Updating international humanitarian law and the laws of armed conflict for the wars of the 21st Century

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Aspects of international humanitarian law (IHL) and the international law of armed conflict (LOAC) are out-dated because they are ill-adapted to new battlefields. Some innovation is needed in them to address the complexities of the networked insurgencies that we see today.

War between states has declined in prevalence and importance relative to armed conflicts across societal groups, both within states and across national borders. Private organisations are likely to dominate armed conflicts for the foreseeable future, including those in the Asia-Pacific and beyond, where Australian expeditionary forces are engaged. Often called 'non-state actors' in the international legal parlance, they typically conduct hostilities through irregular but systematic attacks, including bombings, shootings and psychological operations. Are these armed conflicts to which LOAC even applies?

The asymmetrical balance of forces resulting from the confrontation between states and non-state actors leads typically to tactics by the latter that include violence intentionally directed against soft targets such as civilians. These tactics can be defined as war crimes or terrorism, although application of each of these categories is legally controversial. The criminality of the tactics used raises the need for mechanisms for prosecution of these crimes. Such mechanisms need to be applicable across a wide range of novel armed conflict circumstances and be sufficiently robust to withstand intensely political scrutiny of their legitimacy.

In addition, the privatisation of American military operations in Iraq has been extraordinarily extensive and responses to allegations made against the conduct of private security corporations have demonstrated that the framework for their accountability is poorly developed. To whom are they liable and should they be covered under status-of-forces agreements as military auxiliaries? Under what circumstances might they be regarded as mercenaries?

Confronting sacred taboos

Both IHL and LOAC naturally reflect what we have learned from the wars of the past. The fresh lessons of the World War II motivated a rewrite and further development of international law, producing the four 1949 Geneva conventions. The mid-20th-century experience of decolonisation led to the two 1977 Protocols to the Geneva Conventions.

Although those treaties and protocols are partly based on enduring moral principles, they are also partly based on international political processes. Such processes are reflective of their contemporary attitudes and circumstances and often articulate fractious compromises. Thus, it should not be surprising to find that the Geneva conventions and protocols are not fully attuned to the early 21st Century, just as they could not reasonably be expected to anticipate all the exigencies of the 22nd Century.

Yet, the new dilemmas of 21st Century war have been pressing upon legal policy makers with increasing urgency for over a decade without being addressed. The extraordinarily important function of IHL and LOAC in civilising armed conflict has attained a sacred status. The current treaty instruments have themselves become a holy canon. The suggestion that aspects of them might be inappropriate or ill-adapted to 21st Century asymmetrical conflict, and that they need rethinking, attracts consternation and opprobrium among many expert practitioners. The International Committee of the Red Cross has stated its position firmly; it sees no need to revisit the Geneva Conventions and Protocols.

New conflicts – new moral and legal dilemmas

Nevertheless, there are endless debates and confusion on many matters to be found in newspapers, academic journals and legal and defence circles. These include deciding whether particular insurgents are or are not terrorists; when are insurgents to be regarded as combatants and if, when and how might they retain civilian status; what rights and protections are they entitled to, and what might the rights and obligations of state powers be. Such practical and legal quandaries demonstrate the uncertainty generated by the ambiguities and anachronisms in the Geneva Conventions and Protocols. Guantanamo Bay has aptly been called a legal black hole. The so-called 'War on Terrorism' gives these problems profile and urgency.

At the heart of today's doubts, needs, iniquities and questions are the problems caused by changing battlefield practices. These include asymmetry of forces, non-distinction

between combatants and civilians (especially by terrorists) and the privatisation or civilianisation by contract of military support structures and protective security elements. These are exacerbated by a fundamental lack of reciprocity between belligerent parties, especially nation-states bound by and adhering to IHL and LOAC, and their terrorist adversaries who do not feel so bound and who often regard the adherence by others to IHL and LOAC as an advantage to be ruthlessly exploited.

