Chapter 12

“Combatants” – Substance or Semantics?

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“When I use a word,” Humpty Dumpty said in a rather scornful tone, “it means just what I choose it to mean – nothing more nor less.”

Professor Yoram Dinstein is a giant in the field of international law. I am just one of the many who have benefited over the years from his wisdom and kindness. The sign of true greatness is never to be afraid of argument or dissent. Yoram Dinstein never is – and never has been. Indeed he encourages it! One of my first major Conference presentations found me on the same panel as Professor Dinstein on a subject on which we took opposed views. To assist me in my presentation, he had sent me copies of some of his published – and unpublished – material so that I could develop my argument. He then published my paper in the Israel Yearbook on Human Rights. Over the years, we have continued the dialogue and although I initially described the gap between us as “the Atlantic Divide”, he soon taught me that in fact the divide is small in practice and comes down in some respects to semantics. In reality, our separate roads lead to much the same end result.

Far be it from me to accuse Professor Dinstein of any resemblance to Humpty Dumpty or any of the other characters in Lewis Carroll’s stories. However, semantics are important and perhaps nowhere more so than in the study of law, whether domestic or international. Words are the tools of the lawyer’s trade and therefore it is important that there is some agreement as to the meaning to be ascribed to words that are important in the legal lexicon. Courts define words and seek to dissuade the Humpty Dumptys of this world from their attempts to introduce anarchy into the use of words. In the international field, there are fewer opportunities for such decisions and greater emphasis perhaps on principles. This is particularly so in the field of international humanitarian law, the law of armed conflict as it is known in the military, where the law is based

on treaties, often containing compromise wording of which Humpty Dumpty would be proud.

And yet still words matter. The soldier, sailor, airman or marine is not interested in philosophy or principles. He or she wants to know what he or she can or cannot do. His or her orders need to be clear and concise. There is no room for ambiguity here. One of the tasks of military lawyers is to assist in that process of interpretation so that the raw material contained in the treaty texts comes out at the end of the process as clear instructions, which the lowest serviceman can then understand and implement.

It is for that reason that I wish here to return to my original disagreement with Professor Dinstein and see where we have moved and whence we are moving. The word that is the subject of so much controversy is “combatant”. I deliberately leave the word in its unvarnished state. Whatever adjective some may wish to use to describe any particular category—“illegal”, “unlawful”, “unprivileged” or just plain “enemy”—the core of the problem of interpretation lies in the noun itself. What does it mean and, perhaps more importantly, what should it mean?

Some years ago, I was reviewing the material used at the British Joint Services Command and Staff College in their Foundation Studies Phase. In that phase, “International Law and Ethics” were taught in the same package. The essential reading listed consisted of a paper by Christopher Greenwood, a chapter from a book by Peter Rowe and a chapter from a book by Gordon Graham. The problem was that two were by eminent scholars in international humanitarian law and one by an equally eminent scholar in the field of ethics. No attempt had been made, so far as I could find, to check for consistency.

Greenwood, in his paper, outlined in traditional terms that “a central feature of the laws of armed conflict ever since the eighteenth century has been the distinction between combatants and civilians.” He went on to deal with the definition of combatants under the treaty law, ranging from the Hague Regulations

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3 Command and the Laws of Armed Conflict, Christopher Greenwood, Strategic Combat Studies Institute Occasional Paper No.4, Camberley, 1993 (Greenwood).
4 Chapter 9, The Geneva Conventions and Additional Protocols, in Defence: The Legal Implications: Military Law and the Laws of War, Peter Rowe, Brassey’s, 1987 (Rowe).
5 Chapter 3, War, in Ethics and International Relations, Gordon Graham, Oxford, Blackwells, 1996 (Graham).