

CIVIL SOCIETY AND INTERNATIONAL LAW

Angie Zelter
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Powerful nations have a tendency to act above the law and to abuse power, which is why there is a need for a strong civil society to keep track and pressure Governments to uphold international humanitarian law. This has been difficult as there is a great deal of official and public cynicism about law in general and international law in particular, epitomised by views that the law serves the powerful in society, does not look after the interests of the poor or weak, and is the law of the victors over the vanquished.

However, International Humanitarian Law is based on powerful foundational ideas of protection of the weak and powerless and of the environment. The Geneva Conventions, and other war laws, are good agreements that, if implemented, would keep warfare and conflicts within bounds, so that civilised life can be rebuilt after violent conflicts have ended.

And the public's role has been recognised for a long time. The Martens Clause¹, states that when cases are not covered by international agreements, '***civilians and combatants remain under the protection and authority of the principles of international law derived from (among other things) the dictates of public conscience***'.

In other words, the law derives from the ethical foundations of our society – from our consciences. And we need to be continually involved in refining our consciences in the light of current affairs. We need to realise that the law evolves, it is not static and we, as civil society, have a part to play in this. It cannot be left to government's or to the legal profession alone to bear this burden.

The Scotsman, Sir David Maxwell-Fyfe, a former Attorney General under Churchill, was the UK prosecutor at Nuremberg. In 1946 he said, "*The law is a living thing. It is not rigid and unalterable. Its purpose is to serve mankind, and it must change and grow to meet the changing needs of society. The needs of Europe today have no parallel in history.*"²

I would re-iterate and modernise this to say – *the needs of our interdependent, conflict-ridden world today have no parallel in history – international law must be strengthened and implemented and evolve to serve all of humankind.*

It is this sentiment that has informed much of civil society's creative involvement with international law. Rather than seeing it as an institution set in stone and way above us as part of the higher-level power struggles between mighty nations, many of us in civil society have engaged with international law as part of our attempts to humanise the State and its institutions and bring it into line with our 'public consciences'. We³ attempt to get our governments to comply and implement international law and also to develop it for the benefit of humanity as a whole and not for the narrow self-interests of a particular nation state.

1 The Martens Clause was first included in the Hague Convention of 1899, and is found more recently in Article 1, paragraph 2, of Additional Protocol I of 1977 with the wording '*civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience*'.

2 International Military Tribunal, The Trial of German Major War Criminals. Proceedings of the International Military Tribunal Sitting at Nuremberg, Germany. Part 22. 28th August 1946. Taken from the Official Transcript. Published by HMSO, London, 1950. P.243.

3 'We', here and throughout this paper, refers to many in the peace movement and other social change movements and indicates that it is felt by the author to be not only her own opinion but an opinion shared by many of her colleagues.

But there are serious challenges. ***"International law is not real law and does not apply in Scotland"*** - thus said a Procurator Fiscal in Helensburgh District Court in 1999⁴, and although not often so frankly articulated, nevertheless this is still an attitude prevalent in the courts at all levels when applied to cases involving protests against nuclear weapons. It is accompanied by impatience and strong disapproval of ordinary citizens meddling in the law, and a belief that 'amateurs' should not try to 'uphold' the law or 'take the law into their own hands'. We are told over and over again not to get involved, that it is up to the government, or the police, or the military, or some other institution, to deal with crimes against peace or war crimes. In the UK, there are outdated judgements that hold our society back, like that of Hutchinson⁵ which misinterprets the ICJ's Advisory Opinion, or Chandler⁶ which relies upon the principle of the Royal Prerogative⁷ to insist that the disposition of the armed forces is not justiciable, that it is not for judge or jury to decide what the armed forces can or cannot do. In effect, these judgements have prevented the courts from acting as a necessary balance to the power of the executive and ensured that they do not do their job of judging whether the armed forces are acting within the law. This lack of judicial oversight has allowed our State to cover up their illegal acts.

However, civil society acts in the belief that the strength and wisdom of a society lies with its people and that we get the government and legal system that we allow. We believe we are not completely powerless but are responsible individuals. Thus we cannot stay silent or be still when we can see gross crimes being committed in our names. We see the active deployment of weapons of mass destruction and know that the use of such weapons would break the fundamental principles of humanitarian law. Taking the law seriously we call our institutions to account. We become part of the forces creating the evolution of our society, taking a part in shaping the law and ensuring its implementation.

There have been numerous examples of civil society attempts to get governments to comply with and develop international law. They can be categorised as three broad routes.

