

# MODERNIZING INTERNATIONAL HUMANITARIAN LAW: THE NECESSITY OF DEALING WITH THE CHALLENGES OF 21ST CENTURY WARFARE

**ON THE SECOND DAY of The 3rd Hague Peace Conference, Dr. Robert Heinsch, Associate Professor at the Grotius Centre for International Legal Studies at Leiden University, held the following speech on one of the two main themes: modernizing the Geneva Conventions.**

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Already after World War II, but increasingly with the end of the Cold War, there has been a change in the conduct of armed conflicts. We have witnessed a move away from classical interstate wars towards usually non-international armed conflicts, which are no longer characterized by two equal armies on each side. Rather, the majority of conflicts involve a (militarily) superior party, usually government troops opposed by armed rebel groups, freedom fighters, or terrorist cells – parties which are characterized by their conventionally weaker position. The inherent asymmetry of these conflicts creates a temptation for the inferior party to use war tactics that violate rules of international humanitarian law (IHL) in order to make up for disadvantages in matters relating to materiel, resources and fighters. This links in with the observation that today's conflicts ('new wars') are not characterised mainly by the objective to gain territory or military victory in the classical sense, but are rather about achieving independence, identity, ethnic cleansing of an area, spreading terror and publicity for their cause in the case of terrorist groups. At the same time, new technologies like cyber warfare, drone strikes, and autonomous weapon systems, which might be employed at least by one side in these conflicts, raise questions whether IHL is actually applicable to their use in the first place, because the Geneva Conventions and additional protocols were drafted at a time when none of these technologies were available or their development even anticipated.

Against this backdrop, I believe that it is necessary to think about reforming international humanitarian law in three main areas: we need to (1) further assimilate the two legal regimes applicable for international armed conflict and non-international armed conflict; (2) prepare international humanitarian law for the fact that some of the non-State actors do not seem to be willing to follow the rules of the law of armed conflict due to the fact that they challenge the international legal system (and their values) as such; and (3) think about adequate responses in order to deal with the challenges presented to us by modern technologies.

Considering the first major challenge, the assimilation of the legal regimes for international and non-international armed conflict, we have to see that in this regard the current international humanitarian law regime still reflects a system which might have been adequate immediately after World War II, but unfortunately is in many ways not up-to-date in the current times. The fact that the rules for international armed conflicts are much more elaborate than for non-international armed conflicts does not reflect the fact that nowadays the majority of armed conflicts are non-international in character. In addition, it does not take into account that for the victims suffering from these armed conflicts, it does not make a difference whether it is an international or a non-international armed conflict. As the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has stated its famous Tadić Decision: “What is inhumane, and consequently proscribed, in international wars cannot but be inhumane and inadmissible in civil strife”. Although through the jurisprudence of the ICTY as well as the development of customary international law during the last 20 years, the gap between the rules for international and non-international armed conflict has become smaller, there is still much needed room for improvement. Fighters in non-international armed conflict still do not receive the benefits of being “combatants” when they are regular fighters, and also do not receive the Status of “Prisoners of War” when they are captured. Especially the problem of detention in non-international armed conflict is much less regulated in these situations, leaving the question open which rules are to be applied in this moment. Finally, the list of war crimes, i.e. serious violations of international humanitarian law, which can be prosecuted when committed in non-international armed conflict, is still much shorter than the one for war crimes in international armed conflicts. I believe that it is necessary that the international community continues to work on bridging this gap between the two legal regimes for international and non-international armed conflicts, so that finally we have one coherent regimes applicable for both types of conflicts.

