The Harmonization Project: Improving Compliance with the Law of War in Non-International Armed Conflicts

BRUCE "OSSIE" OSWALD*

The Project on Harmonizing Standards for Armed Conflict[1] explores the extent to which it is possible for the treaty law applicable in international armed conflicts to apply to situations characterized as "non-international armed conflicts." While international armed conflict is governed by the four Geneva Conventions[2] and Additional Protocol I,[3] the law concerning non-international armed conflict is specifically found in Common Article

*Bruce "Ossie" Oswald is an Associate Professor and the Director of the Asia Pacific Centre for Military Law at Melbourne Law School. This article is based on Ossie's presentation *From Gettysburg to Guantanamo: 150 Years of the Lieber Code and the Law of Armed Conflict* at Columbia Law School on November 21, 2013. The author is a member of the Steering Committee of the Harmonization Project. He is grateful to Ms. Natasha Robbins for her assistance in editing this paper.

1. The Project on Harmonizing Standards for Armed Conflict (the Harmonization Project) is a project of the Human Rights Institute of Columbia Law School. It is co-directed by Professor Sarah H. Cleveland, the Louis Henkin Professor of Human and Constitutional Rights at Columbia Law School, and Sir Daniel Bethlehem, Visiting Professor of Law at Columbia Law School, and former Legal Adviser to the U.K. Foreign & Commonwealth Office.

2. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3362, 75 U.N.T.S. 31 [hereinafter Geneva Convention I]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Geneva Convention II]; Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva Convention III]; and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 287 [hereinafter Geneva Convention IV]. The international armed conflicts to which these treaties apply include armed conflicts between states and the belligerent occupation of one state's territory by another.

3. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Additional Protocol I]. Additional Protocol I applies to conflicts between states, the belligerent occupation of one state's territory by another, and self-determination conflicts of national liberation.

3 of the four Geneva Conventions and Additional Protocol II.[4] The practical aims of the Project are to clarify positive rules, raise the level of human protection, and reduce "multilateral coordination problems in non-international armed conflicts based upon rules that states are already comfortable administering in situations of armed conflict."[5] The Project therefore seeks to clarify and lift the legal standards governing such matters as the humane treatment of individuals by combining both a rule-based and state practice approach.

Before going any further, it is necessary to note that the Project has not been finalized, and therefore the comments that follow are based on the author's understandings of drafts of the Project's findings and the author's discussions with members of the Project's Steering Committee as of August 2014. Although the Project's findings are still being revised, it is nonetheless appropriate to make some comments concerning the likely benefits of the Project.

After more than a decade of armed conflicts involving coalition forces serving in Afghanistan and Iraq, and with new conflicts arising in places such as Ukraine, it is worth reflecting on the application of some aspects of the laws of war to the conduct of military operations in non-international armed conflict situations. Many military and policy advisers involved in advising on the conduct of operations in Afghanistan and Iraq at the strategic and operational levels will recollect, mostly without any fondness, the often heated discussions about the application of some facets of the

4. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 609 [hereinafter Additional Protocol II]. The non-international armed conflicts that Common Article 3 addresses include a state engaging in armed violence against organized non-state armed groups, or organized non-state armed groups fighting each other. The application of Additional Protocol II requires a higher threshold, which includes the organized armed group exercising control over territory, and the conflict must be between the state's armed forces and the organized armed group. It is now also generally accepted that where a state, with the consent of the state on whose territory the armed conflict is occurring, intervenes to fight those organized armed groups, that armed conflict is also determined to be a non-international armed conflict. For a more detailed discussion about the differences between the legal regimes in international armed conflicts and non-international armed conflicts, see, for example, Dieter Fleck, *The Law of Non-International Armed Conflicts*, *in* THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 581, 627–29 (Dieter Fleck ed., 2008) and Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 32, 32–79 (Elizabeth Wilmshurst ed., 2012).

