

Gerd Hankel. ***Das Tötungsverbot im Krieg***. Hamburg: Hamburger Edition, 2011. Pp. 131. €12. ISBN: 9783868542240

Contrary to its narrowly phrased title, *Das Tötungsverbot im Krieg* ('The Prohibition to Kill in War'), Gerd Hankel in his most recent publication presents his thoughts on contemporary armed conflicts, humanitarian interventions, and the future of the laws of armed conflict. One should not be fooled by the small and handy format of the book; in its six manageable chapters, Hankel provides a plethora of recent and older examples and explanations to support his call for the revision of international humanitarian law.

Considering recent history, from the conflicts in Sri Lanka and Afghanistan, over Gaza in 2008–2009, and to Libya, modern conflicts have one thing in common: the main victims are civilians. This is surprising for two reasons. First, in a globalized information society, public awareness and condemnation of civilian casualties have increased. Examples can be found in the widespread public outrage regarding civilian collateral damage in armed conflicts, for

example after the airstrike on two fuel tankers by US fighter jets under the command of German Colonel Klein in September 2009. Secondly, armed conflicts are nowadays often fought for humanitarian reasons. A recent case in point is the conflict in Libya. NATO armed forces entered Libyan airspace for humanitarian reasons, as mandated by UN Security Council (UN SC) Resolution 1973 of 17 March 2011. The international armed forces became involved for the protection of the civilians, yet first reports of civilian casualties due to NATO airstrikes have been published.

Here, Hankel's discussion comes in. The book is an appeal to states, practitioners, members of armed groups, and the public to re-think the laws of armed conflicts in light of the high toll they take on civilian populations despite the fact that many modern armed conflicts are fought in the name of humanity. His call for revision adds to the ongoing discussion about the advantages of a revision of Geneva law but his very concrete proposals certainly usher in a new phase of the discussion. The failures and mistakes Hankel discusses are common to most modern conflicts making the book highly relevant and a must-read for those interested in the laws of war and possibly sceptical of its need for revision.

Hankel argues that the failures of the humanitarian missions in Afghanistan and Iraq, especially the high toll of civilian casualties, call for a revision of the normative framework as it was created after World War II and updated once about 30 years ago. Civilian casualties are especially problematic in humanitarian missions, as which Hankel swiftly categorizes both Afghanistan and Iraq. Instead of reflecting on the reasons for failure and on solutions to the problems, Hankel argues that the states which had started the missions with the noble goals of implementing democracy and human rights left behind destruction and chaos. To Hankel, these failures serve as the starting point for a reflection on international humanitarian law, and especially the principle of proportionality as established in Article 51(5)(b) of Additional Protocol I. Being a wide and vague principle, it leads to a high tolerance level for the resulting violence. The question the book attempts to answer is whether this can still be justified. The law is over half a century old and cannot possibly, despite modern interpretations, be up to date. For example, as has been recognized by several national laws, the distinction between international and non-international armed conflicts is quite arbitrary and not necessarily useful (see, for example, the German *Völkerstrafgesetzbuch* which has eliminated the distinction between international and non-international armed conflicts, making crimes against protected persons during both international and non-international armed conflicts punishable).

To elaborate on the inadequacies of present day international humanitarian law, Hankel focuses on three aspects. The recent conflict in Afghanistan serves as an example. First, Hankel criticizes the strict binary classification of armed conflicts and the effects this has on the status of persons actively participating in hostilities. In international armed conflicts, they can lawfully participate in hostilities and are protected when captured; in internal armed conflicts, they cannot lawfully kill combatants, will enjoy only limited protection upon capture, and can be prosecuted for fighting in the conflict. While generally criticizing the callous manner in which the international community played with the typification of conflict in Afghanistan, Hankel's criticism is aimed at the effects the classification of the conflict has on the status of combatants. Hankel, secondly, moves to discuss the discrepancy between present realities and the law of occupation. He argues that the international community quite randomly decided that Afghanistan be a 'transformative occupation' without determining what this meant for the application and applicability of the rules of occupation. As a consequence, the general law of occupation did not apply and the *de facto* occupying force was not limited in its actions by international humanitarian law. However, since the installation of new governments in Afghanistan in 2001 and Iraq in 2004, *de jure* the law of occupation no longer applies, not even that of transformative occupation. This leaves a lacuna where the occupying forces enjoy the benefits of a *de facto* occupation without facing legal limitations. Thirdly, Hankel uses the Kunduz airstrike in 2009

as an example of the shortcomings and pitfalls of the principle of proportionality. According to Hankel, it is not the application of the principle of proportionality that causes the high level of violence, but rather the norm itself that allows for it.

