New Battlefields OLD LAWS
From the Hague Conventions to Asymmetric Warfare

INSCT/ICT Herzliya Workshop: *New Battlefields/Old Laws*
SHAPING A LEGAL FRAMEWORK FOR COUNTERINSURGENCY
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Program Description: Counterinsurgency operations (COIN) reflect the "new battlefields" that now dominate 21st century warfare. The *New Battlefields/Old Laws* research project has examined a range of legal and policy lacunae that arise when traditional treaty-based and customary rules of international humanitarian law (IHL) and human rights law (HRL) are applied to asymmetric warfare between states and nonstate armed groups. The objective of this workshop is to explore the legal and policy dynamics of COIN in relation to existing understandings of IHL and HRL.

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- Geoffrey S. Corn, Associate Professor of Law, South Texas College of Law, Houston
- Evan Criddle, Assistant Professor of Law, Syracuse University College of Law
- Eric Talbot Jensen, Visiting Assistant Professor of Law, Fordham University Law School
- Daphné Richemond-Barak, Professor, Radzyner School of Law at the IDC, Herzliya
- Gregory Rose, Associate Professor, Faculty of Law, University of Wollongong, Australia
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OVERVIEW:

As developed and practiced by several nations and their militaries, COIN incorporates forms of

institution building, COIN takes place in a variety of conflict situations. Depending on the setting, COIN occurs where there is/is not an armed conflict of an international/non-international nature; where human rights law applies in the absence of or as an addition to IHL; in the face of customary or treaty-based principles of international law; and alongside domestic laws of the nation managing the COIN operation, which may or may not have incorporated international laws as part of the domestic law.

Although actual operations continue to evolve in COIN as it is practiced around the globe, scholars and practitioners have not critically and carefully examined the legal bases for COIN. In COIN operations, IHL, HRL, international law, and domestic laws do not provide adequate legal and policy guidance for a variety of reasons, some of them to be explored in the workshop. Meanwhile, in the absence of a legal framework that effectively regulates COIN, commanders, and legal advisors have promulgated various operational rules that supply rough guidance for soldiers. Expedient operational discussions in current conflict settings have often occurred without robust input from the policy and academic communities.

As a result, in the context of counterinsurgency strategy, operational rules have become more protective of civilians than the law. The workshop will explore these overarching questions:

1) How may the overlapping and converging legal paradigms that conceivably apply in COIN be adapted to constitute a stand-alone legal framework for COIN? Are the convergences damaging and, if so, how can the damage be minimized, avoided, or repaired? Do the overlaps threaten the integrity of any one legal framework and, if so, how may the threat be managed?
2) If operational rules exceed legal requirements in favor of a quest for legitimacy, what are the implications for the loss of legal control over COIN? To the extent that the rules for COIN are fashioned by nonstate entities (NGOs, private contractors) do states risk losing sovereign control over the "new Battlefields"? If so, what are the implications?

INTRODUCTIONS, William C. Banks, Director, Institute for National Security and Counterterrorism (INSCT), Board of Advisors Distinguished Professor, Syracuse University, College of Law and Maxwell School of Citizenship & Public Affairs (Convener/moderator)

ABSTRACTS:

Two Sides of the Combatant Coin: Aligning the Law of Non-International Armed Conflict with Operational Reality, Geoffrey S. Corn, Associate Professor of Law, South Texas College of Law, Houston

COIN operations will often mandate the aggressive application of combat power. However, the law of non-international armed conflict (NIAC) has never explicitly recognized the existence of nonstate armed belligerent groups. Instead, such conflicts are seen as involving state armed forces engaged against civilians taking a direct part in hostilities. This interpretation is flawed and operationally inconsistent with the history of NIAC. Since 1949 NIAC involved hostilities between state armed forces and armed belligerent groups organized militarily, and the law of NIAC was a direct response to armed hostilities between armed belligerent groups and their failure to conform to minimal standards of professional conduct. While it is axiomatic that these nonstate belligerents cannot qualify for lawful belligerent status

participating in hostilities.

