

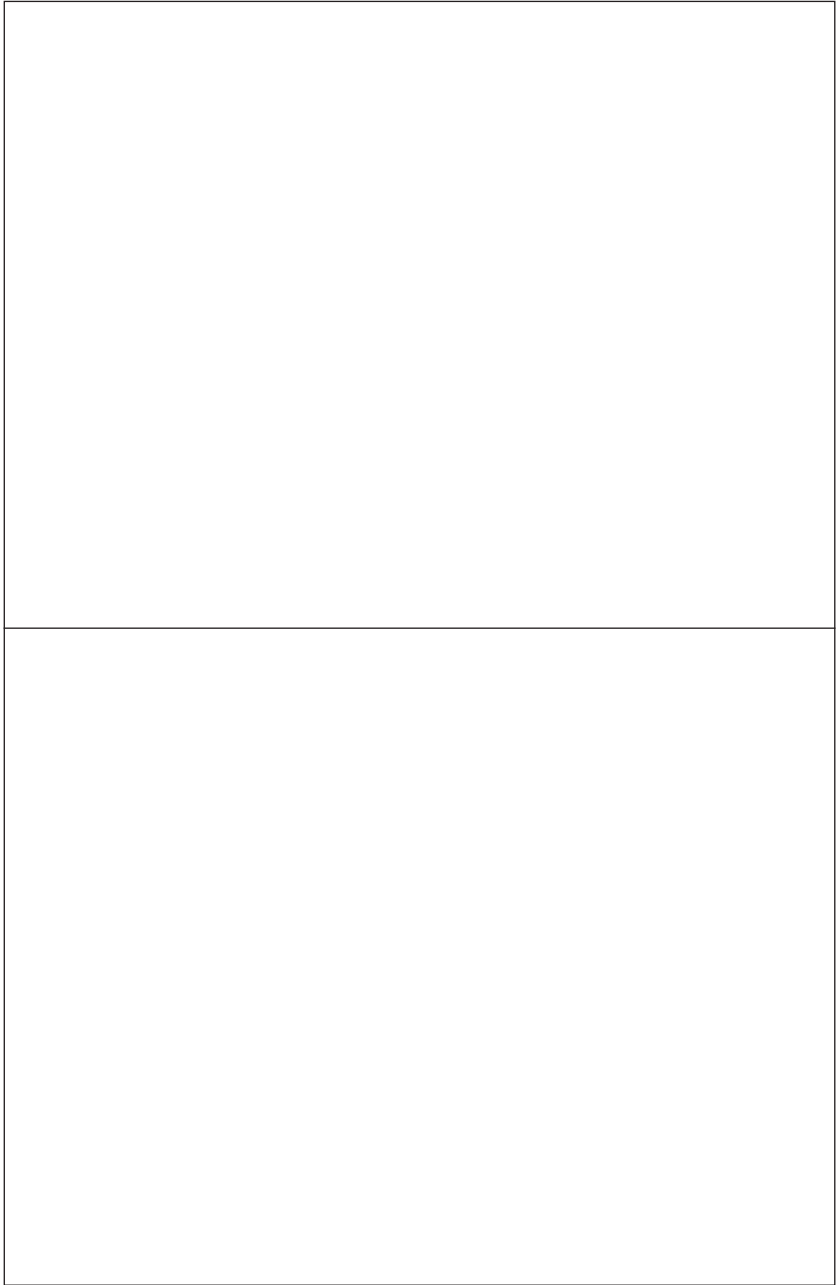
Björnstjern Baade/Linus Mührel/Anton O. Petrov (eds.)

International Humanitarian Law in Areas of Limited Statehood

Adaptable and Legitimate or Rigid and Unreasonable?



Nomos



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Björnstjern Baade, Linus Mührel, Anton O. Petrov
Berlin, March 2018

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African Charter on Human and Peoples' Rights (adopted 27 June 1981, entered into force 21 October 1986) CAB/LEG/67/3 rev. 5, 21 ILM 58 (ACHPR)

American Convention on Human Rights (adopted 22 January 1966, entered into force 18 July 1978) 1144 UNTS 123 (ACHR)

Charter of the United Nations (adopted 27 June 1945, entered into force 24 October 1945) 1 UNTS XVI (UN Charter)

Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14 (adopted 4 November 1950, entered into force 1953) ETS 5 (ECHR)

Convention for the Settlement of Investment Disputes between States and Nationals of other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention)

Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 21 August 1949, entered into force 21 October 1950) 75 UNTS 31 (GC I)

Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (adopted 21 August 1949, entered into force 21 October 1950) 75 UNTS 85 (GC II)

Geneva Convention relative to the Treatment of Prisoners of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 135 (GC III)

Geneva Convention Relative to the Protection of Civilian Persons in Time of War (adopted on 12 August 1949, entered into force 21 October 1950) 75 UNTS 287 (GC IV)

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Hague Convention Respecting the Laws and Customs of War on Land and Its Annex: Regulations Concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) (Hague Regulations)

International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

Protocol Additional to the Geneva Convention of 12 August 1949, and relating the Protection of Victims of International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 (AP I)

Protocol Additional to the Geneva Convention of 12 August 1949, and relating the Protection of Victims of Non-International Armed Conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 (AP II)

Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90 (ICC-Statute)

Statute of the International Court of Justice (adopted 24 October 1945, entered into force 18 November 1946) annexed to the Charter of the United Nations (ICJ-Statute)

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT)

Resolutions of the United Nations General Assembly

Articles on Responsibility of States for Internationally Wrongful Acts: resolution (adopted 8 January 2008 by GA Res A/RES/62/61) (ASR)

Resolutions of the United Nations Security Council

Statute of the International Criminal Tribunal for the Former Yugoslavia (as amended on 17 May 2002) (adopted 25 October 1993 by SC Resolution 827/1993) (ICTY-Statute)

Statute of the International Criminal Tribunal for Rwanda (as last amended on 13 October 2006) (adopted 8 November 1994 by SC Resolution 955/1994) (ICTR-Statute)

List of Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHR	American Convention on Human Rights
AJIL	American Journal of International Law
AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts
ASIL	American Society of International Law
ASR	Articles on State Responsibility
BIT	Bilateral Investment Treaty
BYIL	British Yearbook of International Law
CA 3	Common Article 3 of the four Geneva Conventions of 12 August 1949
Case W. R. JIL	Case Western Reserve Journal of International Law
DRC	Democratic Republic of the Congo
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
FPS	full protection and security
GC I	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field
GC II	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea
GC III	Geneva Convention relative to the Treatment of Prisoners of War
GC IV	Geneva Convention relative to the Protection of Civilian Persons in Time of War
GOJIL	Goettingen Journal of International Law
GYIL	German Yearbook of International Law
Harv. Int'l L. J.	Harvard International Law Journal
Hague Regulations	Regulations Concerning the Laws and Customs of War on Land, Annex to the Convention Respecting the Laws and Customs of War on Land of 18 October 1907
IAC	International Armed Conflict

List of Abbreviations

ICC	International Criminal Court
ICC-Statute	Rome Statute of the International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICJ Rep	International Court of Justice, Reports of Judgments, Orders and Advisory Opinions
ICJ-Statute	Statute of the Court of International Justice
ICLQ	International and Comparative Law Quarterly
ICRC	International Committee of the Red Cross
ICSID	International Centre for Settlement of Investment Disputes
ICSID Convention	Convention for the Settlement of Investment Disputes between States and Nationals of other States
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IHLRI	International Humanitarian Law Research Initiative
IHRL	International Human Rights Law
IIL	International Investment Law
ILC	International Law Commission
ILM	International Legal Materials
ILR	International Law Reports
ILS	International Law Studies
IO	International Organisation
IRRC	International Review of the Red Cross
ISAF	International Security Assistance Force
ISIS	Islamic State of Iraq and Syria / Daesh
IYHR	Israel Yearbook on Human Rights
J. Int'l L. of Peace & Armed Conflict	Journal of International Law of Peace and Armed Conflict
JCSL	Journal of Conflict & Security Law
JICJ	Journal of International Criminal Justice
JILP	NYU Journal of International Law and Politics
JPR	Journal of Peace Research
JZ	Juristenzeitung
KFG	Kolleg-Forscherguppe
LJIL	Leiden Journal of International Law
LTTE	Liberation Tigers of Tamil Eelam
MPEPIL	Max Planck Encyclopedia of Public International Law
NIAC	Non-International Armed Conflict
OAG	Organised Armed Group

