Lessons Learned After Twenty Years of Hostilities: The Use of Force and the Law of Armed Conflict

Kenneth Watkin*

> *"It is a joke in Britain to say that the War Office is always preparing for the last war. But this is probably true of other departments and of other countries, and it was certainly true of the French Army."* [1]

INTRODUCTION: PRE-9/11

Whatever truth there is to the old adage that generals always prepare for the last war, there is much to learn from the use of force and law of armed conflict/humanitarian law issues that have arisen since the 9/11 attacks. This is all the more important given the desire by many countries to reorient their focus away from the

* Brigadier-General (Ret'd) Kenneth Watkin, QC served 28 years as a Canadian Forces legal officer, including four years as the Judge Advocate General for the Canadian Forces (2006-2010). Watkin taught at the United States Naval War College (2011-2012) as the Charles H. Stockton Professor of International Law and has worked as a counterterrorism/counterinsurgency consultant for the United Nations and the Government of Canada.

1. WINSTON CHURCHILL, 1 THE SECOND WORLD WAR: THE GATHERING STORM 475 (1948).

counterterrorism and counterinsurgency efforts of the past 20 years. Instead, they anticipate future hostilities will involve a resurgence of classic conventional state versus state conflict. It is necessary to address such conflict due to the changing nature of 21st century security threats. However, the present and future threats posed by non-state actors will not subside on their own or become any less relevant.

Indeed, the challenge for states will be how to address an even more complex security environment than has occurred over the past 20 years, one that will include blended state and non-state actor threats (e.g., proxy warfare) even in the context of an international armed conflict. The answer to that challenge will not be found by exclusively embracing pre-9/11 interpretations of the law governing the use of force or the conduct of hostilities that is exclusively focused on inter-state warfare; it will also require an application of the lessons learned during the past two decades. Technological change, continuing challenges to state governance, and the global nature of non-state actor ambitions mean that in terms of state responses to emerging security threats, "whatever happens, there will be no turning back."[2]

Perhaps the greatest paradigm shift caused by the 9/11 attacks was the requirement to address the threats posed by non-state actors, not only in the traditional setting of internal state conflict, but more uniquely in a transnational context. Despite the legal approaches adopted during the past 20 years of counterinsurgency and counterterrorism having recently been referred to as a "corrupting influence," non-state actor threats will, if history is any judge, remain predominant in the coming years.[3] The result is that a reorientation of international law to address an anticipated, but thankfully yet to materialize, resurgence of traditional inter-state warfare will have to be one of degree rather than a wholesale change. Despite a desire to focus on more conventional applications of the law, the lessons learned since 9/11 will remain as relevant as the rules governing classic inter-state conflict.

I. TWO DECADES OF CONFLICT

A. The Enemy

The attacks of 9/11, carried out by al Qaeda terrorists, marked a significant paradigm shift towards conflict with non-state actors. Described as "megaterrorism," this transborder attack forced the international community to not only accept that states could exercise a right of self-defense against non-state actors, but also address the organization of such groups and the changing nature of the threat they posed.[4] While controversy erupted over the United States' categorization of the conflict as a Global War on Terror, ultimately al Qaeda and the Islamic State were recognized as presenting a unique "global" threat, one that involved a mix of insurgency and terrorism that was not constrained internally within states.[5]

---

2. Ulysses S. Grant, quoted in GORDON C. RHEA, THE BATTLES FOR SPOTSYLVANIA COURT HOUSE AND THE ROAD TO YELLOW TAVERN MAY 7-12, 1864 3 (1997).

3. Charles Pede & Peter Hayden, *The Eighteenth Gap Preserving the Commander's Legal Maneuver Space on "Battlefield Next"*, MIL. REV., Mar-Apr 2021, 6, 17, https://perma.cc/SJH4-WG9X.

