

Armed Conflict and International Law:
In Search of the Human Face

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Editors

Armed Conflict and International Law: In Search of the Human Face

Liber Amicorum in Memory
of Avril McDonald



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Foreword

By the time this book is published it will be about three years ago that Avril McDonald suddenly passed away, at the age of 44, on 13 April 2010. She left behind a large group of friends and colleagues and a lot of unfinished projects. There was so much that she had wished to achieve and that she was passionate about: her friendships, her research projects, her students. Avril lived an intense life in which she demanded much of herself and of others, including her students, in order to realise the best achievable results. She could be very critical of herself and could be very straightforward to others, but her enthusiasm and humour made it acceptable to everyone.

Avril had worked very hard to reach the position which she had attained in 2010. In May 2009 she was appointed as Rosalind Franklin Fellow in International Law and Contemporary Conflict at the University of Groningen in the Netherlands and in 2010 she would have become adjunct professor and entitled to use the title of *professor*. In this professorship she would have combined her expertise in international humanitarian law (IHL) with questions related to the use of force in international law, in particular on the role of non-state actors in international conflict. Avril graduated in law in 1987 at Trinity College, Dublin. However, the first years of her career were not dedicated to law but to journalism as she obtained a graduate diploma in journalism in 1988 and worked for various journals and magazines in Ireland, Australia and the USA, mainly in New York. In 1995 she had returned to the study of law and obtained an LLM in Human Rights and Emergency Law from Queens University in Belfast. Combining her skills as a journalist and her knowledge of international law she worked at the International Criminal Tribunal for the Former Yugoslavia as a Legal Assistant in the Press and Information Office in 1996 and 1997. Her scholarly ambition did not stop there and she started working on a Ph.D. thesis at Queen's University Belfast which she completed in 2002, while at the same time working in The Hague and at the T.M.C. Asser Institute as managing editor of the Yearbook of International Humanitarian Law (1997–2007) and as Head of the international humanitarian law section at the Asser Institute. Her increasing academic contributions were combined with various teaching posts at various universities in the Netherlands, including in Groningen, where she succeeded Professor Frits Kalshoven in 2004 as the lecturer on the course in international humanitarian law.

Avril was a remarkable teacher, capable of making a 7-week course in IHL, only a half-semester course, to one of the most intense, valuable and also most liked courses in the curriculum for students specialising in international law. In these lectures she really tried to share with the students her passion for this area of the law. With her energetic presentations, her humour, her sometimes provocative style, she left a great impression on many groups of students and aroused a lasting interest in IHL for many. Avril used all her talents in her teaching, but she also worked very hard to prepare fully for each class and for giving students all she had. She could be very demanding and critical, but at the same time she would always be there for students to help them to learn from her critique.

In about 10–20 years Avril was able to become an expert in the field of international humanitarian law as is evident from her growing list of publications, her participation in training programmes and summer schools in various countries and for audiences ranging from the academic to the military, her active involvement as an organiser, the chair and most often a speaker in dozens of conferences and seminars in many places around the world. With her new appointment as the Rosalind Franklin Fellow at Groningen University she was about to reap the fruits of all her work. She had worked on a book on private military contractors in armed conflict, a project she had hoped to conclude soon, and was active in developing her Rosalind Franklin project in which she would focus on various aspects of the use of armed force by non-state actors and the consequences thereof for the further development of the law of peace and security and international humanitarian law. With this project she would investigate and comment on international legal developments on the basis of an understanding of the changed nature of conflicts in the world and the involvement of not only states and their armies, but a variety of armed groups, terrorists and criminal organisations not under the control of state authorities.

Avril's motivation and inspiration was in essence a humanitarian one; international human rights and the application of the concept of humanity to international and internal conflict were her driving force. *Armed conflict and international law, in search of the human face* is therefore a very fitting title for this book dedicated to her. This book is a tribute to Avril from her friends and colleagues. There were many others who would have liked to contribute but had to be declined for various reasons.

