

*Dissonance in International Law: The Increasing
Tension Between International Humanitarian Law and
State Sovereignty*

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ABSTRACT

This paper examines how the changing nature of armed conflict and the attempt to hold accountable those who violate the principles of International Humanitarian Law (The Law of Armed Conflict) in other-than-international armed conflicts create an inevitable tension with the bedrock International Law principle of state sovereignty.

It begins with a discussion of how the nature of armed conflict has evolved from the traditional state-versus-state model to one involving conflict between the regular forces of a sovereign state and loosely organized and structured irregular forces supporting a non-state actor. It discusses how the pertinent principles and instruments of International Humanitarian Law (customary humanitarian law, Hague Regulation IV, the four Geneva Conventions and the Additional Protocols thereto), while applicable to traditional state-versus-state armed conflicts, cannot always be applied to other-than-international armed conflicts. It explains how, as a result, perpetrators of alleged violations of the principles of International Humanitarian Law often escape prosecution because they are subject only to the jurisdiction of the state in which the infraction(s) occurred and that state may (and often does), at its discretion, decide not to prosecute. It also explains how any attempt to apply the provisions of International Humanitarian Law and the principle of universal jurisdiction in such cases inevitably infringes the principle of state sovereignty and is seen as an attempt to interfere in the internal affairs of a sovereign state. It arrives at the disturbing conclusion that many violations of the principles of humanitarian law go unpunished in the name of state sovereignty.

The paper goes on to discuss the attempts to extend the application of International Humanitarian Law to other-than-international armed conflicts and calls for additional efforts in this direction. It also examines the adequacy of current means of adjudication for violations of the principles of International Humanitarian Law including *ad hoc* tribunals, the International Criminal Court, and domestic courts and calls for continued efforts to support the authority of these judicial bodies. The paper concludes with several recommendations for updating International Humanitarian Law in light of this dissonance with International Law. These recommendations include a comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts, updated definitions of war crimes to accommodate modern trends, and a re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts.

DISSONANCE IN INTERNATIONAL LAW: THE INCREASING TENSION BETWEEN INTERNATIONAL HUMANITARIAN LAW AND STATE SOVEREIGNTY

Introduction

The attempts by the Libyan government in March, 2011 to forcefully suppress the popular uprising staged by its citizens served to highlight, once again, the tension between international humanitarian concerns and the sovereignty of the State. The Libyan ruler, Col. Muammar Khadafy, used military aircraft, artillery, armored vehicles, tanks, and naval warships to engage Libyan citizens who were seeking to forcefully bring about a change in regime. There are those, in addition to Colonel Khadafy, who would argue that this use of overwhelming military force was justified as the legitimate exercise of the police power of a sovereign state to maintain law, order, and security in the midst of a civil war arguably fomented by foreign intervention. On the other hand, there are those who would argue that the use of such overwhelming force was disproportionate to the threat faced by the Libyan government and that humanitarian intervention by foreign military forces to alleviate or prevent the suffering caused by the use of Libyan military forces was warranted as well as justified.

While the proponents of the use of armed force in the name of humanitarian intervention certainly acknowledge the obligations of states to refrain from the use or threatened use of force and to resolve disputes by peaceful means, they would argue that the use of force in this particular instance could be justified on humanitarian grounds. The passing of the United Nations Security Council Resolution 1973 would seem to validate this position. However, these proponents cannot deny that this uprising was an internal affair and they must realize that any interference in the internal affairs of a sovereign state, such as

that imposed by the use of force for any reason, challenges a bedrock principle of International Law, namely, that of state sovereignty which imparts a duty on all states not to intervene, directly or indirectly, in the internal or external affairs of another state. Hence, there arises a tension between respecting the sovereignty of any given state and using military force to effect humanitarian relief to citizens of that state whose rights are threatened or abused by that state.

This paper carries that tension into the field of International Humanitarian Law and the Law of Armed Conflict which seek to limit or otherwise control the amount of suffering inherent to a state of armed conflict. It begins with a discussion of how the nature of armed conflict has evolved from the traditional state-versus-state model to one involving conflict between the regular forces of a sovereign state and loosely organized and structured irregular forces supporting a non-state actor. It discusses how the pertinent principles and instruments of International Humanitarian Law (customary humanitarian law, Hague Regulation IV, the four Geneva Conventions and the Additional Protocols thereto), while applicable to traditional state-versus-state armed conflicts, cannot always be applied to other-than-international armed conflicts. It explains how, as a result, perpetrators of alleged violations of the principles of International Humanitarian Law often escape prosecution because they are subject only to the jurisdiction of the state in which the infraction(s) occurred and that state may (and often does), at its discretion, decide not to prosecute. It also explains how any attempt to apply the provisions of International Humanitarian Law and the principle of universal jurisdiction in such cases inevitably infringes the principle of state sovereignty and is seen as an attempt to interfere in the internal affairs of a sovereign

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The paper goes on to discuss the attempts to extend the application of International Humanitarian Law to other-than-international armed conflicts and calls for additional efforts in this direction. It also examines the adequacy of current means of adjudication for violations of the principles of International Humanitarian Law including *ad hoc* tribunals, the International Criminal Court, and domestic courts and calls for continued efforts to support the authority of these judicial bodies. The paper concludes with several recommendations for updating International Humanitarian Law in light of this dissonance with International Law. These recommendations include a comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts, updated definitions of war crimes to accommodate modern trends, and a re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts.

