THE PROTECTION OF HUMAN DIGNITY IN LIGHT OF INTERNATIONAL LAW IN NON-INTERNATIONAL ARMED CONFLICTS AND "NEW CONFLICTS"

THE FUNDAMENTAL PRINCIPLES ON THE CONDUCT OF HOSTILITIES

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I am grateful for the opportunity of speaking to you today on this most important course. The world is changing and so is the character of war. There are fewer and fewer international armed conflicts between States – though these still exist – and the majority of conflicts now are non-international in nature, involving non-State armed groups. The law has been made by States for States and sometimes seems ill-equipped to deal with this change. It is not that non-international armed conflicts are new. What is new, however, is the interest of the international community. What happened within the borders of a State was, in the past, considered to be a matter for that State alone and not for the wider world. That, in the world of CNN and instant news reporting, is no longer sustainable.

My task today, as I see it, is not to make you all into lawyers any more than I expect you to make me a theologian. What I want to do is to introduce you to the underlying principles behind the laws of war and how they are applied. I often tell soldiers when I am training them "Do what is right". If they do that, they won't go far wrong. A young soldier in the 1991 Gulf War, during a Scud Missile alert, began giving to an Iraqi prisoner in his care parts of his own chemical protection clothing. When asked why, he just replied that it seemed like the right thing to do. He wasn't quoting law but he was acting fully in accordance with the law.

We are told that the laws of war go back 150 years but this is not true. It is correct for the modern day law relating to the protection of victims which has developed from the foundation of the International Committee of the Red Cross and the first Geneva Convention in the 1860s.[1] However, the law itself, dealing more generally with the conduct of hostilities, goes back millennia. You find it in the Old Testament, the Koran, the Hindu Code of Manu and all the great theologies and philosophies of the world. Although we Christians claim that the origins of

[1] Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864, 22 Stat 940 (1895).

much of modern law rests in the Just War principles of St Augustine and others, in fact they were building on a much older and more universal tradition.

The law is based on a number of key principles. Whilst descriptions of these vary, my own choice is military necessity, humanity, distinction and proportionality. I will deal with each.

The two conflicting principles are those of military necessity and humanity. Here we face a Faustian pact. Military necessity with no humanity is barbarism; yet, humanity with no military necessity is suicide for soldiers. To quote from one eminent treaty, the law "seeks to conciliate the necessities of war with the laws of humanity".[2] Nowhere is this more important than in the law relating to the conduct of hostilities, sometimes called "Hague law", after the early Hague Conventions on the conduct of hostilities. The law relating to the protection of victims, sometimes called "Geneva law", after the ICRC and the successive Geneva Conventions, is humanity based and essentially seeks to fix "the technical limits at which the necessities of war ought to yield to the requirements of humanity". Put simply, Geneva law, which was covered yesterday, is humanity, tempered by military necessity. Hague law is military necessity, tempered by humanity.

Included within the principle of humanity is that of unnecessary suffering. I mention this briefly because it is much misunderstood. It deals with unnecessary suffering to **combatants**, those entitled to take a direct part in hostilities. Unnecessary suffering is itself a balance, implying that there is such a thing as necessary suffering. However, one cannot decide what is necessary or unnecessary simply by the amount of suffering incurred. This has to be balanced against the military advantage. An example is the use of expanding bullets, "dum dum" bullets. In normal circumstances, the additional suffering that these cause in comparison with regular bullets cannot be justified and this was recognised when they were banned in international armed conflict in 1899.[3] However, there are circumstances where the additional suffering can be justified and this is why such ammunition is often issued to police and security forces in law-enforcement situations involving hostages. The additional suffering caused to the hostage taker is outweighed by the reduction in risk to the hostages from ricochet or the failure to kill instantly. Here we face a difficulty in relation to non-international armed conflict, where the intermingling of those taking a direct part in hostilities and those who do not can almost equate

[2] St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles, under 400 Grammes Weight, 11 December 1868, 1 AJIL (1907) Supplement 95-96.
[3] Hague Declaration 3 Concerning Expanding Bullets, 29 July 1899, 1 AJIL (1907) Supplement 155-157.

to a hostage situation. There are those who consider that such ammunition should be banned in all circumstances and indeed, this seems to be the modern trend. However, is this right if it places civilians at greater risk? I leave you with that moral dilemma.

Regrettably, war is a reality of this fallen world but not all war is wrong, as St Augustine realised. States want to be enabled to conduct military operations effectively. If they cannot do so lawfully, the law will be ignored and replaced by anarchy. The difficulty is to strike that balance between military necessity and humanity in such a way as not to lose sight of either.

