SUPERIOR RESPONSIBILITIES UNDER INTERNATIONAL CRIMINAL LAW: CONCURRENCE WITH MILITARY ETHICS

PROF. G.J. ALEXANDER KNOOPS[*]

1. INTRODUCTION

Contemporary international criminal law imposes ever stringent legal restrictions and responsibilities on the military operations conducted by military commanders.(1) Surprisingly, legal literature dedicates little attention to the question whether and how military ethics infers with potential criminal liabilities for military commanders to be incurred for the methods of warfare they apply.(2)

Indeed, as expressed by Van Baarda and Verweij, "*effective leadership demands judgments which are sound from the operational and the ethical point of view*."(3) Moral integrity, to be required from every commander, is actually reflected in the criteria for command responsibility as developed by

* Professor of International Criminal Law, University of Utrecht, Attorney at Knoops & Partners Lawyers, Amsterdam, the Netherlands, Major (reserve) Royal Netherlands Marines Corps

International Studies Journal (ISJ), Vol. 7, No. 3, Winter 2011, pp. 1-18.

the international criminal tribunals. It is instructive to look into these criteria which have been significantly refined in various judgments and decisions of the Yugoslav Tribunal (ICTY) over the last decade.

Yet, military ethics as said gained little attention within the jurisprudential parameters for superior responsibility. Nor did specific cases arise whereby the latter doctrine was successfully applied to abusive use of Weapons of Mass Destruction (WMD). Modern warfare transgressing into the use of WMD raises pertinent questions on verge of military ethics and criminal responsibilities of political as well as military leaders

It is therefore timely to assess the question whether military ethical norms may fuel criminal liabilities of military leaders, particularly in regard to the area of WMD. This article will address the question at hand, portraying it on the basis of history, current treaties and contemporary case law of the international criminal tribunals.

2. The Roots of Military Ethics in Ancient Times

It is misconceiving to assume that the emergence of the Hague Regulations of 1907 and Geneva Conventions of 1949 did introduce military ethics as such on the battlefields. These Conventions were merely a reflection of what ancient times dictated in terms of these ethics.

For military ethics pertaining to the methods of warfare, the history shows that it accrues self-contained responsibilities on part of military leaders. Exemplary is the reference to various types of – what could qualify as – military ethical norms within almost all major religious systems of the world. Starting with the Old Testament, the following two comments draw attention:

> *"Do not kill them," he answered. "Would you kill men you have captured with your own sword or bow? Set food and water before them so that they may eat and drink and then go back to their master." So he prepared a great feast for them, and after they had finished eating and drinking, he sent them away, and they returned*

to their master. So the bands from Aram stopped raiding Israel's territory.[4]

The other comment reads that:

When you lay siege to a city for a long time, fighting against it to capture it, do not destroy its trees by putting an ax to them, because you can eat their fruit. Do not cut them down. Are the trees of the field people, that you should besiege them? However, you may cut down trees that you know are not fruit trees and use them to build siege works until the city at war with you falls.[5]

Similarly, the Qur'an dedicates an important phrase to the position of prisoners of war, saying that:

' Feed for the love of Allah, the indigent, the orphan and the captive'[6]

As to ancient philosophic commentators, one finds relevant roots for a ethical dimension when waging a war. Alib Hasan Al Muttaqui held that:

'Let there be no perfidy, no falsehood in your treaties with the enemy, be faithful to all things, proving yourselves upright and noble and maintaining your word and promises truly'[7]

Further, a direct reliance on military ethics can be found in the writings of Sun Tzu (544 BC to 496 BC), an ancient Chinese philosopher, saying that:

'The worst policy is to attack cities. Attack cities only when there is no alternative'[8]

When determining these religious sources, it can be said that they clearly create a military ethical dimension on the basis of which contemporary warfare treaties – drafted as of the 19th and 20th century – were vested. Next paragraph will delve into the subject-matter of this treaty law in order to ascertain whether this dimension was actually translated in any concrete legal norms.

Conventions relative to “unethical” warfare methods: source of military legal responsibilities?

The quantity of the various treaties promulgated during the last century on the prohibition or restriction of particular methods of warfare and WMD, seems to suggest that the international community was indeed able to set up a comprehensive legal framework on this area which was at the same time criminally enforceable.