5. COLUMBIA LAW SCHOOL, *Human Rights Institute Annual Report* (2012–2013), *available at* http://web.law.columbia.edu/sites/default/files/microsites/human-rights-institute/files/HRI%20Annual%20Report%202012-2013.pdf.

laws of war to aspects of those conflicts. Not only were there debates about classifying those conflicts, but there were also discussions concerning the application of specific areas of the laws of war and the interaction of those laws with other areas of international law, such as international human rights law and international criminal law. In the context of Afghanistan, a debate arose over whether the conflict was an international or non-international armed conflict.[6] Another debate in relation to both Afghanistan and Iraq was the appropriate classification of individuals captured on the battlefield—were they prisoners of war, security detainees, or unprivileged combatants?[7]

Such debates have led to a number of initiatives by international organizations and states to develop greater clarity concerning the application of international law in armed conflicts. Recent examples include the efforts of the International Committee of the Red Cross (ICRC) to define and distill laws relating to direct involvement in hostilities,[8] occupation,[9] detention,[10] and ensuring greater compliance with international humanitarian law (IHL);[11] and the Copenhagen Process.[12] Academics have also added their

6. *See, e.g.*, Françoise Hampson, *Afghanistan 2001–2010*, *in* INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS 242, 242–79 (Elizabeth Wilmshurst ed., 2012).

7. *See, e.g.*, GEOFFREY CORN ET AL., THE LAW OF ARMED CONFLICT: AN OPERATIONAL APPROACH 309–43 (2012).

8. International Committee of the Red Cross, Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law (May 2009), *available at* https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf.

9. International Committee of the Red Cross, Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory (Mar. 2012), *available at* https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf.

10. 31st International Conference of the Red Cross and Red Crescent, Geneva, Switz., Nov. 28–Dec. 1, 2011, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Doc. No. 31IC/11/5.1.2, *available at* https://www.icrc.org/eng/assets/files/red-cross-crescent-movement/31st-international-conference/31-int-conference-ihl-challenges-report-11-5-1-2-en.pdf; International Committee of the Red Cross, Strengthening Legal Protection for Persons Deprived of their Liberty in Relation to Non-International Armed Conflict: Regional Consultations 2012–2013 Background Paper, *available at* https://www.icrc.org/eng/assets/files/2013/strengthening-legal-protection-detention-consultations-2012-2013-icrc.pdf.

11. International Committee of the Red Cross, Third Meeting of States on Strengthening Compliance with International Humanitarian Law (IHL) (June 2014), *available at* http://www.icrc.org/eng/assets/files/2014/third-meeting-of-states-2014-background-document.pdf.

12. The Copenhagen Process was a five year process which had two broad objectives: (1) to reach a consensus amongst states and relevant international organizations concerning the international legal regime applicable to dealing with detainees captured in military

reflections to the mix, advancing a better understanding of the applicable law with regard to military operations. The analysis and reflections concerning the classifications of armed conflicts in the book *International Law and the Classification of Conflicts*[13] are excellent examples of commentators striving to articulate a more nuanced understanding of some of the political, policy, and legal challenges involved in classifying armed conflict.

The Harmonization Project adds to the above initiatives and reflections in at least three ways. First, it has used a methodology that is quite unique. The Project has undertaken a detailed examination of the principles, rules, and standards in the four Geneva Conventions and Additional Protocol I and considered from a practical perspective how they might apply in various non-international armed conflict contexts. By closely examining hundreds of provisions in the four Conventions and matching the application of those provisions with an examination of the practice of a number of states in armed conflicts, the Project will provide military and policy advisers, in the context of non-international armed conflicts, with a template to identify relevant principles, rules, and standards that: (1) might be directly applicable, (2) have no application, (3) are likely to require further interpretation, (4) might require a reservation in relation to the extent of applicability, or (5) might require further consideration based on the context. There is no other study to date that has been so thorough and detailed in seeking to better understand the application of these norms in non-international armed conflict contexts, while maintaining a focus on the practical consequences of transferring principles and rules from one legal framework to another.

The guidance provided by the Harmonization Project will benefit actors engaged in promoting greater humanitarian protections during non-international armed conflicts in several ways. One benefit is that the study will provide military and policy advisers with a starting point to consider applicable law for the planning and conduct of military operations. For example, a provision-by-provision analysis of the extent to which the Third Convention

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operations; and (2) to settle upon principles, rules, and guidelines concerning the treatment of detainees. *See* MINISTRY OF FOREIGN AFFAIRS OF DENMARK, THE COPENHAGEN PROCESS ON THE HANDLING OF DETAINEES IN INTERNATIONAL MILITARY OPERATIONS (2012). For a detailed explanation of the Copenhagen Process, and the Principles and Guidelines, see Bruce Oswald & Thomas Winkler, *The Copenhagen Process: Principles and Guidelines on the Handling of Detainees in International Military Operations*, 83 NORDIC J. INT'L L. 128 (2014).

