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From the Battlefield to the Courtroom (and Back)

*The Interplay Between International Humanitarian Law and
International Criminal Law*



Rogier Bartels

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From the Battlefield to the Courtroom (and Back)

The Interplay Between International Humanitarian Law and International Criminal Law

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aan de Universiteit van Amsterdam
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	prof. dr. G. Gaggioli	University of Geneva

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Acknowledgements

After having printed the first hardcopy of the full draft of my PhD manuscript, and having left it on the desk in the front room of our house, my two sons, then aged 3 and 6, and unaware of the meaning and value of this large stack of papers to me, made drawings on the first few pages. At the time, Aedan, the oldest, was very much into maps, and especially treasure maps. He used the front page to draw a map that surprisingly accurately represents how a PhD thesis comes into existence: a number of roads going in various directions while occasionally crossing or intersecting with each other, three of which – each full of bends and turns – leading “home” [“naar huis”]; but also a couple of dead-end roads and roads seemingly leading nowhere,¹ as well as a few hidden treasures² along the ways.

In his somewhat more ‘abstract’³ drawing on the next page, my youngest son, Tristan, may have tried to capture – and in fact properly reflected – how much academic research is devoid from practical reality. In the present study, I have attempted, however, to inject a lot of realism as well as my experience as a practitioner: as someone who worked in both the fields of international humanitarian law (IHL), albeit not on “the battlefield”,⁴ and in international (and domestic) criminal law. In reference to the title of this book, the latter experience was to a large extent in “the courtroom”. My thinking, and the focus of my research, has very much been shaped by the various places where I have worked: at the Netherlands Red Cross, the International Criminal Tribunal for the former Yugoslavia, the Netherlands Defence Academy (NLDA), the judiciary and prosecution at the domestic level, and the International Criminal Court (ICC).

The research for the present book spanned several years. Combining academic research with a full time job outside academia is not always easy, and finding the time to focus on research, and even more so on writing, is often a real challenge. Numerous persons have helped me, in some form or another, in completing my endeavour.

At the outset, I must start by thanking my supervisors, professors Terry Gill and Jann Kleffner, for their patience, guidance, and friendship. Elvis’s “wise men” said that “only fools rush in” – advice that I have taken to heart. When Jann first approached me about the possibility of conducting a PhD under his and Terry’s supervision, I would be his first (co-)

1 In this case: off the page.

2 “X marks the spot” – three of them on Aedan’s map.

3 While Tristan’s drawing was abstract in the meaning of the art movement, and had a touch of Kandinsky to it, according to the Cambridge English Dictionary, the word “abstract” actually means “existing as an idea, feeling, or quality, not as a material object”.

4 I am therefore very grateful to those friends and colleagues, who do have such experience, for enlightening me on the challenges arising during military operations, and on issues such as targeting procedures and the choice and employment of weapon systems and weapons.

supervisee. Since then, he has (co-)supervised a number of successful PhD projects that commenced later, yet finished well before mine. Terry, in the meantime, transitioned to professor emeritus, and although having been freed from the managerial tasks associated with his chairs, he actually seems even more active than before. I am grateful for their forbearance, and feel fortunate for having had the opportunity to work with two of IHL's great minds – each so different, thereby complementing each other in an excellent way.

A special thanks is due to the members of the reading committee – professors Paola Gaeta, Gloria Gaggioli, Göran Sluiter, and Harmen van der Wilt, general and professor Paul Ducheine and judge and professor Christine Van den Wyngaert – for the time they took to assess my manuscript. As the most cited scholar in the present research, it was only logical that Robert Cryer would be part of the reading committee. He taught my IHL course at the University of Nottingham and it was a true pleasure to discuss IHL and ICL matters with him in the years thereafter, over a pint, or by email. His untimely passing came as a shock, and he is still being missed by both the IHL and the ICL community, as he was one of the few who was truly 'fluent' in both fields.⁵

Over the years, the most frequent and/or extensive discussions on IHL have been with my friends Jeroen van den Boogaard and Katharine Fortin, while my friends Matt Halling and Simon De Smet were my primary sounding boards on ICL matters. The Netherlands Defence Academy was the only work-place where I was able to conduct my research during working hours. With my colleagues during my first period in the Military Law Section, namely Paul, Eric Pouw, Joop Voetelink, and Jeroen, we discussed our research over a number of years in an inspiring forum, named after cafés/restaurants where our meetings would take place: i.e. first "Orloff" and later "De Rechtbank"). At my current work, at the ICC, I experienced much of the issues I discuss in the present book, in practice. In addition, it has been very helpful to discuss legal and practical matters with my colleagues, and to bounce ideas of them.⁶ While there are many more, I will name and thank the following ones specifically: Cynthia Chamberlain, Thomas Körner, Rod Rastan, Judge Robert Fremr, Sebastian Grzybowski, Stéphane Bourgon, and Eric Iverson. My second stint at the NLDA, albeit affected by a global pandemic, allowed me to focus on finalising this manuscript. Bart van den Bosch and Marten Zwanenburg perfectly balanced giving the freedom to set my own schedule and applying appropriate pressure; and helped me beat NLDA colleagues Ardan, Robert-Jan, and Steven to the manuscript-completion finish line.