The contrary is true. Despite the evolvement of several Conventions enhancing “unethical” warfare methods, all of these instruments lack an effective criminal enforceability system in order to endorse the Convention’s prohibition. Characteristically, these treaties leave it totally to the States Parties themselves whether and how to criminalize the respective provisions.

Chronologically, the following Conventions emerged with a clear aim of excluding certain types of “unethical” warfare. Yet, ascertaining a unequivocal criminal law system which could strengthen the military ethical values without criminal powers.

First, the Hague Convention IV (1907), respecting the laws and Customs of War, introduces in article 22 the principle that “*The right of belligerents to adopt means of injuring the enemy is not unlimited*.” It is followed by article 23, introducing a specific prohibition *“to employ poison or poisoned weapons;”* and “t*o kill or wound treacherously individuals belonging to the hostile nation or army.”*

Secondly, in 1925, the Geneva Protocol for the Prohibition of the Use in War of Asphyxiatin, Poisonous or Other Gases, and of Bacteriological Methods of Warfare came into force, including the pertinent military ethical norm contained in this Protocol, saying that: ”W*hereas the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices, has been justly condemned by the general opinion of the civilised world.”*

A third international instrument addressing ethical behaviour in warfare methods is the 1972 Convention on the Prohibition of the Development,

Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and their Destruction, holding in article I that: "*Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:*

> *(1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;*
>
> *(2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict."*

However, when reading article IV of this Convention, it underscores the previous observation that these instruments lack a comprehensive criminal law enforcement system. Said article obligates State Parties to "*take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in Article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere."* However, how a State Party is to fulfill this obligation is left unclear.

Similarly, the Convention on the Prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction of 1997 inheres this lacuna.[(9)]

Admittedly, the concept of international criminal justice was, at the time of the enactment of these Conventions, far from crystallized. The system was a scattered one. By that time, only two Ad Hoc criminal tribunals were vested in 1993 and 1994, namely the ICTY and ICTR. A world criminal court was not yet within the range of reality. Only in 1998, the international legal community consented to such a forum. The enforceability of military ethical norms has thus been hampered by the absent of a world criminal court able to address said lacuna.

It is perhaps for this reason that this legal ambiguity also affected the drafting of said Conventions in terms of their criminal enforceability. An exponent of this legal ambiguity is also envisioned by the International Court of Justice (ICJ) Advisory Opinion of 8 July 1996 on the legality of the use of nuclear weapons. The ICJ was unable to arrive at an answer as to the (ethical) permissibility of nuclear weapons during armed conflicts, saying that:

> *'Accordingly, in view of the present state of international law viewed as a whole…and of the elements of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defense, in which its very survival would be at stake…'*

These observations do reflect a legal-political compromise which is indicative for the duality of the prohibition of WMD. War should be prevented, but in order to prevent war, WMD are a powerful instruments so States should be entitled to have them; a duality in optima forma. Seen from this perspective, the possession of WMD may prevent unnecessary suffering of the civil population, how contradictory this may sound.

4. THE TRANSFORMATION OF MILITARY ETHICAL DIMENSIONS TO WAR CRIMES WITHIN THE ICC-SYSTEM.

Ultimately, in July 2002, the long-desired world criminal court (International Criminal Court) became operative. As said, one could expect the introduction of a more robust legal framework in terms of enforceability of the prohibition on certain WMD and its underlying ethical norms. This became only partly true.

Article 8 of the ICC-Statute, dealing with War Crimes, enumerates a catalogue of different types of war crimes, to be committed during international and non-international armed conflicts. Only some of the

aforementioned treaties have been implemented in this provision, violation of which constitutes a war crime within the scope of the ICC.