PCIJ	Permanent Court of International Justice
POWs	Prisoners of war
RdC	Recueil des Cours de l'Académie de Droit International de La Haye
SJZ	Süddeutsche Juristenzeitung
TDM	Transnational Dispute Management
UK	United Kingdom of Great Britain and Northern Ireland
UNCITRAL	United Nations Commission on International Trade Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UN GA	United Nations General Assembly
UN HRC	United Nations Human Rights Committee
UN SC	United Nations Security Council
UN SG	United Nations Secretary-General
UN-Charter	Charter of the United Nations
US	United States of America
VCLT	Vienna Convention on the Law of Treaties
VJIL	Virginia Journal of International Law
Yale J. Int'l L.	Yale Journal of International Law
YbIHL	Yearbook of International Humanitarian Law
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht / Heidelberg Journal of International Law

Introduction: International Humanitarian Law and Areas of Limited Statehood

Heike Krieger, Björnstjern Baade and Linus Mührel

IHL needs to cover increasingly diverse forms of armed conflict. While its main structural features were conceived in the 19th and 20th century against the background of a predominant narrative of war conducted on a battlefield between armies and navies of sovereign States, the effectiveness of its legal rules has been constantly challenged by recurring changes in the conduct of warfare. During the last twenty-five years, the predominance of intra-State conflicts and the militarisation of terrorism has led to a focus on asymmetrical conflicts and NIACs. In recent years, challenges stem from the increasingly blurred lines between armed conflicts and more subversive forms of the use of force, as symbolised by the concept of ‘hybrid warfare’. For maintaining its effectiveness, IHL needs to respond to changing social realities and thus accommodate new phenomena. Accordingly, changing conflict paradigms as well as the development of new technologies and corresponding strategies have tested the adaptability of existing rules and pushed for new rules, mostly laid down in treaty obligations.

However, since the adoption of the 1949 Geneva Conventions and the 1977 Additional Protocols, new treaties on the conduct of warfare have not been concluded. Instead, the international community has accommodated new phenomena through customary international law, interpretation and a focus on compliance. In particular, international tribunals have developed the rules of IHL in their jurisprudence and both the ICRC and the UN SC have focused on the enforcement of and compliance with IHL. Despite these efforts, including the establishment of the ICTY, the ICTR and the ICC, there is a widespread perception of a crisis of IHL. Some observers hold that its rules cannot sufficiently direct the behaviour of relevant actors.¹ In order to counter the perception of such a trend the ICRC has

1 Cf ‘Report of the Secretary-General on the protection of civilians in armed conflict’ UN Doc S/2017/414 (10 May 2017) 3, 7 et seq; Ian Clark et al, ‘Crisis in the laws of war? Beyond compliance and effectiveness’ (2017) *European Journal of International Relations* <<http://journals.sagepub.com/doi/pdf/10.117>

changed its publicity strategy and aims to shed more light on successful cases of compliance.² One may assume that this policy change reflects the understanding that the effectiveness and the legitimacy of norms are mutually reinforcing.³ While emphasising that the rules of IHL are still effective might contribute to an increase in compliance, challenges to their legitimacy also need to be addressed in order to further compliance.⁴

The interplay between effectiveness and legitimacy as an important precondition for norm-compliance in IHL can be made explicit by focusing on the challenges which stem from areas of limited statehood. The present volume considers the impact such areas have on IHL and it inquires whether IHL can be adapted to meet challenges emerging from them in a way that is perceived as legitimate.

While the term ‘areas of limited statehood’ (A.) as such is only seldom used in legal discourse, areas of limited statehood have had a discernable impact on various developments that affect international law.⁵ Regarding IHL, various challenges stem from the territorial State’s limited capabilities and the need to compensate for them through other actors, in particular other States, international organisations and NGOs. Armed non-State actors’ exercise of governance functions poses the most problems in this context (B.). How has IHL responded to these challenges so far? Or has a lack of responsiveness created legitimacy problems (C.)? These and other questions were probed by the contributions to this volume (D.). As a whole, the contributions reveal the dilemma that by trying to improve legitimacy and effectiveness for some actors, the same might be reduced for others.

7/1354066117714528> accessed 13 December 2017 (hereafter Clark et al, ‘Crisis in the laws of war?’).

2 For further reading, see Juliane Garcia Ravel, ‘Changing the narrative on international humanitarian law’ (*Humanitarian Law & Policy*, 24 November 2017) <<http://blogs.icrc.org/law-and-policy/2017/11/24/changing-the-narrative-on-international-humanitarian-law/>> accessed 13 December 2017.

3 Heike Krieger ‘Governance by armed groups: Caught in the legitimacy trap?’ in Cord Schmelzle and Eric Stollenwerk (eds), *Virtuous or Vicious Circle? Governance Effectiveness and Legitimacy in Areas of Limited Statehood, Special Issue* (under review).