Avril loved books. Her apartment in The Hague was famous for the large collection of books she had built up, including a huge number of (international) law books. Her collection of law books has been donated by her family to the University of Groningen and has been incorporated in the collection of the University library and can now be used by her colleagues and students. This book is published with the help of the Avril McDonald Memorial Fund, a fund set up by her colleague Roseland Franklin Fellows and for which activities are organised every year to replenish the fund. The fund is intended to support talented young scholars in realising their academic dreams. The book would not have seen the light of day without the relentless efforts of Brigit Toebes and in particular

Mariëlle Mathee. In the editorial phase Mathilde Bos has assisted very effectively in the preparation of this book for publication.

We are confident that this book will not only be regarded as a tribute from those who have contributed, but will also help everyone to remember Avril McDonald for the very special person she was.

Groningen, Spring 2013

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Abbreviations

| | |
|----------|--|
| AFRC | Armed Forces Revolutionary Council |
| AMIS | African Union Mission to Sudan |
| ANCBS | Association of National Committees of the Blue Shield |
| BMA | British Medical Association |
| CCW | Certain Conventional Weapons |
| CDF | Civil Defence Forces |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CETC (F) | Chambre de la Cour suprême du Cambodge |
| CPI (F) | Cour pénale internationale |
| DARPA | American Defense Advanced Research Projects Agency |
| DIH (F) | Droit international humanitaire |
| DoD | Department of Defense of the United States |
| DRC | Democratic Republic of Congo |
| DRTF | Disaster Relief for Museums Task Force |
| ECCC | Extraordinary Chambers in the Courts of Cambodia |
| ECHR | European Convention for the protection of Human Rights |
| ECOMOG | Economic Community of West African States Monitoring Group |
| FDLR (F) | Forces démocratiques de libération du Rwanda |
| GHF | Global Heritage Fund |
| HRL | Human Rights Law |
| HRW | Human Rights Watch |
| IAC | International Armed Conflict |
| ICA | International Council of Archives |
| ICBS | International Committee of the Blue Shield |
| ICC | International Criminal Court |
| ICCPR | International Covenant on Civil and Political Rights |
| ICESCR | International Covenant on Economic, Social and Cultural Rights |
| ICJ | International Court of Justice |
| ICL | International Criminal Law |
| ICOM | International Council of Museums |
| ICOMOS | International Council of Monuments and Sites |

| | |
|----------|--|
| ICRC | International Committee of the Red Cross |
| ICTR | International Criminal Tribunal for Rwanda |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IEDs | Improvised Explosive Devices |
| IFLA | International Federation of Libraries |
| IHL | International Humanitarian Law |
| IMCuRWG | International Military Cultural Resources Working Group |
| IPB | International Peace Bureau |
| ISAF | International Security Assistance Force |
| JCE | Joint Criminal Enterprise |
| LLRC | Lessons Learnt and Reconciliation Commission |
| LOAC | Law Of Armed Conflict |
| LRA | Lord's Resistance Army |
| MAARS | Modular Advanced Armed Robotic System |
| MP | Military Police |
| NATO | North Atlantic Treaty Organisation |
| NGO | Non-governmental Organisation |
| NIAC | Non-international Armed Conflict |
| OCHA | United Nations Organisation for the Co-ordination of Humanitarian Assistance |
| OEF | Operation Enduring Freedom |
| OHCHR | Office of the High Commissioner for Human Rights |
| OTP | Office of The Prosecutor |
| PCIJ | Permanent Court of International Justice |
| PMCs | Private Military Companies |
| POW | Prisoner Of War |
| RDC (F) | République Démocratique du Congo |
| REV | Robotic Evacuation Vehicle |
| REX | Robotic Extraction Vehicle |
| RoE | Rules of Engagement |
| RPVs | Remotely Piloted Vehicles |
| RUF | Revolutionary United Front |
| SCSL | Special Court for Sierra Leone |
| SLA | Sierra Leone Army |
| SWORDS | Special Weapons Observation Reconnaissance Detection System |
| TPIR (F) | Tribunal pénal international pour le Rwanda |
| TPIY (F) | Tribunal pénal international pour l'ex-Yougoslavie |
| TRC | Truth and Reconciliation Commission |
| UE (F) | Union Européenne |
| UAVs | Unmanned Aerial Vehicles |
| UGVs | Unmanned Ground Vehicles |
| USVs | Unmanned Surface Vehicles |