Addressing the second major challenge, the growing asymmetry in conflicts, and the problem that some of the modern non-State actors seem to disregard the international legal system as such touches upon a crucial distinction in international law: the distinction between the armed conflict paradigm which is the basis for the application of international humanitarian law on the one side, and the law enforcement paradigm which usually is accompanied by the application of the international human rights

regime. While international humanitarian law is the older system and was developed originally to regulate the relations between States in armed conflict, it also - and mainly because of that - presupposes a certain willingness of the subject objects of the legal regime to adhere to its rules. This important starting point for the regime of international humanitarian law is questioned more and more during modern conflicts, in which terrorist groups often out of principle disregard the respective international law standards, also in order to challenge and provoke the international community. One way to at least partially solve this problem is to think more about ways to include non-State armed groups in the drafting and law-making process of the respective international humanitarian law treaties. This would enhance the legitimacy of the respective documents, and most probably on the long run would lead to greater adherence to the regime of international humanitarian law. However, we have to be aware of the fact that some groups do not even want to be included in further developing the current international legal order, but just will continue to violate its rules. In these circumstances, we have to find a more efficient way to enforce rules of international humanitarian law in those situations where there is actually an armed conflict taking place, through the prosecution of war crimes before national and international Courts and Tribunals. We also have to clarify and probably expand the rules applicable for situations below the threshold of armed conflict, i.e. when we need international (human rights) standards clearly stating how people in these kinds of situations are to be treated. This area is unfortunately still underdeveloped, mainly because of the problem of extra-territorial application of human rights. But probably the biggest challenge the international community has to tackle here is to come up with a system which allows for the setting up of an international police/security force, which is actually able to prevent further violations of international law in crisis situations. The current system under Chapter VII of the United Nations Charter seems to have proven not to be able to deal with a lot of the current problems, as demonstrated for example by the conflict in Syria.

Coming to the third, and final major challenge, the new technologies like cyber war, remote controlled weapons, and lethal autonomous weapon systems. All three areas are too complex to cover them in detail here, but what combines them is the fact that the law of armed conflict was drafted at a time when neither of these technologies had been developed. That a such does not exclude the current IHL regime to be applicable to them, and the International Committee of the Red Cross as well as many academic colleagues have clearly shown that the current IHL regime is abstract enough to also give adequate answers to these new technologies. But concerning the possibilities of cyber warfare one has probably to admit that we have not yet seen all the possibilities in practice, and we should be prepared for the fact that non-State actors will take advantage of the fact that cyber capacities are easily available and that the effect of using them as a weapon in today's interconnected world can be dramatic. In this regard, it seems advisable to further look into ways to regulate the area of cyber warfare (but also cyber crime, being below the armed conflict threshold), a process that has already been started by the Tallinn Manual Group of Experts. With regard to remote controlled

weapons and especially concerning lethal autonomous weapons the international community needs to ask itself whether it wants to allow “killer robots” to autonomously take the decision whether the life of a human being can be taken. It might be sensible to continue the discussion whether there is not the need for banning this kind of weapons in order to ensure that the principles of humanity in armed conflict are actually taken into account by a human being.

Overall, this brief overview has hopefully shown that there is a continued need for further improving and updating the already quite sophisticated system of international humanitarian law in order to ensure that also the victims of 21st century warfare are sufficiently protected during these situations of modern armed conflict.

*“I was born in the midst of a civil crisis that lasted through my childhood to my teenage years, so I will never know what it is like to be a child – my childhood was stolen. Most of my teenage memories are haunted by faces of young men and women whose dreams were shattered as they were killed, raped, abducted or forcibly conscripted into warring factions. This is a reality shared by millions of people and a reflection of the current crisis that we face around the world. I believe peace is possible in the world but only if we use the bottom up approach, and not the other way around.”*

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*“The world that was born at the end of World War II is very different from the world that we live in. Local crisis and the emergence of extremist groups are the main diplomatic challenge of our century, which cannot be solved only by the bias of the five major powers that permanently occupy the UN Security Council, losing legitimacy with every armed conflict that it is not able to prevent. Participation of new global players should be strongly considered and encouraged, but the Council should work initially to establish local mechanisms of defense. At the same time, foreign policy should not be a one sided affair, but a process that also involves the population itself. The strategic measure to elucidate the foreign policy crisis of legitimacy is creating political participation mechanisms that provide greater transparency. The consultation must expand without loss of agency or coordination capacity.”*

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