

DIFFICULT QUESTIONS: OBEYING INTERNATIONAL HUMANITARIAN LAW IN MODERN CONFLICT

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*"As long as armies have met in battle, there have been limits on soldiers' conduct in combat.....Such rules and laws have been based not only on national interests, but on sound tactical and strategic considerations. "*²

Most soldiers in reasonably civilized countries have at the very least a basic foundation in International Humanitarian Law (hereafter IHL). At the very least, they know that it is illegal, and wrong, to kill prisoners of war, to torture, to kill civilians and so on. The degree to which officers and soldiers are trained in IHL varies from country to country. It is probably worth pointing out that training in ethics and the law of war is rather different from *education*. Training drills a person to behave in a certain way given particular circumstances. Education equips a soldier to consider and apply principles to difficult situations which may not have been specifically foreseen. This article will look not so much *what* is taught in terms of IHL or its close relative the 'Law of Armed Conflict' (hereafter LOAC) but rather *why* it is important to obey it.

We will begin by looking at the history of IHL, which is long and distinguished and surprisingly 'international' in nature. We will then go on to look at the practicalities of compliance, narrowing down on the instrumental benefit that can accrue to the legally compliant soldier or officer. The section ends with a reflection as to what is the difference between a man with a gun — a mercenary, and a professional soldier.

The article continues with an observation on the importance of leadership in this matter. A key characteristic of most, if not all of the war crimes that have been discovered and litigated, at least in the US and UK, has been a failure of leadership. It concludes by arguing that for all its problems, IHL is a great deal better than nothing.

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² SOLIS & GARY, THE LAW OF ARMED CONFLICT 26-27 (Cambridge 2008).

I. A POTTED HISTORY OF INTERNATIONAL HUMANITARIAN LAW

There is a long history of nations trying to regulate armed conflict; although the famous Roman lawyer and philosopher Cicero once wrote that law falls silent during the clash of arms' in fact most cultures have found ways of trying to regulate warfare. The roots of the Law of Armed Conflict (LOAC) also known as International Humanitarian Law (IHL) are very deep.

As long ago as 1400 BC Egypt had agreements with Sumerian and other states with regard to the treatment of prisoners. The Bible demonstrates that rules were developing concerning how certain kinds of war should be regulated. For example the book of Deuteronomy Chapter 20 says:-

"When you march up to attack a city, make its people an offer of peace. If they accept and open their gates, all the people in it shall be subject to forced labour and shall work for you. If they refuse to make peace and they engage you in battle, lay siege to that city"⁴,

With respect to Islam, one of the first leaders of the expanding Islamic community, the Caliph Abu Bakr, is quoted as instructing his soldiers:-

"Stop, O people, that I may give you ten rules for your guidance in the battlefield. Do not commit treachery or deviate from the right path. You must not mutilate dead bodies. Neither kill a child, nor a woman, nor an aged man. Bring no harm to the trees, nor burn them with fire, especially those which are fruitful. Slay not any of the enemy's flock, save for your food. You are likely to pass by people who have devoted their lives to monastic services; leave them alone"⁵

He is said to be summarising the views of the Prophet. It is worth noting here that not only are the old, women and children protected, but there is an environmental element to the instructions. From the Islamic perspective, this is simply a reflection of instructions that are found in the Q'uran, the Islamic holy book.

³ 'Silent enim leges inter arma.' This is reported speech, and no-one is quite sure whether Cicero actually took this view.

⁴ DEUTERONOMY CHAPTER 20 VERSES 10-12 (New International Version).

⁵ AL MUWATTA BOOK 20.

Similar provisions can be seen in African, Indian and East Asian cultures. Readers of this journal may be well aware that the Mahabharata, a very ancient Sanskrit religious scripture of great importance to Hindus, decreed that once one's opponent is disabled, one should cease fighting; those who surrender should not be killed; non-combatants should not be attacked; and places of worship should be respected.⁶

In ancient China, Sun Tzu (who lived about 2500 years ago) advised that prisoners be treated kindly. According to Sun Tzu, it was an effective way of ensuring the surrender of other enemies. The central point to be drawn from these admittedly somewhat patchy examples is that an attachment to ethical restraints upon warfare and IHL are not culturally specific nor particularly recent.

Moving forward in time it is well-known or supposed, and to some extent true, that the medieval code of Chivalry in Europe had some effect in ameliorating combat. Certainly the ideas that have derived from chivalry have had a major effect on the development the LOAC. Indeed some experts in MIL identify 'Chivalry' as a principle of *us in bello* alongside Distinction, Necessity Proportionality and Humanity. It was for breaches of the rules of war as understood in the late 15th Century that a mercenary called Peter von Hagenbach was charged in 1474. This was the so-called Breisach trial, often thought of as the first war crimes tribunal. Amongst other crimes, Hagenbach was charged with murder and rape. He was executed. This trial was also the first occasion known of where the defense of 'superior orders' were offered.

