New Battlefields OLD LAWS
From the Hague Conventions to Asymmetric Warfare

INSCT/ICT HERZLIYA WORKSHOP:
THE SCOPE OF THE 21ST CENTURY BATTLEFIELD: FORECASTING THE LEGAL AND POLICY LANDSCAPE

TUESDAY, 13 SEPTEMBER 2011, 9:30-12:30

Institute for National Security and Counterterrorism (INSCT)
College of Law/Maxwell School of Citizenship & Public Affairs, Syracuse University
International Institute for Counter-Terrorism (ICT)
Lauder School of Government, Diplomacy and Strategy, Interdisciplinary Center (IDC), Herzliya-Israel

PROGRAM DESCRIPTION: ***The Scope of the 21st Century Battlefield: Forecasting the Legal and Policy Landscape.***

Since its inception in 2007 the *New Battlefields/Old Laws* research project has examined a series of legal and policy lacunae that arise when traditional 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 changing scope of the 21st century battlefield – from its geographic parameters to the means of waging battle and the identities and loyalties of the participants. Workshop panelists will focus on emergent, borderless battlefields, tensions between operational practice and traditional legal prescriptions, the changing status of belligerents, and new battlefield means and methods:

- *Convener:* Prof. 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
- Prof. Oren Gross, Irving Younger Professor of Law, Director, Institute for International Legal and Security Studies, University of Minnesota
- Prof. Geoffrey S. Corn, Professor of Law, South Texas College of Law, Houston
- Prof. Eric Talbot Jensen, Associate Professor of Law, Brigham Young University Law School
- Dr. Daphné Richemond-Barak, Professor, Radzyner School of Law at the IDC-Herzliya, Israel
- Dr. Corri Zoli, Assistant Research Professor, Institute for National Security and Counterterrorism (INSCT), College of Law/Maxwell School of Citizenship & Public Affairs, Syracuse University

OVERVIEW: Forecasting the Scope of the 21st Century Battlefield

Ten years after the 9/11 attacks there is little doubt that the dynamics of conflict in the world are markedly changed from the post-World War/Cold War environment. In this workshop, our distinguished panelists will assess the scope of the emerging battlefields. From the role of organized crime groups in conflict settings, to technological innovations in the means of warfare, and evolving strategic and regulatory approaches to conflict management, our workshop will critique existing legal and policy prescriptions for regulating conflict, while we forecast how laws and policies may shape the emerging battlefield.

INTRODUCTIONS: Prof. 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)

ABSTRACTS:

New Wars, Old Rules? The Laws of Armed Conflict Post 9/11, Professor Oren Gross, Irving Younger Professor of Law and Director, Institute for International Legal & Security Studies, University of Minnesota Law School

The laws governing armed conflicts—both those attempting to regulate the legality of going to war (jus ad bellum) and the rules pertaining to the conduct of warfare (jus in bello)—have seen changes and modifications in reaction to shifts in the nature of warfare, in general, and the introduction of new technologies of communication, transportation, manufacturing and destruction, in particular.

However, throughout those changes, the laws of armed conflict (LOAC) and international humanitarian law (IHL) have maintained a core of basic principles such as the principle of distinction (or discrimination) between combatants and non-combatants, the principles of proportionality and necessity, and the need to balance between humanitarian concerns and military necessity. At the same time, LOAC have taken as a basic assumption the reality of regular, clearly identifiable, armies facing each other on the battlefield.

Yet, for the most part, the realities of the wars in Iraq and Afghanistan have been different. Rather than following the patterns of what some have called the older generations of warfare, the United States and its allies found themselves engaged in asymmetric warfare in which there are no clear frontlines and no clear distinctions between combatants and non-combatants. This type of warfare—some have taken to calling it the fourth generation of warfare—raises questions about whether the existing LOAC are adequate to dealing with, and answering, the challenges that the new reality of warfare presents.