When analyzing article 8(2)(b) of the ICC-Statute, it criminalizes several military ethical norms included in the mentioned WMD-instruments, such as:

■ (iv) *Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated*;

■ (v) *Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives*;

■ (xvii) *Employing poison or poisoned weapons*;

■ (xviii) *Employing asphyxiating, poisonous or other gases, and all analogous liquids, materials or devices*;

■ (xx) *Employing weapons, projectiles and material and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering or which are inherently indiscriminate in violation of the international law of armed conflict, provided that such weapons, projectiles and material and methods of warfare are the subject of a comprehensive prohibition and are included in an Rome Statute of the International Criminal Court 13 annex to this Statute, by an amendment in accordance with the relevant provisions set forth in Articles 121 and 123*;

Noticeably, no prohibition on the use of nuclear weapons as such is included in this article 8. In light of the ICJ's Advisory Opinion described above, this may not come as a surprise.

Indeed, the 'legislative' history of the ICC reveals a controversy between the nuclear and non-nuclear States. While the former States insisted on a overall criminalization of the possession and use of WMD's, the latter States advocated the principle of non-discrimination. It was held by them

that an exclusion of a criminal prohibition on WMD's would put nuclear States in a military advantageous position.[10] As a result, a seemingly awkward situation was created by the ICC-drafters in that – unlike the use of nuclear weapons - 'poisoned arrows and hollow bullets are forbidden.'[11]

5. The Transposition of Military Ethical Dimensions to Superior Responsibility under International Criminal Law

5.1 General (military ethical) principles[12]

Military ethics are probably meaningless when they cannot be criminally enforced in order to deter military commanders from not honouring these ethical principles as laid down in the ancient and the Conventions, described in the preceding paragraphs. For this purpose, the doctrine of superior responsibility as developed by the laws of the contemporary international criminal tribunals, should be analyzed in order to asses whether these laws can serve as legal instruments to endorse military ethics on the area of warfare methods. Attention should be drawn to, in particular, the case law of the Yugoslav Tribunal (ICTY). Superior responsibility under these laws arises when the following three criteria are met:

i. The existence of a superior-subordinate relationship

ii. The superior knew or had reason to know that the criminal act was about to be or had been committed; and

iii. The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[13]

With respect to the first element, the ICTY Appeals Chamber has held that in order to establish a superior–subordinate relationship, effective control over a subordinate has to be proven beyond reasonable doubt. For superior responsibility to be vested, the Appeals Chamber of the ICTY does not require a direct or formal subordination in order to establish such a "effective control". As the Appeals Chamber of the ICTY held: "rather, the

Accused has to be, by virtue of his position, senior in some sort of formal or informal hierarchy to the perpetrator."[14]

However, the ability to exercise effective control in terms of material power to prevent or to punish can be proven, cannot – without additional indicia - be established without the existence of a (formal) relationship of subordination.[15] In other words, superior responsibility can be assumed, both in the event of a formal *de jure* but also in the event of *de facto* power.

As to the third element, crucial is the existence of a material ability to prevent and punish, which ability can also emerge outside a superior–subordinate relationship.[16]

Illustrative, the ICTY Appeals Chamber mentions the example of a police officer who by virtue of his position is able to prevent or punish crimes under his jurisdiction; however this mere fact does not make him a superior under the doctrine of superior responsibility for any crimes committed by individuals within this jurisdiction.[17]

In the mentioned *Halilovic* Appeals Chamber judgment, the Appeals Justices enumerated several factors which can be indicative of effective control:

- the accused's position;
- his capacity to issue orders;
- his position within the military or political structure;
- the procedure for appointment;
- the actual tasks performed;[18]
- the capacity to issue orders.[19]

Importantly, the ICTY Appeals Chamber, in the *Halilovic* judgment, endorsed the principle as previously set forth by the ICTY Appeals Chamber in the *Hadzihasanovic* case, where it was held that an accused cannot be charged under the doctrine of superior responsibility for crimes committed by a subordinate *before* the accused assumed command over this particular subordinate.[20]

As a consequence, the ICTY Appeals Chamber requires that several

material facts must be pleaded in the indictment in order to validly prosecute a commander on the basis of superior responsibility. The first fact which is perennial for such a plea is that the indictment clearly should allege "*that the accused is the superior of certain persons sufficiently identified, over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and for whose acts he is alleged to be responsible.*"[(21)] In the *Halilovic* case, the ICTY Appeals Chamber arrived at the conclusion that the Prosecution had failed to timely, clearly and consistently inform the Defence that even if *Halilovic* was not de jure or de facto commander of the specific military operation, he allegedly still had effective control over the perpetrators of the crimes charged in the indictment, on the basis of his position as the most senior ranking officer of the army of Bosnia and Herzegovina due to his position as a Team Leader.[(22)]

As for the ICC Statute, Article 28 codifies this case-law of the ICTY, underscoring that the superior-subordinate relationship applied to both civilian and military commanders.[(23)]

In sum, Superior responsibility transpires a legal principle that is rooted in a military ethical view that superiors are normally genuinely in a position to prevent or punish those that he or she is commanding. Two questions arise as to the extent of this military legal-ethical duty.