However, these rules varied according to period, place, culture and the moral standards of the time. There was no universal code of laws and practices that was applicable worldwide. It was not until the late 19th Century that a set of rules common to all major cultures of the world began to develop, with Henry Dunant founding the International Committee of the Red Cross (ICRC) and convening the first Geneva Convention of 1864. The ICRC remains the most important international organization dealing with IHL.

The 1868 St. Petersburg Declaration is very important, as it defined the only legitimate object of war as 'to weaken the military forces of the enemy'. Anything that acts in excess of that objective, such as 'to aggravate suffering of disabled men' would be contrary to the laws of

⁶ SOLIS, *supra* note 2.

humanity'. This was the first time the concept of 'unnecessary suffering' was embodied in an international legal text.

The Hague Conventions of 1899 and 1904 made attempts to reduce unnecessary suffering by restricting the use of certain weapons, such as gas. Most of their provisions have now been superseded by more recent conventions. However the 1904 Hague Convention included a short paragraph which is of lasting importance. It is known as the *Martens Clause* after its author:

"...populations and belligerents remain under the protection and empire of the principles on international law as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience"

The crucial importance of this clause is that it enshrines the importance of 'Humanity', insofar as it is possible, as a guiding principle. This principle is the ultimate rule that now suffuses and guides almost all international conventions on IHL. Even today, the body of Conventions and rules relating to the use of various banned weapons is known as 'Hague Law'.

Another 'Geneva Convention', this one promulgated in 1929, attempted to set out principles for the treatment of Prisoners of War. It was the last major convention before the destructive Second World War. The appalling abuses of 1939-1945 brought the nations together in 1949 under the auspices of the ICRC to draft and ratify the four great Geneva Conventions of that year. Those key Conventions and their 'Protocols' (additional agreements) of 1977 remain in force and their principles apply in all international armed conflict worldwide.

DIFFICULT QUESTIONS, DIFFICULT ANSWERS.

Some service personnel have little or no sympathy with IHL. They consider it to be an unreasonable restraint upon their actions. However, in most countries, this approach remains a minority view. The truth is that most professional military personnel accept and largely comply with these principles. Notwithstanding that, almost every country has its own body of LOAC. These are often enshrined in manuals or other forms of military doctrine. For example, the first manual of Indian Military Law was issued in 1911, although 'Articles of War' go back to 1833. The most recent edition of the 'Manual of Law; Indian Armed Forces' was published in 2014. These books and manuals, published by every serious

military nation, have a great deal of commonality of approach. Indeed it is that very commonality which provides us with 'Customary Law'.

The central point to be drawn here is that the practice, as reflected in the rules applied by nations is very similar. However, there are several difficult questions that arise here. Some of these arduous questions are addressed below.

II. WHY SHOULD WE OBEY IHL WHEN THE ENEMY DOES NOT?

In an age beset throughout the world by terrorists who have little time for the niceties of IHL this is an entirely reasonable question. If they do not comply, why should we? In the words of Judge Barak, an almost legendary Israeli judge 'this is the destiny of democracy, as not all means are acceptable to it, and not all practices employed by its enemies are open before it. Although a democracy must often fight with one hand tied behind its back, it nonetheless has the upper hand'.⁷ That is essentially an argument from principle. A response that might be more polemic in nature is 'why should we lower ourselves to the level of our enemy. Are we not proclaiming ourselves to be fighting for a good cause, a higher cause than our enemies?' This brings us to the question of 'narrative' and 'truth'. As the strategist David Betz says, 'No narrative can survive, even in part, if it is based on a lie.'⁸ The idea that a narrative backed by factual or perceptual truth is vital to the conduct of war is reinforced in Emile Simpson's writings.⁹ In writing about the Taliban's approach to rhetoric, Simpson says that 'to base one's entire strategy upon perception rather than on the reality that lies beneath it is highly unstable. In the aftermath of the global financial crisis, it is clear that narratives which depend massively on perception without a base in physical reality are very dangerous.'^m In other words, it is important to practice what one preaches, as it were."

Nonetheless, there is no doubt at all that what government officials often call 'optics', or, in other words, what appears to be happening as opposed to what might actually be happening, is important. This is the province of 'media operations' or 'psychological operations'—categories now subsumed under the rubric 'information operations'.

Public Committee Against Torture v. State of Israel, HC 5100/94 (Israel 1999).