These three areas of concern are, according to Hankel, the reason that violence has escalated in recent conflicts. Reality thus no longer conforms to the aspiration of *humanitarian* law. It is refreshing that, while Hankel is clearly aware of the discussions concerning asymmetric conflicts and their characteristics, he does not base his arguments on this development. The fact that many modern armed conflicts are asymmetric appears to be a fact, not a precondition for his argument. Rather it is the ramifications of the law governing such conflicts that he criticizes.

In a description of the historic development of international humanitarian law, Hankel focuses on how the distinction between combatants and civilians has evolved. The starting point is the concept of war according to Helmut Graf von Moltke, Carl von Clausewitz, or Francis Lieber who rejected the idea of legal limitations to states' choices in methods and means of warfare. Lieber writes, 'The more vigorously wars are pursued, the better it is for humanity. Sharp wars are brief' (quoted at 45). After two world wars and several attempts to set rules for armed conflict or address its consequences, a legal framework for armed conflicts has now existed for over 50 years. The development of this modern international humanitarian law occurred in three phases: the first marked by the adoption of the Geneva Conventions of 1949, the second by the adoption of the two Additional Protocols of 1977 as a reaction to the many bloody wars of decolonization, and the third being the slow convergence of two previously separate areas of law: humanitarian law and human rights law. Especially the latter should ideally curtail a state's choice of methods and means of warfare that are harmful to civilians.

After a discussion of the development of the principle of distinction in international humanitarian law, Hankel zooms in on the problems this principle has given rise to in recent conflicts. Modern conflicts affect civilian populations much more severely than would seem lawful when looking at the laws of war. This is not a new discovery, but one which Hankel illustrates with examples of recent conflicts, namely the lengthy armed conflict in Sri Lanka and the conflict in Gaza in 2008–2009 both known for their high numbers of civilian casualties. Although Hankel notes that public outcries over violence against civilians in armed conflicts have increased, use of violence is usually accepted when the war is considered 'just'. In such a case, there is a general public perception that the civilian casualties can be in proportion to the military goals and 'just' cause. Based on the principle of proportionality, civilian casualties that are not 'excessive in relation to the concrete and direct military advantage anticipated' (Article 51(5)(b) of AP I) become acceptable. This would justify an approach towards armed conflicts as advocated in the late 19th century: 'the harsher, the shorter, the more humane' (at 84).

Hankel considers what would convince states to forgo the use of military action when civilian casualties are a realistic possibility. A restrictive interpretation of international humanitarian law would not suffice. An appeal to the moral standards of the nations involved in armed conflict would be needed, and a new concept of reciprocity. Traditionally, reciprocity is used to justify an increase in violence, often at the expense of civilian populations. Combined with a high level of tolerance for civilian casualties, the application of the principle of reciprocity currently causes an upward spiral of violence. Hankel proposes a re-thinking of prevalent attitudes so that escalations of violence can be prevented. The more powerful party to a conflict, especially in asymmetric conflicts, should promote a differentiated view of the adversary and reject the dehumanization of the enemy. A risk recognized by Hankel is that weaker parties in asymmetric armed conflicts often undermine *all* rules and thus also do not respect reciprocity. He argues that terrorists too need public support and would reconsider further violence against an enemy who has publicly and in practice demonstrated goodwill towards the civilian population.

Hence, Hankel turns the principle of reciprocity on its head in favour of civilians and humane warfare. Reciprocity in non-violent behaviour, so to speak, appears very reasonable – if

you want less violence, be the wiser man and practise what you preach. This is a political rather than legal argument against the use of excessive violence against civilian populations. It may be difficult to frame legally. But is it realistic? Can we expect states to change their manner of warfare in order to save civilian populations in the hope that the weaker, often terroristic, adversary will do the same? Is this naïve or does Hankel here present a simple solution to end an ever-increasing escalation of armed conflicts to the detriment of civilian populations? Naturally, both parties to a conflict – and especially the industrialized states waging wars against a weaker enemy – would need to trust the adversary and hope that he too would change his ways in order not to lose public support. Yet, taking the Gaza conflict as an example, approval of Israel by the international community would have been greater if not so many civilian targets had been hit. Hamas would possibly have lost its public support had it been the only one of the two parties to the conflict targeting civilians.

Hankel thus calls for a revision of existing humanitarian law. He finds the acceptance of civilian casualties especially problematic in humanitarian missions where the motive for the mission is the plight of the civilian population. Irrespective of the official reason for such a mission, whether or not based on the *Responsibility to Protect* (R2P), as soon as international humanitarian law applies, so does the principle of proportionality which allows for collateral, civilian damage. Hankel hence proposes special rules for humanitarian missions, either as special agreements between states pursuant to common Article 3 to the Geneva Conventions or as a new (fourth) Protocol to the Geneva Conventions concerning – here he introduces a new term – armed humanitarian conflicts (at 95).