The Military Response to Armed Organized Crime, Geoffrey S. Corn, Professor of Law, South Texas College of Law, Houston

Since September 11, 2001, the military response to transnational terrorism has been the focus of analysis and resulted in an array of legal theories for the use of military force to destroy, disrupt, or disable terrorist operatives—from internationalizing noninternational armed conflicts to militarized law enforcement. While there is an increasing acceptance for classifying at least certain components of the military response to transnational terrorism as armed conflict, these operations continue to stress traditionally accepted interpretations of international law in light of the sporadic and transnational nature of the terrorist threat.

A recent challenge in discussions over the efficacy of international law to balance states' legitimate security requirements with limits on their resort to military force is steadily gaining momentum: the legal framework governing responses to armed and organized criminal syndicates. Unlike transnational terrorism, the challenges of identifying the legal framework for regulating government responses to such threats is not the sporadic nature of the violence or the extraterritorial threat—but the internal presence of these syndicates and their overt and continuous use of violence in ways that inevitably push governments toward the resort to military force. This threat, much like transnational terrorism, was not contemplated when existing law of armed conflict (LOAC) triggering provisions were conceived and adopted by the international community. As a result, the fact that these groups operate for the primary purpose of achieving collective criminal objectives—not as dissident groups seeking to overthrow existing government authority—creates uncertainty as to the proper characterization of any military response action.

This uncertainty is exacerbated by the assumption that human rights principles provide the exclusive legal framework for state responses to criminal threats. While these principles provide the state with flexibility in addressing traditional criminal threats, the nature of criminal gang-related violence in Northern Mexico, El Salvador, Colombia, and Brazil, indicates that the traditional response authorities are limited. This paper explores the complexity of the resort to military force in response to highly organized armed criminal syndicates. It highlights the fundamental distinctions between traditional human rights based law enforcement response authorities and the authority provided by LOAC to defeat a belligerent threat and how these two regulatory frameworks might be reconciled in relation to the deprivation of life and liberty of criminal syndicate members. The failure to link response authorities and the unusual nature of this threat creates demoralized military forces and provides a tactical advantage to the criminal element.

Technological Innovation and the Laws of War, Eric Talbot Jensen, Associate Professor of Law, Brigham Young University Law School

If the pace of technological innovation globally has doubled between 2008 and 2010, this innovation curve also applies to the means and methods used by militaries on the modern battlefield and in defense of new, and emergent threats, such as terrorism. Yet, such next-generation technologies, in many cases under development or already deployed in armed conflict, and the more general pace of technological innovation, have stressed the capacity of existing law to effectively regulate modern armed conflict. Just as historical developments in military capabilities and tactics at the turn of the twentieth century provided the impetus for new laws governing armed conflict, similar innovations necessitate new ideas and new laws to fill this lacuna in contemporary battlefield regulation.

Three examples illustrate this point: the use of drones and other robotics; cyber operations; and the militarization of nanotechnology. Though drones have been in use for several decades, their use today is forcing the reconsideration of basic legal principles, such as the differentiation between the *jus ad bellum* and the *jus in bello*, and the further militarization of robotics will strain the principles of distinction and discrimination. Likewise, cyber operations, now beginning to capture public attention with the recent STUXNET malware, have pressured traditional definitions of "attack" and the "use of force" as applied to the use of cyber tools. Finally, the emerging militarization of nanotechnology heralds a type of armed conflict that has the potential to undermine such fundamental principles as distinction and proportionality.

As states continue to develop and deploy these capabilities to achieve strategic military objectives in lieu of traditional means and methods of warfare, the law must either adapt or develop to ensure the continued balance between necessity and humanity, or be left behind, only to be resurrected in the aftermath of legally unconstrained armed conflict.