⁸ D. BETZ, THE VIRTUAL DIMENSION OF CONTEMPORARY INSURGENCY AND COUNTERINSURGENCY, SMALL WARS AND INSURGENCIES 519, 19, 4 (2008).

⁹ EMILE SIMPSON, WAR FROM THE GROUND UP (London: Hurst, 2013).

^{1°} *Id.* at 218.

" FRANK LEDWIDGE, REBEL LAW 7 (London: Hurst, 2017).

Military doctrine is not blind to the necessity of maintaining a link between what a counterinsurgent asserts and what goes on in fact. It formulates the link between honesty in narrative and legitimacy. The US Army Field manual on counterinsurgency rightly states that "counterinsurgents seeking to preserve legitimacy must stick to the truth and ensure that words are backed up by deeds."¹² The same is surely true in conventional warfare. In any event, in an environment where information is power, propaganda gift of an enemy being seen to commit a war crime is extremely appealing.

This is where we arrive at the instrumental value of compliance with IHL. It is a very tenable position to take to argue that the abuses at the Iraqi prison of Abu Ghraib constituted a strategic defeat for the US. It fatally undermined the argument that 'we are better than what we replaced'. Other atrocities that were uncovered only served further to undermine the rationale for any kind of support from Iraqi civilians. In a so-called 'counterinsurgency campaign' it is often said that 'hearts and minds' are vital. Whilst recent experience would tend to suggest that this is a somewhat specious concept, there is no doubt that failing to comply with basic notions of decency, and being seen to fail, acts fatally to undermine a counterinsurgent case. These matters go partly towards answering the next question.

III. WHY SHOULD A STATE RESTRICT ITS OWN ACTIONS AT A TIME OF NATIONAL EMERGENCY?

This argument is made by commentators who argue that states will always act in their own interests. Readers may be well aware that this approach is characterised as 'Realism'. The first retort is a simple humanitarian one; should Thucydides' famous words 'the strong do what they can and the weak suffer what they must' really be seen as a guide to the conflict? This is all acceptable of course, even from the perspective of the radical realist, until that radical realist find himself on the receiving end of the strong. For example, when having acted upon his Thucydidean precept, he is then taken prisoner. To take an extreme example, if I may draw one from Indian military history, it is well known that after the 1971 War against Pakistan, the Indian forces took over 90000 prisoners. It is also generally known that these prisoners were treated, in the main, rather well.

¹² US Counterinsurgency Field Manual (FM 3-24).

Put very simply from a human perspective, could Indian troops expect good treatment in the event they find themselves prisoners? Clearly there is a strong pragmatic element to an expectation of reciprocity, particularly in conventional war.

As a leading scholar on IHL and LOAC at the US Army Academy, Gary Solis puts it, "the temporary advantages of breaching LOAC are far outweighed by the ultimate disadvantages".¹³

IV. HASN'T WAR CHANGED Now; Do WE REALLY NEED THESE RULES ANYMORE?

In one sense this question takes us back to the beginning when we looked briefly at the concept of customary law. The assumption behind it is that IHL and its offshoot LOAC are a body of rules that have in some way been imposed upon unwilling states. This is simply untrue. IHL is the embodiment of principles and practices that are largely fully accepted by the community of civilised states. Most soldiers in regular armed forces know that targeting non-combatants, raping women and destroying churches, mosques or other safe havens are criminal acts. They learn this in training, but they also know it well before becoming soldiers.¹⁴ Such principles, in other words, are not simply military ones. Those who argue that the law is no longer 'fit for purpose' have tried to redefine the law to render torture or the protection of civilians no longer anathema. The problem, it might be argued in the field of IHL these days, is not the law itself, but these 'norm entrepreneurs' who are attempting to empower ideas of 'moral disengagement'.¹⁵ The dangers of this approach can scarcely be overestimated and threaten the very fabric of what has been regarded as basically acceptable behavior for centuries.

Space forbids a full discussion of these and other vital questions. However, there is one approach — indeed a question itself - which in a sense answers all the above questions. It is this: who exactly are you? Are you a military professional in service to a greater good? Or are you a mercenary; a murderer? Because the blunt truth of the matter is that only one thing distinguishes the two — and it is not a uniform, as murderers and mercenaries may acquire those. The difference lies in adherence to a basic set of universally accepted principles.

¹³ SOLIS, *supra* note 2, at 8.

¹⁴ Anna Di Lellio & Emanuele Castano, *The Danger of new norms' and the continuing relevance of IHL in the post-9/11 Era*, INTERNATIONAL REVIEW OF THE RED CROSS 1277-1293 (2015).

¹⁵ *Id.*

V. THE IMPORTANCE OF LEADERSHIP

The inculcation of the basic principles which define a professional is the task of all service personnel. However, officers (and here I mean especially senior officers) have a special role to play. For the common feature of all war crimes whether committed by German soldiers in the Second World War, or British or US soldier in recent campaigns is the tone set by senior officers.

