

How Changes in the Nature and Conduct of Warfare Since the End of the Cold War Affected the
Relevance and Applicability of International Humanitarian Law

David A. Brady

Introduction

Operating as a cavalry scout in the US Army in West Germany was filled with many mundane tasks such as M3 Bradley gunnery ranges, field training exercises and various other army training tasks. However, once every six months was the highlight of my time; I got thirty days on the East German border patrol. Typically, that consisted of us watching East German and Soviet Russian soldiers watching us watching them. The Cold War and “The Wall” was part of my entire life, being built on 13 August 1961, two years before I was born. But that would change.

On 8 November 1989, the night started off as normal with the patrol brief with the West German Bundesgrenzschutz (BGS, Federal Border Guards), then off to the border. This night shift would turn dramatic though. After midnight of the 9th, construction vehicles rolled onto the border pulling up the land mines on the “plowed strip”. A few hours later the vehicles came up to the fence line and proceeded to rip down the fences and walled areas. World War Three was about to start or the Cold War just ended.

The end of the Cold War dramatically changed the focus of world politics, the Geneva Conferences, the nature and conduct of warfare and the relevance of international humanitarian law. The rise of the Cold War informed the conception of international humanitarian law. (Barsalou, 2008, p. 19). During the cold war, response to humanitarian crises was routinely used to support foreign policy objectives (Ferris, 2016, p. 174) rather than assisting those in need. But with the Cold War ending, the focus and development of laws and policies as well as locations, ideologies and theologies had to shift. International humanitarian law (IHL) needed to catch up to the new norms of warfare. New norms of warfare would soon include the rise of women soldiers, to include the sharp rise of women in military leadership; the rise of child soldiers,

either force or by choice; non-state warring parties and terrorists; new concepts of torture and detainees; and refugee flow.

Women Soldiers

Women in the battlefield aren't anything new. They have been on the battlefield from the time of dawn, mostly in support roles such as hospital workers, merchants, cooks, laundresses and companions. It was not unheard of to have women in combat roles. Names like Joan of Arc and Lyudmila Pavlichenko, the famed Russian sniper in WWII, can come to mind for those who study military history. The Geneva Accords and Protocols and IHL envisioned a world where the rise of women in warfare could happen but maintained the idea that women are victims or relegated to the roles of child bearing and rearing. There are provisions made for women but these are usually thought of as after effects of battles or conflicts. Vulnerable is the catch word. There is a lot to be said about protecting the "honor" on women and protecting against sexual assault. But with a simple reading of IHL one can walk away with the impression that men are the warriors and women are the victims of that war. "Feminist legal scholars have expressed frustrations at IHL's lack of analysis of matters such as systematic gender inequalities. They argue that this contributes to IHL's inability to move beyond a male norm when dealing with the impact of armed conflict upon women" (Durham, 2010, p. 36).

Since the end of the cold war, however, the rise of women in the military has dramatically raised both in regular and irregular forces (Durham, 2010, p. 37) and with this rise in opportunity to participate in the military as war fighters, the rise of women in leadership roles has risen as well. American soldiers remember the service of Sergeant Leigh Ann Hester while serving in Iraq led an attack against insurgents and winning the Silver Star medal. She did not demonstrate being a

vulnerable side effect of war. With leadership on the battlefield comes responsibility however. In addition to the gender debate on the role women assume on the battlefield comes ownership of responsibility of women who break the gender stereotype and engage in crimes during times of armed conflict (Durham, 2010, p. 40). Few will forget Sergeant Lynndie England at Abu Ghraib. A deeper look into these topics could be done to bring IHL into a more 21st century view of women 's role in the battlefield.

