Program on Humanitarian Policy
and Conflict Research
Harvard University

Transnationality, War and the Law

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A Report on a Roundtable on
the Transformation of Warfare,
International Law, and
the Role of Transnational Armed Groups

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Executive Summary

On October 30, 2005, the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) brought together a select group of international experts for a discussion on the theme of "The Transformation of Warfare, International Law, and the Role of Transnational Armed Groups." The meeting was hosted by the Geneva Center for Security Policy in their offices in Geneva, Switzerland.

This project grew out of a research interest identified at the High-Level Informal Expert Meeting on International Humanitarian Law at Harvard University in June 2004 which gathered representatives of twenty-eight governments and international organizations, as well as distinguished scholars, to examine the legal and policy challenges faced by international humanitarian law (IHL). The purpose of the meeting in Geneva was to explore the changed landscape of transnational wars and the prominent geopolitical role played by transnational non-state armed groups as well as their impact on interpretations and responses of international law to the new warfare. Built around three pillars of changing war, changing actors, and static law, the discussion in Geneva was organized along sessions on the transformation of war, the regulation of new conflicts, the current gaps and limitations of international humanitarian law, and the challenge of compliance and protection in the new environment.

Starting from the decolonization wars of the twentieth century, armed conflicts have been departing gradually from the classical, state-centered paradigm embodied in the Geneva Convention of 1949 to the current framework in which non-state actors have acquired a larger, if not yet central, role. That fluctuation constitutes a bending of the traditional tactics of war brought about by the rise of comparatively weaker non-state actors and a modification in the space taken up by the new wars. Participants to the Geneva meeting stressed that non-state actors have been fighting states throughout the history of the state. However, in previous eras they fit more clearly into the realm of domestic law enforcement, as states sought to quell "internal disturbances." The new conflicts are driven across state borders and represent a true challenge in terms of regulating the behaviors of both transnational non-state armed groups and the corresponding territorial and extraterritorial response of states.

Transnational armed groups are problematic because they are irregular, not easily recognizable, difficult to respond to, and generally unrecognized by the long-standing laws of war. As with other non-state armed groups, their members operate without the protections granted to combatants under international humanitarian law. As transnational actors, however, they engage states and state military agents across borders in the realm of international armed conflict, an environment in which state military is given special protection if captured. It is states — as crafters and signatories of most notably the Geneva Conventions of 1949 — that retain ultimate control over the shape of international humanitarian law. Conversely, by targeting civilians, transnational armed groups

have nearly rejected the relevance of key principles of international humanitarian law, in particular the principles of distinction and proportionality — as the foundation of contemporary IHL.

In those cases where the intercourse between states and non-state actors crosses the threshold of the legal definition of an armed conflict, how does the lack of legal protections and responsibilities for transnational armed groups affect the course of battle? Some participants at the meeting regarded the recalibrating of the laws of war to provide a greater stake for all parties to the combat as a necessary step towards preserving the laws' relevance. Others were opposed to any redrafting. A third group fell in between these two options. The mechanics of new transnational war brought the group to inquire whether there was conceivably a way of 'updating' IHL without making untenable compromises. Four general conclusions emerged from the debates:

- The **new prominence of transnational wars** is characterized by the absence of clear-cut conflict delineations, both spatially and temporally. Such open-endedness renders analysis and regulation particularly difficult. Sooner or later, the question of a reexamination of the rules of war will lead to opening new territory, in particular regarding the issue of transnationality, which, for now, remains addressed imperfectly. Ultimately, the threshold may not be what states can accept but what can no longer remain outside the realm of IHL.

- **International humanitarian law** is entering a moment of democratization. With the question of adequacy fully on the table, calls for an update and revision concern principally the inclusion of new and ongoing non-state actors, the redefinition of mandates, the definition of terrorism, and the regulation of counterterrorism. The merit of the existing legal framework, the residual value of law enforcement approaches, and the implications of a premature embracing and legal sanction of a global battlefield are central to this process.

- A gnawing question remains unaddressed: Is it actually possible to recognize transnational armed groups to have **the authority to use force, apart from the legitimacy to fight** and therefore be able to treat them within the laws of war? A strengthening of distinction and proportionality would certainly subdue transnational armed groups. In tandem with a tightening of the right of self-defense, this may improve the laws of war. Yet, is not the first proposition akin to legitimizing an illegitimate use of force?

- In relation to the antagonism between **compliance to existing rules and regulating new conflict environments**, two approaches are pitted against each other: self-preservation vs. development of new law. Underscoring the two is the notion that regulation is needed because ultimately there is a common interest in its preservation. There is room for development in relation to four dimensions: (i) status (acknowledgment of belligerency), (ii) distinction (belligerency and victimhood), (iii) proportionality (judgment criteria), and (iv) neutrality (proclaimed or granted). Such development should be rooted into the history of IHL and build on the lessons learned from previous attempts to expand the legal corpus of IHL.

Introduction

On October 30, 2005, the Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) convened a group of experts to discuss "The Transformation of Warfare, International Law, and the Role of Transnational Armed Groups." The meeting was hosted by the Geneva Center for Security Policy in their offices in Geneva, Switzerland. The roundtable was organized in order to elicit a range of views on how the increasingly prominent geopolitical role played by non-state, transnational armed groups was reflective of changes in the nature of warfare, and how, secondly, these transformations were impacting on interpretations and responses of international law to the regulation of new warfare. This report summarizes the range of the views offered and elaborates on their implications.