4 Heike Krieger (ed), *Inducing Compliance with International Humanitarian Law* (CUP 2015) (hereafter Krieger, *Inducing Compliance*).

5 For further reading, see Heike Krieger, ‘International Legal Order’ in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming) (hereafter Krieger, ‘International Legal Order’).

*A. Areas of Limited Statehood*⁶

Areas of limited statehood constitute those parts of a State in which the government lacks the capability to implement and enforce rules and decisions or in which they do not command a legitimate monopoly over the means of violence.⁷ The term does not imply the extinction of a State (as a whole or in a certain area). The area still *de jure* belongs to the State, but its internal sovereignty there is *de facto* tenuous.

The term ‘areas of limited statehood’ describes an empirical phenomenon which has to be distinguished from normative concepts such as ‘unwilling and unable’ or ‘failed’ States.⁸ These concepts are closely related to the phenomenon of securitisation and may thus be understood as tools of States of the Global North to push their specific interests in law-making processes, for instance in relation to re-interpretations of the right to self-defence. In contrast, the term ‘areas of limited statehood’ neither implies a normative judgment that a State has failed nor suggests that State failure would be the definite result of a process.⁹ It is meant as a neutral analytical tool that avoids negative connotations and opens the door for an analysis from different perspectives. These can include the questions whether and to what extent the limitedness of statehood is compensated by other actors, what kind of governance they may perform, and how effective those governance functions are.¹⁰ The term is also broader in the sense that only certain policy

6 This part draws from Krieger, ‘International Legal Order’ (n 5).

7 Tanja Börzel, Thomas Risse and Anke Draude, ‘Governance in Areas of Limited Statehood: Conceptual Clarifications and Major Contributions of the Handbook’ in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming) (hereafter Börzel, Risse and Draude, ‘Governance in Areas of limited Statehood’).

8 Ibid.

9 Note that also e.g. Görlitzer Park in Berlin Kreuzberg can be qualified as an area of limited Statehood, see Börzel, Risse and Draude, ‘Governance in Areas of limited Statehood’.

10 Cf Klaus Schlichte, ‘A Historical Sociological Perspective on Statehood’ in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming); Andrew Brandel and Shalini Randeria, ‘Anthropological Perspectives on the Limits of the State’ in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming).

areas or parts of one or more States might be affected.¹¹ Another advantage is that the limitedness of statehood is empirically measurable according to certain factors, including administrative capacity and monopoly of force.¹² While the term ‘areas of limited statehood’, which was conceived by political scientists in the Collaborative Research Centre 700 ‘Governance in areas of limited Statehood’, has so far only seldom been used in legal discourse, it is by now gradually adopted because of its more neutral connotations.¹³

B. Legal Issues when other Actors Step in

Areas of limited statehood generally are not simply ungoverned.¹⁴ Other actors regularly step in to perform government functions: other States, international organisations and non-State actors, including non-State armed groups and NGOs, have the potential to, and do, exercise effective and long-term regulatory power in such areas.¹⁵ This has raised questions concerning the international legal obligations of non-State actors, international organisations and of States acting extraterritorially. The relevance of non-State practice and the possibility of a change in the structure of the law-making process that weakens or even undermines the primacy of State consent as the traditional foundation of positive international law-making, in order to improve the law’s legitimacy towards non-State actors, has also become a contentious issue.

11 Thomas Risse and Ursula Lehmkuhl, ‘Governance in Areas of Limited Statehood – New Modes of Governance?’, Research Program of the Collaborative Research Center (SFB) 700 (Berlin 2006) 9.

12 Eric Stollenwerk, ‘Measuring Governance and Limited Statehood’ in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming).

13 See e.g. Leuven Centre for Global Governance Studies of KU Leuven, in particular the research projects on ‘human rights, democracy and rule of law’, ‘peace and security’, and ‘non-state actors’ <<https://ghum.kuleuven.be/ggs>> accessed 13 December 2017.

14 This part draws from Krieger, ‘International Legal Order’ (n 5).

15 Cf various chapters in in Tanja Börzel, Thomas Risse and Anke Draude (eds), *The Oxford Handbook of Governance and Limited Statehood* (OUP 2018, forthcoming), e.g. Markus Lederer, ‘External State Actors’; Benedetta Berti, ‘Violent and Criminal Non-State Actors’; Marianne Beisheim, Annekathrin Ellersiek, and Jasmin Lorch, ‘INGOs and Multi-Stakeholder Partnerships’.

