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**M. Lattimer and P. Sands (eds) *The Grey Zone: Civilian Protection Between Human Rights and the Laws of War* (Hart, 2018)**

As the title suggests, a 'grey zone' exists between the application of international human rights law and the law of armed conflict, both of which intend to protect civilians during armed conflict. There is also a growing gap between the law and its application. As conflicts in Syria, Yemen, Afghanistan and elsewhere bring massive numbers of civilian deaths and human suffering, this collection is an important and timely call for international law to face and address these gaps. Edited by Mark Lattimer, Executive Director of Ceasefire Centre for Civilian Rights and Phillippe Sands QC, professor of International Law at University College London, *The Grey Zone* brings together an impressive collection of leading experts, both academics and practising lawyers, to speak to these challenges. The volume is structured in three parts. 'Rights' addresses boundary issues that exist in the law, and how they apply to contemporary conflicts. Boundary issues include questions such as who is a civilian (Crawford), or how to classify armed conflicts in an era where 'non-international' armed conflicts become increasingly globalised (Kilibarda and Gaggioli). The second part, 'Remedies', turns to the numerous ways that the law is enforced, and how civilians can seek redress for violations of these laws. This includes the right to reparation for victims of armed conflict (Ferstman) and the application of international humanitarian law (IHL) standards in national courts (Weill). The third section, 'Developments', explores various ways the law can better protect civilians during periods of conflict and civil unrest. This volume is more than a collection of quality essays on the law of armed conflict and human rights, but also presents a clear focus and aim: to find ways to protect and provide remedies for civilians caught in this grey zone. It covers a broad array of issues and challenges without losing sight of this goal. It revisits some of the classical questions facing IHL and IHRL, such as the question of proportionality (Cohen) or the extraterritoriality of human rights obligations (Ryngaert), but also addresses newer developments, including the progress towards a new treaty on crimes against humanity (Sadat) and the new arms trade treaty (Ní Ghrálaigh).

*The Grey Zone* is primarily a legal book, so it is understandable that its authors focus on the content and application of the law. It primarily deals with questions about how to make the law more effective. Lattimer argues that, regarding Syria "the overwhelming issue is not identifying the applicable law but rather that both IHL and IHRL are being blatantly flouted with, up to now, almost complete impunity." (Lattimer, p.10). This is a theme picked up by a number of the authors: it is not the content of the law that is problematic, but that the law is consistently disobeyed. This leaves the author questioning what are the causes, beyond the law, that leave IHL and IHRL to be flouted? Jennifer Welsh's chapter on the responsibility to protect and non-state armed groups addresses these political issues. Welsh agrees that problems lie not with the law, but with its application: "the legal framework in international human rights, humanitarian and refugee law was already sufficient; the challenges was to close the gap between the law's promise and the actual suffering of civilians..." (Welsh, 359). Yet in seeking to close this compliance gap, the other chapters focus on the law, without seeking to understand the nature of new conflicts and the practical reasons the law is not observed. The final section discusses some proposals to deal with these gaps, yet these legal solutions do not always seem appropriate given the magnitude and complexity of the problems discussed in the preceding sections.

A core issue is the relationship between IHRL and IHL. The two most commonly cited ICJ judgments in the book are the *Nuclear Weapons* Advisory Opinion and the *Wall* Advisory Opinion. These judgments confirm that IHL and IHRL can apply concurrently. Beyond this, the authors take different positions on the relationship between these bodies of law, which are increasingly marked by a great deal of convergence. Bowring's 'The Death of *Lex Specialis*' is highly critical of the view that IHL and IHRL are complementary systems, arguing that they are like 'chalk and cheese', with fundamentally different

aims, purposes and histories. Applying IHRL to situations of armed conflict may appear to be a positive development – importantly, it can allow victims to access procedures that they may not under IHL, which lacks the same level of institutions. Yet it also gives rise to complexities and problems. Regarding the question “which law should apply?”, Ryngaert mentions that there is a ‘deceptively simple’ answer: “to apply the norm that is most protective of the rights of civilians”. Yet as Ryngaert acknowledges, this approach also has flaws. How does one assess which framework is more ‘protective’? Which civilians, and which rights, are to be prioritised? Most problematic, such an approach may not provide the level of certainty to decision-makers and combatants. Courts might be in a position to assess the relationship between IHRL and IHL after the fact, but the law also requires clear rules that can be applied in advance. The use of drones, the conditions of detention in NIACs, or the principle of proportionality, require clear rules. The volume does not present a coherent answer to this problem of how IHRL and IHL are to interact.

