

BOOK REVIEW

Counterinsurgency Law: New Directions in Asymmetric Warfare

Edited by William A. Banks*

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As the active engagement of US and North Atlantic Treaty Organisation (NATO) troops in the conflict in Afghanistan winds down, the challenges of that conflict, and the legacy of challenges of the conflict in Iraq, continue to resonate in the policy discussions within governments and in academic literature. Throughout the first decade of the twenty-first century, legal literature has reflected an effort to adapt to what has often been characterised as a new era of conflict.¹

Counterinsurgency Law: New Directions in Asymmetric Warfare, edited by Professor William Banks, is but one of the latest contributions to this literature. The second publication of collected essays produced under the aegis of Syracuse University's Institute for National Security and Counter-Terrorism,² the book provides a collection of well-researched and well-supported papers that serve the legal community. Both publications propose practical analytic approaches intended to help decision-makers and practitioners, as well as scholars, deal with an extremely

* Published by Oxford University Press USA, 2013. The views expressed here are those of the book reviewer alone and not of the International Committee of the Red Cross.

complex and difficult subject – the targeting of insurgents. They both explore the various bodies of law applicable in determining when the targeting is warranted and under what body of laws the decision is to be made in a manner that provides useful guidance on bridging the gap between theory and practice. While all legal advisers who work in the field of international humanitarian law (IHL) will find the book valuable, its greatest utility is to those who educate and train military legal advisers and those developing doctrine and procedures at the operational or strategic level of command.

Before discussing what this collection does, it is necessary to first distinguish what it does not do. There has been a great deal of controversy over the utility of counterinsurgency as either doctrine or as a strategy.³ This book does not wade into that discussion, but assumes that the tensions inherent in applying either human rights law (HRL) or IHL will remain a source of concern in years to come.⁴

Similarly, and despite the title, the book does not presume to provide a comprehensive analysis of all aspects of law applicable to a situation of counterinsurgency. There are books that attempt to provide at least some broader coverage of the subject, such as Ganesh Sitaraman's *The Counterinsurgent's Constitution*.⁵ In this work, Sitaraman provides a brief overview of the law regarding not just the *jus ad bellum* and *jus in bello* aspects of counterinsurgency, but also issues such as transitional justice, development, the rule of law, and constitutionalism in the post-conflict environment.

Professor Banks' approach in choosing the topics to be covered in this book is sound. The title may be overly broad, but the substance of the book is not. It does adopt the underlying premise of counterinsurgency (COIN) doctrine that a counterinsurgency effort must be comprehensive and that protection of the indigenous population is a key focus of military efforts.⁶ Instead of trying to address all aspects of the law that may then be encountered in different parts of a counterinsurgency campaign, this book focuses on only one of them: the question

1 Many books and articles on the subject exist. See, for example, Michael N. Schmitt and Jelena Pejic, *International Law and Armed Conflict: Exploring the Faultlines – Essays in Honour of Joram Dinstein*, Martinus Nijhoff Publishers, Leiden, 2007; Michael W. Lewis, *The War on Terror and the Laws of War*, Oxford University Press, Oxford, 2009; David H. Bayley and Robert M. Perito, *The Police in War: Fighting Insurgency, Terrorism, and Violent Crime*, Lynne Rienner, Boulder, CO, 2010.

2 The first of the series was *New Battlefields/Old Laws: Critical Debates on Asymmetric Warfare*, also edited by William A. Banks and published by Columbia University Press in 2011 as part of the Columbia Studies in Terrorism and Irregular Warfare series.

3 See, for example Gian Gentile, 'A strategy of tactics: population-centric COIN and the Army', in *Parameters*, Autumn 2009, pp. 5–17, available at: <http://strategicstudiesinstitute.army.mil/pubs/parameters/Articles/09autumn/gentile.pdf> (last visited 12 January 2014); Gian Gentile, 'Wrong Turn; America's Deadly Embrace of Counterinsurgency', in *The New Press*, New York, 2013; and Edward Luttwak, 'Dead end: counterinsurgency warfare as military malpractice', in *Harper's Magazine*, February 2009, available at: www.ifri.org/files/politique_etrangere/luttwak.pdf (last visited 29 January 2014).