The proposal is specified for three specific issues in humanitarian missions: prisoner of war status, the law of occupation, and the protection of civilian populations. According to his proposal, all humanitarian missions should be mandated by the UN SC. Concerning prisoner of war status, Hankel suggests that in armed humanitarian conflicts all members of armed forces should be seen as combatants and enjoy protection as prisoners of war when captured. He provides one exception to his rule: in cases of violations of international humanitarian law by perfidious acts, the person having committed the act should not enjoy protection as a combatant and prisoner of war. Terrorist acts should not by definition be considered perfidious, says Hankel, in order for the protection not immediately to be watered down.

Concerning the law of occupation, Hankel suggests a shift of focus – away from retaining the occupied territory's sovereignty (Article 43 of the 1907 Hague Regulations) to guarding the rights of the occupied population and their humane treatment. The inner sovereignty should thus play a larger role and the only justification for foreign interference should be providing the preconditions for durable peace, good governance, respect for human rights, and the autonomy of the population (at 100–101). Such a transformative occupation, Hankel concedes, would surely not be easy. Still, he suggests that all efforts should go towards re-establishing a transitional government elected by the UN SC from candidates suggested jointly by representatives of the occupied country and the UN SC, and that, under the guidance of the UN SC, it should act in accordance with international human rights standards. Although Hankel believes that the UN SC would provide the necessary legitimacy for the occupier, whether such power vested in the UN SC would actually increase credibility and acceptance of a transitional government is questionable. Furthermore, the fact that Hankel proposes a *de facto* regime change, even if mandated and supervised by the UN SC, is highly problematic in light of the principle of sovereignty. Hankel should clarify what exactly distinguishes his proposal from a 'regular', often criticized, regime change.

The protection of civilian populations should, according to Hankel's proposal, be increased by replacing the principle of proportionality with a rule according to which no military actions should be carried out that would risk civilian casualties. In case of doubt, military actions would have to be cancelled. This would place humanitarian considerations above military necessity. Hankel expects that such a clear humanitarian approach would eliminate all grey areas: the only

permissible civilian casualties would be the truly unexpected. To ensure this, Hankel argues that forces should send ground troops rather than, as is the latest trend, using unmanned weapons. This would increase the risk for soldiers who, however, accepted this risk when they joined the armed forces. Furthermore, self-defence would still remain an option. Applying this suggestion to the Kunduz airstrike would result in a finding that the command of the German Colonel was unlawful, given the supposition that civilians were on site. Hankel not only proposes new rules, he further proposes that all those responsible for killings of civilians should be prosecuted. Indeed, the principle of proportionality has always been rather vague and undefined, and strict adherence to humanitarian goals would increase the credibility of armed forces on a humanitarian mission. Civilian casualties would no longer be accepted as collateral damage, but rather be permitted to occur only when completely unpredictable (see his accurate argument at 107).

Overall, Hankel's argument places humanitarian considerations above all other aims. This is the logical conclusion from the convergence of human rights and international humanitarian law. His very concrete proposal for law reform is reasonable: how can states justify humanitarian missions without placing humanitarian concerns above all else? Yet it requires some more thought regarding, for example, the important role assigned to the UN SC in his proposal. Nonetheless, the humanitarian focus is justified – and supported by the ICJ (for example in the ICJ Advisory Opinion concerning *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, 2004).

Any proposal as controversial as Hankel's will face much resistance by states involved in armed conflicts. Hankel addresses arguments that are likely to be brought *against* his proposal. Even though he may not succeed in rebutting all of them convincingly, he adopts an optimistic outlook. He argues that a revision would not only be preferable to a compromise based on existing principles of international humanitarian law, but would also increase legal certainty. In an almost visionary statement, he claims this to be essential for future humanitarian missions – as was proved true by the recent humanitarian mission in Libya.

Whether his arguments and his proposal can convince states remains to be seen. Our time is not marked by the horrific experiences of World War II. Hence, there is no direct trigger for revisions of the laws of armed conflict as there was in 1949. Moreover, states will hesitate to increase the risk of both death and prosecution for their armed forces in humanitarian armed missions, or to abandon the principle of reciprocity in 'regular' armed conflicts. These objections should, however, not hinder but rather contribute to a discussion that is indispensable. If we want to change the fate of civilian populations in armed conflict and in the ever-increasing number of humanitarian missions, we may have to start with the fundamentals. Hankel's book is a good start.

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doi: 10.1093/ejil/chr079