

THE RULES OF ENGAGEMENT IN OCCUPIED TERRITORY: SHOULD THEY BE PUBLISHED?

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[The traditional view amongst some states is that the rules of engagement are not published beyond those who need to know them in the armed forces of a state. The reason given for this is that publishing them widely would allow an enemy to know how a particular operation will be conducted and, for instance, the limitations imposed by them on soldiers before they are permitted to open fire. After discussing the nature of rules of engagement and the confusion over this term, this think piece will consider whether this traditional view should be maintained where territory is occupied and where Geneva Convention IV applies. It will be explored from both the standpoint of the civilian in occupied territory and that of the soldier. The conclusion is that the rules of engagement (in some form) should be published by a state in occupation of territory.]

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I INTRODUCTION

The traditional view amongst some states is that current rules of engagement should not be published. This think piece will consider whether they should, nevertheless, be published when a state is in occupation of territory.

When a state is engaged in an international armed conflict, the limits of a soldier's¹ actions are judged by international humanitarian law. National law has little to contribute and is largely in abeyance, except where international humanitarian law has been implemented within it.² Soldiers may kill enemy soldiers and attack military objectives merely because the object of their use of force is an enemy soldier or a military objective. In judging the nature of the target and the methods deployed to do so, soldiers must comply with international humanitarian law.

The occupation of territory is quite different. It requires that the territory be 'actually placed under the authority of the hostile army'.³ When this occurs the occupying state assumes some of the basic responsibilities of the territorial sovereign, such as the establishment and maintenance of public order and safety

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¹ This term is used for convenience to include any member of a state's armed forces.

² See *Public Prosecutor v Oie Hee Koi* [1968] AC 829, 860, although compare the dissenting judgment of Lord Guest and Sir Garfield Barwick: at 867.

³ *Hague Convention (IV) respecting the Laws and Customs of War on Land, Annex to the Convention, Regulations respecting the Laws and Customs of War on Land*, opened for signature 18 October 1907, (1910) UKTS 9, art 42 (entered into force 26 January 1910) ('*Hague Regulations*').

of those whom the *Geneva Convention IV*⁴ describes as ‘protected persons’.⁵ In the absence of serious insurgent activity, the occupying army’s role may look similar to that of a police force in terms of law enforcement functions. In order to preserve public order and safety, a regime of law applicable to that territory will have to be maintained or established.⁶ International humanitarian law requires the occupier’s actions to be controlled by law.⁷

II WHAT ARE RULES OF ENGAGEMENT?

The term ‘rules of engagement’ is often used in a number of distinct senses and individual states may, of course, interpret the phrase in different ways. It can apply to the detailed plans of a military campaign which can take into account political considerations, such as setting out what may be military objectives but which should not be attacked. Once given the task by the government, senior commanders are most commonly required to draw up an operational plan to achieve it. This is likely to provide considerable detail on the administrative and other arrangements involved in the mission.⁸ Such plans may well need to be altered at short notice and commanders will frequently be directed by senior government ministers and advised by lawyers, particularly in regards to targeting, in the course of an armed conflict. During a period of occupation, however, soldiers and their commanders will seek to avoid ‘engagement’ with civilians except where they might need to search them or their property. The detail of an operational plan is likely to vary considerably as between a period of actual armed conflict and a period of occupation.

The term ‘rules of engagement’ can, however, be used in a different sense, which forms the subject of this think piece. In this sense, the rules of engagement refer to instructions actually issued to soldiers (usually in the form of a card⁹) clearly defining who and what may be attacked in the context of an international

⁴ *Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (*Geneva Convention IV*’).

⁵ *Ibid* art 4. The obligation under the *Hague Regulations*, above n 3, is qualified by the words, ‘as far as possible’: art 43. See generally Kerem Altıparmak, ‘Bankovic: An Obstacle to the Application of the *European Convention on Human Rights* in Iraq?’ (2004) 9 *Journal of Conflict & Security Law* 213, 249–50; *R (on the application of Al-Jedda) v Secretary of State for Defence* [2007] QB 621, 641 (Brooke LJ, discussing the power to intern during the UK occupation of Iraq).

⁶ This may be based upon the law of the territory or some imported system of law: see Bruce Oswald, ‘Model Codes for Criminal Justice and Peace Operations: Some Legal Issues’ (2004) 9 *Journal of Conflict & Security Law* 253, 271–4. This power can extend to the creation of courts: see William Schabas, *The UN International Criminal Tribunals: The Former Yugoslavia, Rwanda and Sierra Leone* (2006) 54, referring to the powers of the states which occupied Germany in 1945 to establish the International Military Tribunal at Nuremberg.