To do this, we have the principles of distinction and proportionality. Distinction is perhaps the key. It divides those who take a direct part in hostilities, described in international armed conflict as combatants, who may be attacked, from those who do not take a direct part and may not be attacked. It divides military objectives which may be attacked from civilian objects which may not. The whole of the law on the conduct of hostilities rests on this principle. As with so many principles, it is easy to state but difficult to apply, particularly in non-international armed conflicts. Here there is no combatant **status** but only people who take a direct part in hostilities. Frankly the law is still struggling with definition here. These people are "combatants" in the general sense of the term but do not have the **status** of combatant, with the privileges that go with it in international armed conflict. Why is this important? Because it governs who can be targeted with lethal force and when they can be targeted. Combatants, in international armed conflict are targetable at all times but in non-international armed conflict, where there is no combatant status, what are the rules? Again the law struggles. Members of State armed forces and members of organised armed groups with a "continuous combat function" are generally accepted to have a sort of quasi-combatant status so that they are targetable at all times. Others may only be targeted when and for such time as they take a direct part in hostilities, the farmer by day, fighter by night situation. This is extremely difficult for the soldier to discern. Attempts are being made to clarify the law here but the nature of such conflicts is likely to continue to make it difficult.[4] The law requires combatants to distinguish themselves from non-combatants in international armed conflicts, one of the reasons for uniforms. However, this is less easy in non-international armed conflicts where uniforms are in

[4] See ICRC, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, adopted by the Assembly of the International Committee of the Red Cross on 26 February 2009, IRRC, Vol. 90, No. 872 (December 2008), 991-1047.

short supply and indeed, the non-State actor may not want to distinguish himself against a superior foe.

Similarly, there is the distinction between military objectives and civilian objects. But again not all is what it seems. The definition of a military objective, in so far as objects are concerned, is:

"objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."[5]

A civilian object such as a school may become a military objective if, for example, it is used by military forces to store weapons or as a defensive position. Similarly, what might be thought to be a military object may not be a military **objective** if, in the circumstances ruling at the time, there is no definite military advantage to its destruction, capture or neutralization. In the 1991 Gulf War, Saddam Hussein parked a fighter aircraft next to the Ziggurat at Ur of the Chaldees. He was inviting an attack which might damage the Ziggurat. But was the plane a military objective? It was parked in sand and could not take off. The view was taken that there was no military advantage and it was not attacked. Some objects are known as "dual use", such as an electricity station that provides power to both military and civilian facilities. Clearly there might be a military advantage to neutralizing it and it makes an effective contribution to military action but what of the effect on the civilian facilities when the electricity is cut off?

This brings us to proportionality which again reflects the balance between military necessity and humanity and is one part of the law that philosophers find the hardest to accept. In war, it is realised that people will be killed, even innocent people, and things will get broken. However, the principle of proportionality provides that the expected collateral losses resulting from a military action should not be excessive in relation to the anticipated military advantage.[6] Note the words "expected" and "anticipated". This is decided by foresight, not hindsight. In war mistakes happen and if a result was not foreseen and could not reasonably have been foreseen, then regrettable as it may be, it is not a breach of the law. Take the attack on the command centre in Baghdad in 1991. It was not known that this was also being used as an air raid shelter for families and the attack resulted in the deaths of several hundred civilians. The issue here is

[5] Art.52(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of International Armed Conflict (Additional Protocol I), 8 June 1977, 16 ILM (1977) 1391-1441.
[6] Art.51(5)(b), Additional Protocol I, op. cit.

not so much whether this was proportionate as to whether the attackers should have known of that shelter.

Proportionality is not an exact science and people will disagree. The most extreme example might be the arguments that the atomic bombs on Hiroshima and Nagasaki actually **saved** lives when one considers the cost in human lives, military and civilian, that would have occurred during an invasion of Japan. Not all proportionality decisions are as extreme as that but all are difficult and are amongst the most sensitive that military commanders have to make. Commanders must take into account the foreseeable consequences of their actions and so, in the case of the electricity station that I mentioned earlier, a commander would have to look at the effects on the civilian population and weight that up against the anticipated military advantage. Even if it were decided that the expected collateral losses are not excessive in relation to a particular attack, a commander still has to seek to minimise those losses further through what are known as "precautions in attack", such as choice of weaponry, timings and direction of attack and even warnings where feasible.

You will note that I have not mentioned much treaty law. That is because in non-international armed conflict, there is not very much in relation to the conduct of hostilities. Almost all of the main treaties deal only with international armed conflict. There is treaty law on the protection of victims in the Geneva Conventions[7] and Additional Protocol II[8] but States have largely resisted treaty law dealing with the conduct of hostilities in non-international armed conflict. The law is therefore based mainly on custom arising from the practice of States (even here it is States that make law) as defined in judicial decisions particularly from the Yugoslav and Rwanda Tribunals. It is thus here that the principles are so important and we are again thrown back on the underlying ethos of the law.

That soldier who handed over his protection kit in Iraq did not know it but he was following in a long and distinguished tradition that dated back to the beginning of time.

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[7] Common Article 3 to the Four Geneva Conventions of 1949, 12 August 1949.
[8] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict (Additional Protocol II), 8 June 1977, 16 ILM (1977) 1442-1449.