Contemporary hostilities led by non-state actors also are frequently 'internationalised' in that they benefit from support by foreign governments, whether by means of arms, intelligence, finance or refuge. Thus, they are trans-national conflicts that are networked across several countries but do not occur directly between countries. Debate over the meaning of Common Article 3 of the Geneva Conventions, which applies to armed conflict of a 'non-international character', has centred on whether it properly applies only to internal or also to trans-national conflicts. A plurality of the United States Supreme Court considered it to be broad enough to cover the circumstances of trans-national armed conflict with private organisations (*Hamdan* v *Rumsfeld*). However, Common Article 3 is articulated in highly generalised terms and provides scant legal guidance for state conduct in addressing the wide variety of circumstances that need to be covered. Common Article 3 may be supplemented by Article 75 of Additional Protocol I and by Additional Protocol II, to the extent that those provisions have become customary international law, which is uncertain, or to the extent that those instruments have been ratified (eg. Australia has ratified both, the USA has not).

Just as the times change and history moves on, so must the law. We need to review aspects of the Geneva conventions and their Protocols, discomforting a task as it may be, so as to enable and enforce the rule of law in armed conflict. To address contemporary battlefield reality, new questions need to be elaborated in international law. These primarily concern the respective status, rights and responsibilities of state powers vis-à-vis private actors that are not conventional armed forces, such as insurgents and security corporations.

Keeping up with national laws

National legal systems have been far more quick and agile in confronting the new challenges posed by networked insurgents using terrorist tactics. Australia, for example, like Canada, France, the United Kingdom and the USA, has instituted new laws that define and criminalise terrorist networks, redefine and modernise the definition of sedition, extend the extraterritorial application of these crimes, expand intelligence gathering powers and protect intelligence from disclosure, enable emergency preventative detention, create control orders to restrict liberty of movement, restrain some usual privileges in court cases, and facilitate the mobilisation of military forces to assist the police with domestic law enforcement.

These new national security laws are forging a new legal space between the domestic laws governing criminal procedure and those governing international armed conflict. Complementary innovation is needed in the more cumbersome international legal system.

Some have suggested that human rights treaties provide guidance for IHL and LOAC. On the one hand, it is arguable that the Geneva Conventions form a special law (*lex specialis*) that displaces the application of human rights norms, such as the right to life, in the circumstances of armed conflict. On the other hand, the position articulated by United Nations bodies, including the bench of the International Court of Justice, opine for the complementary application of human rights norms but do not prescribe which or how these are to be implemented during hostilities. Further, it is uncertain which human rights norms might be considered customary international law and not all states are bound by all the relevant provisions.

Significantly, in December 2007 the UK House of Lords decided that a person's human rights may be infringed lawfully in legitimate military operations where it is necessary for imperative reasons of security, but that the human rights concerned are merely qualified to the extent necessary, not displaced. (The case was decided in relation to military operations by the United Kingdom in Iraq authorised by the United Nations Security Council, and human rights norms binding on the United Kingdom under the European Convention on Human Rights (*Al-Jedda v Secretary of Defence*)). However, the extent to which it is necessary to qualify the application of human rights norms during armed conflict remains unclear. There remains an immediate need to elaborate adequate legal standards applicable to non-state actors engaged in hostilities.

New protocol for a new age of warfare

A Fourth Protocol to the Geneva Conventions would be useful. It could fill troubling gaps in the Conventions, and fix some of the problems of the First Protocol. In particular, it might clarify in what circumstances targeted attacks on insurgents who use terrorist tactics are to be characterised as combat measures in an armed conflict or as extrajudicial assassinations within state jurisdiction.

A Fourth Protocol might also address some particularly vexing dilemmas arising from recent international armed conflicts:

- What is the legal significance of trans-national circumstances in a conflict with private (non-state) actors?
- When captured alive, how are private actors to be treated, especially if long-term detention of terrorist belligerents is involved to prevent them renewing their belligerency (as it is for prisoners-of-war under the Third Geneva Convention)?
- When and how are such detained non-state actors to be released?
- What is the consequence of their non-enemy nationality, particularly if the armed conflict in question is a trans-national but not an inter-state one?