4. J. PAUL DE B. TAILLON, HIJACKING AND HOSTAGES: GOVERNMENT RESPONSES TO TERRORISM 61 (2002).

5. S.C. Res. 2249, *Preamble* (Nov. 20, 2015).

Although there were still international armed conflicts during this period of time (e.g., the 2008 Georgia/Russia and 2014 Russia/Ukraine conflicts), the state versus state phases of hostilities tended to be brief. In this respect, the relatively short post-9/11 inter-state conflict in Afghanistan and the 2003 invasion of Iraq were followed by lengthy ongoing and highly complex insurgencies. The Iraq conflict in particular serves as a stark reminder of an often-overlooked reality that international armed conflict can involve operations against diverse non-state actors during an occupation.

It also became evident that the "enemy" was unique in terms of its involvement in, or close association with, criminal activity (e.g., hostage taking, oil smuggling, extorsion, drug trafficking) in order to fund its operations. The similarities between organized crime and insurgent networks often meant the analysis of an organization for targeting purposes more naturally fell within the expertise of the police rather than conventionally trained military intelligence personnel.[6]

It must also be noted that conflicts with non-state actors were not restricted to the Sunni-based threat posed by al Qaeda and later the Islamic State (e.g., Russia continued its involvement in a highly destructive counterinsurgency with Chechen guerrillas). The past 20 years have also witnessed complex hostilities involving a variety of non-state actor proxies (e.g., Hezbollah, Hamas, Houthi rebels) supported by Iran against Israel, the United States, and Saudi Arabia, as well as an Iranian effort to create a Shia-controlled crescent across the Middle East. While "proxy wars" were a part of the Cold War, reliance by states on non-state actors has expanded considerably. They were used not only by Iran, but also by coalition States in countering the global counterterrorism threat. Coalition operations against the Islamic State in Iraq and the post-2011 Syrian conflict highlighted the degree to which states can ally themselves with non-state actors (e.g. Kurdish People's Protection Units and Iraqi Popular Mobilization Forces).

B. The State Response

Just as al Qaeda adopted different tactics against a "far" and "near" enemy, Western nations have geographically separated their responses. External operations against non-state actors were viewed as engagement in armed conflict while threats manifesting themselves within their borders were largely addressed through a domestic law enforcement framework. The international legal community struggled to categorize this conflict particularly in terms of its transborder character, and the category of "international armed conflict" was retained for inter-state hostilities. However, prompting some controversy, the U.S. Supreme Court accepted that the conflict with al Qaeda was a "conflict not of an international character" notwithstanding its global reach.[7] Given the lack of clarity on conflict categorization, many practitioners simply asked the question whether

6. RANDALL WILSON, BLUE FISH IN A DARK SEA: POLICE INTELLIGENCE IN A COUNTERINSURGENCY 6 (2013).

7. Hamdan v. Rumsfeld, 548 U.S. 557, 562 (2006).

there was an armed conflict in existence, since that was a condition precedent for applying targeting precautions, and other humanitarian law provisions. The difficult, sometimes arcane, and often doctrinaire debate on classification was often left to the academic community.

Confronted with a unique counterterrorism and counterinsurgency threat, the state response was exceptional in many ways. While conventional military operations did occur, the requirement to deal with an enemy hiding amongst civilian populations placed a premium on intelligence-led responses. A disproportionate reliance was placed on special operations forces, including raids designed to capture rather than kill terrorist leaders. While often policy driven, such an approach reflected the priority given to law enforcement-type responses to the insurgent/terrorist threat. Consistent with the nature of counterinsurgency operations, state action—such as Canada's involvement in Afghanistan—became "Whole of Government" activities involving diplomatic, police, corrections, and humanitarian aid, as well as military deployments.

Military forces did fight some set piece battles (e.g., 2006 Operation Medusa[8]), but improvised explosive devices presented a dominant threat. Many military deployments reflected a focus on law enforcement: this included, during regular interface with the civilian population, manning check points, conducting searches, and supporting local police forces, such as through Police Operational Mentoring and Liaison Teams (POMLET). Rules of Engagement necessarily reflected human rights-based law enforcement norms requiring a graduated use of force. With a focus on governance, the need to transfer detainees for trial by local authorities led to significant efforts to collect evidence on the battlefield. This resulted in intelligence and operational-focused forensic efforts to counter the IED threat also complimenting efforts to bring perpetrators to justice.