5.2 Military Ethics and Mens Rea for Superior's Liability

The first one provokes the fundamental question as to what level of mental element (mens rea) is required for the criterion "had reason to know" that the potential war crime was about to take place. Can superior responsibility be accepted merely on the basis of 'negligent' behaviour of the commander?

The ICTY Appeals Chamber did not approve the latter view, holding that superior "responsibility can be imposed for deliberately refraining from finding out but not for negligently failing to find out."[(24)]

Similarly, the ICTR Appeals Chamber denounced a concept of mere 'negligence' when assessing superior responsibility.(25)

5.3 Military Discretionary Powers: Exponent of Military Ethics

The second question touches upon the concurrence between criminal law norms, governing superior responsibility and discretionary powers of military commanders on the battlefield. The complexity of armed conflicts and the decision-making process military commanders have to go through in order to endorse a military campaign, may collide with a rigid application of the doctrine of superior responsibility. Such complexity is reinforced when WMD's are involved. To what extent are military commanders imbued with discretionary powers when it concerns the decision to use certain warfare methods in order to successfully accomplish their military mission?

The Statutes of the international criminal tribunals do not address this issue as such, let alone the interrelation between the legal criteria for superior responsibility and discretionary military powers. Yet, several legal precedents illustrate the relevance of this relationship. In fact, military discretionary powers are exemplary for the military ethical dimension when ascertaining criminal liabilities of superiors.

5.4 Military ethics: the Israeli Supreme Court's Perspective

The fusion of commanders liabilities and military ethics, especially in the field of controversial warfare methods, is prominently addressed by the Israeli Supreme Court, sitting as the High Court of Justice (HCJ). In various judgments of the HCJ, one can find reliance on the discretion of the military commander, when facing potential violations of the laws of war by the Israeli Defence Forces (IDF).

In the case *of Phycisians for Human Rights et al v. Commander of the IDF in the Gaza Strip*, the plaintiffs held that the IDF illegally caused harm –

in its operations in Rafah – to civilians. The HCJ, in its judgment of 30 May 2004, confronted with the juxtaposition between legal and military ethical norms, ruled that:

■ A Court should exercise caution in its judicial review of military actions.[26]

■ The Supreme Court reiterates the notion it delineated in previous case law, namely that "Clearly this Court will take no position regarding the manner in which combat is being conducted. As long as soldiers' lives are in danger, these decisions will be made by the commanders."[27]

■ In keeping with the first principle, the Supreme Court holds in paragraph 17 that it has no power to "review the wisdom of the decision to take military action" but is constrained only to review the legality of military operations. As a consequence, the commander's military operational assessment of a particular situation as such falls outside prosecutorial and judicial scrutiny.

■ This approach is enunciated and specified by the Court's observation that "with regard to issues of military concern, we do not stand in the stead of the military commander and we do not substitute our discretion for his own. That is his expertise (…)."[28]

In a second judgment of the HCJ, this issue was again at the heart of assessing civil liability of the IDF for allegedly illegal military operations in the West Bank. In this case, the IDF-commander in Judea and Samaria to facilitate the security fence. Also here, military discretionary powers to pursue such type of military actions was challenged. In its judgment of 30 June 2004[29], the HCJ promulgated certain parameters:

1. The Supreme Court, as a basic tenet holds that, "We, Justices of the Supreme Court, are not experts in military affairs. We shall not examine whether the military commander's military opinion corresponds to ours."[30]