The Geneva roundtable meeting marked a waystation in the development of HPCR's research on the role of transnational armed groups and new challenges for international law. Within the wider context of the Program's ongoing commitment to explore the application of the law of armed conflict, or international humanitarian law (IHL), and the challenges posed for that legal regime by contemporary conflicts, HPCR has, since the spring of 2005, been developing several lines of inquiry into this important topic, with, in particular, the publication, in June 2005, of a policy brief entitled *Non-Linearity of Engagement: Transnational Armed Groups, International Law, and the Conflict between Al Qaeda and the United States*. That essay explored the unique nature of the war between Al Qaeda and the United States and what challenges Al Qaeda's non-linear war posed to existing conceptions of the state and the laws of war.

This project grew out of a research interest identified at the Informal, High-Level Expert Meeting on International Humanitarian Law at Harvard University in June 2004[1] which gathered representatives of twenty-eight governments and international organizations as well as distinguished scholars to examine the legal and policy challenges faced by IHL. The October 2005 meeting evolved out of an interest in exploring the changed landscape of war and the legal setting in which at least one prominent non-state actor, Al Qaeda, is battling transnationally with the United States, and to a lesser extent other state governments. If this conflict, now several years old, appears destined to lin-

[1] For more information on the Informal, High-Level Expert Meeting, see www.ihlresearch.org.

ger, alongside similar transnational armed conflicts, it seems prudent to explore the ability of existing legal and military frameworks to contain such novel warfare.

The aim of the discussion was to draw on existing research and understanding of the transformation of armed conflict as well as serious, innovative exploration of the goals and tactics of transnational armed groups to examine how warfare in the twenty-first century might best be regulated. The application of the full body of international humanitarian law in conflicts between states and non-state actors has been examined at length, and indeed, it does continue to provide a subject of healthy debate. This gathering did not seek to restate interpretations of existing law but, rather, to explore where gaps in those interpretations lie and also to imagine how revisions of that regime might improve conditions on the battlefields of the future. Inherent to this exploration is a serious consideration of the costs and benefits of any revision to the existing body of international humanitarian law.

The roundtable had, as a starting point, the current intellectual frontiers in relation to war and its regulation. As such, the debate constituted a moment of exploration of the regulation of twenty-first century battlespace. Consequently, the central question concerned the manner in which scholarship and policy on this issue could be approached in an innovative manner, specifically to help advance the debate with novel ideas to contain the use of force, and more particularly the politically-charged violence of armed groups. The specific context was the twofold one of the current adaptation, or lack thereof, of international humanitarian law, and the increased presence and action of transnational armed groups.

Against that background, the aim of the gathering was to sketch the intellectual basis of organizing answers to these questions. The meeting featured five sessions. The first session, "Introducing the Issues," set the stage for the discussion, taking stock of the three strands – changing war, changing actors, and static law – whose challenges the meeting sought to tackle. An introductory presentation on paradigm shifts named the challenge of bridging the increasing disconnect between the way war is conceived and conducted and the manner it is regulated and codified currently. A second session, "The Transformation of Conflict: What is New about New Wars?," reviewed the recent metamorphosis of war, identifying the features and determinants of this evolution and outlining its lasting implications.

The next two sessions that followed, "Regulating the New Conflicts: Challenges" and "Current Law of War Limitations," delved, firstly, into the problematic challenges that new forms of warfare, in particular transnational ones, are posing to the existing body of international

law, and inquired, secondly, about the potential legal 'black holes' of the law of war. In so doing, the discussion investigated the merits and demerits of an international humanitarian law regime change. The meeting closed with a presentation — "Defining Strategic Responses for Protection and Compliance" — on the practical opportunities and costs of obtaining transnational non-state armed groups to engage with the law of war.

The present analytical report is laid out according to the three core strands of inquiry that set the agenda for the discussion in Geneva, and which can be summarized as three different questions:

- How have wars changed?
- What characterizes the non-state transnational armed groups of today?
- What gaps may exist in the ability of international law to regulate wars fought not between states, but between states and transnational armed groups?

War

The meeting opened with a discussion of the transformation of armed conflict, looking at the evolution of warfare and the salient features of contemporary wars. It was offered that, during the past two centuries and over four distinct epochs, armed conflict had been departing gradually from a classical, state-centered paradigm to a modern framework in which non-state actors have acquired a larger role.

More than one hundred and seventy years after Karl von Clausewitz's seminal work, *On War*, his oft-quoted observation that "war is nothing but a continuation of political intercourse, with the intermixing of other means"[2] rings truer than ever before. In the intervening years, that 'political intercourse' (*des politischen verkehrs*) has continued to evolve beyond the limited parameters of Europe's nineteenth-century congress. Today, arguably, it is no longer solely the relationship amongst states but also the 'intermixing of other means' (*mit einmischung anderer mittel*), in particular between states and non-state actors that also defines the nature of armed conflict. Indeed, the latter relationship provides the most fertile contemporaneous ground for the evolution of political intercourse into war.

Among the contributions of Von Clausewitz's thinking on war was his formulation of war as a normal phase in the relations of states. The battlefield was an arena in which states could determine the outcome of a difference in wills with a combined contest of strategy and might. The roundtable meeting began by inquiring whether it might make sense to view the conflicts between non-state actors and states as a similarly 'normal' phase in the relations of states. The first step was to examine recent conceptions of the transformation of warfare, particularly the mutation of the theater of conflict from a relatively sharply delineated ground to a looser field, as the battle*field* is increasingly becoming a battle*space*.