The assertion that nonstate operatives must be treated as civilians taking a direct part in hostilities risks a fundamental distortion of targeting authority. Members of such groups are not presumptive civilians, and, therefore, subjecting them to attack should be based on a determination of their membership status—not on individual conduct justifying the conclusion that they present an actual threat to the friendly armed forces. Upon determination of status as enemy belligerents, these individuals should be subject to a use of force authority analogous to that of attacking an enemy soldier in an international armed conflict: status-based targeting with no requirement to use proportional force to subdue the opponent. Classifying nonstate operatives as civilians directly participating in hostilities results in a fundamentally different targeting paradigm: conduct-based targeting with a proportionality obligation that protects the object of attack. This interpretation produces an anomaly. By virtue of the direct participation, nonstate operatives lose immunity from being made the deliberate object of attack and is ostensibly analogous to an enemy combatant. However, unlike the enemy combatant, the direct participant in hostilities is protected from an excessive use of force. This reliance on the direct participation in hostilities rule to address the authority to engage nonstate operatives and the anomaly it creates is a consequence of the refusal to acknowledge that 'enemy armed forces' exist in NIAC as they do in IAC. This refusal results in a flawed targeting framework for NIAC, a framework that transforms what is often a policy-imposed constraint on use of force authority to a legal obligation. Without acknowledging nonstate armed belligerent forces military commanders to tailor their use of force authority to the dictates of the COIN operational situation.

Reconciling Human Rights and Humanitarian Law: A Relational Theory, Evan J. Criddle, Assistant Professor of Law, Syracuse University College of Law

Conventional wisdom suggests that international human rights law (IHRL) and international humanitarian law (IHL) represent conceptually distinct and prescriptively conflicting paradigms for safeguarding human dignity during national crises. Traditionally, IHRL has been understood to safeguard human dignity—including the right to life and fundamental freedoms—from state abuse. IHL, on the other hand, allows states to take human life and restrict personal freedoms selectively in furtherance of military objectives. International courts and publicists have struggled mightily to resolve the conceptual tensions between these paradigms in the context of armed conflicts. Some have suggested that IHRL and IHL are analytically distinct fields with mutually exclusive jurisdiction; in armed conflicts, they argue, IHL as *lex specialis* displaces IHRL. Others have reasoned that IHRL and IHL maintain at least partially overlapping jurisdiction to regulate states' use of force. For a variety of reasons, neither of these theories offers a fully satisfying positive or normative account of the relationship between these bodies of law.

I outline a normative theory of human rights that provides a starting point for negotiating the relationship between IHRL and IHL. Specifically, I will argue that both IHRL and IHL can be understood as relational legal duties emanating from the fiduciary character of state sovereignty. Under international law, states serve as fiduciaries for the purpose of establishing legal order—a regime of secure and equal freedom—for their people. Under the relational fiduciary theory, international law authorizes states to employ coercive force only in conformity with certain substantive principles (e.g., purposiveness, evenhandedness, and solicitude) and procedural principles (e.g., notice, justification, and contestation)

strictly necessary to preserve a regime of secure and equal freedom.

International armed conflicts justify separate treatment under the relational theory of human rights because they involve coercive force outside the general state-subject fiduciary relation. Because states do not ordinarily undertake the full responsibilities of governance for foreign nationals beyond their borders, their human rights obligations are correspondingly limited. Although states must (at a minimum) refrain from violating jus cogens and avoid inflicting unnecessary suffering on foreign nationals, they need not afford enemy combatants in international conflicts the full panoply of equal freedoms guaranteed to their own subjects. Moreover, states acting as agents for their people in the international realm may use lethal force against foreign combatants where necessary to defend their own people from aggression. The relational theory thus explains how the core features of IHL—which are incompatible with many leading philosophical accounts of human rights—are consistent with a robust legal theory of human rights.