13. INTERNATIONAL LAW AND THE CLASSIFICATION OF CONFLICTS (Elizabeth Wilmshurst ed., 2012).

provisions might apply or relate to non-international armed conflicts will reduce legal uncertainties about the application of generally accepted standards concerning the treatment of belligerents captured in such conflicts. Another benefit of the Project is that in situations where multinational operations are being conducted, either under the auspices of an international organization or a coalition of the willing led by a state, the Project's analysis of the applicability of a particular provision in one of the four Conventions will enhance interoperability by providing a baseline for the organization and states to have a more nuanced discussion of which international armed conflict legal principles, rules, and standards should cross over into non-international armed conflict situations. Yet another benefit of the study is that it will provide organizations that engage with non-state armed actors, such as the ICRC and Geneva Call, with a firm basis to discuss the benefits of particular provisions with those actors when they are engaged in combat with either state or other non-state armed actors.

Second, the Project proposes a Model Legal Framework for adapting the international armed conflict treaty regime to non-international armed conflicts, which states could then adopt, individually or collectively, through means of unilateral declarations.[14] The combined Model Declaration and Framework proposed by the Project provides states with a method of applying international armed conflict law to non-international situations, and a firm foundation for understanding the extent to which the adaption would be compatible with the conduct of military operations in non-international armed conflict and the limits of the crossover. If a state decides, for example, to unilaterally declare that it will always apply relevant provisions of Geneva Convention III to the treatment of belligerents captured during a firefight, military planners and commanders at strategic and operational levels then have a more nuanced framework to use in the training of their subordinates and in the allocation of resources to ensure that those captured by their forces are treated humanely. An added benefit to making a Unilateral Declaration within the construct of a Model Legal Framework is that the Framework provides states with one body of law to apply in non-international armed conflicts, rather than a fragmented "Tower of Babel" of laws. Identifying one applicable body of law will assist states, and perhaps even non-state armed groups who face fact-finding commissions or litigation, with a publicly declared and

14. For a more detailed discussion concerning unilateral declarations, see, for example, GILLIAN TRIGGS, INTERNATIONAL LAW: CONTEMPORARY PRINCIPLES AND PRACTICES ¶¶ 3.62–3.65 (2011).

binding legal framework against which their military operations may be measured. Such certainty might reduce the confusion that sometimes arises when fact-finding commissions, courts, and tribunals conflate legal regimes or are unable to decide which legal regime must be applied to the facts before them.

The broad benefits of the Project are visible in the Project's work concerning two specific areas of law: combat immunity and detention. Two of the more controversial aspects of translating international armed conflict obligations to non-international armed conflicts are the principles governing combatant immunity—that is, immunity from prosecution for belligerent acts that do not violate the laws of war[15]—and the treatment of captured belligerents. In international armed conflicts, Geneva Convention III provides a basis for arguing that combatants who have been captured must be granted combatant immunity and provides a very detailed regime for the treatment of those captured and detained as prisoners of war. Geneva Convention IV provides an alternative regime for the internment of civilians who are imperative threats to security, with no expectation of combatant immunity. In non-international armed conflicts, neither Common Article 3 of the four Geneva Conventions, nor Additional Protocol II to those Conventions, provides a basis for arguing for combatant immunity, nor do they provide a detailed regime for the treatment of those captured. Additional Protocol II accepts that individuals might be "deprived of their liberty . . . for reasons related to [armed] conflict" and provides a shallow regime of protections for such persons.[16]

The Harmonization Project, recognizing the inadequacies of the legal regime in non-international armed conflicts in relation to the treatment of captured belligerents, takes a principled approach by advocating that states that wish to apply a Geneva Convention III detention framework to those considered belligerents in non-international armed conflicts—because they are taking a direct part in hostilities—must also afford such detainees combatant immunity and the privilege of being treated as prisoners of war. The authors of the Project do not shy away from acknowledging that providing

15. For a more detailed discussion of combatant immunity or, as it is sometimes referred to, "combatant privilege," see, for example, LAURIE R. BLANK & GREGORY P. NOONE, INTERNATIONAL LAW AND ARMED CONFLICT: FUNDAMENTAL PRINCIPLES AND CONTEMPORARY CHALLENGES IN THE LAW OF WAR 243–44 (2013), SANDESH SIVAKUMARAN, THE LAW OF NON-INTERNATIONAL ARMED CONFLICT 514–20 (2012), and EMILY CRAWFORD, THE TREATMENT OF COMBATANTS AND INSURGENTS UNDER THE LAW OF ARMED CONFLICT 78–79 (2010).