That being as it may, it was recognized that it would be reductionist to suggest that two specific points — for instance, the battle of Borodino in September 1812 between the French and Russian armies, and the Qaeda attack on New York in September 2001 — determine an entirely accurate line of best fit, charting the course of warfare as it moves forward. The conduct of warfare is never a monolithic phenomenon or a static display. Battles of variegated kinds are fought at any given moment and war

[2] Karl Von Clausewitz, *On War*, London: Penguin Books, 1968 [1832], p. 402.

is changing continuously in response to various political, technological, and societal changes. However, the configurational distance between two moments, such as early nineteenth century battles and early twenty-first century combat, does help illustrate significant shifts in the nature of conflict that deserve greater attention. That fluctuation, a central postulate of the discussion, constitutes at once a bending of the tactics of war brought about by the rise of comparatively weaker non-state actors and a modification in the space taken up by such wars.

The wars waged by non-state actors present a military strategy that differs sharply from the traditional state-based conflicts that dominated the battlefields of the eighteenth, nineteenth, and early twentieth centuries. The wars fought in that period were fought not between men in their individual capacity, but between soldiers as agents of the state. States took full responsibility over war and engaged in symmetrical battles using relatively similar artillery. Today's battles pit relatively weak non-state actors with limited resources in terms of traditional weaponry against states with a fully developed machinery of war. These conflicts are thus typically asymmetrical.[3] Yet the new non-state actors have borrowed from the strategy of guerrilla wars to fight when and where they like, and in so doing are altering the pace of warfare to suit their needs. Such battles therefore tend towards slow, lingering contests of endurance or, indeed, attrition.

A second postulate of the debate was that the nature of the military objectives on both sides of the battle had changed as part of this evolution in strategy. Non-state actors have shown a willingness and determination to target the civilian population, as well civilian and cultural objects. To be certain, this cannot be described as an entirely new development. Terrorism has been used as a method of combat by non-state actors throughout history. Similarly, bombing of cities such as Dresden, Manila, Tokyo, and London in the Second World War, let alone Hiroshima and Nagasaki, were intended to sustain significant civilian casualties. However, a distinct feature of suicide bombing campaigns and other tactics seek to bring the battle more immediately, more systematically, and more massively to the core of the civilian population centers.

The men who have signed up to fight these battles against states are not conscripted but

[3] For interesting commentary on the question of asymmetry, advanced particularly within military scholarship, see, notably, Coral Bell, *The First War of the Twenty-First Century – Asymmetric Hostilities and the Norms of Conduct*, Canberra, Australia: Strategic and Defense Studies Center, 2001; Timothy L. Thomas, "Deciphering Asymmetry's Word Game," *Military Review* 81, July-August 2001, pp. 32-37; Frederick Teo Li-Wei, "Rethinking Western Vulnerabilities to Asymmetric Warfare," *Journal of the Singapore Armed Forces* 28, April-June 2002; Colin S. Gray, "Thinking Asymmetrically in Times of Terror," *Parameters*, Spring 2002, pp. 5-14; and Ivan Arreguin-Toft, *How the Weak Win Wars – A Theory of Asymmetric Conflict*, Cambridge University Press, 2005.

instead sign up to fight in the new low-intensity conflicts. As Martin van Creveld wrote in 1991, "in the future, war will not be waged by armies but by groups whom we today call terrorists, guerrillas, bandits, and robbers." It is indeed these actors, once viewed as merely prospective subjects of the criminal justice system, who have come to overwhelmingly fight the wars of the twenty-first century.

It is worth noting, too, as some participants indicated, that the tactics of these so-called 'new wars' are not entirely new. As noted, targeting civilian and cultural (or religious) objectives has been a tactic exploited by warriors repeatedly throughout the history of warfare. Some suggested that, though the many changes in the strategy and tactics of war mark a departure from the strategies of the state-based wars of post-Westphalian Europe, they might be also seen as a *return* to the tactics of warfare before the modern state emerged to determine the rules of engagement. In that sense, it may be useful to think of new wars as "a return to a state prior to Europe's early modern statization of war," and that the state today has become "*no longer* what it was then *not yet*: the monopolist of war."[4]

In addition to the significant shifts in the tactical shape of modern war, the space of war is changing as the state loses that monopoly over war and the battlefield on which wars are fought loses its borders. Those transformations are reflected in the difficulty in categorizing today's armed conflicts in the same way as might have been appropriate at the end of the Second World War. The empirical study of warfare and deadly conflict presents an attendant set of questions over the classification and codification of what data are available. A dataset updated annually by the University of Uppsala in Sweden and the Norwegian Peace Research Institute in Oslo (PRIO) has gained increasing currency as a reliable record of global armed conflict since 1946. The Uppsala/PRIO dataset codes conflicts that meet a threshold of twenty-five battle-deaths in a given year into one of four categories: interstate, intrastate, extrastate, and internationalized internal conflict.[5]

Data from the Uppsala/PRIO dataset formed the basis for the 2005 Human Security Report[6] and other similar studies published in recent years, which have heralded the evident decline in the overall number of conflicts in the world in past decades. The total number of conflicts has fallen from about fifty in 1992 to about thirty in 2003, the most recent year for which data have been published.

[4] Herfried Münkler, *The New Wars*, Cambridge: Polity, 2005, p. 2. Also see, Ralph Peters, "The New Warrior Class," *Parameters*, Summer 1994, pp. 16-26.
[5] The dataset is available at www.prio.no/cwp/armedconflict.
[6] See www.humansecuritycentre.org.

Equally telling is the rise in the number of deadly conflicts fought between states and non-state actors. Intrastate conflicts have risen not only in number over the reporting period but even more markedly and the proportion of the overall number of conflicts, which they represent. In the 1950s, intrastate conflict — referred to in international humanitarian law as non-international armed conflict — represented only between a third and half of all conflicts, whereas they now account for nearly all of global conflict.