⁷ See *Hague Regulations*, above n 3, art 43; *Geneva Convention IV*, above n 4, arts 64–78.

⁸ For the NATO definition of ‘operational plan’, see NATO Standardization Agency, *NATO Glossary of Terms and Definitions (English and French)*, Allied Administrative Publication AAP-6(2007) (16 April 2007) 2-O-4, <<http://www.nato.int/docu/stanag/aap006/aap-6-2007.pdf>> at 18 October 2007. It is also ‘employed by higher authority to permit subordinate commanders to prepare supporting plans and orders’.

⁹ In Northern Ireland it was referred to as the ‘yellow card’ and now generally as ‘card alpha’: UK, *Parliamentary Debates*, House of Lords, 31 October 2006, vol 686, 211 (Lord Drayson, Parliamentary Under-Secretary of State, Ministry of Defence).

armed conflict, as well as other relevant details such as the appropriate treatment of any prisoners.¹⁰ Like the operational plan referred to above, these instructions will need to be altered, if they are to have maximum realistic value, after the armed conflict part of an operation has been concluded and the period of occupation begins. They may then include instructions such as the challenging of intruders to areas being guarded, whether warning shots should be fired and how anyone detained should be treated. These two cards are likely to differ as helmets differ from soft hats.

In addition to relevant areas of international law, national law will play a much more significant part in the formulation of the rules of engagement where the military operation has been transformed from armed conflict to the occupation of territory. It will be argued below that where this has occurred, the criminal or military law of the occupying state will be the predominant arbiter of wrongful conduct after taking into account the circumstances faced by the soldier.

Some may find it difficult to distinguish rules of engagement from orders given by a military superior, particularly during the actual course of a military operation.¹¹ Rules of engagement (in the sense referred to above) are a species of superior orders but which have been produced (normally) on a card and issued to soldiers. Their standing in law cannot be any different from an oral military order or from other written orders and they are not considered law, as such. As a form of a military order, which the soldier is required to obey, their legal status cannot be independent of, or supplant, national or international law binding in or on the state concerned.¹² They must, therefore, reflect this law and to err on the safe side they may (but need not) be drawn up in such a way as to impose greater limitations on the actions of a soldier than national or international law would actually permit.

There may be some matters included in written orders rather than in the rules of engagement. This will be the case where details of military operations are likely to change on a frequent basis. Such items included in routine or daily orders avoid the need for frequent changes to, and printing of, the rules of

¹⁰ For the NATO definition of 'rules of engagement': NATO Standardization Agency, above n 8, 2-R-8.

¹¹ UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 289 (Lord Campbell of Alloway).

¹² See *R v Clegg* [1995] 1 AC 482, 491 (Lord Lloyd): 'it is not suggested that the yellow card has any legal force'; *R v MacNaughton* [1975] NI 203, 206. The position both in Australia and Canada is similar. For Australia, see Commonwealth, *Parliamentary Debates*, House of Representatives, 8 September 2003, 19498 (Alexander Downer, Minister for Foreign Affairs) and for Canada, see Canadian Standing Committee on National Defence and Veterans Affairs and Canadian Standing Committee on Foreign Affairs and International Trade, *Committee Evidence*, 17 January 2002, 1055 (General Raymond Henault, Chief of the Defence Staff, Department of National Defence). See also Martin Friedland, *Controlling Misconduct in the Military: A Study Prepared for the Commission of Inquiry into the Deployment of Canadian Armed Forces to Somalia* (1996) 19–20. In *R v Brocklebank* (1996) 134 DLR (4th) 377, 397–8, Decary JA (Strayer CJ concurring) accepted that the rules of engagement were orders which could form the basis of a military duty which, in turn, may form the subject of a charge of neglect of that duty. This is not in conflict with the Australian or UK position.

engagement.¹³ The soldier's obligation to obey military orders applies equally to these different categories unless rules of engagement (as such) are given a particular statutory basis. An attempt was made in the United Kingdom to achieve such a result during the passage of the *Armed Forces Act 2006* (UK) through Parliament, an issue discussed below.

III ARGUMENTS FOR NOT PUBLISHING THE RULES OF ENGAGEMENT

The traditional answer, at least in some states, is that the rules of engagement should not be published. Some, like Australia, Canada and the UK, insist that they should remain classified.¹⁴ Others, like the United States, may publish the rules of engagement, namely the card or instructions issued to soldiers, but not the operational plan, and often, but not exclusively, only after the particular operation to which it refers has been concluded.