| | |
|--------|--|
| UUVs | Unmanned Underwater Vehicles |
| UN | United Nations |
| UNESCO | United Nations Educational, Scientific and Cultural Organisation |
| WHO | World Health Organisation |
| WMA | World Medical Association |



Photograph by Gearóid Dolan

A Lit Beacon in the Dark

On the Academic Work of Avril McDonald

Avril McDonald's work can be characterised as being rich and diverse in nature: diverse were not only the topics she discussed, but also the perspectives she skilfully imagined and defended. Her work reflects a thorough understanding of what goes on in situations of armed conflict. She addressed topics and questions that were not part of mainstream research and could run counter to viewpoints defended in international politics. For instance, she wrote on the conflict between the Israelis and the Palestinians before most others did.¹

Her research was of high quality, and being a journalist by education and using her writing skills allowed her to make her publications accessible to both lawyers and non-lawyers working in the field of international humanitarian and criminal law. Furthermore, her frequent use of metaphors and references to well-known expressions in the English literature made her work enjoyable to read.²

One approach that runs as a common thread through Avril's work will be discussed more elaborately in this introduction: she searched for the human face of international humanitarian and criminal law in the day-to-day reality of armed conflict.

¹ See [Chap. 6](#). See also Handmaker and McDonald 2006b.

² For instance, she humorously mentioned the current address of the International Criminal Court (Moon Road) and the analogy with its function did not escape her; its role being 'to shine a light into the darkest depths of human behaviour', McDonald 2004b. Furthermore, when discussing the challenges of and the responses to terrorism and international law, she compared the vision of the American politicians with the words used by Lewis Carroll in *Alice in Wonderland* to describe the misperceptions of the human mind, 'through the looking glass' effects (McDonald 2002a, p. 71). In her contribution on the Bosnian war chamber, she used the following metaphor: 'the goliath of international justice such as the ITCY', McDonald 2009, p. 328.

The Human Face

Looking for the human face of the international law of armed conflict can have many aspects. For Avril, it meant, in the first place, insisting on the special character of international humanitarian law itself. She recognized that the construction of a legal system for situations characterised by chaos, anarchy, violence and mutual distrust is in itself a very valuable event and at the same time a delicate path to tread. She defined it in one of her contributions:

The law of war is called international humanitarian law not because it is obvious that humanity should exist in war but because it is not obvious at all to those who fight these wars, as opposed to those who legislate for them. Because of the natural human tendency to lose all inhibitions when fighting in armed conflict, the need for humanity in war has had to be implanted into the rules regulating this most barbaric of human activities.³

International humanitarian law is built on the recognition of two opposite sides of humanity. On the one hand, the term ‘human’ refers to the sympathetic kindness of members of the human race, for instance the human capacity for compassion, which is reflected in the protective scope of international humanitarian law; the protection of those not directly involved in the armed conflict.⁴ On the other hand, it refers to the fragility of the human race, its ‘dark side’ and capacity to destroy. According to Avril, the construction of humanitarian law is based on a simple attitude of good sense and self-preservation, as she expressed in the following sentences:

..., it [IHL] seems to be and is a question of good sense and self-preservation: do unto others as you would have them do unto you. This system of reciprocity only works, however, where there are two or more enemies who, as much as they might despise one another, are committed to observing the rules out of a sense of prudence, economy, self-preservation and advantage, or a combination of some or all of these and other motivating factors.⁵

She recognised that it is not purely for idealistic purposes that international humanitarian law has developed, but that it is actually based on common sense and on a very realistic view of human behaviour that calls for a clear and obvious incentive to obey rules regulating the conduct in armed conflicts. She stated:

...This has been done for reasons that are not necessarily purely altruistic but because usually it has been considered to be militarily advantageous to do so. Humanity and advantage thus should not be seen as principles of the law that are naturally diametrically opposed and in conflict with one another; in fact, they are closely related and can be mutually reinforcing.⁶

For the protection of this vulnerable construction of humanitarian law, Avril always looked at the essence of the rules on the one side, and at the reality of

³ McDonald 2008a, p. 244.