Many of the 'active' conflicts are taking place in Sub-Saharan Africa, where they are spilling across state borders. Armed conflict continues in the Democratic Republic of the Congo, six years after its inception, having involved the armed forces of up to four other countries, paramilitary units, private militias, and ex-military forces such as the Rwandan FAR. Similarly, the Lord's Resistance Army in Uganda continues to operate across a porous border with Sudan and recruit regionally.

Participants stressed that non-state actors have been fighting states throughout the history of the state. However, in previous eras they fit more clearly into the realm of domestic law enforcement, as states sought to quell "internal disturbances." The new conflicts — those of a fourth generation of warfare[7] — are driven *across* state borders. The difficulties that they present for coding the data of war under old categories are that "in most of the literature, the new wars are described as internal or civil wars or else as 'low-intensity conflict.' Yet although most of these wars are localized, they involve myriad transnational connections so that the distinction between internal and external, between aggression (attacks from abroad) and repression (attacks from inside the country), or even between local and global, are difficult to sustain."[8]

The group discussed this development whereby the traditional Westphalian order's division of armed conflict into two categories, international (between states) and internal (within states), appears to no longer reflect fully the realities of modern warfare. It may be time to recognize a category of wars that is waged outside and across states. If war is indeed a true chameleon, then its protean nature is changing such that novel forms may be escaping the full grasp of state-based legal frameworks created to contain it.

[7] See Thomas X. Hammes, "Fourth Generation Warfare: Our Enemies Play to Their Strength," *Armed Forces Journal* 142, November 2004, pp. 40-44.
[8] Mary Kaldor, *New and Old Wars – Organized Violence in a Global Era*, Stanford: Stanford University Press, 1999, p. 2.

The New Actors

A second pillar of the discussion was the nature and role of an emerging actor in war; namely transnational, non-state armed groups that are, arguably, simultaneously reflecting the above considerations on the mutation of warfare, and are themselves, by virtue of their very action, ushering the pace and configuration of these momentous changes. These new actors, it was remarked, are characterized primarily by their statelessness, emancipation, privatization, as well as their asymmetric position towards states.

In a world of increasing cross-border flows of wealth, population, and information, it might be expected that armed insurgencies have spread from more limited internal conflicts to take on a transnational character. Reports of seized computers with recruiting materials or building plans to be used for bombing operations, and usage of videotapes released to global media as a strategic tool, are surface evidence of how some groups have harnessed the powers of the technology age to multiply their forces. Other groups, however, simply draw on cross-border transfers that come from porous borders and loosely-established states.

Some participants remarked that, in general, the transnational armed groups of today are most usefully viewed not as disorganized enemies of the state but as political organizations with various aims and aspirations that seek to co-opt qualities of the weak and failing states that have spawned them. While appropriating various qualities of the state, they are themselves stateless, generally drawing upon the resources of the territory of several states but finding no fixed abode. Yet these actors' use of force is tantamount to war, and the challenge is to tackle its problematic cogency as such.[9]

Discussion took place amongst the meeting's participants as to the existing variety of these groups. One particular fault line between national liberation movements and transnational armed groups is the ambition of the latter to displace, as it were, the state and not be overtly concerned with international recognition — whereas liberation movements pursue that formal recognition and see themselves as constituting the embryo of a national government. In that sense, it was noted that the higher the legitimacy of the state, the less likelihood of the presence of a transnational armed group.

[9] See Paul L. DeVito, "Terrorism as Asymmetrical Warfare is Still War," *Officer* 78, 6, July-August 2002, pp. 33-35.

Amidst the ongoing armed conflict between Al Qaeda and the United States and other states, and the significance that war has assumed in geopolitical relations, Al Qaeda stands out as the transnational armed group *par excellence*. Admittedly, it may be argued that its exceptionalism is rule-proving.[10] Other groups from all corners of the world share with Al Qaeda certain characteristics of the new non-state actors, but they are generally more limited in geographical focus and scope and they vary in shapes and aims.

For now, Al Qaeda is the sole transnational armed group operating with such a wide geographical scope and with such ambitious claims to legitimacy. Believing it has a valid claim drawn from the *ius ad bellum* to fighting a just war, the group has raised and trained cells in different global staging grounds, including the Sudan, Afghanistan, and Pakistan. Too, the group has proven itself to be global in outlook with targets in Madrid, Washington, Bali, Riyadh, and Karachi, among others. Similarly, the organization's original goal of eliminating the presence of United States military forces from the Arabian Peninsula has expanded to include demands regarding the presence of Western troops in Iraq and Afghanistan. The participants agreed that the precise shape and structure of the group is murky, but that it can be envisioned meaningfully as a network that is loosely organized but highly focused, and with regional outposts deepening its transnational character.

By forming strategic alliances, Al Qaeda has extended its global reach and contributed resources to smaller transnational groups. Groups such as Jemaah Islamiyah (JI), based in Indonesia but operating throughout Southeast Asia, have more regional aims — JI seeks to work towards the creation of a pan-Islamic state in the region. It was through cooperation with Al Qaeda that JI was able to carry out attacks like the 2002 bombings in Bali. In the future, transnational partnerships of this sort can be expected to achieve shared goals.

