

missions to states emerging from (mostly) civil wars, missions that share much of the reformist ethos of transformative occupations. Benvenisti carefully reviews this record, focusing, as noted, on Kosovo where the Council issued perhaps its most far-reaching authorization for social change. If an opportunity exists to advance human rights, democratic governance, and the rule of law multilaterally, why expand opportunities to do so unilaterally by expanding the prerogatives of state occupiers? Armed with this authority, what incentive would an intervening state then have to seek Security Council approval for its transformative agenda?

More generally, if certain occupiers may acquire much of a *de jure* sovereign's legislative power, what separates occupation so-conceived from annexation? Benvenisti would surely reply that the line between those two ideas becomes a pointless formalism if, as he advocates, reform during an occupation is designed with substantial local input and then ratified in free and fair elections. 'Sovereignty' is now increasingly an idea of power vested in citizens, and it is their voice that would inform the legislative acts of occupiers and the government of a post-occupation state. No residual 'sovereign prerogatives' would be usurped in such a scenario.

This may well be the direction in which occupation law is headed, though apart from Iraq it is difficult to find cases in which unilateral occupiers have pursued liberal democratic transformations that are even nominally vetted with the local population. And perhaps the high bar Benvenisti sets for legitimate transformation would disqualify the acts of most reform-minded occupiers, thus leaving Council authorization under Chapter VII of the Charter the only possible option. But if, to paraphrase Richard Nixon, we are all democrats now, surely most occupiers will announce their intention to promote human rights and popular sovereignty – whether sincerely or not – as soon as they attain effective control of a territory. At that point, international law can either insist that they seek Security Council authorization despite their stated good intentions, or it can wait to see if they make good on their promises. A strong version of the conservationist principle would promote the former course. If that is no longer the law, as Benvenisti suggests, one hopes the latter course will turn out for the best.

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Anthony Cullen. ***The Concept of Non-International Armed Conflict in International Humanitarian Law***. Cambridge: Cambridge University Press, 2010. Pp. 219. £62.00. ISBN: 9780521760485.

The objective of Anthony Cullen's work is to 'remedy some of the confusion that exists surrounding distinctions that are used to differentiate between different types of non-international armed conflict' (at 3). He works towards developing a framework for the characterization of armed conflicts. The author is a research fellow at the Lauterpacht Centre for International Law and is participating in the joint British Red Cross and International Committee of the Red Cross project to update the collection of practice underlying the ICRC's study on Customary International Humanitarian Law.<sup>1</sup>

Application of humanitarian law to non-international armed conflict is a timely subject in the present political context. One needs only to point to discussions about the so-called global war on

<sup>1</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 Vols. (2009).

terrorism, asymmetrical conflict, and the fight against pirates. Examples where the application of humanitarian law is in question are the US practice of detention without charge or trial of terrorist suspects<sup>2</sup> and targeted killings. They are currently discussed in many academic contributions and have triggered a political debate after high-ranking members of the US government, including President Obama, have publicly defended this practice.

In the first part of his book Cullen traces the origins of the concept of non-international armed conflict and its development in international humanitarian law. He looks at issues such as the non-application of the laws of war to situations of rebellion, the concept of insurgency, the recognition of belligerency, and the application of international humanitarian norms in civil war. Chapter 2 is dedicated to the history of discussions on common Article 3 of the four Geneva conventions, on the ICRC commentary on that article, and on state practice. Article 3 emerges as a centrepiece in Cullen's argument, inasmuch as it constitutes important progress due to the extension of humanitarian principles to conflicts not of an international character, but also because states tend not to recognize the applicability of this provision. Cullen discusses various pertinent criteria to determine the threshold for non-international armed conflict in view of Additional Protocol II, Article 1(1), referring to criteria such as organized groups, responsible command, exercise over part of territory, and sustained and concerted military action. The author notes a general tendency of states in the past to recognize neither status of belligerency nor a state of non-international armed conflict under humanitarian law in order to avoid giving the opposing armed movement some degree of legitimacy or even according it legal status (at 109, 187, 192).