2. In this regard, the Israeli Supreme Court arrives at a fundamental notion in order to judicially assess the conduct of military commanders by saying that judges – when called upon to value the commander's military

conduct – are virtually only to be able to determine “whether a reasonable military commander would have (…) acted as this commander”[31] whereby “it is obvious that a court cannot ‘slip into the shoes’ of the deciding military official.”[32]

In this respect the HCJ built upon its previous ruling in *AGA v. Commander of the IDF Forces* in which the Justices held that they do not “substitute the security consideration of the military commander with our own security considerations” and as a consequence that the Court “shall not substitute the discretion of the commander with our own discretion.”[33]

3.As a result, the boundaries of this form of judicial review, as the HCJ perceives it, are premised on a “zone of reasonableness” in that the military commander’s discretion should fall within the “zone of reasonableness.”[34]

4. Within this judicial system of review of military commander’s discretion, the HCJ is mindful as to how a dispute on military-professional questions, including those on compliance with the principle of proportionality, should be approached. In the *Beit Sourik Village* Judgment, the Court cited its ruling in *Amira v. Defense Minister* where it was held that “in such a dispute regarding military professional questions, in which the Court has no well founded knowledge of its own, the witness of respondents [i.e., the opinion of the military commander who is responsible for the preservation of security; GJK] shall benefit from the assumption that his professional reasons are sincere reasons.”[35]

5. Accordingly, the HCJ promulgates an evidentiary criterion, which is meant to endorse the aforementioned assumption namely that “Very convincing evidence is necessary in order to negate this assumption.”[36]

5.5 Military Ethics: the ICTY Prosecutor’s view

The juxtaposition between criminal liabilities that commanders may incur for warfare methods and military ethics – portrayed by discretionary powers – emerged also in the 1999 bombing campaign in Serbia during the Kosovo war. NATO bombing actions destroyed civilian objects such as the Chinese

embassy in Belgrade and the Serbian Radio Station 'RTS' in April 1999. Was NATO to be criminally prosecuted for war crimes? The ICTY Chief Prosecutor did not accept this view, relying on a concept of military discretionary powers which inherently affects judicial scrutiny of superior liability.

In essence, the ICTY Prosecutor investigative report reveals the following:

1. In the first place, paragraph 29 of this report elaborates on the tension between international military law and the tasks of military commanders during military operations and acknowledges that military commanders also within the framework of enforcing international military law "must have some range of discretion to determine which available resources shall be used and how they shall be used." From this discretionary authority necessarily emerges the primary role of the military commander's personal assessment of the situation at hand. Of significance is that the report of the ICTY furthermore confirms that "precautionary measures" and the interpretation of these measures could also be based on and derive from earlier incidents (see paragraph 29).

2. Second, the ICTY prosecutor concludes in paragraph 50 of the report – confronted with the question to which extent a military commander is obliged to expose his own forces to danger *vis-à-vis* civilian objects – that this has to be resolved *on a case by case basis*, the answers of which might differ depending on the background and values of the commander. In view of the various backgrounds of the military commanders, the differing degrees of combat experience or national military histories, the report holds that the criterion has to be that of a "*reasonable military commander*."

For sure, it is hard to formulate such parameters in the abstract. On the battlefield, the decision-making process is not and cannot only be legal-normative; it comprises of a combination of military-operational, legal-normative and ethical factors. The latter being highly subjectively induced. A fair application and interpretation of Article 28 of the ICC Statute should

be based on all of these factors. Discretionary powers of military commanders features within the first and third factor. The second factor - i.e. the legal-normative one – should only operate as a correctional mechanism, thus not as a primary one.

6. Balancing Commander's Criminal Liabilities and Military Ethics in Warfare: Future Views

Expounding on ancient (military-ethical) norms of warfare which were in those days perceived as "customary" – having a common denominator in several religious systems of the world – the international legal community crafted Conventions which were meant to codify, in part, those norms, while at the same time securing certain leeway in order to protect State interests. The ICJ Advisory Opinion of 1996 was – in this article – perceived as an exponent of this duality.

It was shown that, despite the progressive development in enacting several Conventions to outlaw 'unethical' methods of warfare, the international legal framework on this area still is a fragile one. Rather than being mandatory for States, it is based on the willingness of States to accede to this framework. Moreover, it is not equipped with a coherent criminal enforcement system. Only few of the Conventions under scrutiny embrace the principle "*aut dedere aut judicare*", whilst the right to withdraw from the particular Convention in times of emergency is specifically created. Additionally, it is left open to States how to criminalize these treaty norms.