C. The Use of Force and 9/11

Perhaps one of the most dramatic paradigm shifts brought on by the 9/11 attacks was the acceptance by the international legal community of a state's right to act in self-defense under Article 51 of the *Charter* against non-state actors. Added to this was the unique aspect of drone warfare, a technologically advanced weapon well suited to be used in the low-threat counterinsurgency environment. This weapon system was frequently used to target terrorists in territory located in failed or failing states that were not able or willing to halt the activities of non-state actors. This prompted considerable controversy about whether this defensive response was governed by a restricted law enforcement approach, a considerably more liberal humanitarian law-based response, or a unique application of self-defense principles, which ultimately incorporated law of armed conflict principles (e.g., "naked self-defense"). The argument against reliance on the law

8. *See generally* DAVID FRASER & BRIAN HANNINGTON, OPERATION MEDUSA: THE FURIOUS BATTLE THAT SAVED AFGHANISTAN FROM THE TALIBAN (2018) (Operation Medusa was the code name given to the 2006 Canadian led operation to defeat the Taliban in the Panjwayi district that involved Afghan, American, British, Dutch, Danish, and Romanian troops).

of armed conflict was based not only on "geography of war" issues (e.g., areas of "active hostilities"), but also the *Tadić Case* threshold of requiring protracted violence by an organized armed group in order for a non-international armed conflict to exist.[9] However, the approach taken by some lawyers was to accept that a "one-off" attack by a non-state actor could constitute an "armed attack." In doing so, reliance was placed on a "totality of the circumstances" test that looked at various criteria like non-state group organization, group weapons and tactics, the type of target, and the force required to defeat the threatened action.[10]

D. Targeting People and Things

Targeting people became a particularly controversial issue largely due to the technologically-enhanced (e.g. drones) capacity to conduct lengthy video surveillance and deliver highly precise missile and artillery ordnance against terrorists hiding amongst the civilian population. Strikes in the Occupied Territories, Yemen, Afghanistan, and Iraq caused the international community to finally assess the meaning of *Additional Protocol I and II*[11] concept of "direct participation in hostilities." The International Committee of the Red Cross released a controversial 2009 study[12] that introduced new concepts such as the "continuous combat function" and a "revolving door of protection" standard for civilian participants in hostilities. These criteria were not favorably accepted by many states, so their military forces continued to apply a broader approach towards targeting that saw the performance of combat support and combat service support functions as indicia of organized armed group membership, and as an indication of direct participation in hostilities by civilians.

Since 9/11, the human rights community has consistently stressed the need for accountability regarding aerial strikes it viewed as causing disproportionate collateral casualties. Command-generated operational restrictions on using force during counterinsurgency operations prompted questions about how broadly the legal prohibition against causing "excessive" collateral civilian damage or casualties was to be interpreted, and whether the limitations imposed were for legal, operational, or political reasons. Claims that NATO did not strike targets during the 2011 Libya campaign if it was believed civilian casualties would result

9. Prosecutor v. Tadić, Case No. IT-94-1-I, Decision On The Defence Motion For Interlocutory Appeal On Jurisdiction, ¶ 70 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995), https://perma.cc/G464-R62G (protracted armed violence with an organized armed group).

10. KENNETH WATKIN, FIGHTING AT THE LEGAL BOUNDARIES: CONTROLLING THE USE OF FORCE IN CONTEMPORARY CONFLICT 375-378 (2016); Laurie R. Blank & Geoffrey S. Corn, *Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition*, 46 VAND. J. TRANS'L. L. 693, 731-45 (2013).

11. *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts*, *opened for signature* Dec. 12, 1977 Art. 51(3) 1125 UNTS 3; *Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts*, *opened for signature* Dec. 12, 1977, Art. 13(3), 1125 UNTS 609.

