

Law and Conflict for the Contemporary Practitioner

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Review of Kenneth Watkin, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict* (Oxford University Press, 2016)

The last major attempt to revise international humanitarian law (IHL), also referred to as the law of armed conflict or the law of war, was the Diplomatic Conference which met in Geneva from 1974 to 1977 and produced the two 1977 Protocols Additional to the Geneva Conventions of 1949: Additional Protocol 1 (AP1) addressing international armed conflict, and Additional Protocol 2 (AP2) addressing non international armed conflict. As opposed to the Geneva Conventions of 1949, which are essentially universally ratified, there are major non-parties to AP 1 and AP2, including the United States. Fortunately, much, although not all, of the contents of the APs is regarded as part of customary law.

No one can dispute that evolving technology and the changing nature of modern conflict would justify the convening of a new diplomatic conference to revise the law of armed conflict once again. Twenty-five years elapsed between the development of the Geneva Conventions of 1949 and the commencement of the negotiating process for the APs. Almost

forty years have elapsed since the APs have been available in final form.

It is, unfortunately, almost inconceivable that the major countries of the world would participate in such a conference. It is extremely difficult to envisage a diplomatic conference gathering to update the law involving most states and also non-state actors such as ISIS. Bearing in mind the contemporary tendency to include nongovernmental organizations at least as observers or in an advisory role, the possibilities for discord would appear endless.

Unless we accept the conclusion that there is a major lacuna in the law, and I do not, we must develop alternative means to make the treaty and customary law which exists relevant and usable in all contemporary conflicts. A variety of such means have been relied upon, including progressive restatements of selected areas of the law by groups of experts and progressive assessments of the current state of customary law by institutions such as the ICRC. The approach adopted by the Office of the Prosecutor (OTP) for the

International Criminal Tribunal for the former Yugoslavia (ICTY) has been to attempt to develop common offences with common elements for both international and non-international armed conflicts. This last approach has had some success but it has clearly not been followed by the International Criminal Court (ICC).

Kenneth Watkin, a former Judge Advocate General of the Canadian Forces (2006-2010) and holder of the Stockton International Law Chair at the United States Naval War College (2011-2012) has made his own attempt to provide a solution to one of the major legal problems in contemporary conflicts. His book, *Fighting at the Legal Boundaries: Controlling the Use of Force in Contemporary Conflict*, is, quite possibly, the most important single-author IHL monograph written in many years.

Essentially, as Watkin notes, contemporary conflicts are rarely traditional international armed conflicts. Instead, they are usually asymmetric and involve states with regular armed forces on one side and non-state actors, which may or may not wish to gain control of a state, on the other. Further, although the non-state actor may be based in the territory of a particular state, which may or may not be involved in the conflict, it may conduct operations outside the territory of the base state. This transnational aspect means that contemporary armed conflicts tend to differ from traditional non international armed conflicts, which were usually envisaged as being confined to the territory of a single state. As a result, one can envisage arguments that legal reviews of the use of force in many contemporary armed conflicts require assessments of the law concerning recourse to the use of force, IHL, international human rights law (IHRL), the domestic law of the states from which the participating armed forces come, the domestic law of the state where combat activity occurs, and even the international law of neutrality. As is obvious, the legal

principles in these various bodies of law may clash.

The purpose of Watkin's book is to make a holistic analysis of the legal issues involved in the contemporary use of force in order to provide guidance to those involved in advising on or controlling the use of state armed forces, including police forces in some circumstances, in contemporary conflicts. This is not a simple task.

After an introductory chapter, Watkin focuses in his Part Two on the interaction between relevant normative frameworks, specifically the interaction between the law governing the recourse to war by states, IHL, and IHRL. Chapter 2, "Controlling State Involvement in Armed Conflict" reviews the U.N. Charter-based framework concerning recourse to war, the division between that body of law and IHL, IHL as it applies to non-international conflicts, the tendency for contemporary non-international conflicts to have international aspects or to transition into international conflicts, and the growing acceptance that the right to self-defense by states is also relevant to conflicts with non-state actors.