In Chapter 4 the author discusses Additional Protocols I and II of 1977 and the statute of the International Criminal Court, in particular Article 8(2)(e) and (f), and the judgment of the Appeal Chamber in the *Tadić* case addressing the challenge by Tadić that the ICTY lacked subject-matter jurisdiction to try him.<sup>3</sup> The Chamber used the following definition of armed conflict: '[a]n armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'.<sup>4</sup> Organization of insurgents and intensity of hostilities thus emerge as important criteria.

In the concluding chapter, Cullen stresses that, while the drafters of common Article 3 foresaw its application to situations akin to conventional international war, the use of the term 'armed conflict not of an international character' has allowed the concept to evolve in practice. At the same time, the absence of a formula to determine the applicability of common Article 3 had the effect of restricting its implementation because states simply did not recognize the applicability of this provision (at 187).

With a view to affording the highest degree of protection to victims of armed conflict, the author warns against the introduction of too many demanding criteria for the application of common Article 3, such as command responsibility. The characterization of a situation as a non-international armed conflict should not be interpreted as implying a change in the legal status of non-state actors (at 192). Cullen also refers to the view of many experts that in principle one body of law should apply to all situations of armed conflict irrespective of their characterization. This view is to be welcomed because it would counteract tendencies to diminish the protection of people affected by armed conflict. This is particularly relevant since at present the overwhelming majority of armed conflicts are of a non-international character. And while

<sup>2</sup> Bellinger III and Padmanabhan, 'Detention Operations in Contemporary Conflicts: Four Challenges for the Geneva Conventions and Other Existing Law', 105 *AJIL* (2011) 201.

<sup>3</sup> ICTY, *Prosecutor v. Dusko Tadić a/k/a 'Dule'*, Decision on the defence motion for interlocutory appeal on jurisdiction, Case No. IT-94-AR72, Appeals Chamber, 2 Oct. 1995.

<sup>4</sup> *Ibid.*, at para. 70.

humanitarian law is strong on international armed conflict (Geneva Conventions and Protocol I), it is weak on non-international armed conflict (Protocol II).

Anthony Cullen's monograph offers an excellent inquiry into many relevant aspects of the concept of non-international armed conflict that should be of interest to both the general and expert reader.

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Theodor Meron. ***The Making of International Criminal Justice. A View from the Bench***. Oxford: Oxford University Press, 2011. Pp. 336. £60.00. ISBN: 9780199608935.

'[T]here is no question that what we write and when we write can only be explained by our own life experiences' remarks the author in the lecture which forms the introduction to the present book (at 3). Few people are better placed to write on the past and present of international criminal justice than Theodor Meron. President of the International Criminal Tribunal for the Former Yugoslavia ('ICTY') on two occasions (from 2003 to 2005 and from 2011 to the present) and a former member of the US delegation to the Rome Conference held in 1998 to establish the International Criminal Court ('ICC'), Meron is a leading figure in international criminal justice and has played an integral part in its development.

It is the author's vast experience as an international judge which is crystallized and captured in this collection of speeches delivered during his tenure on the bench. Meron's motivation for publishing this collection is made clear at the outset, in the book's preface:

[I]t is important, in promoting the universe of international criminal justice, to speak about our achievements, our challenges, and, yes, even our frustrations. It is this belief that has animated my decision to share a selection of my speeches in the present volume.

Introduction and epilogue aside, the book covers four main themes: first, humanitarian law and human rights law as evolving bodies of law; second, the rise of international criminal tribunals; third, international crimes and jurisprudence of international courts; and, fourth, responsibility and the role of the judge.

Aged nine years at the outbreak of the Second World War, the author's focus upon humanitarian law and its relationship with human rights law is perhaps unsurprising. As Meron himself acknowledges:

[I]n many ways, the title of my book *Humanisation of International Law* could describe the overarching theme of my life's work ... and my fervent desire to integrate these disciplines [at 14].

The impact of the terrible events of 1939–1945 upon the author and his work is plain:

[T]he imprint of the war made me particularly interested in working in areas which could contribute to making atrocities impossible and avoiding the horrible chaos, the helplessness, and the loss of autonomy which I remembered so well ... My World War II experience was never far away [at 4].

That work was not in vain; as the International Court of Justice articulated in its *Nuclear Weapons* Advisory Opinion, it is now accepted that the protection afforded by human rights law 'does not cease in times of war', except if lawfully derogated from.<sup>1</sup>

<sup>1</sup> *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, at 240.