The reason given by the Australian Government for wishing to keep the rules of engagement confidential was set out by the Minister for Veterans' Affairs and Minister Assisting the Minister for Defence who told the House of Representatives in 2005 that 'divulgence of these details [the rules of engagement] could lead to mission failure and/or place the lives of ADF personnel in danger unnecessarily'.¹⁵

Finally, it may also be argued that the rules of engagement is an operational document which cannot be drafted as if it were a legal one. There is certainly a strong argument that they must be drawn up by military professionals (with appropriate legal advice) to ensure the most effective military campaign conducted within any parameters set by government ministers and within the law (both national and international).

¹³ An example might be an instruction that soldiers will not load a round into the chamber of their firearms unless actually threatened. I am grateful to Professor Michael Noone for suggesting this to me.

¹⁴ For Australia, see Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2005, 177 (De-Anne Kelly, Minister for Veterans' Affairs and Minister Assisting the Minister for Defence); Commonwealth, *Parliamentary Debates*, Senate, 1 December 2003, 18598 (Robert Hill, Minister for Defence). For Canada, see the Canadian Standing Committee on National Defence and Veterans Affairs and Canadian Standing Committee on Foreign Affairs and International Trade, *Committee Evidence*, 17 January 2002, 1055 (General Raymond Henault, Chief of the Defence Staff, Department of National Defence). For the UK, see UK, *Parliamentary Debates*, House of Lords, 31 October 2006, vol 686, 211–3 (Lord Drayson, Parliamentary Under-Secretary of State, Ministry of Defence). See also Defence Committee, *The UK Deployment to Afghanistan: Government Response to the Committee's Fifth Report of Session 2005–06* (House of Commons Paper No HC 1211, 15 June 2006) 3: 'As a matter of Government policy we do not comment on the detail of ROE'. It is not clear whether the Ministry of Defence was referring only to the rules of engagement in the sense of instructions issued to soldiers.

¹⁵ Commonwealth, *Parliamentary Debates*, House of Representatives, 9 August 2005, 177 (De-Anne Kelly, Minister for Veterans' Affairs and Minister Assisting the Minister for Defence). In the UK, the reason given was that this information would 'then be available to the enemy, which would be very prejudicial to the interests of our Armed Forces': UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 295 (Lord Drayson, Parliamentary Under-Secretary of State, Ministry of Defence). See also UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 291 (Earl Atlee).

IV ARGUMENTS TO SUPPORT PUBLICATION OF THE RULES OF ENGAGEMENT

No argument is presented here to support publication of operational plans or detailed documents relating to military operations.¹⁶ However, the rules of engagement set out in the cards issued to soldiers are quite different. They will commonly spell out international obligations about which there will be little dispute. The 1991 Operation Desert Storm Rules of Engagement¹⁷ are likely to be a good example of rules of engagement issued by many states when contemplating a straightforward international armed conflict between the armed forces of different states.¹⁸ They are, in effect, a distillation of the *Geneva Conventions*¹⁹ and related treaties, or of customary international law.²⁰ The fact that they betray the hand of the lawyer should be considered to be a good thing since the card is designed to keep the soldier within the law. Their publication would tell an enemy nothing about the legal obligations of US forces fighting on the ground which he could not find out merely by checking that state's adherence to relevant treaties, although he may be pleasantly surprised to note that the US also accepts at least one rule of customary international law in these rules of engagement.²¹ Publication would also enable them to be subject to constructive criticism.

An enemy might also appreciate that these international obligations, spanning very many pages of text, have been reduced to nine paragraphs (with four 'Remember' points). From this they may conclude that US soldiers are likely, in

¹⁶ Although combatants may be encouraged to give effective advance warnings of attack that may affect the civilian population, this is limited by the requirement to do so 'unless circumstances do not permit': *Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts*, opened for signature 8 June 1977, 1125 UNTS 3, art 57(2)(c) (entered into force 7 December 1978) ('*Additional Protocol I*'). It is unlikely that a state would, on this basis, feel obliged to disclose part of its military plans (which it may describe as part of the rules of engagement).

¹⁷ Adam Roberts and Richard Guelff, *Documents on the Laws of War* (3rd revised ed, 2000) 562–3.

¹⁸ Given that many states will take the same view as Australia, Canada and the UK and not publish any form of their rules of engagement, it is not possible to compare the US rules of engagement with those of other states. On occasions, however, UK rules of engagement will be published, in part, in a court judgment. See, eg, *R (Al-Skeini) v Secretary of State for Defence* [2005] 2 WLR 1401, 1414; *Bici v Ministry of Defence* [2004] EWHC QB 786, [6].