12. INTERPRETIVE GUIDANCE ON THE NOTION OF DIRECT PARTICIPATION IN HOSTILITIES UNDER INTERNATIONAL HUMANITARIAN LAW, International Committee of the Red Cross (2009).

highlighted the degree to which "zero casualty" warfare became an expected norm.[13] Strikes against the "terrorist" enemy were not limited to attacks on people: highly controversial strikes against "Taliban" drug labs in Afghanistan and the strategic air campaign against ISIS oil production facilities and financial institutions reflected not only the continuing relevance of traditional law of armed conflict targeting issues, but also the exceptionally diverse nature of the jihadist "terrorist" groups.

E. Detention Operations

The response to the 9/11 attacks very quickly highlighted the lack of legal clarity regarding the detention, status, and treatment of non-state actors. The United States' decision to deny Taliban forces and al Qaeda members prisoner of war status or combatant immunity during the international armed conflict portion of the hostilities, the use of C.I.A. and foreign-controlled "black sites," and the torture and abuse of detainees stand out as actions that attracted considerable criticism of the "Global War on Terror." This, combined with the abuse of detainees in Iraq (e.g., Abu Ghraib) brought negative consequences for the U.S.-led efforts to defeat the jihadist insurgency. It has been acknowledged that such abuse aided jihadist recruiting efforts, which ultimately deepened the insurgency in that country and elsewhere. The Canadian approach towards detainees was to apply prisoner of war treatment standards to all captured persons. However, even then it became involved in a controversy over whether detainees transferred to Afghan authorities for prosecution were being abused or tortured once they were in host nation custody. This resulted in litigation, the mentoring of Afghan authorities, and the establishment of a detainee treatment monitoring regime.

Another issue that arose was the lack of clarity over the international law authority to detain persons during a non-international armed conflict. European states largely tended to look for some form of "positivist" authority (e.g., domestic legislation, UN Security Council resolution), while other predominately common law states relied on a customary humanitarian law basis. Considering the unlikeliness of the drafting of an international treaty to address this issue, states will continue to apply different approaches that may complicate coalition operations.

F. The Humanitarian Law and Human Rights Law Interface

Finally, the tension between human rights advocates—advocating for a greater, even dominant role for human rights law—and state legal advisors—relying on humanitarian law as the *lex specialis* governing counterterrorism and counterinsurgency operations—intensified over the past 20 years. The United States, initially at least, relied on a strict exclusionary approach towards the application of human rights law; the military followed a policy of applying the principles of the

13. Letter from Peter Olsen, Legal Advisor, NATO, to Judge Philippe Kirsch, Chair, International Commission of Inquiry on Libya, United Nations 3 (Jan. 23, 2012), https://perma.cc/YY9A-2EFE.

law of armed conflict on all operations, however categorized. In an exclusionary fashion the Canadian Federal Court of Appeal ruled that it was international humanitarian law that applied to detainee transfers by the Canadian Forces to Afghan authorities rather than Canadian domestic human rights constitutional protections.[14] Conversely, the European Court of Human Rights expanded the role human rights law performed during non-international armed conflict (e.g., during the Russia/Chechen conflict) to include controlling aerial bombing and the use of artillery, although it also incorporated humanitarian law principles into its analysis.[15]

However, there have been "cracks" in the rhetorical armour presented by advocates for both sides. The reality of 21st century operations (e.g., Iraq and Afghanistan) has resulted in greater references to the application of human rights law and norms by the United States. This includes an acknowledgement that the *Convention Against Torture* has limited extraterritorial application, as well as references being made to human rights law in military legal manuals. The U.S. Supreme Court ruled Article 75 of *Additional Protocol I* reflected customary humanitarian law, which was also referenced in Department of Defense detainee handling policies.[16] Conversely, European and Inter-American human rights tribunals have been increasingly forced to address the application of humanitarian law. While the European Court of Human Rights extended human rights law jurisdiction to coalition operations in occupied Iraq, it has also accepted there are limits on its jurisdictional reach, including most recently during the initial "active" phase of combat during the 2008 Russia/Georgia Conflict.[17]

II. LESSONS LEARNED AND THE FUTURE

The past twenty years had a profound impact on how the use of force and the law of armed conflict is applied to regulate hostilities.