Chapter 3, "Applying Self-Defense Principles During Armed Conflict" explores the interface between the law governing state recourse to force and IHL. Although some may differ, it is Watkin's view that the law governing recourse to force is applicable to strategic decisions concerning the use of force and not to the actual conduct of operations at the tactical level. Chapter 4, "States, 'Proper Authority', and Conflict", starts out by analyzing the just war concept of proper authority, which, in today's context, requires that armed conflict be initiated by a sovereign state. The special status accorded to states to maintain order and participate in conflict requires the consideration of IHRL and domestic law when non-state actors are involved in the conflict as groups acting outside state authority are criminalized under domestic law.

Chapter 5, “The Humanitarian Law and Human Rights Law Interface,” is particularly important. IHL experts have, in the past, regarded IHL and IHRL as mutually exclusive, with IHL as a form of *lex specialis* overriding IHRL in the unlikely event of a conflict between the two bodies of law. The reviewer can remember participating in many IHL expert meetings up to the end of the 1980s in which IHRL expert participation was not expected and did not occur. The participation by IHRL experts, together with IHL experts, in ICRC sponsored discussions on Direct Participation in Hostilities (DPH) was looked on by many of the LOAC experts, including the reviewer, as IHRL imperialism. The reviewer has since concluded he was wrong. While the conversion occurred before Watkin’s book was published, the reasons put forward in the book do make an overwhelming argument in favor of the need to incorporate IHRL considerations into the legal analysis of use of force issues in contemporary conflicts.

“Part Three: The Threat, The State Response, and Legal Uncertainty” comprises Chapters 6 through 9 and focuses on insurgency and terrorism and responses to them. Chapter 6, “Contemporary Threats: Insurgency and Terrorism,” is primarily descriptive. Chapter 7, “Counterinsurgency and Converging Norms,” discusses the continuing military relevance of counterinsurgency operations. Douglas Porch, in his book *Counterinsurgency: Exposing the Myths of the New Way of War* (Cambridge, 2013) severely criticizes the recent emphasis on counterinsurgency doctrine particularly in the U.S. forces as a very wasteful method of waging war, requiring enormously disproportionate resources to achieve a given result. Watkin is of the view that the requirement for counterinsurgency operations is, however, inevitable and one must get on with preparing for them rather than grumbling. In his words: “unique aspects of

counterinsurgency operations, such as placing a premium on law enforcement; acknowledging the link between applying a capture over killing approach and establishing control over an area of operations; and taking additional care to limit civilian casualties during targeting, will have to be understood and incorporated into military operations (p. 223).”

Chapter 8, “Counterterrorism and the ‘Away Game,’” looks at Special Forces raids and at the use of drones. In relation to drone strikes, Watkin reviews three legal theories which might be applicable: the law enforcement approach, which is more restrictive; the more permissive conduct of hostilities approach; and what is referred to as the self-defense approach. Each approach has strengths and weaknesses. In his view: “the solution is trending toward one that more fully incorporates human rights-based law enforcement norms, either as a result of legal interpretation or policy into the rules governing drone strikes (p. 27).” Chapter 9, “Non-State Actors and Armed Conflict”, focuses on assessing how transnational violence is characterized across the conflict spectrum and on assessing the threshold for determining the existence of a non-international armed conflict.

“Part Four: Applying Force Across the Conflict Spectrum” comprises Chapters 10 through 13 and addresses the conduct of operations against non-state actors across the spectrum from international armed conflict to international law enforcement. Chapter 10, “Self-Defense and the Protection of Nationals,” addresses hostage rescue operations in both a national and international context and uses two such operations as case studies to explore the relevant factual and legal issues in the international context: the 1976 Israeli rescue of hostages at Entebbe and the 2000 British operation in Sierra Leone to free soldiers captured by an organized armed group called the West Side Boys. In

Watkin's view, law enforcement aspects are significant for all such operations.