¹⁹ *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 31 (entered into force 21 October 1950) ('*Geneva Convention I*'); *Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 85 (entered into force 21 October 1950) ('*Geneva Convention II*'); *Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949*, opened for signature 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) ('*Geneva Convention III*'); *Geneva Convention IV*, above n 4 (collectively, '*Geneva Conventions*').

²⁰ See, eg, rule A of the 1991 Operation Desert Storm Rules of Engagement, which states 'do not engage anyone who ... is an aircraft member descending by parachute from a disabled aircraft': Roberts and Guelff, above n 17, 562. This is taken from *Additional Protocol I*, above n 16, art 42(1), to which the US is not a party, but this article has been stated to reflect customary international law: see International Committee of the Red Cross ('ICRC'), Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law: Volume 1 — Rules* (2005) 170, which states: 'Rule 48 ... State practice establishes this rule as a norm of customary international law'.

²¹ ICRC, above n 20, 170: 'making persons parachuting from an aircraft in distress the object of attack during their descent is prohibited'.

the main, to comply with these rules of engagement²² which, at least, has the potential to encourage them to do likewise on a basis of reciprocity. In practice, knowledge of the rules of engagement will be particularly important for the protection of civilians not taking an active part in the conflict. If these civilians are aware of how the enemy soldiers are required to behave, they are less likely to be killed or injured by taking actions which soldiers may mistakenly perceive as posing a combat risk.

The publication of the rules of engagement will also show states not involved in the armed conflict the rules by which a state intends its soldiers to carry out military operations. This will tend to make international humanitarian law more visible and thus encourage adherence to it by anyone involved in the conflict. No less important is the message which the rules of engagement will convey to the civilians of the state whose armed forces are engaged in an international armed conflict. The rules of engagement will stress the importance which their state attaches to the conduct of an armed conflict being fought in accordance with the laws of war and that this message has been conveyed directly to each soldier. It is generally considered a good thing that knowledge of international humanitarian law is understood by as many individuals around the world as possible.²³ Rules of engagement have, as argued above, an important role in this dissemination process since they are able to capture the essence of this law in a size which can be printed on a card carried by soldiers.

The case for publishing rules of engagement when territory is occupied is even stronger than, as argued above, when an international armed conflict is taking place. In this case, the hostile army²⁴ assumes authority but not sovereignty over the occupied territory. In carrying out their duty to maintain law and order, soldiers of the occupying force may well take on the functions of a paramilitary police force either alone or in conjunction with elements of the territorial police or army. The obligations imposed by *Geneva Convention IV* are designed to protect those civilians who do not take part in the conflict. They are not to be murdered or tortured; they are to be treated humanely and to be protected against all acts of violence.²⁵ Private property is not to be destroyed unless made 'absolutely necessary by military operations'.²⁶

The rules of engagement drawn up for an armed conflict prior to occupation will look totally inadequate when soldiers, who now form part of an occupying force, look for guidance as to how they should treat civilians at roadblocks,

²² For a discussion of the consequences of poor drafting of the rules of engagement, see Canada, Somalia Commission of Inquiry, *Report of the Somalia Commission of Inquiry* (1997) vol 5, Conclusion.

²³ *Geneva Convention I*, above n 19, art 47; *Geneva Convention II*, above n 19, art 48; *Geneva Convention III*, above n 19, art 127; *Geneva Convention IV*, above n 4, art 144.

²⁴ Whilst the intentions of a state which occupies the territory of another may vary, the term 'hostile army' is drawn from the *Hague Regulations*, above n 3, art 42. Compare the position of Australia, which is not an occupying power in Iraq: Commonwealth, *Parliamentary Debates*, House of Representatives, 8 September 2003, 19497–501, (Alexander Downer, Minister for Foreign Affairs). Australia is, however, involved in military operations in Iraq. Compare this position to where a state treats *Geneva Convention IV* as being applicable even though there is no occupation in the technical sense of that term. See Michael Kelly, *Restoring and Maintaining Order in Complex Peace Operations: The Search for a Legal Framework* (1999) 149–56.

²⁵ *Geneva Convention IV*, above n 4, arts 27, 32.