- What is the proper method of trial for their crimes against IHL?
- Which of the obligations of a state power are unilateral and which reciprocal?
- In what circumstances are the personnel of a contracted private security company entitled to civilian protections or to be treated as combatants?
- What obligations do they owe to whom?
- In cases of negligence or of criminal conduct, to whom are they liable?
- By what process should they be held accountable?

The USA has been the main country to begin formulating a set of internationally applicable rules that respond to the new circumstances of armed conflict. Its efforts to devise a trial system by military commission have fumbled through a thicket of domestic and international objections. Actions of the USA in the Middle East, and in Guantanamo Bay, as well as the practice of extraordinary rendition in Central Europe and Central Asia, have caused controversy. Allegations concerning war crimes by the USA and its allies thrive in the current uncertainty concerning the application of the laws of armed conflict to trans-national terrorism and insurgency. That the US's terrorist adversaries resolutely refuse to comply with IHL in their execution of attacks is too often ignored or glossed over in international discussions of the legal frameworks involved. Highly politicised war crimes indictments against other political figures and military personnel also have been launched in countries including Belgium, France, New Zealand and the UK.

Measures taken by the United States administration and courts include:

- defining a class of combatants not entitled to the protections of the Third Geneva Convention;
- defining the responsibilities of the detaining power under Common Article 3 of all four Geneva Convention;
- defining armed conflict by them, where it involves terrorism, as a crime; and
- devising a trial system by military commission for those to be charged with war crimes, crimes against the laws of war or serious criminal offences.

Moral as well as legal obligation

In December 2007, the Legal Adviser to the US Secretary of State, John B. Bellinger III, in an address at Oxford University, called for scholarly debate to clarify and elaborate the rule of law in relation to detentions of private persons engaged in trans-national terrorist activities. Similarly, the Foreign Affairs Committee of the House of Commons in the United Kingdom has called for updating of the Geneva Conventions. Further research and conceptual work is also needed to elaborate rules for the civil and criminal liability of private security corporations that a state contracts to provide services in the field. The process of international law formation is diffuse and the time is ripe to deepen and widen the discourse on this topic.

Unfortunately, there has been little discourse yet in academia on how new legal initiatives might clarify and elaborate the status of non-state actors. While the political sensitivity of these issues might be expected to inhibit governmental leadership in a divisive global debate over innovative standards, it is concerning that academic debate has also been sparse. Of course, the same political sensibilities and reticence predominate in academe but it is remarkable that, over seven years after the 11 September 2001 attacks and the launch of the 'war on terrorism', the issues remain to be systematically explored.

Australia has much to contribute in this field and a timely opportunity to do so. It is appropriate that Australia, as a member of the 'coalition of the willing' in Iraq, the NATO-led International Security Assistance Force in Afghanistan and the International Security Force in East Timor, consider its direct and regional interests in the development of norms related to insurgents and private military companies. Throughout Asia, state military and police forces are also both being engaged to combat the overlapping phenomena of networked insurgency and transnational crime.

Although the USA has gone it alone to create a legal system to address its trans-national armed conflict with private parties, other insurgents or terrorists and other states are engaged in comparable conflicts. The examples of armed conflicts with insurgent groups in India, Indonesia, Pakistan, the Philippines, Sri Lanka and Thailand come readily to mind. The time has come for international lawyers in government and academia to update the international laws of armed conflict. Although it is easier to sit back and watch the USA shoulder the responsibility of legal innovation, and the risk of opprobrium for blaspheming apparent holy canon, that path will not lead to an optimal outcome for Australian and other national interests.

It will instead result in the much slower development of new customary legal practices, greater uncertainty as to what they are, and a lesser role for other interested countries in crafting outcomes that are appropriate to their specific needs and capabilities. And it is cowardly to leave such matters up to the Americans.

If Australian forces in Afghanistan capture in battle a private combatant who is a citizen of a friendly country, say Noordin Mohammed Top, how should we treat him and under what law? Next time an Australian ally captures a new David Hicks on a new battlefield, what should we expect? Unless we are willing to devise a clearer international law for such situations, we can have no fair expectations. ◆

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