Chapter 11, "Law Enforcement and Self-Defense," explores the relationship between human rights-based law enforcement, state exercise of self-defense, and IHL. The author observes that law enforcement and the international law concerning self-defense use similar concepts, such as necessity, proportionality, and imminence, but these concepts often have different contents.

Chapter 12, "The Narrow Operational and Normative Gap", indicates that there can be a very narrow gap between the legitimate use of force under IHL and the legitimate use of force in law enforcement in certain cases, and uses a discussion of the 1997 rescue of hostages held at the Japanese Embassy in Lima, Peru as an illustration. In such a case, essentially the same level of force is acceptable under both the law enforcement and IHL provisions. Chapter 13, "Limits of Law Enforcement and Human Rights Law" looks at the effectiveness of human rights law in controlling the use of force during armed conflict. In particular, as the British Government chose to regard the long running insurgency in Northern Ireland during the "Troubles" as a domestic law enforcement matter, the facts of the so-called "shoot to kill" controversy were reviewed.

"Part Five: The Way Ahead" comprises Chapters 14 and 15. Chapter 14, "A Holistic Solution," in the author's words: "outlines the application of a holistic, operational law approach that is designed to address the evolving, diverse, and unique security threats facing the international community ... [His] analysis ... focuses on applying a human rights based response *as a matter of law, as State policy, or as a discretionary decision by the chain of command* (p. 29-30, italics mine)." Both Watkin and the reviewer would be reluctant to assert that these legal approaches are hard or even soft law at

present but, in the absence of a diplomatic conference to update the law, the book's approach can be regarded as an excellent statement of suggested best practices. Indeed, bearing in mind the fact that the non-state actors in many current conflicts do not appear to pay much attention to law compliance, the "best practices" approach may be preferable in the short run. Chapter 15, "Preparing for Twenty-First Century Conflict", focuses on how legal advisers must be trained to provide operational law advice in the complex current security environment. In particular, Watkin argues that state (including military) legal advisers must be as well trained to apply domestic and international human rights law as they are trained to apply IHL.

Watkin's book is firmly rooted in a sophisticated and almost exhaustive analysis of the relevant facts and law. The author's depth of experience as a practitioner of "holistic" operational law is evident on every page. The book is extremely important but by no means a quick read. Fortunately, as aids to the reader, the last section of each chapter is essentially a précis of what has been written earlier and there is a very helpful decision tree on p. 617, entitled "Confronting Transnational Violence: A Holistic Approach".

This book is outstanding and one hopes it will be widely read and thought about. The reviewer has, however, two observations.

First, reliance on IHRL is by no means a total solution to the contemporary IHL problem, even where the use of force is concerned. IHL treaty texts such as AP1 contain extensive provisions concerning the use of force directed against both people and things, although even these provisions are insufficient to provide adequate and elaborate guidance to the man or woman on the ground carrying a rifle. IHRL does not address use of force against things and, where people are concerned, usually prohibits unlawful killing without specifying what is unlawful. Further, IHRL

tends to focus on the behavior of states and state organs and IHRL tribunals seem to adopt an approach whereby the state is obligated to prove its innocence, in lieu of the approach of criminal tribunals in which the guilt of the accused must be proved beyond a reasonable doubt.

Second, it will probably be quite difficult to educate the legal paragons who will be expected to provide the sophisticated, accurate and usable legal advice which will be required in the current security environment. The reviewer spent ten years working for the Prosecutor at the ICTY. It was, probably, the view of all the lawyers there that the perfect prosecutor for a complex war crimes case would have extensive criminal prosecution experience, experience handing extremely complex cases, and a high level of expertise in IHL and IHRL. Many newly hired lawyers brought one of these experiences with them. No one brought them all, and it took

many years to develop “the compleat international criminal prosecutor.” It is quite likely it will also take years to develop “the compleat operational law advisor.”

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