²⁶ *Ibid* art 53.

during house searches, when they are detained, and the circumstances in which they can open fire against them (through warning shots or otherwise). It follows, therefore, that the occupying army will need to compile fresh rules of engagement for this particular situation. Not only are the circumstances quite different from those faced when fighting an international armed conflict, but also, few states will have any modern experience of being a 'hostile army' occupying the territory of another state. Although a state may have deployed its armed forces to assist the civilian police to maintain order in its own territory (as the UK did in Northern Ireland from 1969–98) it also had the benefit of being able to pass emergency statutes giving soldiers, for instance, legal powers which they would not otherwise have had to impose a curfew, to arrest civilians for a short period, to stop motor vehicles and to search houses.²⁷

Where the sovereign has been ousted by the occupying state, there is clearly no state with which to enter into a status of forces agreement to provide a regime where jurisdiction over criminal matters conflicts. Indeed, reference to status of forces agreements during occupation of territory is singularly inappropriate. Whilst the occupying power is under an obligation to maintain the orderly government of the territory, it may 'subject the population ... to provisions which are essential to enable [it] to fulfil its obligations under [*Geneva Convention IV*]'.²⁸ In maintaining order, it can only be in the interests of both the civilian population and the occupying armed forces that military discipline of the latter's armed forces is maintained. Although the rules of engagement are not, as shown above, law in themselves, they will normally reflect an underlying basis of both relevant national and international law. They will provide a soldier with a justification supported by the law applicable in his or her own state should the soldier use any degree of force within the permissible limits. As such, the rules of engagement will not amount to 'penal provisions' within the meaning of art 65 of *Geneva Convention IV* unless the term 'penal provisions' includes all defences to the use of force committed by soldiers. The occupying power may not, in fact, impose any new offences on the population but it is very likely to lay down (in rules of engagement or elsewhere) the circumstances as to when any particular degree of force may be used.

The effect of this is that, in practice, whether or not a civilian in occupied territory has been killed lawfully by a soldier will depend on the law of the occupying state and not the law of the territory.²⁹ Even if a provisional authority has been established on occupied territory through the intervention of one or more states and with or without the support of the United Nations, a status of

²⁷ A number of these statutes were styled as the *Northern Ireland (Emergency Provisions) Acts*: see *Northern Ireland (Emergency Provisions) Act 1991* (UK) c 24, ss 16, 18, 21, 23.

²⁸ *Geneva Convention IV*, above n 4, art 64.

²⁹ The soldier may also be in breach of international humanitarian law or cause his state to be liable for a breach of its international human rights obligations. To be effective in practice, obligations arising from the former branch of law may be implemented into national law. A failure by a soldier to comply with a number of human rights obligations of his state may result in criminal or disciplinary proceedings being taken against him. His liability to judicial proceedings by another state or by an international court will depend upon that state or court establishing jurisdiction over him: see, eg, *Nachova v Bulgaria*, Application Nos 43577/98 and 43579/98 (Unreported, European Court of Human Rights, Grand Chamber, 6 July 2005); *Akpınar and Altun v Turkey*, Application No 56760/00 (Unreported, European Court of Human Rights, 27 February 2007).

forces agreement is likely to provide that the sending state (previously the occupying state) will have exclusive jurisdiction over any crimes committed by its armed forces on the territory of the occupied state.

In practical terms, therefore, the law applicable to offences and the defences for a soldier's actions will, in effect, be the soldier's rules of engagement drawn up specifically to reflect the fact of occupation and not of armed conflict, although parts of international humanitarian law may be implemented into the national law. These rules may well clash with the law of the territorial state, particularly in relation to the justifications for using force against civilians of the occupied territory.

Since the rules of engagement are not published by some states, the civilian will be unable to find out the limits of this law unless the occupying state (if it belongs to a group of states which does not publish its rules of engagement) makes the relevant law available to the inhabitants of the occupied state in a different manner. This will not be easy to do in a comprehensible way, especially if the legal systems of the two states are not similar. A practical alternative would be to publish the soldier's rules of engagement since this is designed to encapsulate the law clearly and simply. A translation of this should prove adequate to bring to the attention of the civilians living in an occupied state the law (on which the rules of engagement are based) which will apply to them in relation to the maintenance of law and order. Where orders to soldiers are likely to vary from day to day, they can be posted in routine or daily orders (as discussed above) and these need not, of course, be published.

Publication of the rules of engagement will attract a further advantage, namely, to enable the relatives of a civilian killed by soldiers of the occupying state to be able to play a meaningful part in an investigation into his death. It seems clear that in certain very limited circumstances, the *European Convention on Human Rights*³⁰ and the *International Covenant on Civil and Political Rights*³¹ may apply to acts committed by the armed forces acting outside their own territory.³² If the *European Convention on Human Rights* applies, the European Court of Human Rights, for instance, has stated clearly that the obligation upon states to protect the right to life includes within it an obligation to conduct an 'independent, effective and thorough investigation'³³ into a death so as to 'secure the effective implementation of the *domestic laws* which protect the right to life and, in those cases involving state agents or bodies, to ensure their accountability for deaths occurring under their responsibility'.³⁴ It matters

³⁰ *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 November 1950, 213 UNTS 221 (entered into force 3 September 1953) ('*European Convention on Human Rights*').

