Foreword

Good law books and doctoral theses in law deal with a problem of relevance for practice, but place the solution in a larger theoretical framework of – in this case public international – law. Anne Quintin's book is such a good book. Based upon a perfect understanding of public international law, international humanitarian law (IHL) and international human rights law (IHRL), it explores whether IHL provides permissions to act, or is only composed of prohibitions and prescriptions. The extremely nuanced answer to this question, always exploring possible counterarguments, is couched in larger debates about the nature of international law and of legal norms in general. She is, however, cautious not to decide theoretical debates for purposes other than IHL.

When Henry Dunant initiated the modern codification of IHL after the battle of Solferino, IHL was regarded as imposing only positive obligations (for instance, collecting and caring for the wounded and sick) and negative obligations (for example, not to attack medical personnel) on States. Existing treaty IHL may still be viewed in the same manner and Anne Quintin's meticulous analysis of the *travaux préparatoires* of IHL instruments of the last 150 years shows that such an understanding was widely shared by their drafters. The very nuanced and cautious analysis of the 1899 Hague Conference is a masterpiece in itself. This finding is not astonishing because IHL applies to an activity that is to be avoided and is today outlawed even when IHL is perfectly respected – war. The rule allowing a Detaining Power to subject prisoners of war to internment may be understood as simply meaning that such deprivation of liberty (which is not based on an individual reason or process) is not prohibited, but that it is subject to all of Geneva Convention III's limitations. Belligerents have obviously always considered that they may kill enemy combatants while fighting, destroy military objectives and deprive captured enemies of their liberty. However, the ability to undertake these wartime actions was not seen as being based upon a permission given by IHL (which IHL could also have refused) but rather upon the inherent power of States to wage war and the fact that 'the laws of war' did not prohibit such conduct.

More recently, some States (for instance, the US in what it termed for a certain time the 'war on terror') and many scholars increasingly argue that IHL equally 'authorizes' States to undertake certain actions in war. Even the International Committee of the Red Cross (ICRC) considers that IHL foresees 'an inherent power to detain'. This follows the traditional claim that combatants

in an international armed conflict (IAC) have a right to kill enemy combatants who are not hors de combat. All of this raises several questions explored by Anne Quintin. Why would belligerents need such ‘permissions’? What are the meaning and consequences of such a ‘permission’? Which IHL rules provide for such a ‘permission’? Anne Quintin focusses, after an admirable general analysis of IHL itself based on relevant aspects of public international law, on the two most controversial issues in IHL: whether belligerents have a permission to use lethal force and whether they have a permission to deprive persons of their liberty. In my view rightly so, those issues are analysed separately for IACs and for non-international armed conflicts (NIACs), despite contemporary tendencies of both States and humanitarians to blur this distinction.

Belligerents may need permission under IHL for several reasons. First, this is the case if international law always prohibits a conduct that it does not permit. Second, a permission is also needed if the Martens Clause implies, as some authors claim, that in the field of IHL every conduct that is not permitted is prohibited. Third, if a certain conduct is prohibited by another rule of international law but not by IHL, an IHL ‘permission’ is needed as the *lex specialis* applicable in armed conflicts to prevail over the prohibition found elsewhere. The latter reason, requiring a permission under IHL to engage in a certain conduct, is theoretically distinct from – but overlaps in practice with – the case that another rule of international or domestic law requires a legal basis for a certain conduct to be lawful. This principle of legality plays an increasingly important role in domestic laws and in IHL. Anne Quintin shows, however, that legal basis and permission are two distinct concepts.

As to the question whether IHL offers permissions, the answer is blurred by the fact that the term ‘permission’ has different meanings. First, a permission could imply a subjective right. However, due to the strict separation between *jus ad bellum* and *jus in bello*, such a right does not mean that the adverse party must tolerate such conduct under international law. Even if, for the sake of argument, combatants have a ‘right’ to kill other combatants and to destroy military objectives, a State that is a victim of aggression may obviously do everything feasible (and compatible with IHL) to hinder the ‘right’ holder from exercising that right. Even within IHL, combatants who are attacked by a belligerent exercising its ‘right to kill’ are not obliged to tolerate being killed, which would be the consequence of a genuine right. A right of passage, for example, implies that a State may not be prevented from exercising the rights it has. Combatants, however, may not be punished for having killed those exercising their ‘right’ to kill. This is inherent in combatant status. Similarly, if a right to intern existed, those who could be interned under such a right could not resist capture – just as criminals have no right to resist arrest by the police. Combatants, in contrast, may resist capture. Even once interned as POWs, they

may try to escape and may only be subject to disciplinary punishment if their escape is unsuccessful.

Second, permissions may refer to what Anne Quintin calls ‘strong permissions’. IHL rarely explicitly mentions such strong permissions, but some cases exist, such as that combatants have ‘the right to participate directly in hostilities’. Most often, they implicitly result from interpretations (which must follow all of the usual rules of interpretation) of exceptions to prohibitions or conditions that IHL attaches to certain obligations. Thus, IHL protects civilians against attacks ‘unless and for such time as they take a direct part in hostilities’. Strong permissions constitute IHL rules that may (but not always) prevail over rules of IHRL under the *lex specialis* principle. In my opinion, whether strong permissions also constitute a legal basis required by IHRL is a question that only arises if IHRL constitutes the *lex specialis* on the issue at hand. If so, this must then be determined according to the normal IHRL requirements for a legal basis, which include rules of international law.

