

War and law in the 21st century: Adapting to the changing face of conflict

International laws governing conflicts and crimes against humanity have developed slowly and unevenly since the first Hague Convention of 1899.

Anne-Marie Slaughter, until recently a top Obama Administration official, sets out the three main trends re-shaping international criminal law

Conflicts in the 21st century are going to look very different from those of the century before. The two wars launched in response to 9/11 – one justifiably in Afghanistan and the other unjustifiably in Iraq – are likely to be the last examples of 20th century-style warfare: large-scale multi-year conflicts involving the ground invasion of one country by another.



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Among the major powers, 21st century warfare is more likely to be fought on the digital frontier, or by special forces conducting limited operations. Among the majority of the world's nearly 200 states, conflicts are much more likely to take place within states than between them. As former UN official Andrew Mack found after a major study of conflicts between 1945 and 2008, wars in the post-Cold War world have mostly been fought within rather than between states, and by small armies equipped with light weapons. Those wars generally kill fewer people compared to the superpower proxy wars fought in the Cold War period, but they are "often characterised by extreme brutality toward civilians." Consider Rwanda, Somalia, East Timor, Bosnia, Kosovo, Darfur, the Democratic Republic of the Congo, Libya and, increasingly, Syria. The current international legal regime governing military conflict is designed primarily for wars between states conducted on the ground, at sea, or in the air by organised and identifiable military forces. It will apply less and less to coming conflicts, although

the 1977 Additional Protocol to the Geneva Conventions of 1949 extend basic humanitarian protections to insurgencies fighting against colonial regimes or occupying forces. But it is not clear in the first instance that international law should even apply.

When a government abuses one of its citizens it is a domestic constitutional rights violation. If a government official kills a citizen extra-judicially it is murder, punishable under domestic criminal law; and if a government official tortures a citizen, it is assault and battery. When a government discriminates against a group of citizens, it is a minority rights violation, again subject to redress under most constitutions. When a government charged with making and enforcing laws systematically violates those laws by a deliberate decision to torture, murder, “disappear” or detain citizens without legal justification, domestic law gives way to international human rights law, and increasingly to international criminal law. When those citizens fight back in an organised fashion, or otherwise organise themselves against the state in a sustained military confrontation, then international human rights law gives way to the patchwork of international rules developed to apply to conflicts within states.

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The boundaries between all these categories are very blurred, witness the ongoing dispute over the past decade as to whether to try terrorists as criminals in a domestic court or as unlawful combatants under the laws of war. It will probably take many years to sort out when “the state” should be treated as one unit under international law, as a government accountable to its people under domestic constitutional and statutory law, or as a group of individuals responsible for their actions under domestic and international criminal law. But three trends will shape the answers to these and other questions.

The first is the individualisation of international law. The traditional subjects of international law are states, but international human rights law, international criminal law, and the laws of war addressing unlawful combatants all focus on individuals as both perpetrators and victims. States are often willing to sign treaties that they do not intend to comply with, either because they are

confident they can resist pressures for compliance, or also because they have the political ability in the first place to influence findings such as veto rights in the UN Security Council or the customary international law rule allowing states that persistently object to an international legal practice not to be bound by it.

But if individuals can bring claims against states in independent international tribunals like the European Court of Human Rights, and if international prosecutors can bring claims against individual government officials, as can happen in the International Criminal Court, then the need for intensive safeguards against the politicisation of legal processes will steadily increase.

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It is also essential that these new tribunals should show consummate professionalism to counter growing state wariness about entering into these arrangements. In theory, we can imagine a 21st century international legal regime in which it would be possible to indict the equivalents to Hitler, Stalin, Pol Pot, Milosevic and the architects of the Rwandan genocide as soon as evidence of systematic killing emerges, accompanied by a warrant for their arrest with a substantial bounty attached for bringing them to justice. Such a regime would be more effective and far less costly than allowing millions to die, or of mounting an international intervention. But government leaders could not agree to such a regime without a system of both legal and political checks and balances that would assure its application only in cases of genocide, crimes against humanity and systematic war crimes, ethnic cleansing and other similarly egregious crimes.