⁴ See [Chap. 3](#), Brollowski.

⁵ McDonald 2008a, p. 243.

⁶ *Ibid.*, p. 244.

today's armed conflicts on the other. Are the rules still apt to the current situations; do they need to be adjusted? Where can and do we need to expand the rules of humanitarian law to guard the human face? Where do we need to refrain from applying the rules too strictly to keep in line with the pace of people and to prevent the disobedience of the rules of international humanitarian law?

Making a Real Connection with the Lives of People Directly Affected by Armed Conflicts

Avril's interest was undeniably in people affected by the reality of armed conflicts. The chosen topic for her Ph.D. on the rights to legal remedies of victims of serious violations of international humanitarian law and her first publications on how justice can be rendered to women, victims of violence and rape already illustrate her empathy with people who suffered from armed conflicts. From these first studies, she concluded that looking for victims' justice, without making connections with their lives, and without making them part of the process, will not lead to reconciliation:

Above all, victims need to be consulted and listened to. Presuming to know what victims want and imposing 'solutions' on them that seem to have no real connection with their lives will not assist in promoting reconciliation.⁷

The wording 'above all' indicates how important this conclusion had become for Avril; to make a 'real connection' with the lives of the people directly affected by armed conflict. This approach, which could be referred to as looking for the human face of armed conflicts, is a core element in her work. If her position as a scholar could be characterised in one sentence, it might be described as ensuring that this real connection took place by promoting attention to the unheard voices of the people concerned, over and over again. Whether it be women raped during armed conflict,⁸ or the Palestinians,⁹ or the victims of serious violations of international humanitarian law in general,¹⁰ or the 'hors de combat' or 'unlawful combatants' after September 11,¹¹ or the victims of the use of depleted uranium,¹² she tested the ability of international humanitarian and criminal law to respond to their concerns.

Her concern with people directly affected by armed conflict went beyond the obvious categories of victims of armed conflict; it extended to all people who are directly touched by armed conflict, whether in their position as victims or as military. She examined, for example, the legal status of military and security

⁷ Ph.D. research of Avril McDonald, on file with the T.M.C. Asser Institute, p. 292.

⁸ McDonald 1998, pp. 72–82.

⁹ Handmaker and McDonald 2006b.

¹⁰ McDonald 2006a, pp. 237–276. McDonald 2007a, pp. 34–44.

¹¹ McDonald 2002b, pp. 206–209. McDonald 2008a, pp. 219–262.

¹² McDonald 2008b, pp. 251–278.

subcontractors as an emerging group of civilians, directly or indirectly linked to hostilities and armed conflicts for whom there is a clear lack of international legal regulation that provokes questions concerning their international criminal liability or their status as prisoners of war.¹³ She was aware of the ambiguous position the contractors were in, but she also had an eye for the realities of today:

There is an almost inherent prejudice against and suspicion of PMCs [private military companies] and military and security contractors, and an assumption that the practice of contracting must be limited as must be the roles performed by subcontractors. Yet, these deeply held beliefs are challenged by the realities of modern war making and conflict. The growth in PMCs is a direct response to the rising demand for their services.¹⁴