Throughout the years, I have discussed and debated many of the aspects of the present study with other academics and/or practitioners, both in person and in writing. In alphabetical order, I want to name specifically Dapo Akande, Roy Ariav, Chris De Cock,

5 Rob used to tell me that, like it is for me, IHL was his "first love" and that although he happened to have ventured into ICL, he always kept – as first loves go – IHL close to his heart.

6 Being able to discuss my views and receive feedback on them, certainly does not mean that my colleagues agree with my views.

Geoffrey Corn, Tristan Ferraro, Chris Gosnell, Robin Geiss, Emanuela-Chiara Gillard, Nobuo Hayashi, Francoise Hampson, Jean-Marie Henckaerts, Barbora Hola, Emilie van den Hurk, Michael Newton, Agnieszka Jachec-Naele, Eric Talbot Jensen, Sigrid Redse Johansen, Noam Lubell, Kubo Macak, Tim McCormack, Simon Meisenberg, Marko Milanovic, Simon Minks, Alphons Orié, Ido Rosenzweig, Deborah Ruiz Verduco, Aurel Sari, Marco Sassòli, Mike Schmitt, Barbara Sonczyk, Kinga Tibori Szabo, Michael Vagias, and Marten Zwanenburg.

I was fortunate to be given the opportunity by the Minerva Center for Human Rights and the International Committee of the Red Cross to present various parts of my research at four of their yearly IHL conferences, held either in Jerusalem or Tel Aviv. The opportunity to present my ideas in rough form, and receive feedback from the other participants has been truly helpful. I want to thank Danny Evron and Anat Mishali for their good care during these conferences. Other parts of my thesis were presented during the T.M.C. Asser Institute's "International Humanitarian and Criminal Law Platform" in The Hague, organised by Christophe Paulussen, the 2019 BYU Law School workshop law and hybrid armed conflicts, hosted by Eric Jensen, and during various research meetings of the Law of Armed Conflict and Peace Operations, or short "LACPO",⁷ of the Amsterdam Center for International Law (ACIL).

Parts of this book were published in peer-reviewed journals.⁸ I am grateful to the (managing) editors of these journals, as well as the anonymous peer-reviewers, for their feedback and assistance: Caroline Fournet, Katharine Fortin, Steven De Wulf, Yael Ronen, Yuval Shany, and the late Nigel Rodley.

The ACIL and NLDA have hosted me during the course of this study, as various other academic institutions. I am indebted to the law schools and (law) libraries, and their respective staff, of the Universities of Exeter, the University of Toronto, and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg, for the opportunity to stay for several weeks or months to conduct research; and, of course, the excellent Peace Palace Library, in my home town, where I spent many hours, in inspiring surroundings, reading or writing.

Aware of my intention to pursue a doctorate, my sister Marjolijn wrote in the acknowledgments of her PhD, that now it was hopefully my turn.⁹ It took me some years after that to actually get started, but my parents, brothers and sisters (John, Marjolijn, Floris, and Annelot) have always been incredibly supportive; and with "oma en opa" regularly looking after Tristan and Aedan, it was easier to work in a busy, demanding job, while doing academic research on the side. Above all, the opportunities provided to me by my parents, including

7 Later amended to become LACMO, by expanding the scope from peace operations to "military operations" more generally.

8 Namely, Chapters 3, 4, 5, and 6.

9 Marjolijn C. Bartels, *Ways to Improve (Visual) Outcome in Corneal Transplantation, Corneal Pathology and Astigmatism* (Erasmus University Rotterdam 2005), p. 154.

support when I – stubbornly – sought to make it in the challenging international field, and as examples of work ethos, have brought me to where I am today.

I remember my father, when I was still a small boy, sitting in his (very) small office in the attic, working on, what I later realised, his PhD. Most of that time, my grandmother was looking after me, after kindergarden was done. As this was always fun, I have never experienced my dad’s research, or later academic activities, as having placed a burden on the family. With a demanding regular job, also with often long hours, I am afraid I have placed a bigger strain on my own family. I nonetheless hope that our sons will positively reflect on the process of papa writing “his book”; even if during the drafting stages, the “book” appeared less than impressive to them, as they made clear, given that, at that time, it was just a unbound stack of printed paper, without any pictures.¹⁰

While doing research is a lonely (a)vocation, no big undertaking can be done alone. To conclude therefore, my greatest gratitude goes to my wife Natalie, and to Aedan and Tristan, for their inspiration, love, support, patience, as well as endurance. Indeed, they had to endure not only the many stacks of books and – ostensibly endless – piles of papers covering the desk or even spread throughout the house, but also, in addition to absent-mindedness when contemplating an academic paper or matter, my absence while I was at conferences, research trips, or the many late nights and/or weekend days working. I still have a vivid memory of the impressive Senaatskamer of Utrecht University, where I attended my father’s defence, despite being only four at the time. An advantage of having taken some time to complete this research, is that Aedan and Tristan are by now old enough to attend my PhD ceremony in the – similarly impressive – Agnietenkapel. I hope it will be worth their – and Natalie’s – while.



10 As indicated above, they did add “figures” to the manuscript.

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