Other transnational armed groups such as Hezbollah and Hamas have made different, if more limited, claims to proper authority based on political grievances. These two groups receive transnational support, but are each based in relatively fixed locations, Lebanon and the Palestinian territories, respectively. They also are more advanced in participating fully in the existing political process, thereby committing to pursuing their political aims from a state-based position rather than acting outside their political organization. With full participation in the

[10] "The United States is in 'a new kind of war' against a non-state, transnational terrorist organization called Al Qaeda. Although the recent nature of this war's threat both asymmetric and on American soil is largely unfamiliar, the principles being applied in this campaign are not." See Dane Thorleifson, "Usama Bin Laden and Al Qaeda's Operational Design," Newport, RI: Naval War College, May 2003, College, p. 2.

electoral process, and governmental leadership since February 2006 in the case of Hamas, the concomitant changes concern their military strategy (specifically attacks on Israeli civilians). Will a greater stake in sovereignty and national politics bring with it a greater respect for international laws and norms on the use of force?

Discussion was had as to the difficult but important question of scope: How divorced from territoriality many of these groups are? Operating globally, the new transnational terrorism has certainly freed itself from the absolute dependence on local support.[11] Round the world, weak states have spawned groups, smaller still in their scope, whose operations exist on the border of transnationality. The Philippine group Abu Sayyaf, based in the southernmost island of Mindanao, is best known for the 2002 kidnapping of tourists and workers of various nationalities from a resort in Malaysia. Armed groups familiar in European history since 1945 — such as the Basque separatist group ETA and the Irish Republican Army — have established goals of national liberation similar to those of colonial regimes that fought for independence in the first decades after the Second World War.

Willful violation of the principle of distinction — arguably the most fundamental principle of the law of war — is one operation strategy shared by all of these groups. Each group deliberately targets the civilian population rather than limiting its attacks to military objectives. Such a strategy reveals the central dilemmas that transnational armed groups introduce, namely that of the maintenance of order (criminal function) versus the maintenance of security (military function).

Ultimately, transnational armed groups are problematic because they are irregular, not easily recognizable, difficult to respond to, and generally unrecognized by the long-standing laws of war — in a word a bad fit for existing rules of war. "They are influential but not accountable. They express affinity but not comity. They have support but no identifiable constituency or territory." However novel and idiosyncratically testing, the rise of these groups also reveals a long-standing problematic question besetting the laws of war, namely the challenge of formulating the distinction between lawful and unlawful combatant; an issue which, as it were, drove most aspects of the legal controversy at the international conferences on international humanitarian law from 1874 to 1949.

[11] Fred Schreier, "Transnational Terrorism: The Newest Mutation in the Forms of Warfare," in Theodor Winkler et al., *Combating Terrorism and its Implications for the Security Sector*, Geneva and Stockholm: Geneva Center for the Democratic Control of Armed Forces, and the Swedish National Defense College, 2005, p. 46.

The Hamdan Case

Salim Ahmad Hamdan is a Yemeni citizen who, in 1996, was recruited to leave Yemen to join an Islamic insurgency in Tajikistan. Refused entry into Tajikistan upon his arrival at the Tajik-Afghan border, he spent the next five years in Afghanistan working with Osama Ben Laden, allegedly as his driver and bodyguard. In late 2001, Hamdan was kidnapped by Afghan warlords, who handed him over to US forces in exchange for bounty. He then spent six months in two US prisons in Afghanistan before being transferred to the Guantánamo Bay US military base on the island of Cuba in 2002. After two years, in response to the finding of the Supreme Court in another case, Hamdi v. Rumsfeld, Hamdan was put before a Combatant Status Review Tribunal in 2004, which found him to be rightly classified as an "enemy combatant," and deemed his continued detention to be "necessary." Hamdan challenged his indefinite detention in US courts and the case was being heard by the Supreme Court in the spring of 2006.

Hamdan's case is a powerful illustration of the transnational dimensions of modern warfare. Recruited in Yemen to join an insurgency in Tajikistan, he ended up under the employ of a transnational armed group (Al Qaeda) that used its base in Afghanistan and links to the Taliban government there to continue to launch attacks against the United States, the United Kingdom, and Spain, including the suicide attacks on New York and Washington in September 2001, which soon after led the United States government to war in Afghanistan. That war targeted the Taliban regime and the state of Afghanistan but also men like Hamdan, who formed a variously-affiliated group using the country as a training camp and staging ground for attacks abroad.

The United States and other countries seeking to protect their territory and citizens against such attacks have had difficulty finding a course of action that international consensus believes to be fully consistent with the existing laws of war. On April 7, 2005, Senior Circuit Judge Williams, concurring in US Court of Appeals for the DC Circuit Hamdan v. Rumsfeld, wrote that "Non-state actors cannot sign an international treaty. Nor is such an actor even a 'Power' that would be eligible under Article 2 (3) to secure protection by complying with the Convention's requirements. Common Article 3 fills the gap, providing some minimal protection for such non-eligibles in an 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. The gap being filled is the non-eligible party's failure to be a nation."

Judge Williams' opinion, issued in response to an appeal by Hamdan of the means used for determining the status of his ongoing detention at Guantánamo Bay, point to the difficulty inherent in trying to determine what standard protections and responsibilities afforded by the laws of war should apply to the non-uniformed and often only loosely affiliated "soldiers" in this war. His comments also show how, even though conflicts such as that between Al Qaeda and the United States are not fought between states, they may still be legitimately termed wars, or more to the point, armed conflicts in the legal definition as provided by the laws of war.

The Law

The law of armed conflict, or international humanitarian law, has developed from its earliest sources as a body of laws that seek to regulate armed conflict and limit the human cost of conflict and the resort to unnecessary cruelty in war. As such, the law's development was driven not only by normative concerns for limiting the means and methods of warfare, but also by an awareness that laws governing warfare must be written such that compliance with the law remains in the warring parties' ultimate self-interest.

States follow international humanitarian law not merely (or primarily) out of respect for limiting enemy casualties but rather out of a desire to protect their own forces and civilian populations. By drawing up agreements on limited rules of engagement, states ensure a predictable regime in which the use of force can be regulated within a specific space in which reciprocal obligations exist.