To illustrate the relational theory's prescriptive potential, my contribution to the workshop will briefly discuss the relational theory's lessons for counterinsurgency (COIN) operations. At first blush, COIN would seem to pose a thorny challenge for the relational theory because counterinsurgents use lethal force deliberately against their own people—a practice that might be viewed as inconsistent with the principle that states must treat all subjects as equal beneficiaries of legal order. As I will argue, however, when insurgents seek to develop their own political order in opposition to a state that honors the principle of self-determination, they effectively opt out of the state-subject fiduciary relation and therefore cannot claim the full panoply of relational safeguards IHRL recognizes between states and their subjects. The state may therefore use lethal force to defend its people against domestic insurgents where such force is strictly necessary to address an actual or imminent threat to the secure and equal freedom of other subjects. On the other hand, because states may not lightly conclude that their subjects have "opted out" of the state-subject fiduciary relation or that the use of lethal force is warranted, the fiduciary principle dictates that states bear an especially heavy burden to establish that particular subjects qualify as insurgents and that COIN policies and procedures adopted in derogation of IHRL comply with customary principles of necessity, distinction, and proportionality. In this respect, IHRL's derogation regime for public emergencies offers a useful model for structuring and institutionalizing the relationship between IHRL and IHL in COIN.

Reunifying the Law of Armed Conflict, Eric Talbot Jensen, Visiting Assistant Professor of Law, Fordham University Law School

Rules regulating warfare have existed since the beginning of history, but the Treaty of Westphalia solidified states as the primary actors and empowered them with the monopolization of violence. This monopolization was never absolute, but the laws developed primarily to regulate the sovereign's use of force. This created a single "law of armed conflict" that applied to the sovereign's forces, regardless of how that force was employed. In the wake of WWI, the UN Charter codified the position of the state as the primary arbiter of international relations and created a consensual organization to ensure international peace and security. As before, the Charter's underlying assumption is that states monopolize the legitimate use of force and that any non-state use of force is completely illegitimate. However, since WWII, and particularly in the last two decades, the amount of non-state actors who apply state-level violence is dramatically increasing. In response, the international community

thereby legitimizing the use of force by non-state actors. This legitimization of the use of force by non-state actors is one of the main bases for the US objection to the Additional Protocols.

History shows that API and APII have had the effect of legitimizing state-level force by non-state actors, but have had little effect on non-state actor compliance. Rather, they have created an asymmetrical benefit for non-state actors known as lawfare, where non-compliant actors gain an asymmetrical advantage over those States who seek to be compliant. Nowhere is this demonstrated more clearly than in COIN where states ask their forces to accept an increasingly diverse types of missions, such as fighting non-state organized armed groups, conducting a counter drug war against narcotics traffickers, dismembering transnational criminal business networks, supporting disaster relief and providing humanitarian assistance, and even quelling civil unrest. COIN demonstrates that the bifurcation of the laws of armed conflict into International Armed Conflict and Non-international Armed Conflict has lost its usefulness. Rather, state-sponsored military action in armed conflict should be regulated by a united body of laws applying to all armed conflicts, as was the case prior to the post WWII era.

Non-State Actors in Armed Conflicts: Issues of Proportionality, Daphné Richemond-Barak, Professor, Radzyner School of Law at the IDC, Herzliya

The laws of war apply to the vast majority of conflicts—even when one of the belligerents acts in violation of such laws. However, in a limited set of circumstances, the laws contemplate otherwise: Common Article 2 of the Geneva Conventions suggests that the state may be relieved of its obligations in an international armed conflict involving a nonstate actor that *neither accepts nor applies* the law. This would, accordingly, include an international armed conflict involving a terrorist organization. While Common Article 2 would set aside the whole of the Geneva Conventions in these circumstances, I argue that core norms of humanitarian law continue to apply. In this paper, I examine how one such norm—proportionality—applies in international armed conflicts involving nonstates, which do *not* comply with the law. Proportionality entails a delicate balancing between competing values. Instead of an exact formula, lawyers and commanders must take a variety of factors into consideration when determining whether an attack against a legitimate target meets the standards of proportionality. Among such factors are the selection of the target, the means and methods of attack, foreseeable injury to civilians, and actions that might be taken to minimize harm to innocent civilians. While I do not question the importance of proportionality, I argue for a reassessment of its constitutive elements in international armed conflicts pitting states against terrorist organizations.