Child Soldiers

Child soldiers aren't anything new since the Cold War. Since the Cold War though, media attention has been aimed often at child soldiers whether they're in the Palestinian region, Iraq, Afghanistan or several African nations. In 2007 the internet went crazy with the hunt for Joseph Kony, a Ugandan warlord accused of kidnapping thousands of children and force them into soldier use, amongst other things. Movies such as Blood Diamond (2006) and Beasts of No Nation (2015) brought the visuals of child soldiering front and center to the world's eyes. There is a culture view of child soldiers and a right of passage to manhood. In certain countries there seems to be little interest in government intervention so IHL is either ignored or held impotent for lack of enforcement. This will also be addressed later as countries refuse to recognize IHL. The international community is held at bay with little ability to help these children.

There are a few things worth pointing out in discussing child soldiers. The first is that girls and boys are targeted due to lack of protection from the state (Mazurana, 2004, p. 35). Though it seems that most writing recognize both boys and girls as child soldiers, most of the focus seems to points toward girl soldiers primarily. Though an assumption, and I believe a reasonable one, girl soldiers seem to be a focus since, in addition to soldiering, the forced marriages, forced child

bearing play a role into the life of a girl soldier. It is pointed out that girls enter armed groups “to escape violent or repressive relations or institutions within the larger society and seek sanctuary among armed groups to escape violations and repression within their own families and cultures” (Mazurana, 2004, p. 55). Some would suggest that they traded one environment of violation and repression for another environment with the same outcome. In the new Post-Cold War world with the new reality, or reemergence of an old reality brought to light, of child soldiers, IHL needs to be strengthen since state fail to protect them.

Non-State Warring Parties and Terrorists

In the realm of geopolitics, there was something disturbingly comforting about the Cold War. It was stable and predictable. We had western history of WWI and WWII to set parameters and expectations in IHL. We saw failures of countries on how the treated soldiers, POWs and civilians as expendable. We held actors accountable, learned from the mistakes and war crimes and revised rules in the conduct of war. Peace wasn’t everywhere, though. Israel, Korea and South East Asia flared up but the world leaders watched the stand-off between NATO and the Warsaw Pact countries. “Small” wars seemed minor in comparison to nuclear holocaust. “European States were the driving force behind the development of IHL conventions to protect their interests in spaces where such protections would be useful, such as inter-State armed conflicts within Europe” (Waschefort, 2016, p. 600). As pointed out earlier this all changed after 9 November 1989. Asymmetrical and intra-state warfare was to be the new challenge. It is neither stable or predictable. Relevance and applicability of IHL was to be and is being stretched further than anticipated. Clashes between at least one non-state armed group with an upward

trend in the proportion of one-sided violence perpetrated by non-state actors" (Bradley, 2016, p. 114) has become the new norm.

The challenge of this new norm is how to hold non-state actors accountable to IHL that they didn't help formulate, have limited knowledge of what it consists of, or care to comply with what they know out of arrogance toward world authority or out of cultural, ideological, or theological differences. UN interventions into Somalia in 1991 and Rwanda in 1994 only showed the difficulty and failures of enforcing IHL. Terrorism of Al Qaeda, Boko Haram, and ISIS deal a blow to IHL when there are multinational coalitions with "invisible" non-governmental leaders with multinational mobile headquarters. IHL "limits war's effects in the field while attempting to protect civilians. It strikes a balance between military necessity and the distinction between civilians and combatants" (Van Engeland, 2011, p. 18) but the distinction between civilian and combatant become very fluid in asymmetrical warfare. This has painted a bleak picture on enforcement of IHL.

New Concepts of Torture and Detainees

A sub-section to Non-State Warring Parties and Terrorists is the new concepts of torture and detainees. With the advent of the Global War on Terror (GWOT), IHL has been stretched and twisted by Western powers to classify nearly anyone as a combatant, and thus nearly anyone can be identified for detention. US Patriot Act can hold anyone it deems a threat in near indefinite detention, since there is no end statement to the War on Terror. Since they are classified as detainees, they loose most of the protection granted by the Geneva Convention. In addition, the term enhanced interrogation justifies the imperative of information acquisition by any cost, since it not officially called torture.