It is states — as crafters and signatories of all the sources of international law, including most notably the Geneva Conventions of 1949 — that retain ultimate control over the shape of this law. Like the entire corpus of international law of which it forms an integral part, international humanitarian law is based on state consent. Despite some efforts to include a range of non-state actors in the drafting of the 1977 Protocols Additional to the Geneva Conventions, states remain the sole signatories of the instruments of IHL. States will presumably remain unwilling to consider any evolution of IHL that grants greater protections to non-state actors unless they perceive such evolution as being in their interest.

Non-state actors operate without the vast majority of protections under IHL. The Second Protocol Additional to the Geneva Conventions expanded some limited protection to apply in those armed conflicts not covered by the First Protocol (covering armed conflict between state) "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol" (Article 1.1). Groups that do not meet the requirements of territorial control and organization of forces are granted only the protections of humane treatment upon capture. They may be detained until the end of hostilities.

Discussion ensued among participants regarding the fact that laws against terrorism have provided a platform for many states in their domestic encounters with the use of force by armed groups in internal disorder, but the definition of terrorism has been less successful in international law. It was noted that states have struggled to come to a consensus definition due to disagreement over whether some armed actions by non-state actors constitute a struggle against occupation or other forms of oppression. Debate continues at the United Nations in an effort to draw clear distinctions about what, if any, use of force by non-state actors may be deemed legitimate.

In those cases where the intercourse between states and non-state actors crosses the threshold of the legal definition of an armed conflict, how does the lack of legal protections and responsibilities for transnational armed groups affect the course of battle? Beyond, how might increased protections under the law change the tenor of battle?

Two cardinal principles form the foundation of contemporary IHL. The first of these is the principle of distinction aimed at the protection of the civilian population and civilian objects and establishing the distinction between combatants and non-combatants. States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. Uniformed soldiers acting under an organized chain of command are given free rein to target one another but must avoid, subject to military necessity, attacks on the civilian population. Civilians lose their right to immunity from attacks when they take up arms. This is legal space into which many non-state actors fall: unprivileged combatants who forfeit all but a few fundamental protections of IHL by taking up arms as part of non-uniformed groups not formally party to the conflict.

It is this principle of distinction that transnational armed groups nearly uniformly reject by targeting civilians. In the case of Al Qaeda, they do so through the formal articulation of an argument[14] by which they hold the citizens of the states they are fighting coterminously responsible of their governments' policies.[15]

Yet states have contributed their own efforts, wittingly or not, to weakening the space in which the form of the privileged combatant might take up arms. If special forces and private military contractors make transitory contributions to the battle effort without wearing

[14] See Gordon I. Peterson, "'An Asymmetric Act of War': Collective Responsibility Cited in USS Cole Investigation," *Sea Power* 44, March 2001, pp. 18-21.
[15] See Program on Humanitarian Policy and Conflict Research, *Non-Linearity of Engagement – Transnational Armed Groups, International Law, and the Conflict between the United States and Al Qaeda*, Cambridge: HPCR, July 2005.

the uniform of the state, how can they be said to hold up to the definition of the combatant? In many instances in the prosecution of the wars in Afghanistan (2001-2002) and Iraq (2003-), state regular forces operated in a fashion that recalled Napoleon's alleged command to General Lefèvre Desnouettes; "*il faut opérer en partisan partout où il y a des partisans*."[16]

Participants noted that, in the final analysis, under the current law of war, transnational armed groups are ineligible for the protections afforded both civilians and combatants, and they also reject outright the principle of distinction by deliberately targeting the civilian population. Whether as a means of redress against the citizens of democracies that they hold responsible for the alleged wrongs of their governments, or simply as an effective means of scoring a major direct impact on the enemy, the destruction of civilian targets remains a core element of the groups' *modus operandi*. Arguably, the rejection by transnational armed groups of this bedrock principle of the laws of combat will continue to dissuade states from creating more space within the IHL regime for expanded recognition.

The second cardinal principle of IHL is the principle of proportionality. Attendant upon this obligation is a limitation on the methods of warfare available legally. It is here that there may be some evidence of compliance by both states and non-state actors. For instance, Al Qaeda has, to date, refrained from using nuclear weapons (or using nuclear-graded ammunitions) and its leader, Osama Ben Laden, has gone on record[17] as saying nuclear weapons would only be considered by the organization if they were used by the United States. Nevertheless, from a technical point of view, the terrorist use of nuclear weapons (or at least a plausible threat of using them) cannot be entirely discounted.[18]

States have claimed repeatedly to be following their obligations in protecting the civilian population and choosing methods of warfare subject to the restraints of proportionality in their operations against non-state actors. This record has at times, of course, been disputed, and incidences such as the alleged use of white phosphorus by United States forces in operations in the Iraqi city of Fallujah in November 2004,[19] despite a ban on the use of white phosphorus as a chemical weapon, show that such restraint remains a real issue. One analyst remarks that "irregular warfare almost invariably drives the regular belligerent to behave terroristically towards the civilian populace that provides, or

[16] "You must act as partisan wherever there are partisans."
[17] Interview with Hamid Mir, *Dawn*, November 6, 2001.
[18] Martin Van Creveld, *Technology and War*, New York: The Free Press, 1989, p. 309.
[19] The allegations were made in *Fallujah: The Hidden Massacre*, documentary film by Sigfrido Ranucci and Maurizio Torrealta, aired on RAI (Italy), November 8, 2005. Also see Peter Popham, "US Forces 'Used Chemical Weapons' During Assault on City of Fallujah," *The Independent*, November 8, 2005.