First, in selecting the means and methods of attack to be used against an enemy that embeds itself in a civilian population, a state should be able to take into consideration the potential injury to its own combatants. To put it differently, in certain cases, a state should be able to expand its proportionality calculus to include the mitigation of harm to its troops – for example, by employing an aerial assault in an urban area in place of a ground attack. In practice, this might mean shifting responsibility to the non-compliant belligerent for collateral damage to civilians. Second, in calculating foreseeable injury to civilians, a distinction should be made between (1) civilians not taking part in hostilities or involuntary human shields, and (2) voluntary human shields. I argue that the presence of voluntary human shields should not weigh as much in the proportionality balance as the presence of

law provides some leeway in how states fighting terrorist organizations assess proportionality, at least in international armed conflicts. There is room for an interpretation of the principle of proportionality that accounts for the inherently humanitarian character of the law but also addresses some of the difficulties facing states fighting these uniquely problematic nonstate actors.

Detention of Insurgents: Building Consensus on Best Practice Guidelines, Gregory Rose, Associate Professor, Faculty of Law, University of Wollongong, Australia

What are the international and national standards for the practice of detention of persons engaged in insurgency? Not just what but why? And against whom? By whom? How? How long? What then?
We commence by arguing for the justification for a non-criminal system of administrative or military detention of insurgents if the detainees are recognised as being engaged in armed conflict despite being non-state actors. Today, a lone non-state actor can cause massive destruction against civilian targets, more so than a regular soldier typically would. Criminal convictions through a regular civil prosecution process are considered an unsuitable vehicle to achieve the aims of detention, which might range through disruption, incapacitation and deterrence to intelligence gathering.

The paper then examines technical issues that have ethical, security and resource implications. The first concerns the possible legal criteria for indicating an individual who might be detained because engaged in insurgency. The notion of direct participation in hostilities is explored as a criterion additional to the traditional criterion of armed force membership, which tends to be unclear in insurgency context. The design of decision-making processes is addressed by examining evidentiary standards and procedures. Criteria need to be relevant to the objectives of the particular detention powers proposed and tighter safeguards on standards and processes may warrant broader criteria to achieve those objectives. The sort of decision-making body that is appropriate, it is suggested, depends upon the circumstances of detention, length of the detention and stage of decision-making. The transfer of detainees to other authorities remains a vexed issue as it seems that standard practices are yet to develop concerning detainee transfer for rehabilitation, prosecution, repatriation or release.

On the basis of a comparative survey, the paper concludes by looking for convergences between international and national standards for the detention of insurgents as indicators of emerging international consensus. It considers whether they might be considered as best practice in terms of three indicia: their civil-military interoperability, practicality in the conduct of armed conflict, and their protection of the civil rights of individuals.

Gaza Freedom Flotilla: Politicizing Maritime Law, Corri Zoli, Research Fellow, Institute for National Security and Counterterrorism (INSCT), Syracuse University

Most discussions of COIN presume the laws of land warfare and define contemporary gaps between COIN and IHL (i.e., nonstate belligerents, non-international conflict, integration with other law) relative to that setting. The recent Gaza Freedom Flotilla incident (31 May 2010)—a classic instance of politicized, polarized discourse—offers a critical opportunity to identify gaps in the laws of armed conflict with respect to maritime law, which predates humanitarian law. This paper argues that Gaza stands at a political impasse today given overlapping legal regimes and legal ambiguities, largely with

9/11 setting what constitutes clear lines of legal authority in international conflict with nonstate actors has become opaque, the reason that Gaza has become a political morass today is because these inherent ambiguities have helped enable and authorize conflict-prone behavior by conflict parties in the region. My focus, therefore, is on the role of law in shaping dominant narratives told and espoused by partisans in this conflict which, in turn, play a supporting role in its irresolution. To put this point differently, what is at issue in Gaza today is the implication of the law in conflict dynamics at many levels (i.e., selective application of the laws), particularly, the use of the law to advance contested policies (i.e., applying domestic rules of self-defense in a maritime context). If the international community does not exert more care in standardizing legal regimes and their universal application—the basic premise of the rule of law—Gaza will be a harbinger of the future of international security and the wholesale implication of law in politics.