She saw it as the responsibility and the challenge of international and national lawyers to take into account the concrete circumstances of the armed conflict, or of the post-conflict situation. Reconciliation cannot take place without the voice of victims and obedience of the rules of armed conflict depends on the willingness and capacities of soldiers to obey them. She stressed the importance of holding on to the essential principles of international humanitarian and criminal law. At the same time, she invited researchers and politicians to be attentive to changing circumstances of the people involved in armed conflict that would have an influence on their capacity to obey the rules or on the capacity of the people affected by armed conflict to come to reconciliation. For instance, in her contribution on the unlawful civilian participation in hostilities, she stated:

Clearly, the investigation and the discussions cannot be purely academic, given that the phenomenon of unlawful civilian participation in hostilities has serious operational consequences. The close involvement of the military in these efforts is to be welcomed and further encouraged.¹⁵

Greater Justice as a Lit Beacon: The Role of Time and Developments

Time is an important element in the way Avril considered developments in the area of international humanitarian and criminal law. Repeatedly, she ended her conclusions with the words ‘only time will tell.’¹⁶ She realised that the ideal world reigned by justice is not established in a day, that our understanding and knowledge of today is insufficient to find all-inclusive solutions. She included the element of time as a valuable element, able to help us find our way in the quest for justice. She also realised that, on the other hand, there is urgency wherever war crimes touch humans. “Nothing can turn back the clock”¹⁷ for those who have

¹³ McDonald 2005, pp. 215–253. McDonald 2007b, pp. 357–401.

¹⁴ McDonald 2005, p. 247.

¹⁵ McDonald 2004a, p. 32.

¹⁶ For instance, McDonald 2000, p. 26.

¹⁷ McDonald 2007a, p. 34.

suffered greatly during armed conflict. Any justice or development in the legal system of international humanitarian law will come too late for them. This urgency can easily lead to the question “How can justice ever be made meaningful for such people?” and may lead to an attitude of frustration and despair. Avril had the ability to remain focussed on the realistic possibilities of nowadays and not be lost in expectations which are too high. She recognised the important accomplished steps, even if they were small, and emphasized the importance of protecting this accomplished work. An example is her publication on the rules on protecting persons hors de combat and the challenges that post-11 September brings along for a suitable interpretation of these rules:

... the laws of war draw a line. Some things can never be justified on any account... What is absolute in the rules codified in the treaties is as far as we have managed to come so far in terms of the quality of mercy. International humanitarian law, as most particularly shown in its rules protecting persons hors de combat, is a statement of the extent, and limits, of our humanity in war. It represents a great success in terms of law making, but in terms of humanity it is a very small step. If only for that reason, the line should be held and not breached.¹⁸

In a similar way, she looked at the establishment of the International Criminal Court (ICC) and its functioning. Not neglecting in any way the fruitfulness of a critical approach, she proposed a different way to consider the ICC: “The best way to look at the ICC is not as a court, although it surely is, but as a centrifuge of a globalised system of prevention and punishment of international crimes.”¹⁹ By proposing this adjustment of perspective on the ICC, she invited the readers to temper their expectations in view of the realities of the limited resources and capacities of the ICC. At the same time, by renaming the role of the ICC, she shifted the focus of the readers from its incapacities to what the ICC is capable of doing today and thereby acknowledging the important step forward that its establishment can mean for the quest for greater justice. She ended:

It seems fitting that the ICC’s temporary seat is on a road in The Hague called Maanweg (moon road), given that its role is to shine a light into the darkest depths of human behaviour. For now, the question of how to make criminal justice really tangible to women victims of international crimes remains unanswerable but at least we can now seriously pose it and a start has been made in moving towards confronting the problem of international criminality with the beacon lit in The Hague.²⁰

During her life, Avril carried out valuable and highly qualified research on various topics in the field of international humanitarian and criminal law. But more importantly, it was her attitude as a humanitarian lawyer that expresses the essence of humanitarian law; she remained attentive to the people directly affected by

¹⁸ McDonald 2008a, p. 248.

¹⁹ McDonald 2004b.

²⁰ Ibid.

armed conflicts and their perspectives and priorities. Through her care, their concerns found a way to be heard by the larger audience working in the field of international humanitarian and criminal law.

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