I. Other States and International Organisations

With third States and international organisations, difficulties arise in the classification of armed conflicts and the determination of the applicable human rights standards. These uncertainties endanger these actors' compliance and, more generally, the relevance of the law to the situation on the ground in areas of limited statehood, and thus its effectiveness

1) Fluidity of armed conflicts

The interventions of third States in internal armed conflicts in areas of limited statehood triggered a debate concerning the classification of those armed conflicts, which directly relates to IHL's effectiveness in these conflicts. Since the law of IAC provides a framework of detailed treaty rules as well as widely accepted customary law rules, it is *prima facie* better suited to effectively govern the conduct of States. In contrast, the law of NIAC only consists of a few treaty rules and the customary law status of several rules is contested. Intervening States will have fewer legal standards to guide their conduct if the conflict is classified as non-international. Thus, IHL becomes potentially less effective due to a lack of legal certainty which regime applies.

The debate around these so-called 'internationalised' NIACs focuses on two issues. On the one hand, it concerns the relation between the intervening State and the territorial State. On the other hand, it deals with the relation between the intervening State and the non-State armed group(s).

In cases in which the territorial State consented to the use of force of another State against a non-State armed group in its own territory, it is widely agreed that there exists a NIAC between the extraterritorially acting State and the non-State armed group. Thus, only the law of NIAC is applicable to this situation. In case of a lack of consent by the territorial State, however, it is highly controversial whether in addition to the NIAC between the intervening State and the non-State armed group(s) there exists a parallel IAC between the territorial State and the intervening State. In this case then also the law of IAC would apply between the territorial State and the extraterritorially acting State, i.e. the conduct of the extraterritorially acting State could underlie the law of IAC, too. This debate gained much attention after the US-led coalition and Turkey *inter alia* started to carry out air-strikes against ISIS and other Islamic terrorist groups in Syria and to

support other non-State armed groups fighting ISIS in the absence of Syria's consent.¹⁶

While some emphasise that the extraterritorial use of force affects the local population and the territorial State's infrastructure to argue for the existence of a parallel IAC,¹⁷ others mention the lack of practicality of the application of the rules of IAC.¹⁸

In addition, the debate concerning the extent of control that a State must have over a non-State armed group to render a NIAC between the non-State armed group and the territorial State into an IAC between the intervening State and the territorial State is still ongoing with no end in sight.¹⁹ Whereas the ICJ upholds its more restrictive effective control test,²⁰ the ICTY follows its broader overall control test.²¹

16 See the various blog-posts on this issue eg Adil Ahmad Haque, 'The United States is at War with Syria (according to the ICRC's New Geneva Convention Commentary)' (*EJIL Talk!*, 8 April 2016) <<https://www.ejiltalk.org/the-united-states-is-at-war-with-syria-according-to-the-icrcs-new-geneva-convention-commentary/>> accessed 17 November 2017; Ryan Goodman, 'Is the United States Already in an "International Armed Conflict" with Syria?' (*Just Security*, 11 October 2016) <<https://www.justsecurity.org/33477/united-states-international-armed-conflict-syria/>> accessed 17 November 2017; Ryan Goodman, 'International Armed Conflict in Syria and the (Lack of) Official Immunity for War Crimes' (*Just Security*, 18 October 2016) <<https://www.justsecurity.org/33670/international-armed-conflict-syria-lack-of-official-immunity-war-crimes/>> accessed 17 November 2017.

17 Tristan Ferraro and Lindsey Cameron, 'Article 2: Application of the Convention' in ICRC (ed), *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field* (2nd edn, CUP 2016) paras 257 et seq (hereafter Ferraro and Cameron, 'Article 2').

18 For further reading, see Terry D. Gill, 'Classifying the Conflict in Syria' (2016) 92 ILS 353; Claus Kieß, 'Some Reflections on the International Legal Framework Governing Transnational Armed Conflicts' (2010) 15 JCSL 245, 255 et seq.

19 Ferraro and Cameron, 'Article 2' (n 17) paras 265 et seq.

20 Application of the Convention on the Prevention and Punishment of Genocide (*Bosnia and Herzegovina v Serbia and Montenegro*) (Judgment) [2007] ICJ Rep 43, paras 392–393; Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v United States of America*) (Judgment) [1986] ICJ Rep 14, para 115.

21 *Prosecutor v Tadic* (Judgment) IT-94-1-A (15 July 1999) paras 120 et seq.