A. Lesson 1: There Will Be a Continuing Need to Address the Global Threat Posed by Non-State Actors

The global threat posed by non-state actors will continue and is likely to intensify whether caused by groups acting on their own, or as state proxies. It is necessary to re-calibrate state military responses by placing greater emphasis on the law governing more traditional inter-state conflict. However, neither contemporary nor future hostilities are likely to exclusively, or even predominately, involve conventional military operations. The ongoing definitional struggle to describe aspects of such conflicts: hybrid wars, gray zone conflict, liminal warfare, surrogate warfare, and campaigns between wars are all testament to the continuing

14. Amnesty International Canada v. Canada (Chief of the Defence Staff) [2009] 4 F.C.R. 149, para 36, 2008 F.C.A. 401.

15. *See, e.g.,* Isayeva v. Russia (II), 41 Eur. Ct. H.R. ¶ 176 (2005).

16. Hamdan v. Rumsfeld, 548 U.S. 557, 634 (2006).

17. Georgia v. Russia (II), App. No. 38263/08, ¶¶ 109-44 (Jan. 21, 2021), https://perma.cc/EK4Y-J3RT.

challenge of addressing the types of shadow wars that find their genesis in the post-World War II era.

In addition, non-state actors will continue to be directly, or indirectly, involved in transnational crime. They will also engage in types of "criminal insurgency" challenging state governance as some countries struggle to control drug and other crimes that transcend borders. The diverse security challenges of this century reinforce the requirement to apply the law governing the state recourse to war, international humanitarian law, and human rights law in a holistic fashion. It is the basis of the "operational law" approach pioneered by the United States in the 1990s and which became a staple of state responses following 9/11.

B. Lesson 2: To Ensure a Coherent Application of International Law, Greater Attention Must Be Paid to the Interface Between the Three Legal Frameworks Governing the Use of Force

While there are conceptual advantages to keeping the legal frameworks governing the use of force separate, operational experience demonstrates at various points that this is not possible, particularly regarding the interface between the state right to self-defense and humanitarian law. Drone strikes have highlighted the challenge of identifying when humanitarian law governs a state response to attacks by non-state actors (e.g., a totality of the circumstances test). However, there is also a need to address their interface during longer-term conflict. Two major schools of thought are that there is a continuing application of the law governing the recourse to war throughout the conflict, and a second more limited approach that indicates the application of self-defense principles ends once the conflict escalates to a major defensive war between states. Further, there is the issue of whether self-defense principles influence the tactical use of force or only apply at the strategic level. The interface between these two bodies of law will need to be resolved to ensure a coherent approach towards controlling the use of force.

The January 2020 drone strike against Iranian Major-General Soleimani and Iraqi militia leader Abu Mahdi al-Muhandis by the U.S. highlights that inter-state violence will continue to be far more complex than a shift in focus toward "near peer" conflict might suggest. That strike not only raised questions regarding the necessity, imminence, and proportionality of that action, but also whether humanitarian law governed the use of force. Amongst the issues that arose was whether it was a discrete use of force, an accumulation of events coalescing in an armed attack, or part of an ongoing armed conflict between the United States and Iran. The attack against a senior Iranian military official and an Iraqi militia leader whose group was integrated into the Iraqi defense forces demonstrates that state and non-state actor interaction will remain a complicating issue in the contemporary security environment.

C. Lesson 3: Human Rights Law Will Have a Continuing Impact on Military Operations

Regardless of whether a future conflict reflects more traditional conventional hostilities, or some form of hybrid hostilities, the human rights community will remain committed to seeking accountability (e.g., war crimes, crimes against humanity, genocide, the crime of aggression), argue for a broader application of human rights law and principles, and engage in litigation in an effort to limit the scope and scale of conflict. The role human rights law performs during armed conflict cannot be ignored by states, nor arbitrarily limited. For example, even during the most conventional of conflicts there is an operational requirement for military forces to apply human rights norms governing the use of force while engaging with the local civilian population (e.g., policing), both during and outside situations of occupation.