This all flies in the face of IHL. The international community has found it equally challenging to hold the Western world accountable to their violations as it tries to hold non-state actors accountable.

On the positive side IHL has proven in this new realm that Rules of Engagement (ROE) can still be created as done prior to and during the Cold War. “Holding fire in case of a doubt might be frustrating for soldiers, but it remains a must to ensure the respect of the distinction between civilians and combatants as well as the principle of protection” (Van Engeland, 2011, p. 20). When in doubt, wait, work the ROE. NATO involvement in Iraq and Afghanistan have numerous examples where standing down saved more lives, especially civilians, than cost lives.

Refugee Flow

Refugees weren’t an after thought in creation of IHL but it was looked at differently. Refugees were added to IHL not specifically to help protect people in resettlement and transition but more to relieve tension between East and West during the Cold War. Miriam Bradley points out that it was to “to minimize tensions between East and West, … characterizing the institution of asylum and implied that the granting of asylum was not to be seen as a hostile act and was not supposed to create tensions between the sending country and the receiving country. For UNHCR specifically, it meant not criticizing countries of origin and not seeking to manipulate the causes of refugee flows” (Bradley, 2016. p. 56). Elizabeth Ferris agrees with Bradley that “during the cold war, UNHCR’s protection function served the interests of Western powers” (Ferris, 2016, p. 24).

To contrast Bradley's and Ferris' statements though, it should be reminded that "Convention and Protocol Relating to the Status of Refugees" came out in 1951 and revised in 1967. Refugees weren't being ignored or used as pawns in East-West chess game and considerable thought was put to this. The "UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status" (2011) is more of an up to date version of how the UNHCR view and help refugees significantly Post-Cold War. In addition to visiting refugee protections "improvements in communications, the end of the cold war, and the growing recognition that consolidation of peace requires supporting displaced people (IDPs) through reintegration programs (Ferris, 2016, p. 31).

Conclusion

There are two conclusions that we can pull out in how the changes in the nature and conduct of warfare since the end of the Cold War affect the relevance and applicability of international humanitarian law. The first conclusion is that there was a lot of time and energy put to IHL. Given the era and attitudes of the time period IHL was relevant and applicable as to their period as it is to ours. IHL may have been clouded with Cold War glasses but the general principles stand as true today and they did then. The second conclusion drawn is that though IHL, in a Post-Cold War era, is relevant and applicable it reflects a dated world view, the rise of asymmetrical warfare and intra-national conflict and nuances of the 21st century refugee and IDP crisis, calls for a fresher review seeking out better application and accountability modes.

Bibliography

Barsalou, O. (2008). Making Humanitarian Law in the Cold: The Cold War, the United State and the Genesis of the Geneva Conventions of 1949. *IILJ Emerging Scholars*, Paper 11, p.19.

Bradley, M. (2016). *Protecting Civilians in War: The ICRC, UNHCR, and Their Limitations in Internal Armed Conflicts*. Oxford: Oxford University Press, pp.56 & 114.

Durham, H. and O'Byrne, K. (2010). The Dialogue of Difference: Gender Perspectives on International Humanitarian Law. *International Review of the Red Cross*, 92(877), pp.36-40.

Ferris, E. (2016). *The Politics of Protection: The Limits of Humanitarian Action*. Washington, DC: Brookings Institution Press, pp.24, 31 & 174.

Mazurana, D. (2004). *Women in Armed Opposition Groups Speak on War, Protection and Obligations Under International Humanitarian and Human Rights Law*. Geneva: Geneva Call, pp.35 & 55.

Van Engeland, A. (2011). *Civilian or Combatant A Challenge for the 21st Century*. Oxford: Oxford University Press, USA, pp.18-20.

Waschefort, G. (2016). Africa and International Humanitarian Law: The More Things Change, the More They Stay the Same. *International Review of the Red Cross*, 98(902), p.600.