³¹ Opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976).

³² See generally Peter Rowe, *The Impact of Human Rights Law on Armed Forces* (2006) ch 5.

³³ *Khashiyev v Russia*, Application Nos 57942/00 and 57945/00 (Unreported, European Court of Human Rights, 24 February 2005) [148]. This view has been stated in a number of cases. On the issue of investigations, see *McKerr v United Kingdom*, Application No 28883/95 (Unreported, European Court of Human Rights, 4 May 2001); *Kakoulli v Turkey*, Application No 38595/97 (Unreported, European Court of Human Rights, 22 November 2005) [122]–[128].

³⁴ *Khashiyev v Russia*, Application Nos 57942/00 and 57945/00 (Unreported, European Court of Human Rights, 24 February 2005) [153] (emphasis added).

not that there is a ‘high incidence of fatalities or that violent clashes are prevalent’.³⁵

The ‘domestic laws’ referred to by the Court must relate to laws under which the soldiers of the occupying state operate in order to hold *them* accountable.³⁶ Civilians must be able to know what laws the soldiers are acting under in order to be able to make an effective contribution to the investigation.

If the soldier is placed on trial, this will often take place outside the territory and any relatives of a civilian killed may find it difficult to obtain information on the result of the trial.³⁷ The availability to the civilian population of lawyers from the occupying state to advise them as to the law and procedure of that state is likely to be very limited.³⁸

In addition, all major human rights treaties require an applicant to have exhausted domestic remedies available to him or her before invoking the procedures under the relevant treaty. These remedies are required to be ‘sufficiently certain both in theory and in practice ... there is no obligation to have recourse to remedies which are inadequate or ineffective’.³⁹ The question then arises: *which* domestic remedies? Does this refer to those which were available prior to the occupation of the state or those by which the occupying state is operating? In considering this issue, another arises. Can an occupying state impose laws (in one form or another) on the occupied state which can have effect as ‘domestic remedies’? The answer to the latter question is in the affirmative. The European Court of Human Rights has held that remedies available in the Turkish occupied part of Cyprus (the ‘TRNC’) ‘may be regarded as “domestic remedies” of [Turkey] and that the question of their effectiveness is to be considered in the specific circumstances where it arises’.⁴⁰ If a civilian in occupied territory who claims to be the victim of a breach of his or her human

³⁵ *Ahmet Ozkan v Turkey*, Application No 21689/93 (Unreported, European Court of Human Rights, 6 April 2004) [319]. See also *Akpinar and Altun v Turkey*, Application No 56760/00 (Unreported, European Court of Human Rights, 27 February 2007). The Court commented that ‘it is mindful of the context of terrorism in Turkey at the material time’: at [59].

³⁶ *Khashiyev v Russia*, Application Nos 57942/00 and 57945/00 (Unreported, European Court of Human Rights, 24 February 2005) [153].

³⁷ The occupying force may, however, take it upon itself to keep relatives informed of any legal proceedings against a soldier. In addition, publicity is frequently given to high profile trials of soldiers but whether relatives and others concerned receive this information in their own language is less certain.

³⁸ Note, however, that a British firm of solicitors has been active in Iraq. Compare the view of Lord Bramall (a former Chief of the Defence Staff): UK, *Parliamentary Debates*, House of Lords, 14 June 2006, vol 683, column 241, with that of the Court of Appeal in *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 288 (Brooke LJ); 303 (Sedley LJ).

³⁹ *Isaak v Turkey*, Application No 44587/98 (Unreported, European Court of Human Rights, 28 September 2006) Admissibility Decision, Part A:3(b). This is a well established principle.

⁴⁰ *Kakoulli v Turkey*, Application No 38595/97 (Unreported, European Court of Human Rights, 22 November 2005) [89]. The Court went on to stress that ‘this conclusion is not to be seen as in any way putting in doubt the view of the international community regarding the establishment of the “TRNC” or the fact that the government of the Republic of Cyprus remains the sole legitimate government of Cyprus’. See especially *Isaak v Turkey*, Application No 44587/98 (Unreported, European Court of Human Rights, 28 September 2006) Admissibility Decision, Part A:3(b). This principle is consistent with the legal effect of occupation established by *Hague Regulations*, above n 3, art 43.

rights cannot get sight of this, it will be difficult for him or her to take the first step in pursuing any domestic remedies.⁴¹

Since soldiers cannot be expected to know the details of international humanitarian law by which their own state is bound, the rules of engagement provide perhaps the most important implementation mechanism of that law. Soldiers can seek clarification of the rules from their military superiors and even discuss them amongst themselves. Soldiers will know that these rules can be enforced directly against them by their commanders through their own system of military law. Such a consequence is more likely to weigh on the mind of the soldier than the vague and uncertain risk of a trial for war crimes. Moreover, a soldier's superiors may also be in breach of their own military obligations if they neglect to perform a duty, such as by failing to report serious breaches of the rules of engagement to a higher authority.