Regulatory Choices in War, Daphné Richemond-Barak, Professor, Radzyner School of Law at the IDC, Herzliya

For the past ten years, legal scholarship has focused on the content of the law, namely on whether the law should be reinterpreted, amended, or rewritten in light of the realities of modern warfare. One related aspect that has not been at the forefront of the debate is how to best regulate war. I suggest, in other words, supplementing current discourse over the letter of the law to ask what form of law is appropriate as a matter of regulatory policy.

Consider cyber-warfare. The substance of the norm—*ad bellum* and *in bello* issues—has attracted much attention: do cyber attacks give rise to the right of self-defense? Does the principle of proportionality continue to apply unchanged? By contrast, the types of instruments and mechanisms most appropriate for regulating the use of cyber-warfare have not been addressed: is this best done through "interpretive guidelines" for existing norms? The adoption of a new treaty regulating cyber-warfare? Should the fact that nonstate actors may conduct cyber-warfare impact regulatory choices? What policies would enhance compliance with the law?

The traditional view views war regulation as comprising binding norms elaborated by states to constrain their behavior in times of war. Today, this view no longer holds, as an increasingly broad array of actors take part in war and as diverse and disorderly regulatory frameworks shape the law. From decisions made by new international tribunals, domestic courts and non-judicial UN bodies to guidelines and self-regulatory mechanisms, the contemporary laws of war take many forms. Which of these regulatory mechanisms guarantees the most effective and humane regulation of armed conflict?

I argue that the answer depends on the type of behavior (cyber-warfare, robots, drones) and the actor (state v. nonstate) considered. While some aspects of war remain suited for regulation through treaties and formal legal arrangements, other aspects may be better addressed through 'soft' law – non-binding instruments, self-regulatory mechanisms, or codes of conduct. This can be explained in light of the ability of 'soft' law to allow for more flexibility, involve interested (non-state) parties in the regulatory process, and positively impact legitimacy and compliance.

The breadth and importance of the questions raised highlight the need to broaden the discourse: Just as the Geneva Conventions changed the way war was perceived and fought in the wake of their adoption, regulatory choices made today will affect the way war is waged in the future.

Real World Military Operations and the Evolution of Battlefield Laws, Corri Zoli, Assistant Research Professor, Institute for National Security and Counterterrorism (INSCT), Syracuse University

This paper examines how the military strategic imperatives in COIN—the need to win the population, for instance—have leap-frogged past the political progress, accounting for progress in developing rules for regulating contemporary armed conflict from the defense (not the policy) quarter.

One of the best examples of this dynamic is the elevated restrictions imposed upon counterinsurgency operations that in fact may exceed existing standards found in the laws of war. Whereas the principle of proportionality prohibits excessive harm to the civilian population, the U.S. Army/Marine Corps Counterinsurgency Field Manual implies, for instance, that any collateral damage is intolerable and, as such, undermines the COIN mission: "An operation that kills five insurgents is counterproductive if collateral damage leads to the recruitment of fifty more insurgents." Operational rules of engagement, in their sensitivity to the actual warfare environment, may be more "humanitarian" than international humanitarian law in

their mission-driven respect for civilian lives and in their ability to more carefully calibrate “the technical limits at which the necessities of war ought to yield to the requirements of humanity."

I focus on a murkier, still evolving example: humanitarian interventions in the recent Presidential Study Directive on Mass Atrocities (4 Aug. 2011), which directs the administration to assess ‘whole of government’ tools (diplomatic, economic, development, and military) and create an interagency “atrocities prevention board” to coordinate the response of government agencies to an unfolding genocide or humanitarian crisis. This directive stems directly from a high-level initiative undertaken at the Defense Department to ready the military to respond to potential mass killings as an operational planning concept.

Some critical observations at the intersection of legal and security studies thus arise: (1.) do military operational and planning cycles comprise the pace and substance of adapting the laws of war and is this a new phenomenon?; (2.) what role does civilian policy leadership play in this process and does it matter?; and (3.) is the prevailing context of warfare over-determining the shape of the laws of war?