Even for states such as the United States and Canada that rely on the *lex specialis* principle—and do not accept a broad extraterritorial jurisdiction for human rights treaties—human rights norms remain an integral part of conventional and customary humanitarian law. Further customary human rights law has universal application. The focus by states should not be on denying a role for human rights law, but rather ensuring its application is directed towards the functions it is designed and intended to perform. Particular attention will need to be paid to the phenomenon of human rights overreach, which has occurred periodically over the past 20 years. This is evidently still an issue given the suggestion by the Human Rights Committee that Article 6 of the International Convention of Civil and Political Rights might have a role to play in controlling the state recourse to war.[18]

D. Lesson 4: Detention Operations Will Remain a Strategic Center of Gravity

The post-9/11 period has established that the humane treatment of prisoners of war and other detainees, including "terrorists," is a key strategic issue. The prohibition on torture and the mistreatment of detained persons is a *jus cogens* principle of international law. Further, torture has no operational utility in terms of acquiring reliable intelligence. The brutal treatment of detainees is one of the primary reasons that liberal democracies lose "small wars," since it drives a loss of public support.[19] Given the attention placed on this issue over the past two decades it is likely to also be critical during inter-state conflict. States can avoid this problem by ensuring the application of *Geneva Convention III* concerning prisoners of war and strict adherence to the humane treatment of other detainees. Adopting a policy of applying prisoner of war standards for all detainees however

18. Human Rights Committee, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life, para. 69-70, UN Doc. CCPR/C/GC/36 (30 Oct. 2018).

19. GILL MEROM, HOW DEMOCRACIES LOSE SMALL WARS: STATE, SOCIETY, AND THE FAILURES OF FRANCE IN ALGERIA, ISRAEL IN LEBANON, AND THE UNITED STATES IN VIETNAM 24 (2003).

categorized is particularly helpful from an operational, moral, and information warfare perspective. The prosecution of "unprivileged belligerents" must take place in accordance with internationally recognized fair trial standards. Such trials will be enhanced by security force (e.g., military and police) engagement in the collection of evidence on the battlefield.

E. Lesson 5: Technological Change Can Skew Legal Analysis

The use of drones has raised unique legal issues. The past 20 years also saw the introduction of other technologically advanced weapons systems, including cyber means and the use of artificial intelligence. The reliance on space-based assets, such as satellite surveillance and communications, is a game changer in terms of military capability. This trend continues with the development of other weapons systems, such as hypersonic missiles, laser and other-directed energy weapons, and high-speed torpedoes.

However, the use of drones focused attention on a unique weapons system that resulted in a very precise and highly personalized form of warfare primarily directed at killing people. This, combined with the pressure to reduce civilian casualties as part of counterinsurgency operations, created a very restricted notion of proportionality that cannot necessarily be applied during inter-state or other conflicts involving more conventional operations. Hostilities such as the 2003 Iraq invasion and the 2006 Second Lebanon war highlighted that the application of humanitarian law targeting rules will have to take into account not only thousands of aerial and artillery-delivered ordnance, but also the effects of targeting objects. Larger scale conflict and higher intensity operations introduce issues such as strategic targeting, economic warfare, and blockade. Any focus on new technology cannot cause the international legal community to ignore the need to consider more traditional applications of the law governing hostilities.

CONCLUSION

The paradigm shift following 9/11 brought about significant changes in how international law was interpreted. The transborder threat posed by non-state actors altered how the law governing the recourse to war was applied. It also has forced states to operate in a far more legally complex and accountable battle space than has occurred in the past. A pivot towards traditional, even large-scale inter-state conflict will not change that reality. As a result, states and their legal advisors will have to be prepared to apply the lessons learned during the past 20 years in a holistic fashion across the full spectrum of conflict.