The practical position is that the soldier is likely to face an investigation and possible proceedings under his or her military or national law procedures following the use of force on a civilian if there is evidence that the rules of engagement have been breached by the soldier.⁴² The contrary position is also likely to be consistent with this, namely, that the soldier's actions will not be investigated if it is clear that he or she has followed the rules of engagement.⁴³ Since these rules of engagement are largely based upon national law requirements, it is difficult to deny the ability of a soldier to take legal advice from a civilian lawyer as to the requirements of the national law, should the soldier wish to do so. He or she will not be able to do this if the rules of engagement card issued to him is a classified document. This is not to suggest that any advice to a soldier from military lawyers will be inadequate or misleading, but merely that to deny the soldier the opportunity to take independent legal advice from a civilian lawyer as to his or her potential liabilities under national law is, on the face of it, difficult to justify.

It might be argued, however, that an effective military operation is dependent on a clear chain of command so that soldiers are advised solely by military

⁴¹ In practice, it will be difficult for the occupying state to show that the applicant has failed to have recourse to domestic remedies which 'were accessible, were capable of providing redress in respect of the applicants' complaints and offered reasonable prospects of success': *Kakoulli v Turkey*, Application No 38595/97 (Unreported, European Court of Human Rights, 22 November 2005) [88]. The remedies may, for instance, be available only in the courts of the occupying state: see, eg, *R (Al-Skeini) v Secretary of State for Defence* [2007] 3 WLR 33.

⁴² For clear examples of this, see *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 253–6 (Brooke LJ). The human rights obligations of the state are unlikely to be of direct significance to the soldier unless they are implemented in the state's national law. Where this is not the case the state, but not the soldier, may be liable: see *Nachova v Bulgaria*, Application Nos 43577/98 and 43579/98 (Unreported, European Court of Human Rights, Grand Chamber, 6 July 2005).

⁴³ See the discussion of the 'post-incident procedure' in Iraq where the commanding officer gathers the evidence about an incident. The commanding officer can then recommend that an investigation does not take place. This procedure 'brings an early resolution to the vast majority of incidents': UK, *Parliamentary Debates*, House of Lords, 31 October 2006, vol 686, 212–3 (Lord Drayson, Parliamentary Under-Secretary of State, Ministry of Defence); *R (Al-Skeini) v Secretary of State for Defence* [2007] QB 140, 254–5.

lawyers acting in this capacity as part of that chain of command.⁴⁴ It is not argued that a clear chain of command is other than an imperative but this has always been subject to the predominance of national law within a democracy. A soldier is required to disobey an order (whether in oral or written form) which is unlawful according to national law. To be able to do this, a soldier must be able to seek legal advice should he or she desire to do so. Although very few soldiers (if any) will actually do so, the principle that the armed forces must act within the national law is too important a principle on which to compromise. The actual position, where soldiers do not seek legal advice, is one where the soldiers carry the risk of acting unlawfully through uncertainty about the requirements of national law and are punished for it. It is, perhaps, for this reason that soldiers of one state may be subject to the rules of engagement of another but usually only if the state of the lending soldier has checked that the rules of engagement of the borrowing state are consistent with its own. The Parliamentary Under-Secretary of State, Ministry of Defence, told the House of Lords that '[e]mbedded UK personnel will be provided with UK guidance to ensure that they stay within the relevant UK domestic and international law'.⁴⁵

An unsuccessful attempt was made in the UK Parliament to require the publication of the rules of engagement, at least in part.⁴⁶ The underlying reason for making out this case would be to give a soldier an absolute defence to any charge if he had complied with the rules of engagement.⁴⁷ A further reason was postulated. A member of the House of Lords commented that:

I suspect that some of the problems in Iraq have arisen because those rules of engagement were not absolutely crystal clear in the minds of everyone concerned. Therefore, it makes sense that the requirement to do that should be in statute so that it cannot be fudged before people are launched.⁴⁸

Whilst it is not entirely clear that the conclusion drawn by Lord Ramsbotham follows from the statement which preceded it, the effect of the proposed amendment, had it been accepted, would have been to create a presumption that some parts of the rules of engagement would be published although the Secretary of State would have had the power to decide that other parts should not be published. It would also have enabled the Secretary of State to be questioned in Parliament about those rules of engagement which were published and his or her reasons for not publishing any other parts of them. The proposal had the merit of

⁴⁴ These lawyers may be faced with a conflict of interest if their role in advising soldiers is not separated from that of advising commanders: see *Report of the Somalia Commission of Inquiry*, above n 22, recommendation 40.40.