One route is campaigning and lobbying, on both national and international levels, **to get international law modernised and developed**. For instance, the International Campaign to Ban Landmines was a particularly successful example of civil society groups combining together to campaign for a new Treaty. From its small beginnings in 1991 it took a mere 8 years for the Mine Ban Treaty⁸ to be formulated, ratified and become binding in international law. It is a wonderful example of what dedicated 'global citizens' can persuade governments to do.

A second route tries to get national and international institutions **to comply with the existing international laws** – either through education and lobbying or through the legal system. Thus civil

4 See 'Trident on Trial – the case for People's Disarmament' by Angie Zelter, Luath Press. ISBN1-84282-004-4.

5 Hutchinson v. Newbury Magistrates' Court (9 October 2000, CO/663/00)

6 Chandler & Others v DPP [1962] 3 All E.R. 142

7 A recent articulation of this can be seen in the March 2002 letter from Rt. Hon Adam Ingram Minister of State for the Armed Forces who stated, *'The right of her Majesty's Government to prosecute military operations abroad is not derived from statute but from the common law, and is exercised under the Royal Prerogative. Powers under the Royal prerogative are those uniquely enjoyed by the Crown and exercised on its behalf by Ministers. The conduct of foreign affairs, including the commitment of forces for military operations, is carried out in reliance on the prerogative.'*

8 The [Mine Ban Treaty](#) is the international agreement that bans anti-personnel land-mines. Sometimes referred to as the Ottawa Convention, it is officially titled: the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. The treaty aims to rid the world of the scourge of mines and deals with everything from mine use, production and trade, to victim assistance, mine clearance and stockpile destruction. In December 1997 a total of 122 governments signed the treaty in Ottawa, Canada. In September the following year, Burkina Faso was the 40th country to ratify, triggering entry into force six months later. Consequently, in March 1999 the treaty became binding under international law, and did so more quickly than any treaty of its kind in history.

society groups produce briefing papers on what laws are being broken and how⁹, encourage debate, lobby, and urge their governments to uphold international law by suggesting various policy changes like stopping the export of arms to repressive regimes, refusing to send troops to invade other countries, voting in the UN appropriately. They hold conferences and demonstrate.

Individuals and groups also use the legal system in various ways either to judicially review government decisions¹⁰ or to take out cases that attempt to get the legal system to indict government and military leaders involved in or complicit in war crimes, crimes against the peace, crimes against humanity, or in preparations for such crimes. For instance, in the 1980's at the height of the nuclear weapons escalation during the Cold War, there were attempts to prosecute the Prime Minister for conspiracy to commit war crimes¹¹ but the courts rejected these attempts as 'malicious' litigations or by stating that they were not prepared to review the decisions of the Attorney General. Most of these attempts were made by ordinary citizens representing themselves directly in the courts.

However, groups also employed lawyers to advise them and to take cases on their behalf. Thus, law firms like Public Interest Lawyers¹² worked with CND to take the Government to court to ask for an advisory opinion on the legality of using Resolution 1441 as a pretext for war¹³, and also with the Gentles & other parents of British soldiers killed in Iraq who brought a judicial review of the Government's failure to order an independent inquiry into the events leading to the decision to invade Iraq. More recently the Nuclear Information Services asked for a Judicial Review of the decision to renew the Trident nuclear weapon system¹⁴.

Attempts to bring to justice those in power have continued over many years and each time civil society gains in strength. Whereas the attempts in the '80's hardly made an impact on society at large, more recent attempts have had a profound impact on debate and feelings in the country. The CND sponsored coalition of law professors and leading NGOs who served notice¹⁵ in 2003 on Blair, Hoon and Straw that they would be investigated by the ICC Prosecutor if the UK breached International Humanitarian Law during any proposed use of force against Iraq fed into the huge anti-war protests that led to the largest demonstration in British history¹⁶. This is being followed up with reports being sent to the International Criminal Court. International Law has now become a prominent part of public debate.

These continuing legal challenges are a part of the process of bringing our society into line with

9 See <http://www.inlap.freeuk.com/publications.htm> for a sample of the kinds of legal briefings that one civil society group INLAP have produced.