Third, the term ‘permission’ may also simply mean an absence of prohibitions. IHL undoubtedly contains instances in which violence or treatment unacceptable in peacetime is not prohibited during an armed conflict. Anne Quintin calls them ‘weak permissions’. In such cases, IHL tolerates and regulates such conduct or considers that it is either legally indifferent or irrelevant for IHL (which therefore does not contain any rule on it). The principle of effectiveness, which is very important for IHL, also supports this understanding of most IHL ‘permissions’. Although IHL applies based upon facts, it does not legitimize those facts. Rather, drafters of IHL treaties started from the idea that States are free to act because it would have been impossible and superfluous from their point of view to enumerate everything a State may do.

Anne Quintin shows that there are good reasons to consider that IHL is essentially a restrictive regime. In that sense it mirrors the general debate that she presents on international law consisting mainly of an obligation framework that leaves residual freedom to States rather than an authorization framework that must give States permission to act. As mainly a framework of obligation, IHL includes many prescriptions but only very few strong permissions. One has to look not only at the definitions of IHL provided in most textbooks and by the ICRC, but also at the wording of the overwhelming majority of rules.

Nevertheless, Anne Quintin must admit that certain strong permissions exist under IHL. Article 43(2) of Protocol I indeed states that ‘combatants ... have the right to participate directly in hostilities’. Concerning the deprivation of personal freedom of prisoners of war (POWs), Article 21 of Convention III provides that ‘[t]he Detaining Power may subject prisoners of war to internment’. No State has legislated to provide a legal basis or procedure to intern POWs, which would be required by most domestic laws and IHRL if IHL itself

did not authorize and constitute a sufficient legal basis to intern POWs without any individual assessment.

However, treaty IHL of NIACs does not contain any similar rules that provide strong permissions for deliberate killings or detention without trial. Admittedly, it also does not prohibit such conduct. The only clear strong permission IHL of NIACs contains concerning the use of lethal force is the permission to use force against civilians directly participating in hostilities for the duration of their participation. The permission to attack members of an armed group with a continuous combat function can, at best, constitute a strong permission under customary IHL. IHL treaty law is silent on the matter. Anne Quintin shows, however, that the principle of legality has in IHRL a different meaning for the right to life than for the admissibility of the deprivation of liberty, and therefore the absence of a strong permission to use lethal force in NIACs does not necessarily mean that such use of force violates IHRL.

By contrast, and this is in my view the most important practical result of this book, on which, in addition, the author differs with her employer, the ICRC, IHL of NIACs only provides weak permissions to deprive members of armed groups of their liberty. Such weak permissions cannot prevail as the *lex specialis* over IHRL requirements. In contrast, the ICRC considers that ‘both treaty and customary IHL contain an inherent power to intern and may thus be said to provide a legal basis for internment in NIAC’. A 2015 resolution adopted by the International Conference of the Red Cross and the Red Crescent reinforces this opinion by recognizing in a preambular paragraph that ‘under international humanitarian law (IHL) States [but, interestingly, not armed groups] have in all forms of armed conflicts ... the power to detain’.

I agree with Anne Quintin. I cannot imagine that any human rights body or domestic judge would recognize an inherent power to detain in NIACs as a sufficient legal basis for depriving persons of their freedom. The possible legal reasons to justify such power – that is, either by analogy to IHL of IACs or through an alleged customary rule – are, in my view, very weak. Indeed, it is extremely doubtful whether reasoning by analogy can provide a sufficient legal basis under IHRL. Second, the factual situation is very different in IACs and NIACs in relation to both the lethal use of force and detention because it is much more difficult in NIACs than in IACs to legally and factually determine who is a legitimate target of such action and when the NIAC (which provides the alleged authorization) actually ends. Anne Quintin shows that an analogy between IACs and NIACs cannot cover permissive rules. As for the alternative claim that customary law provides an authorization to detain in NIACs, Anne Quintin enumerates in detail the specific legislation of States engaged in NIACs that authorizes the detention of fighters, which shows that no general practice and *opinio juris* exist according to which IHL alone would provide a sufficient legal basis. The alleged legal basis provided by IHL is only

invoked in extraterritorial NIACs. Even there the majority of States involved in, for instance, the NIAC in Afghanistan did not detain fighters beyond a limited period but instead transferred them either to the Afghan authorities or to the US (which claims that such an authorization exists) or released them. Despite the above-mentioned resolution, this does not show a sufficiently widespread *opinio juris* supporting the alleged customary legal basis permitting the detention of fighters in NIACs.

Finally, the reader will appreciate the Cartesian structure of this book, which honours the best French tradition, while the constant care for practical pragmatic results and for reality checks follows the best Anglo-Saxon traditions.

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