might provide, recruits or support for the guerrillas."[20]

In that respect, some participants advised about not overlooking the determinant role of nuclear weapons, which, in essence, excise the linkage between (military) victory and (civilian) survival. In effect, usage of nuclear weapons means that a conflict could be won and lost simultaneously. With regard to transnationality, nuclear weaponry is limited to parties that have territorial contiguity. However, in the final analysis, "the extent to which the spread of nuclear, chemical, and bacteriological weaponry will encourage the prophylactic use of force — wars, or at least the use of force, to stop the deployment of weapons systems — is unclear."[21]

Disputes over the implementation and observance of IHL in ongoing armed conflict in Iraq and Afghanistan — in particular as it applies to the treatment of detainees — have led some observers to question the contemporary relevance of IHL.[22] The United States government has been resistant to apply the protections afforded by the Geneva Conventions to any of the "enemy combatants" in its "war on terror" fought since 2001. Al Qaeda and other groups have seen fit to reject outright many of the very foundations of IHL in their attacks on civilian targets.

On this issue, the group was unanimous that international humanitarian law remains relevant. However, views differed on the extent to which its current dispositions covered the warfare dimensions ushered in by the rise of transnational armed groups. Generally, one camp in the debate over the relevance of IHL to contemporary conflicts argues that the evolution of the law has fallen dangerously behind on-the-ground realities of conflict. If non-state actors are fighting the greater part of the new wars and are singularly ignoring the rules of IHL because they are given no true stake in its promotion, then states may, in turn, find less and less incentive to abide by its rules.

Some participants at the meeting regarded the recalibrating of the laws of combat to provide a greater stake for all parties to the combat as a necessary step towards preserving the laws' relevance. Others were adamantly opposed to any redrafting. A third group fell in between, aware of the transformation of warfare but reluctant to open IHL's pandora's box.

Opponents of the revision of IHL focus on protecting and buttressing respect for the canon as it stands. They suggest that reshaping the law only thirty years after the Additional Protocols would weaken the authority of the existing laws.

[20] Colin S. Gray, *Another Bloody Century – Future Warfare*, London: Weidenfeld and Nicolson, 2005, p. 223
[21] Jeremy Black, *War and the New Disorder in the 21st Century*, New York: Continuum, 2004, p. 94.
[22] See Dan Belz, "Is International Humanitarian Law Lapsing into Irrelevance in the War on Terror," *Theoretical Inquiries in Law* 7, 1 (2005), pp. 97-129.

These, they argue, were crafted carefully to limit the military space in which it might be lawful for combatants to kill one another. Status quo defenders argue instead for a more concentrated focus on the full and proper implementation of IHL and the ongoing codification of customary norms to stopple what gaps, if any, remain in the law.

In that sense, the war in Afghanistan fought in 2001-2002, which many consider to have been an international armed conflict between state forces (principally the United States and the Afghan Taliban regime), might provide an example where the existing IHL regime could have been applied more accurately, protecting full combatant status for agents of the state. These opponents may also argue against the expansion of the laws of combat to operations that would not normally meet a strict construction of the legal threshold of armed conflict, thus perhaps rejecting even the theoretical applicability of IHL to new forms of conflict not fixed in space or time.

One particularly problematic challenge in any reconsideration of the existing regime of laws — an IHL "regime change" as one participant put it — is dealing with questions regarding the nature of proper authority and *ius ad bellum*, the area of the law which governs whether or not it is lawful for parties to enter into wars. If *ius in bello*, or laws that govern the means and methods of conflict, asked some participants, are to be reconsidered, must we not reexamine *ius ad bellum* provisions as well? This would entail granting at least some non-state actors a legitimate means of entering into armed conflict. The upshot of this approach would be to offer non-state actors their first true stake following the laws of war.

Featured in the debate were other key concerns that emerge — beyond the simple reluctance of states to recognize the legitimacy of the grievances brought by non-state actors — regarding the questions of 'proper authority' and how to limit the number of groups that might qualify for legitimate belligerent status. What criteria might be applied? Proper authority is generally understood as resting upon two general criteria: (i) force must be organized under some recognizable chain of command, such that there is some responsibility over each other's actions, and (ii) force must have some responsibility for some wider group of people, often displayed by control over some territory. These guidelines delineate the issue but remain operationally vague.

Some participants questioned altogether the usefulness of refining the rules of combat for operations that have been addressed traditionally within the criminal justice system. Historically, internal disorder created by groups operating within one state has been treated by states as criminal and dealt with outside the purview of IHL, particularly so as the legal definition of an armed conflict is never seen as being met.

Even in cases where groups cross borders and draw multiple states into armed interaction, or draw states into armed actions outside their own borders, some wonder whether the very disproportionality of conflict between non-state actors and states is not an asset. Arguably, the only way for the state to respond effectively to the low-velocity conflicts is with a 'shock and awe' approach that violates the principle of proportionality but removes the threat.