10 <http://tapol.gn.apc.org/press/files/pr031210.htm> - Legal action launched against UK Government's arms to Indonesia policy - press release issued jointly by TAPOL and Campaign Against Arms Trade (CAAT) on 10 December 2003- *'A human rights activist from Aceh, Indonesia has today launched proceedings against the UK Government challenging by Judicial Review the legality of the UK's supply of arms to Indonesia. Mr. Aguswandi claims the continued licensing of military exports to Indonesia breaks UK and EU export control laws which clearly state that export licences for weapons should be refused if there is a risk of the equipment being used for internal repression.'*

11 With the Pax Legalis cases and the Snowball information layings.

12 Established in 1999. <http://www.publicinterestlawyers.co.uk/>

13 This was, comprehensively argued by Rabinder Singh, QC and Charlotte Kilroy, acting for CND. The three judges ruled that they could not give an opinion as they had no jurisdiction on this aspect of international law and that it may be 'damaging to the public interest in the field of international relations, national security or defence.' The same CND legal team produced an opinion on why the proposed draft '2nd resolution' would not give legal authority to go to war. They also wrote an opinion on the Attorney General's use of Resolutions 678,687 and 1441 to authorise the war, both on the eve of war and after it became clear that weapons of mass destruction were not being found in Iraq.

14 In the High Court on 26th January, Lord Justice Scott Baker refused NIS permission to appeal Mr. Justice Simon's decision of 10th June 2008 not to grant permission to claim Judicial Review of the Government's 2006 Defence White Paper and its decision to renew the Trident nuclear weapons system. www.nuclearinfo.org

15 Letter to the Prime Minister and Secretary of State for Defence of 23 January 2003.

16 Stop the War Demonstration 15 February 2003.

humanitarian law. Civil society is often well ahead of institutional changes thus legal challenges may not work at any one particular time. Nevertheless, they often succeed at a later date when attitudes have changed and the institutions have caught up. Thus courts must continually be presented with the opportunities to implement international humanitarian law and to act independently of the executive.

On a more international level, we must not forget that it was a global civil society initiative, that eventually drew in international lawyers, that pressed successfully to get the UN to ask the International Court of Justice for their advisory opinion on nuclear weapons in 1996¹⁷ and which has formed the bulk of our discussions today. It was successful because it engaged with citizens in many different nations of the world community and the powerful national governments were not able to stop the process in the end.

A third route is direct citizen's implementation of international law. For example, through disarmament attempts by civil society wishing to prevent weapons being sent out or used where there is evidence that international law will be broken. Thus, there have been nonviolent direct actions to disable weapons being exported to repressive regimes like the British Aerospace Hawk Jets to Suharto's Indonesia that were being used to commit genocide amongst the hundreds of unique tribes in East Timor¹⁸ or the incursions onto US war-planes going out to Iraq and supplying weapons to Israel in its bombing of civilian targets in Lebanon¹⁹. The Trident Ploughshares disarmament actions, like the throwing into Loch Goil of the vital equipment used to test Trident nuclear armed submarines²⁰ form other examples.

Thus civil society has already been playing a vital role in the implementation and development of international law. I believe we are still needed. We are, here in Scotland, at a crucial time for nuclear disarmament. I hope that the civil society pressure on the MSPs and the legal system will be seen as a supportive one for international law and will provide the strong social and political pressure that is needed for Scotland to implement international law and refuse to base and deploy nuclear weapons systems any more.

17 This led to the International Court of Justice Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, General List No.95, 8 July 1996.

18 Seeds of Hope – East Timor Ploughshares – 4 women did £1.5 million worth of damage to one Hawk Jet which was then unable to be exported. After 6 months in prison they won their trial at Liverpool Crown Court (30 July 1996. Case No. T961301) when a jury acquitted them after listening to what had been happening in East Timor and their arguments on international law.

19 In 2006 Prestwick Airport was used to airlift troops to fight in the war in Iraq and also to airlift munitions out to Israel to re-stock their dwindling supply of munitions in their bombing campaign in Lebanon. 3 Trident Ploughshares groups entered the airport on three successive nights to protest at what they considered to be collusion in war crimes. Most of them were acquitted in Ayr Sheriffs Court. A more recent example is the extensive damage done to the offices and equipment used at the Brighton based MBM factory that supplied arms to Israel in its bombing campaign in January 2009. The ITT/EDO MBM arms factory in Moulscombe, Brighton was entered on 17th January 2009. The activists said that they were 'decommissioning' the factory in solidarity with the people of Gaza, who are currently at the receiving end of the factories products. The grave breaches of international law committed by the Israeli Defence Forces against Palestinian civilians is likely to form a major part of their defence.

20 Loch Goil Trident Ploughshares action – acquittal at Greenock (21 October 1999) – more information on TP website at <http://www.tridentploughshares.org/article818>