⁴⁵ UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 297 (Lord Drayson, Parliamentary Under-Secretary of State, Ministry of Defence). In respect of Canadian armed forces deployed to Afghanistan alongside US forces, see General Henault's evidence to the Canadian Standing Committee on National Defence and Veterans Affairs and Canadian Standing Committee on Foreign Affairs and International Trade, *Committee Evidence*, 17 January 2002, 1055 (General Raymond Henault, Chief of the Defence Staff, Department of National Defence).

⁴⁶ See UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 288 (Lord Kingsland). This proposed amendment to the Armed Forces Bill 2006 (UK) drew a distinction between the rules and cards issued to soldiers.

⁴⁷ *Ibid.*

⁴⁸ UK, *Parliamentary Debates*, House of Lords, 11 October 2006, vol 685, column 292 (Lord Ramsbotham).

leaving it in the hands of the Secretary of State to determine whether national interests lay in favour of some parts of the rules of engagement not being published.

Once territory is no longer under occupation but the armed forces of the erstwhile occupying state are invited by the incumbent government to remain and assist it in maintaining law and order, the legal position concerning the rules of engagement may remain the same.⁴⁹ The position on the ground may be little different from that which had existed during the period of occupation.

V CONCLUSION

It is as difficult, in terms of logic, to argue that rules of engagement should always be classified during military operations, as it is to argue that they should always be published. Each situation should be judged on the basis of its own circumstances. The nature of actual 'war fighting' is quite different from that of soldiers acting as an occupying or a peacekeeping force. In the rare situation of an occupation of territory, the role of the armed forces of the occupying state is quite different from that of either of these two other forms of military operation. In this situation, legal authority over the territory passes to the occupier. Whilst the occupier cannot be sovereign, the local population must normally look to it for the maintenance of law and order and the continuance of at least the basic infrastructure of modern life.

It is too late to argue that international humanitarian law gives to the occupier total discretion as to how to maintain its own safety or to achieve political ambitions in the territory it occupies. The structure of this law requires the occupier to act in accordance with law.⁵⁰ In a modern democracy, the law of the occupying state is likely to require no less. In such a state, it would not be acceptable for the organs of law enforcement, the police and possibly the armed forces, to act on the basis of legal powers not available for consultation by the general population. It has been argued above that where civilians come into contact with these law enforcement organs, the most relevant part of the law upon which they act will be the defences or justifications permitted where some form of use of force (fatal or otherwise) has taken place.

These defences or justifications (such as self-defence) are the subject matter of the rules of engagement. Whilst they must be based on the law of the occupying state, since to be effective they must be known instinctively by soldiers who carry out military operations, it would be difficult to argue that they should not be made known to the local population in at least some form. A decision might be taken, for instance, to put matters of tactics (such as whether a round is to be loaded into the breach of a rifle or whether warning shots are prohibited or what weapons are to be carried) into routine or daily orders and not into the rules of engagement. These will not, of course, need to be published.

Should the proposal made in this think piece be followed, civilians in occupied territory and the soldiers charged with the task of maintaining law and

⁴⁹ See, eg, SC Res 1546, UN SCOR, 59th sess, 4987th mtg, UN Doc S/Res/1546 (8 June 2004) [2] in relation to the sovereignty of Iraq by 30 June 2004.

⁵⁰ Human rights law contains the same obligation: see, eg, *Akpınar and Altun v Turkey*, Application No 56760/00 (Unreported, European Court of Human Rights, 27 February 2007) [50].

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order on the streets will, in their separate ways, be able to take advantage of living in an environment where the rule of law is the visible framework by which the duties of the occupying state and those of the citizens of the occupied territory are set. International humanitarian law sees occupation as a temporary state of affairs with sovereignty either being restored (or possibly altered in some form) in due course. It can hardly have intended to give authority to an occupying state to replace the visibility of the law of the occupied territory prior to occupation with invisible law in the form of the occupying state's rules of engagement.