Rather than applying IHRL in situations of armed conflict, another proposal is to bolster the institutions and reporting mechanisms (such as those that exist in IHRL) in IHL. Yet as Zellweger and Voeffray show the process of establishing more robust IHL institutions has met steep political roadblocks. Given the state of international politics and growing scepticism towards international institutions, the prospects of establishing functioning institutional mechanisms, capable of dealing with situations such as Syria and Afghanistan, appears bleak. The Arms Trade Treaty is an example of how there is still some capacity for states to develop new treaties in this field. As Ní Ghrálaigh argues, this is a watered down treaty, and so far, it has done little to prevent states exporting arms to countries that abuse IHL and human rights. Sadat makes a compelling case for a treaty on crimes against humanity, arguing that it would help fill the impunity gap, the state responsibility gap, and resolve much of the doctrinal uncertainty relating to crimes against humanity. Many of the challenges examined in this volume, such as detention in non-international armed conflicts (Hampson), the use of drones (Casey-Maslen), issues related to hybrid warfare such as the use of cyber-attacks, could also be addressed through international legal instruments. IHL develops slowly, but it is not static. New treaties could be developed to apply to the new means, methods and patterns for organized violence that have emerged in the 21<sup>st</sup> Century.

Rather than calling for new treaties or institutions, most chapters call for a dynamic change in the interpretation and application of the law. Courts and tribunals play a pivotal role in this. The chapters thus address the role of international, regional and national courts in addressing some of the challenges, from providing justice to victims of sexual violence (Moore and Chinkin) to addressing violations committed during peacekeeping operations (Zegveld). Sharon Weill discusses the role of national courts in legitimizing government policies, examining the deferral, normative and utopian roles played by national courts. The jurisprudence of the International Criminal Court (ICC) is notably absent, however. The ICC Statute is mentioned – the ICC recognises gender-based crimes, and McDougall demonstrates how the ICC’s jurisdiction over the crime of aggression could improve the protection of civilians – but its case law has made little impact on the discussion of how to close the gaps in the grey zone. As Sadat mentions, “The ICC represents a very powerful idea but is actually a very small and fragile institution, with only eighteen judges, a modest budget, and no police force.” (p. 412). The ICC appears to have had little impact on the conceptual and legal questions addressed in the volume, which have mostly been dealt with by regional and domestic courts.

Protecting civilians does not just involve ensuring respect of the law during conflict, but also implies access to justice and accountability. The volume ensures that these questions are also prioritized. One of the most important developments in IHL in recent decades has been the establishment of accountability mechanisms, including international and hybrid courts, as well as domestic prosecution.

Yet there remains much more to be done to provide such justice and accountability. Lattimer, for instance, makes a convincing argument for a positive duty to investigate civilian death during conflict. Moore and Chinkin focus on the challenges of prosecuting the crime of rape. Ferstman discusses the right to reparation for victims of armed conflict. Zegveld discusses how the liability framework applies by Dutch courts (regarding peacekeeping) has improved access of justice to victims.

*The Grey Zone* addresses one of the most important issues facing IHL and IHRL: the lack of compliance and enforcement. Yet a clearer connection needs to be made between the state of the law and the nature of contemporary challenges in cases of armed conflict. The book looks at judgments, legal texts, and treaties that developed in the context of past conflicts. Yet if the volume seeks to investigate how to alleviate and prevent suffering in contemporary conflicts, the editors could have included more discussion about how and why the law is failing in these conflicts. Lattimer argues in the introduction that IHL relies largely on 'self-restraint', and that, although reciprocity is not the legal basis of the laws of war, they are linked. This implies that, in order to improve compliance with IHL (and IHRL), it will not be enough to improve accountability mechanisms, to provide greater legal clarity and address conceptual gaps. It will need to create conditions whereby combatants – both state and non-state actors – feel compelled to comply with these laws. The grey zone is a legal space, but it is also a political one. Closing legal gaps does not appear to be an adequate response in an era when the existing laws are broken with absolute impunity. Perhaps what is missing are the bold new ideas that will close the gap between the law and reality of contemporary conflict. *The Grey Zone* is a collection of masterful essays that span a broad range of legal problems related to the protection of civilians.