4 William A. Banks, *Counterinsurgency Law: New Directions in Asymmetric Warfare*, Oxford University Press USA, New York, 2013, pp. xiii–xv.

5 Ganesh Sitaraman, *The Counterinsurgent's Constitution: Law in the Age of Small Wars*, Oxford University Press USA, New York, 2013.

6 W. A. Banks, above note 4, p. xii.

of how to approach the two bodies of law that may apply, HRL and IHL, in order to help a government or its agents determine how the use of lethal force against insurgents shall be regulated. These essays seek to provide a workable framework for addressing the issue in an operational environment that is extremely dynamic and complex. In the view of this reviewer, they succeed.

The book relies, in no small measure, on the International Committee of the Red Cross (ICRC) *Interpretive Guidance on the Notion of Direct Participation in Hostilities*.⁷ That document has provided an incredibly important contribution to the discussion, a fact acknowledged by the writers in the degree to which it is discussed, contested and applied. Any reader of these essays would be well-advised to have a copy of it to hand.

Counterinsurgency Law is divided into four sections, each consisting of essays written by scholars and practitioners recognised for their scholarship in the fields of IHL and HRL. Each section focuses on a different aspect of the question,⁸ but throughout all of the essays written by the different contributors, *Counterinsurgency Law* maintains a focus on the crux of the legal debate – whether and to what degree the legal paradigms of IHL and HRL converge in a climate of irregular or unconventional warfare⁹ and how that should affect the actions of the military personnel involved, from those in the field to those directing the operations.

The book opens with an examination of how the United Nations Human Rights Council (HRC) has assumed the role of addressing this convergence in its work, despite the lack of any references to IHL in its mandate. Concise and readable, this essay provides a point of reference for considering the role not only of the HRC but also of other international and non-governmental organisations. Combining analysis and advocacy on HRL/IHL convergence often goes beyond the mandates of such organisations and, the author argues, beyond their expertise as well.¹⁰ The next chapter in this section examines the application of the rule of proportionality in both IHL and HRL, and considers the convergence of the rules through ‘the republican insight that central features of both HRL and IHL reflect a fiduciary relationship between states and persons who are subject to their control’.¹¹ This relational approach, in which states are entrusted with a certain level of

7 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, 2009.

8 Part I focuses on framing the issue of convergence between the two bodies of law in COIN. Part II explains the issue of ‘Reunifying the laws of armed conflict: non-international conflict and COIN operations’. Part III addresses the specific challenges of protecting civilians and the accompanying increased risk to the military forces involved, while Part IV expands the discussion from COIN to other unconventional battlefields – terrorism, the use of drones, and maritime blockades.

9 The terms ‘irregular warfare’ and ‘unconventional warfare’ are often used interchangeably. In the United States, ‘irregular warfare’ is defined as ‘A violent struggle among state and non-state actors for legitimacy and influence over the relevant population(s)’, while ‘unconventional warfare’ is defined as ‘Activities conducted to enable a resistance movement or insurgency to coerce, disrupt, or overthrow a government or occupying power by operating through or with an underground, auxiliary, and guerrilla force in a denied area.’ United States Department of Defense, *Department of Defense Dictionary of Military and Associated Terms*, Joint Publication 1-02 of 8 November 2010 (as amended through 15 March 2014), pp. 136, 273, available at: www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (last visited 9 April 2014).

10 W. A. Banks, above note 4, pp. 16–18.

11 *Ibid.*, p. 30.

responsibility with respect to persons under their control (a responsibility which may vary depending on the specific relationship involved), helps contextualise the applicable rules to a changing operational landscape.¹²

The essays in the second section of the book move toward developing frameworks for distinguishing when and in what circumstances to apply the different rule sets. Both of the authors of the essays in this section, Eric Jensen and Geoff Corn, are published law professors; they each served as judge advocates in the US Army with extensive experience both in operations and at the headquarters level, including having served as chief of the International Law Branch of the US Army Judge Advocate General's Corps and chief of the Law of War Branch in the US Army International Law Division respectively. Their essays each work towards the goal of ensuring a robust application of the law but also clarity in what the law requires for the armed forces involved.¹³