16. Additional Protocol II, *supra* note 4, art. 2(2).

combatant immunity and prisoner of war status to belligerents in non-international armed conflicts is likely to be controversial, particularly for states that are not willing to accept that belligerents fighting against the state are not criminals and are therefore entitled to immunity or privilege. However, the authors also stress that recognizing such immunity and privileges might incentivize non-state armed groups to comply with the laws of war so as to benefit from combatant immunity and prisoner of war privileges. For states that are unwilling to accept the principle of combatant immunity, fighters in non-international armed conflicts could be detained pursuant to the framework set forth in Geneva Convention IV.

Even if one were to disagree about the viability of states accepting that non-state armed actors should receive combatant immunity, it is not difficult to agree that the three articles in Additional Protocol II that concern individuals deprived of their liberty for reasons related to non-international armed conflict[17] are woefully limited in the protections that they provide. The Project's nuanced analysis of the application of the provisions concerning the treatment of those deprived of their liberty, either as prisoners of war pursuant to Geneva Convention III or as internees pursuant to Geneva Convention IV, will therefore assist states to develop more detailed detention standards in non-international armed conflicts. By doing so, the Project will add further value to the Copenhagen Process by filling gaps that exist with regard to detention standards between the legal regimes applicable in international armed conflict and non-international armed conflict.

Of course, it is to be expected that there will be a number of concerns about whether the Project's results might actually reduce the application of law by lowering procedural and other protections. One argument could be that the imposition of international armed conflict standards in non-international armed conflicts may displace international human rights law. Such an argument would likely be premised on the belief that the appropriate legal regime to govern non-international armed conflicts is international human rights law, and that applying international humanitarian law through a Unilateral Declaration would undermine the higher degree of protections afforded by human rights law. If one accepts that international human rights law applies to armed conflicts when a state has a relevant treaty or customary law obligation, it would be a contentious question whether a unilateral declaration concerning the application of the four Geneva Conventions and Additional Protocol I to non-international armed conflicts would displace that obligation.

17. *See id.* arts. 4–6.

Given the debate concerning the applicability of international human rights law to various armed conflict situations, it would also be useful to clarify the relationship between the laws of war and international human rights law by examining which human rights provisions must be applied as a matter of law, have no relevant application, are likely to require further interpretation, might require some form of reservation in relation to the extent of applicability, or might require further consideration based on the specific facts arising in the non-international armed conflict. This phase of the Harmonization Project could potentially be a component of a larger effort to analyze on a provision-by-provision basis how both the laws of war and international human rights provisions might increase the humane treatment of individuals during armed conflicts. For example, a comparative analysis of how the provisions for the humane treatment of individuals in the four Geneva Conventions and Additional Protocols I and II might be interpreted, adapted, or enhanced by the application of specific human rights provisions, such as those found in the International Covenant on Civil and Political Rights,[18] may increase the procedural and other protections afforded to those captured or detained. Questions that could be explored include: Are the procedures for detention and internment under the Geneva Conventions adequate for situations of non-international armed conflict, or would human rights law require their augmentation? What definition of torture should the Geneva Conventions be understood to apply: The definition from the Convention Against Torture, the Rome Statute, or another agreement? Under what circumstances do the laws of war and human rights treaties converge, and how?

A final concern is how to assess the benefits of the Harmonization Project in the short-term. One option is for the Project authors to work with a state, or states, to "stress test" the likely benefits and challenges of adopting some of the recommendations arising from the Project Report. The forthcoming Report is intended to simply start the conversation about the application of international armed conflict rules in non-international armed conflict. Planners and advisers will no doubt have additional insights from their operational experience. Such an examination will better identify the ramifications of the different approaches suggested by the Project.

In conclusion, the Harmonization Project will be a useful tool

18. International Covenant on Civil and Political Rights, Dec. 19, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976 for all provisions except those of art. 41; entered into force Mar. 28, 1979 for the provisions of art. 41).

for military and policy advisers, as well as advocates, to ensure greater legal clarity and protection in non-international armed conflicts.