Let me leave you with two examples, one bad and one good. Readers may be aware of the case of a section of US Marines who killed 24 unarmed Iraqi civilians on 19th November 2005. The subsequent investigation found that according to the statements made by the chain of command during interviews for this investigation, taken as a whole, suggest that Iraqi civilian lives are not as important as U.S. lives, their deaths are just the cost of doing business, and that the Marines need to get "the job done" no matter what it takes. These comments had the potential to desensitize the Marines to concern for the Iraqi populace and portray them all as the enemy even if they are noncombatants'.¹⁶ The tone was created by the officers, and the scene was set for an atrocious massacre. Whether at Mai Lai in Vietnam where 600 or more civilians were killed, or the Baha Musa case in the Iraqi city of Basra, where UK troops murdered a single Iraqi man by beating him to death, there is a commonality — a failure of leadership.

However, the importance of officers setting a professional tone provides an opportunity to gain advantage — even operationally. Colonel David Benest commanded part of the Parachute regiment on a tour of Northern Ireland in the early 1980s. The battalion had gained a bad reputation, due in large part to 'Bloody Sunday' where 16 non-combatants were killed by soldiers from that regiment on 30th January 1972. At the outset of the tour he was firm with his men; he said words to the following effect:

"We have a bad reputation here, which we need to clear up. I will not tolerate anyone speaking in any positive way about that day. We are not here to kill, but to keep the peace."

The tour of duty was one of the most successful the Regiment had in large part because of the tone and approach clarified at the outset and indeed enforced during the tour.

¹⁶ Maj. Gen. Eldon A. Bargewell, Simple Failures and Disastrous Results, Washington Post, April 21, 2007.

VI. CONCLUSION: IHL: A 'JOKE' OR 'BETTER THAN NOTHING'?

There are now many Conventions that seek to set the behavior and practice of armed forces, both regular and irregular into a legal framework. As we have seen there are those who argue that trying to apply rules to the damage and chaos wrought by war is a fool's errand. They come from both sides of the political spectrum. From the traditional right, there is a view that the law has no business on the battlefield and soldiers should be permitted simply to get on with their jobs so that the unpleasant activity of war can be ended all the sooner.

Some might argue that this latter line of argument leads to the German Kommissarbefehl (Commissar Order) on the Eastern Front of 1941 which permitted, indeed instructed, soldiers to shoot 'partisans' and Soviet political officers (Commissars) without any form of trial or investigation. This flagrantly immoral and illegal order became a cover for the slaughter of the Jews. The presumption of the Nazi was that all Jews including women and children were potential partisans. As such hundreds of thousands were shot into ditches. In due course, this approach led to the 'gas chambers'.

In the absence of any overriding law restraining such orders, such activities can happen. For the German soldiers involved in lining Jewish, Russian or Gypsy women and children up to be shot, an appeal to 'international laws and standards' was futile. The response would simply be, and indeed was, 'those laws do not apply to us; the rule that applies here is what we tell you it is'. Once one starts on the 'lawless war' road, the destination is likely to be the commission of mass crimes.

From the left of the political spectrum, and indeed from some pacifists there is also skepticism, although the argument is very different. Some see IHL as simply as providing a legitimisation for men to engage in an activity which is inherently not susceptible to regulation, war. Such thinkers see international law as complicit in warfare. War itself is a terrible crime. The philosopher Joanna Bourke argues that these laws are a mere cover and justification for slaughter, usually of civilians. There are so few trials, and they are always conducted by winners of wars against the losers (this is the idea of 'winners justice'), that international law can be regarded as 'a joke'.¹⁷

¹⁷ BOURKE & JOANNA, AN INTIMATE HISTORY OF KILLING (159-203, 2000).

It is easy sitting in a study and writing or reading criticism about the conduct of those who did not have the luxury of lengthy contemplation of ethical balances. However, it should be remembered that most war-crimes — and all of those referred to in this article - are not committed in the 'heat of battle' at all but indeed after a period of consideration. In practical terms, the truth is that few could be prosecuted for commission of crimes committed in the heat of the moment.

No organisation is more familiar with war and its consequences than the International Committee of the Red Cross (ICRC) whose delegates are to be found in almost every war zone on the plane. Let me conclude with the approach taken by the 'guardians' as it were of much of IHL. The ICRC has no illusions about the likelihood of combatants anywhere obeying all the strictures of IHL. However, they make the vital point that IHL is essentially 'the law of the lesser evil'. At the very least, they say, IHL is better than nothing. Surely this is the more reasonable approach.