Second, there is the individualisation of war. Warfare in the 21st century focuses more and more on individual targets, so from a perspective of limiting civilian deaths it makes much more sense to use an unmanned drone to kill individual leaders of enemy forces, particularly when fighting a networked command structure. But in a world in which war against a terrorist network such as Al-Qaeda is on-going and also global, what is the difference between the targeted killing of an Al-Qaeda commander in Yemen and the targeted assassination by Israeli forces of a Hamas leader? It is a very uncomfortable question for many, but one that must be answered. The U.S. State Department legal adviser Harold

Koh insisted in a speech to the American Society of International Law last year that in all operations involving force, the Obama Administration "is committed in word and deed" to ensuring compliance with all applicable laws. Regarding the specific topic of U.S. targeting practices, he argued that "a state that is engaged in an armed conflict or in legitimate self-defence is not required to provide targets with legal process before the state may use lethal force." This is potentially a very liberal standard; many states that have been attacked by terrorists operating outside their borders could conclude that they are acting in legitimate self-defence by targeting their opponents with lethal weapons.

On the other hand, the European Court of Human Rights (ECHR) ruled recently that the European Convention on Human Rights applied to the actions of the British military not only on British bases in Iraq, but also to all parts of south east Iraq in which it has assumed authority and responsibility for providing security. The failure of the UK military authorities to conduct an independent investigation into the deaths of Iraqi civilians killed by British soldiers is therefore subject to the same legal standards that would apply to any other British government official acting within British territory. The ECHR overruled the British Supreme Court, which had decided that the European Convention did not apply on the battlefield.

We have thus arrived at a point where according to a European court the killing of a civilian by military forces in occupied foreign territory must be investigated the same way as a domestic killing. But according to the U.S. government, the decision to target an individual in another country with a personalised missile based on intelligence that he is a part of a terrorist network is legal under both international and domestic law. The one thing that is certain is that the ECHR decision has given European domestic courts jurisdiction to entertain claims from the family members of all individuals killed by European forces operating in Iraq, and presumably Afghanistan, which will ensure that many more decisions will be handed down in this space.

Third, the international reinforcement of domestic law. Given the limited resources and carefully husbanded legitimacy of international tribunals, it is better that killings and abuses of individuals within states, whether in the context of inter-state or intra-state conflict, should be addressed in the first instance at least under domestic law. The principal differences between the international tribunals for the former Yugoslavia and for Rwanda and the International Criminal Court is that the Yugoslavia and Rwanda tribunals had "primary jurisdiction" over any case they

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wanted to try that had taken place in either country, whereas the International Criminal Court has jurisdiction only over cases that the national courts with primary jurisdiction are unable or unwilling to try themselves.

This system of “complementary” jurisdiction means that the ICC serves as a catalyst for domestic prosecutions, since many governments that come to power after major atrocities perpetrated by their predecessors would prefer to try their own, and backstop only if those prosecutions fail. ICC prosecutor Luis Moreno-Ocampo has taken complementarity a step further and described his mission as helping to provide the legal and educational resources to create a global network of prosecutors capable of applying domestic and international criminal law in domestic courts.

The Council on Foreign Relations in the U.S. recently released a report entitled “Justice Beyond the Hague” detailing the many other ways that international courts, policymakers and advocates can “help build justice at national levels” by supporting the prosecution of international crimes in national courts. One of the most interesting mechanisms is the growth of hybrid tribunals – national courts that combine national and international judges and lawyers. Different versions of these tribunals exist in Sierra Leone, Cambodia, Bosnia, Kosovo and East Timor, and students of the European Court of Justice have long recognised that the real strength of the EU legal system is the way that it connects national and European-level judges in an interactive legal conversation.

International law takes the long view, with progress measured in decades. The Hague peace conferences which produced the Hague Conventions setting forth the law of war, took place in 1899 and then in 1907. It wasn’t until the Geneva Conventions of 1949 that the great hope of the first Hague Convention of a binding international court to rule on international disputes in place of war was first attempted. And the International Criminal Tribunal for the former Yugoslavia was the first serious attempt to hold individuals accountable for war crimes since the Nuremberg tribunal that tried Nazi leaders.

To point out, as this article sets out to do, all the reasons that 21st century conflicts will require a new legal regime is only to draw back the curtain on a decades-long process. But it is a process that will eventually determine the accountability of humankind for acts of inhumanity. ■

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