



Concept Paper: New Battlefields, Old Laws 2013

The Intersection of Operational Law and International Humanitarian Law

The 2013 New Battlefields, Old Laws workshop—The Operationalization of the Law—builds upon a series of insights from an interdisciplinary initiative at Syracuse University’s Institute for National Security and Counterterrorism (INSCT), in partnership with the International Institute for Counter-Terrorism (ICT) at the Interdisciplinary Center (IDC) in Herzliya, Israel.

Beginning in 2007, scholars, government experts, and practitioners from humanitarian, military, and other nongovernmental organizations (NGO) have been working collaboratively to debate whether the post-Sept. 11, 2001 security environment and the challenges posed by asymmetric conflicts require adaptations to the traditional laws and customs of war. The fruits of this dialogue have been encapsulated in *New Battlefields/Old Laws: Critical Debates from the Hague Conventions to Asymmetric Warfare*, published in 2011 by Columbia University Press and *Counterinsurgency Law: New Directions in Asymmetric Warfare*, published in 2013 by Oxford University Press. This year, the workshop is also co-sponsored by the International Committee for the Red Cross.

The 9/11 attacks spurred the US and its allies toward an extraordinary decade and more of military actions against Al Qaeda, the Taliban, and then Saddam Hussein and his Iraqi regime. What the President George W. Bush administration called the “Global War on Terror” routed the Taliban in Afghanistan and then attacked Al Qaeda and Taliban terrorists in the Afghan/Pakistan border areas. The Iraq war was launched by the US in 2003, despite the unwillingness of the United Nations Security Council to authorize military action. Before long, what began as a counterterrorist operation in Afghanistan and a conventional invasion in Iraq changed, dramatically.

Over the next few years, insurgencies flared in both countries, in different ways and from uniquely local circumstances, but both enmeshed in urban areas and local populations. Similarly, non-state terrorist groups were carrying out attacks in the Middle East. In 2006, Hezbollah

launched cross-border raids from Lebanon and fired rockets into Israel, killed civilians, and kidnapped Israeli soldiers. When the Israel Defense Forces (IDF) countered and attempted to root out and neutralize the Hezbollah fighters, attacks against them in civilian neighborhoods and in urban areas brought widespread criticism from human rights groups and the International Committee of the Red Cross (ICRC). These conflicts brought renewed attention to asymmetric warfare, in which conventionally weaker non-state enemies fight the stronger foe in ways that neutralize the conventional strengths and exploit apparent weaknesses, such as the willingness to engage in unlawful attacks with prohibited means, knowing that the dominant state will abide by the laws of war and not reciprocate.

If modern war was between professional state armies and typically large scale, then postmodern warfare discounts the value of overwhelming force, traditional battlefield tactics, and even technological advances, and substitutes equally lethal, smaller scale, urban-based war among the people. Postmodern war can be just as significant strategically as modern war, and its effects on a political order just as profound. Insurgents, after all, reject the existing political order. In this era of postmodern warfare, conflict is anything but linear, and the distinction between war and peace is not clear. Enemies are not easily identifiable, and their identity may change frequently. Victory is achieved not so much on the battlefield but by winning public support, and the battlefield itself is not so much a military one as political, based on a battle of ideas and the support of the local population. At the same time, how the postmodern war is fought—the humanitarian qualities of its campaigns—is crucially important in winning over the local population. Modern labels are insufficient and sometimes plainly wrong—peacekeeping, peace enforcement, counter-revolutionary operations, and humanitarian operations. Law and strategy, like law and tactics, are necessarily connected. Law imposes limits on operations, but legal authority is also necessary to enable the use of force in any kind of war. Positive legal authority is precisely what gives war its legitimacy. Legal legitimacy is as central to postmodern warfare as it is to any form of war, and we argue that the legal framework that has evolved for modern warfare is not sufficient for legitimizing postmodern war.

The trend in postmodern warfare in the last decade has been for many adaptations to traditional international humanitarian law (IHL) to take the form of operational law, or policy add-ons to IHL. Indeed, operational law—best conceptualized as the combined influence of law, national and multi-national policy, and operational imperatives—has outpaced treaty-based legal

developments and case law. It is not surprising that commanders in the field and their legal advisers would be the first to come to grips with the need for a reshaped legal paradigm in combating postmodern warfare. Nor has it been unhealthy for the reshaping to take the form of operational law standards. Going forward, however, we believe there are two critical aspects of this evolution process. First, there is the question of whether nation states should assume full accountability for reshaping the framework for conducting postmodern warfare and adopt a new set of principles and guidelines, through states' political processes at their highest levels. Second, there should be a careful and reasoned integration of both legal *and* operational expertise in this evolution process, an integration that has been deficient to date in the view of many.

This reshaping of the law has and must continue to be done with an IHL foundation. This time-tested legal framework for the conduct of hostilities and the protection of war victims provides the common ground where numerous participants in this reshaping process can meet to explore logical evolutions. To facilitate this process, we believe it is valuable to consider whether even the most fundamental of IHL principles are understood in common terms by academics, military, and non-governmental experts. Although our project clearly focuses on the challenges of asymmetrical warfare, exploring this question should begin with a more conventional context. If divisions in understanding exist, they will reveal an increasing "delta of consensus" as operations progress along a spectrum of conflict complexity. This process of common definition will therefore contribute to harmonizing new standards with the old, embellish them for new settings, and enhancing the value of discourse among all participants in the reshaping process.

Future wars will continue to be irregular. They will use a complex, evolving mix of warfare methods. Operational law and IHL can provide principles and standards—sufficiently supported by law—that will be useful when our soldiers are asked in the future to stabilize a conflict zone or intervene in mass atrocities. We believe that strengthening the foundational legal framework for conducting irregular postmodern warfare is an essential step in establishing normative principles that will go a long way toward the development of strategic justifications for postmodern wars.

War remains a complex political phenomenon, and wars will provide both conventional and postmodern challenges in an ever-changing global political environment. Policymakers, scholars, and practitioners should work to shape a legal framework for postmodern warfare, based on careful reflection, lessons learned, and strategic considerations. The law should be

ahead of the evolution of postmodern warfare, because then the legal framework can itself generate the norms for the conflict. Law can shape strategy, and it can provide guidance to armed forces that will be sorely needed in these challenging future conflict environments.