that the majority if crimes against international law do not represent a result of a single person's conduct or decision. In fact, crimes against international law committed in those situations represent a result, i.e. a consequence of joint enterprise of several persons who either directly perpetrated these criminal offences or inspired others to do so or planned or otherwise facilitated direct commission of these criminal offences. The use of this ground for criminal responsibility under international criminal law implies that all the members of the group acting with a "common purpose" are considered as responsible for a crime against international law.

According to the practice of The Hague Tribunal (Tadić case) [50] common criminal purpose exists if the following constitutive (objective) elements are fulfilled[51]:

[48] This term was first created in the English law of the 14th century and then transplanted and further developed in the American criminal law, especially in the provisions related to organized crime. It is based upon the effort to make the proving of grave criminal offences easier, which enables the group of possible perpetrators to be expanded by including persons who otherwise could not be considered as perpetrators of such criminal offences. This is also a way of creating a new form of common or collective guilt.

[49] It is thought that this institution was implemented for the first time in the appeals judgment of The Hague Tribunal in the Tadić case in 1999. .

[50] The institution of joint criminal enterprise has been used several times in: 1) the practice of The Hague Tribunal: judgment 00-39-T (The Krajišnik case), judgment 98-32 (The Vasiljević case), judgment: 95-14 (The Blaškić case) and judgment 98-33 (The Krstić case), 2) the practice of The Rwanda Tribunal: judgment 96-17 (The Nakirutimana case) and 3) the practice of Special Panels for Serious Crimes in East Timor through the judgments in the following cases: Pereira, Domingos de Deus and Cardoso

1) presence of several persons[52] on a specific level of cohesion. Such cohesion does not necessarily have to indicate the presence of a consistent organization with the form of a military, police, political or administrative structure, but a certain form of joint enterprise is required,

2) the presence of a common project, plan, conception or purpose that includes the commission of a crime against international law. Such plans or purposes do not necessarily have to be strictly arranged or previously formulated. They can also be "improvised" or even "accepted on the spot" by the persons acting together and

3) the participation of the perpetrator in such common criminal design (the contribution of the perpetrator). Such participation does not have to be confirmed by the commission of a criminal offence. The act of the perpetrator comprised simply of helping or facilitating or other contribution to the process of the commission of a common plan or purpose is considered as sufficient.

The Statute of the International Criminal Court (The Rome Statute) also prescribes joint criminal enterprise in its paragraph 25. subpart 3. point "d". According to this provision, a person shall be criminally responsible for a crime within the jurisdiction of the Court if that person contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose[53].

Such contribution shall be considered as intentional and shall either[54] :

1) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court or

2) be made in the knowledge of the intention of the group to commit the crime. Joint criminal enterprise can emerge in three forms.

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[51] B.Ivanišević, G.Ilić, T.Višnjić, V. Janjić, Vodič kroz Haški tribunal, Beograd, 2007. pp.119-121.

[52] A participation of a smaller number of persons in the commission of particular crimes on a limited territory is considered as enough to form "the presence of several persons" in the sense of joint criminal enterprise. These persons need to know (be familiar with) each other because they act together and there is a consent among them on the commission of criminal offences.

[53] The institution of joint criminal enterprise significantly differs from the traditional continental system of criminal law. It is said to have the following missing: 1) it allows a person to be considered as guilty although that person did not have the intent (consciousness and will) that would give reason for the constitution of guilt, 2) guilt is imposed on one person for the predictable actions of another (without clear arguments), 3) significantly different acts of persons who participate in the commission of a criminal offence are wrongfully treated as equal, 4) it is nit in accordance with the principle of legality and 5) the existence of this institution is especially disputable when it comes to proving, since it allows the innocent persons to be punished as well.

[54] M.Damaška, Boljke zajedničkog zločinačkog poduhvata, Hrvatski ljetopis za kazneno pravo i praksu, Zagreb, No.1, 2005. pp.3-11.

Those are[55]:

1) the responsibility of all the members of the group acting with a common purpose and with a common intent to commit a particular crime against international law. In such case, not all the members of the group have to conduct direct perpetration of such criminal offence. But, if one of them voluntarily participated in an aspect of the common plan with the intent to commit such crime against international law as a result of joint enterprise, all of them will be considered as responsible.

2) the responsibility for "concentration camps" [56] , where all the persons on high positions within the camps in which these criminal offences were committed are also considered as perpetrators in spite of the fact that they did not participate in the direct perpetration.

The use of this form of responsibility requires that the following conditions are met:

a) an organized system of maltreatment of the imprisoned persons that includes the commission of some of the crimes against international law,

b) perpetrator's awareness of the nature of this system of maltreatment and

c) the fact that the perpetrator encouraged, helped, supported or otherwise participated in the conduction of the common criminal purpose due to the fact that he had the permission and the possibility to supervise the imprisoned persons and to make their life supportable and acceptable (satisfactory), but failed to do so and

3) the responsibility for the crime against international law that stands beyond the frames of the joint criminal purpose but still represents its natural and predictable consequence. This is the so called "extended" joint criminal enterprise.

CONCLUSION

Established within the frames of international law of war and international humanitarian law, international criminal law obtained its "citizenship" at the beginning of

[55] K.Ambros, Joint criminal enterprise and Command responsibility, Journal of International Criminal Justice, No. 5, 2007. pp.159-183.

[56] According to the practice of The Hague Tribunal, a common plan is considered to exist in the following cases: a) long term and routine imprisonment and captivation of another nation's members, b) repeated torture and beating of the imprisoned persons, c) murder if the imprisoned persons, d) frequent and long lasting forced labor of the imprisoned persons and e) maintenance of inhumane conditions in the prison building.

the third millennium as the newest criminal legal discipline. When The Rome Statute of the International Criminal Court came into force, this branch of law was finally inaugurated in substantial, procedural and executive sense. Even earlier than that, this branch of law had been evolving through the development of basic criminal legal terms and institutions within a series of international legal documents (of universal and regional character) or contracts between individual states as well as through the practice of the courts (first of all, the practice of the Nürnberg and Tokyo Tribunals).

The latter include the following:

1) crime against international law (which differs from a criminal offence with an international element) that can emerge in two forms: as a crime against international law in the narrow sense (genuine) or as a crime against international law in the broader sense (counterfeit or mixed),

2) criminal responsibility of the perpetrator (the precondition for criminal responsibility is the fact that the perpetrator is more than 18 years old), who can appear either as one person or include several persons or even a legal person such as a state or an organization and

3) the system of criminal sentences i.e. punishments that are being imposed by the supranational judiciary authorities.

These fundamental terms and institutions of international criminal law are discussed in this paper.

Because of the nature, the character and the hazard of crimes against international law, this branch of law is familiar with a special form of objectified responsibility besides individual criminal responsibility. It is the responsibility of political and military superiors for the crimes against international law committed by their subordinates, known as the responsibility of a superior, which is entering national criminal legislations through relevant international standards. Accordingly, the latest Criminal Code of The Republic of Serbia from 2005. also includes this institution.