International Humanitarian Law and the Law of Armed Conflict

- A. Principles of International Humanitarian Law and the Law of Armed Conflict (IHL/LOAC)
 - 1. Customary International Law
 - 2. Hague Regulation IV
 - 3. The Geneva Conventions
 - 4. Protocol I and Protocol II Additional to the Geneva Conventions
- B. Violations of IHL/LOAC

Violations of International Humanitarian Law and the Law of Armed Conflict are considered to be war crimes which, as international crimes, impose universal jurisdiction obligations upon all states that are parties to an international armed conflict. Given that most armed conflicts through the middle of the 20th century were between two or more sovereign states and that most states recognized war crimes as international crimes, any issues regarding challenges to the sovereignty of a state by the imposition of universal jurisdiction to adjudicate war crimes have been well settled as consistent with general principles of International Law regarding state sovereignty.

However, the proliferation of “other-than-international” armed conflicts since the end of World War II, the realization that the principles of International Humanitarian Law are routinely violated in such armed conflicts, and the obvious need to apply IHL/LOAC to such conflicts, including but certainly not limited to the uprising in Libya, once again highlights the tension between respecting the sovereignty of any given state and enforcing violations of the principles of International Humanitarian Law that occur during an other-than-international armed conflicts taking place within the borders of that given state. There is little argument that conflicts, such as the uprising in Libya, are internal affairs and subject to the national jurisdiction of the state in which they take place. However, there is also little doubt that there are actions taken by the forces of the State (as well as the insurgents) that violate the principles of IHL/LOAC. However, because these conflicts are “other-than-international,” the application of IHL/LOAC, with their resultant invocation of universal jurisdiction for violations, is extremely limited with the result being that numerous violations of the principles of IHL/LOAC can and do go unpunished in the name of sovereignty. Simply put, a State may or may not decide to prosecute such violations or to prosecute them

selectively and absent the imposition of universal jurisdiction, the violations can and do go unpunished.

As mentioned *supra*, universal jurisdiction obligations apply to the adjudication of alleged violations of IHL/LOAC during the course of the international armed conflict. As such, the alleged perpetrator of a war crime has not safe haven and all states, whether they are parties to the armed conflict or not, have an obligation to adjudicate alleged violations of IHL/LOAC or to extradite the alleged perpetrator of such violations to any state making out a *bona fide* case against that individual. However, universal jurisdiction obligations also require states to adopt national legislation to criminalize such acts and to prosecute alleged perpetrators of such acts in their national, domestic courts. Under this system, the alleged perpetrator of a violation of the principles of IHL/LOAC in an other-than-international armed conflict should be subject to the jurisdiction of the state in which the alleged infraction took place. However, if the state in which the alleged infraction chooses not to prosecute to prosecute selectively, these violations of the principles of IHL/LOAC can and do go unpunished and because of the principle of the sovereignty of the State, the alleged perpetrator(s) of such violations will not be surrendered to the jurisdiction of another state unless the first state chooses to do so.

The foregoing realization, that the principles of IHL/LOAC can and do go unpunished in the name of sovereignty, represent a glaring example of dissonance between the principles of International Law and International Humanitarian Law that must be addressed and corrected.

Corrective Measures in Place

A. Protocol I and Protocol II

The 1977 Additional Protocols to the 1949 Geneva Conventions represented a promising first step toward extending the protective reach of IHL/LOAC to “other-than-international” armed conflicts.

Additional protocols and international agreements are needed to continue this trend.

B. International Tribunals

The *ad hoc* tribunals and special courts created by the United Nations have made impressive inroads towards adjudicating violations of IHL/LOAC in “other-than-international” armed conflicts.

States have asserted sovereignty and lack of jurisdiction as procedural defenses to such adjudicative efforts, the invocation of universal jurisdiction has resulted in a substantial number of examples where perpetrators of such violations have been held personally accountable for their actions.

Given this positive trend, more tribunals and special courts are needed.

C. International Criminal Court

Similarly, the International Criminal Court has sought, albeit with limited success, to assert its jurisdiction to adjudicate acts which violate the principles of IHL/LOAC in international as well as “other-than-international” armed conflicts. Once again, states have asserted sovereignty and lack of jurisdiction as procedural defenses to such adjudicative efforts, despite having signed an international agreement agreeing to accept the jurisdiction of the International Criminal Court.

Given the permanent nature of this judicial body, more support for the International Criminal Court is needed.

D. National/Domestic Courts

States are obligated to adopt national legislation criminalizing acts rising to the level of international crimes. As such, an act that violates a principle of IHL/LOAC must become part of the criminal code of all States. Accordingly, an act that violates a principle of IHL/LOAC also violates the criminal code of the State(s) in which the act is committed. Regardless of the classification of the armed conflict (international or “other-than-international”) the perpetrator is subject to the jurisdiction of the national courts of the State in which the alleged violation occurred. States must regard the obligation to prosecute these alleged perpetrators accordingly. While progress in this area has improved in the last 25 years, there remain numerous gaps in prosecutorial coverage. More needs to be done.

Recommendations

- A. Comprehensive and formal review of humanitarian law instruments to extend the application of this body of law to all conflicts.
- B. Updated definitions of war crimes to accommodate modern trends.
- C. Re-evaluation of the principle of state sovereignty in light of the numerous and ongoing violations of the principles of International Humanitarian Law in other-than-international armed conflicts

While we must unfortunately accept the inevitability of the resort to the use of force to settle disputes and while we must accept the reality that violations of the principles of IHL/LOAC will occur in these armed conflicts, we do not have to accept the fact that these violations will go unpunished. Violations of the principles of IHL/LOAC are war crimes and the perpetrators of these crimes deserve no safe haven in the civilized world. More

importantly, the perpetrators should not be able to hide behind the principle of sovereignty to escape prosecution. This is one example of dissonance that must be removed.