In COIN, as in other forms of conflict, there is a perceived tension within rules of engagement (ROE) between the freedom of a unit to use the amount of force that its members believe necessary to accomplish their mission and protect themselves in a firefight and the restrictions on the use of force that are often needed to serve broader political, operational and strategic ends. In the broader debate over the usefulness of COIN doctrine in Afghanistan and Iraq, critics have argued that the mission focus on protecting civilians reflected in recent ROE distracts military forces from the traditional techniques of war-fighting, thus reducing effectiveness.

The third section of the book engages this debate by looking directly at the population-centric goal of COIN doctrine and its manifestation in guidance for the use of force issued by the American commanders in Afghanistan. The contributions look at whether this focus is ethically sound, whether it serves the intended operational purpose of furthering the goal of winning hearts and minds, and finally, whether the rules do in fact further the humanitarian goal of protecting civilians who are not participating in hostilities.¹⁴ The broader theme of relationship and obligation is used by these essays through an examination of the question of whether a 'duty to assume risk' exists not just as part of COIN doctrine but perhaps as an emerging legal norm.¹⁵ This latter conclusion is rejected, but the essays in this section provide useful frameworks for balancing the responsibilities in interpreting and applying commanders' guidance.

The final section of the book considers several specific case studies. The challenge of applying potentially conflicting sets of HRL and IHL rules in complex operations leads Boaz Ganor to posit a framework that relies on classifying

12 The nature of the changing operational landscape is illustrated by the discussion by former commandant of the US Marine Corps, General Charles Krulak, in his article 'The strategic corporal: leadership in the three block war', in *Marines Magazine*, January 1999, available at: www.au.af.mil/au/awc/awcgate/usmc/strategic_corporal.htm (last visited 1 December 2013).

13 W. A. Banks, above note 4, pp. 46 and 58.

14 *Ibid.*, p. 87.

15 *Ibid.*, pp. 89–90.

actors into one of four contexts, with each classification of an actor being addressed by a specific mix of IHL and HRL approaches.¹⁶ Robert Chesney addresses the continually vexing issue of using remotely piloted aircraft to engage individuals through an examination of the strike against Anwar al-Awlaki.¹⁷ Finally, Corri Zolli explores the Gaza flotilla incident and the debates which followed the use of force by Israel in that case. These case studies expand the consideration of the issues beyond counterinsurgency and address questions of relationship and obligation involving the military forces and the targeted individuals or organisations in two very different contexts – the targeted killing of a member of Al Qaeda and the enforcement of a blockade.¹⁸

What comes out of all the essays in this book is the consistent theme of relationship as the basis for determining the applicable law. The relationship of the actors to each other and of the actors in the insurgency to the broader civilian population is key to any application of COIN doctrine. It is also, as these essays demonstrate, key to an effective application of HRL and IHL in COIN. The role of the HRC and its willingness to interject itself into the legal debates regarding conflicts is a question of relationship of that body to the broader international community. Similarly, the relationships between both government forces and non-government armed groups on the one hand and the civilian population on the other, as well as whether those relationships can be analogised to fiduciary relationships, provides a way of thinking about the use of force and the question of what serves as reasonable efforts to avoid injury to members of the general population not involved in the conflict.

As noted earlier, there are ongoing arguments over whether the most recent *entrée* into counterinsurgency is a phase which has passed, at least for the US military. This writer believes that it would be a mistake to so conclude. As the past thirty years demonstrate, the likelihood that the armed forces of various nations will be engaged in unconventional forms of conflict remains very high. That being the case, it is extremely important that the scholarship on all aspects of this form of conflict continues the conversation on the legal, political and operational issues that it raises. We are likely to face these issues again in the future.

Counterinsurgency Law represents a significant contribution to the literature and to this conversation. It should be added to the bookshelves of scholars as well as practitioners.

16 *Ibid.*, p. 141.

17 *Ibid.*, p. 161.

18 *Ibid.*, p. 178.