Lastly, it was observed that the ICC Statute as such does not erase this rather arbitrary system of norms, supposedly created to endorse ethical standards of warfare. Notwithstanding the introduction within the ICC Statute of a extensive provision on military and civilian superior responsibility, many pertinent questions are still left open. One of these elements, i.e. the interrelationship between military-operational (discretionary) powers as to the use of controversial warfare methods during armed conflicts and legal obligations under the doctrine of superior

responsibility, was at the heart of in this essay.

Can this criticism be counterbalanced by the advent of, for example, an international legal-ethical code for the military? Such a Code could enhance specific parameters and guidelines as to how exactly military superiors, for instance, should respond when ordered to use methods of warfare which are deemed in contravention with the Conventions analyzed in this article. Maybe that the conclusion should be that military ethics are hard to transform into strict criminal law norms at all. Instead, military superior's compliance with military ethics "*... requires a generation of commanders of moral integrity*."[37] ❖

NOTES:

1. See for this topic in general Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in International Criminal Law Developments in the Case Law of the ICTY 260 (Gideon Boas and William A. Schabas, eds., 2003).

2. An exception is the instructive essay of Dr. Th. Van Baarda, *Ethics, Command Responsibility and Dilemmas in Military Operations*, in Military Ethics: The Dutch Approach, A Practical Guide, eds. Th.A. van Baarda and D.E.M. Verweij, Martinus Nijhoff Publishers Leiden 2006, at 45-87.

3. Van Baarda, supra note 2, at 2.

4. 2 Kings 6:22-23

5. Deuteronomy 20:19-20

6. Qur'an II, 205

7. Alib Hasan Al Muttaqui, Book of Kanzul' Uman (634 A.D.)

8. Sun Tzu, The Art of War; see for this topic in more details: Leslie C. Green, *International Regulation of Armed Conflicts*, in International Criminal Law, Second Edition, ed. M.C. Bassiouni, Transnational Publishers 1999, at 355-380

9. See the Convention on the prohibition of the Development, Production, Stockpiling and use of Chemical Weapons and on their Destruction, article VII: "*Each State Party shall, in accordance with its constitutional processes, adopt the necessary measures to implement its obligations under this Convention.*"

10. See W.A. Schabas, An Introduction to the International Criminal Court, Cambridge University Press 2001, at 49.

11. Ibid.

12. Part of this paragraph is derived from the article by G.J.A. Knoops; The use of artillery against populated areas in the Gaza strip: Legal or legitimate use of force to protect civil population under international (criminal) law?, in ELSA magazine Leiden, June 2002, at 17-21

13. See, inter alia, the Appeals Chamber Judgment in *Prosecutor v. Halilovic*, Case no:

IT-01-48-A, 16 October 2007, at 59.

14. Ibid.

15. Ibid.

16. Ibid.

17. Ibid.

18. Ibid., at 66

19. Ibid., at 70

20. Ibid., at 67.

21. Ibid, at 78

22. Ibid., at 97.

23. See also William A. Schabas, The UN International Criminal Tribunals, 2006, at 321.

24. See *Prosecutor v. Blaskic*, Appeals Chamber Judgment, 29 July 2004, IT-95-14-A, at 406.

25. See *Prosecutor v. Bagilishema*, Appeals Chamber Judgment, 3 July 2002, ICTR-95-1A-A, at 35.

26. Judgment 30 May 2004, Case Nr. HCJ 4764/04, at 91.

27. *Ibid*, para. 16; referring to its judgment in *Baroke v. Minister of Defence,* HCJ 3114/02, para. 16.

28. *Ibid,* para. 17.

29. HCJ 2056/04

30. *Ibid.,* para. 46.

31. *Ibid.*

32. *Ibid*.

33. *Ibid.*

34. *Ibid.*

35. *Ibid*., para. 47; see also *Amira v. Defense Minister,* HCJ 258/79, para. 92.

36. *Ibid.*

37. See Van Baarda & Verweij, supra note 2, at 2