Chapter 10

21st Century Conflict and International Humanitarian Law: Status Quo or Change?

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In the Law of Armed Conflicts the hand of the past is heavy upon us.
Colonel G.I.A.D. Draper

I Introduction

It is an honour to contribute this article to the Festschrift for Professor Yoram Dinstein. Professor Dinstein’s record of scholarship and leadership in the field of international law provides ample proof of his mastery of this difficult and at times fluid discipline. While his list of accomplishments speaks to a broad mastery of international law, it is Professor Dinstein’s influential works on “war” and “aggression” and the “conduct of hostilities” that bring him particular renown among those who serve in the “profession of arms”. Professor Dinstein has achieved what few would attempt to master as he combines matchless intellectual rigour with eminently practical analysis of some of the most difficult legal problems facing both military commanders and humanitarian activists in the complex security situations of the 21st century. His impressive work The Conduct of Hostilities Under

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the Law of International Armed Conflict is a necessary reference book for anyone practicing international humanitarian law today.

Professor Dinstein’s approach to international law is unique in the sense that he combines respect for tradition with the realist’s view that law must change to be relevant to the society it regulates. It is Yoram’s way to encourage critical analysis while embracing change and advancement in the law. As he himself noted in The Conduct of Hostilities, the limitation of the semi-traditional quarter century reviews of the Geneva Conventions to “weaponry” over the last decades has produced tangible results in that field but “only serve to spotlight the lethargy in others.” As a result “[o]ne can only express hope that the twenty-first century will revive the tradition of periodic reviews of the main body of LOIAC [law of international armed conflict]. The need for such a review is compelling.”

The goal of this article is to look at some of the contemporary challenges facing international humanitarian law. In doing so, this analysis will touch on three of the “principal problems confronting LOIAC today” highlighted by Professor Dinstein: perceptions that international humanitarian law will have trouble dealing with the development of new methods and means of warfare; the intermingling of civilians and combatants and the employment of civilians as combatants; and the meaningful implementation of international humanitarian law.

The analysis is divided into two parts. First, there is consideration of the degree to which conflict in the 21st century presents new problems. This is done by looking at the types of conflicts, including the “war on terror” and considering the impact of technology on methods and means of warfare. The second part of the article addresses the adequacy of existing law to meet contemporary challenges; looks at the present reluctance to change that law; and outlines a number of the major “cracks” in the humanitarian law normative framework. Ultimately, the article seeks to identify a way ahead in order to ensure the law keeps pace with societal change.

II Modern Conflicts?

The first issue to be considered is whether the nature of conflict has changed in the 21st century. Such an assessment will help identify the degree to which challenges to international humanitarian law are new or simply old problems for which increased scrutiny has served to highlight controversies in the existing

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4 Ibid.
5 Ibid.
6 Ibid. at 257.
7 Ibid.
8 Ibid. The other problems identified by Professor Dinstein are: intransigent theoretical disagreements between the supporters of AP I and some key players led by the United States; and the legality of nuclear weapons.