Others remarked that these objections fail, however, to take account of the wars' new transnational dimension. They felt that there is a need for agreed international norms on how to regulate the very notion of transnationality itself. The current emerging state practice may form the natural basis for the evolution (rather than revolution) of customary norms in the coming decades, but there is certainly little international recognition of any consensus on current state practice. One consequential reason for this state of affairs, remarked some participants, is that the contemporary laws of war are state-centered; indeed "IHL is a Westphalian creature."[23]

The vigorous debate amidst politicians and citizens throughout Europe over the 2005 allegations of the operation on European soil of 'secret prisons' for the detention and interrogation of suspected terrorists by the United States Central Intelligence Agency (CIA) evidenced that many states are involved in the strategy chosen by the United States to fight its "war on terror." On November 3, 2002, the CIA used a missile-carrying Predator drone to kill an alleged Al Qaeda leader traveling by car in the Yemeni desert.[24] In January 2006, a bomb dropped by an unmanned CIA drone in northern Pakistan that was reportedly targeted at Ayman al Zawahiri (the second-in-command of Al Qaeda) but instead killed eighteen civilians sparked considerable unrest among Pakistanis already skeptical of US operations in their country.[25]

All in all, the question remains "whether military operations conducted by one or more states against non-state armed actors of a transnational nature could be qualified as international armed conflict and whether such armed groups could be equated with parties to the conflict. The proponents of this thesis argue that the development of customary rules going beyond the treaty provisions currently in force has contributed to the extension of the notion of international armed conflict."[26] That being as it may, the conundrum is whether it

[23] McAlea. "Post-Westphalian Crime," p. 121.
[24] See William C. Bank, "The Predator," in Volker C. Franke, ed., *Terrorism and Peacekeeping – New Security Challenges*, Westport, Connecticut: Praeger, 2005. Banks argues that "under the law of war, the selection of individuals for targeted lethal force would not be unlawful if the targets are combatant forces of another nation, a guerilla force, or a terrorist or other organization whose actions pose a threat to the security of the United States" (p. 150).
[25] "Top Qaeda Aide Is Called Target in US Air Raid," *Financial Times*, January 13, 2005.

is possible to reconcile in any possible way the norms of IHL with a strategy of targeting civilians. Though the answer to this question appears overwhelmingly consensually negative, the historical persistence of terrorism and the mechanics of new transnational war brought this debate to the brink of the larger question of whether there is conceivably a way of 'updating' IHL without making untenable compromises.

[26] International Institute of Humanitarian Law and International Committee of the Red Cross, "International Humanitarian Law and Other Legal Regimes: Interplay in Situations of Violence," Report on the twenty-seventh roundtable on Current Problems of International Humanitarian Law, November 2003, pp. 4-5.

Conclusions

This roundtable discussion considered the issue of transnationality as a development emerging as response to contemporary changes in warfare. As such, the mutation is inviting questioning of methods that may have triggered it rather than conceiving of it as an isolated phenomenon. Four general conclusions emerged from the debates that transpired.

- The **current configuration of war** is characterized by the absence of clear-cut conflict delineation, both spatially and temporally. Wars tend increasingly to play out in slow motion before our eyes. Such open-endedness renders analysis and regulation particularly difficult. How are we to deal with this knowing that law can, at best, mitigate war's effects? Generally, it emerged that, sooner or later, the question of a reexamination of the rules of war would lead to opening new territory, in particular the question of transnationality, which, for now, remains addressed imperfectly. Ultimately, the threshold may not be what states can accept but what can no longer remain outside the realm of IHL.

- The **contemporary span of international humanitarian law** is entering a moment of democratization. With the question of adequacy fully on the table, calls for a regime change (update and revision) now concern principally the inclusion of new non-state actors, the redefinition of mandates, the definition of terrorism, and the regulation of counterterrorism. The merit of the existing legal framework, the residual value of law enforcement approaches, and the implications of a premature embracing and legal sanction of a global battlefield were noted.

- Beyond this, difficult questions arise. The central one is thus: **Is it actually possible to recognize transnational armed groups to have the authority to use force, apart from the legitimacy to fight, and therefore be able to treat them within the laws of war?** A strengthening of distinction and proportionality would certainly take out some of the fire of transnational armed groups. In tandem with a tightening of the right of self-defense, this would in essence improve the system. Yet, is not the first proposition akin to legitimizing an illegitimate use of force?

- The meeting closed with a focused discussion of **the question of compliance**

and regulation. It was offered that, as of now, two approaches are pitted against each other, namely self-preservation and development. Underscoring the two is the notion that regulation is needed because ultimately there is a common interest in its preservation. Participants agreed that there is room for development in relation to the following four dimensions: (i) status (acknowledgment of belligerency), (ii) distinction (belligerency and victimhood), (iii) proportionality (judgment criteria), and (iv) neutrality (proclaimed or granted).

The principal fault line among participants at the meeting, which reflects the disagreements among most observers, concerned the comparative costs and opportunities of reforming law. Is a minimum response correcting law to the benefit of states enough? Are not states themselves already adapting and mirroring transnationalism, with extraterritorial action for instance?

The purpose of the Geneva roundtable was to clarify the components of the shifting tripartite equation of transnationality, war, and law with a view to set the stage for further research. Ultimately, the danger of static understanding behooves an attempt at breakthrough on these issues. The point may have been reached where the system, instead of fully regulating behavior in war, needs regulation itself. If, as it appears, war is no longer the sole domain of states, and international humanitarian law does remain the privileged province of states, the very existence of transnational armed groups raises legal questions of *ratione personae* (identification of parties), *ratione loci* (identification of territory), *ratione materiae* (nature of conflict), and *ratione temporis* (timeframe of conflict) to which answers must be provided in the next phase. Such development should be rooted into the history of IHL and build on the lessons learned from previous attempts to expand the legal corpus of international humanitarian law.

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The Program on Humanitarian Policy and Conflict Research at Harvard University (HPCR) was set up in 2000 with a view to serve international organizations with research and policy input on humanitarian law, human security, conflict management, and conflict prevention.

The Program is engaged in research and advisory services on conflict prevention strategies, the management of humanitarian crises and the protection of civilians in conflict areas. It advises international organizations, governments and non-governmental actors, and focuses on the protection of vulnerable groups, conflict prevention strategies, and the role of information technology.

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