

A Postcolonial Treatment of Terrorism under the Geneva Conventions

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Abstract - In 1949, the ratification of the Geneva Conventions heralded the international community's adoption of a new universal and non-discriminatory approach to human rights in situations of conflict. While an extensive literature has 'assessed the impact' of the Geneva Conventions in wartime, limited attention has been paid to interrogating the ways an implementation of the Geneva Conventions have functioned to discursively reproduce certain understandings of human rights between states and non-state actors. This article seeks to extend previous analyses of the United States' practice of international humanitarian law, through a discursive analysis of the human rights content in the Geneva Conventions, in tandem with speeches and policy documents on the 'War on Terror'. This article concludes that while the Geneva Conventions may seek to universalise human rights for all, the discourses of human rights and terrorism that underpin its implementation can function to reproduce these very forms of oppression and exclusion.

Keywords - International Humanitarian Law (IHL), State-centric, Terrorism, Universal Human Rights

I. INTRODUCTION

ON 12 August 1949, the adoption of the Geneva Conventions was significant in that it was the first time that the international community acknowledged the criteria of universal human rights in relieving distress faced by anyone in times of conflict. The acknowledgement of universal human rights represented an important shift from a human rights discourse that both privileged Western civilisations and denied to non-Western peoples, to a new discourse on human rights that not only acknowledged their status of equal worth, but also conceptually linked issues of non-discrimination to the practice of IHL in conflicts.

However, the state of IHL has been in disarray with the proliferation of international terrorism. Not only did the phenomenon of terrorism question the applicability of the Geneva Conventions, but it also raised important questions about the fundamental nature of IHL – if it was actually universal enough. While certain conceptual features of the Geneva Convention have been problematised throughout the literature, discursive critiques of the international community's conceptualisation of, and thus approach to human rights and terrorism, have been quite limited. Therefore, I argue for the value of using discursive analysis in order to identify whether the Geneva Convention's new universal human rights discourse indicates the adoption of a new way of understanding IHL in a non-discriminatory way.

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The ontological implications derived from the language found in the Geneva Conventions reveal that while its provisions appear to be universal, they do not indicate a radical rethinking of human rights. Therefore, the Geneva Conventions' understanding of actors remain entrenched in a state-centric logic that privileges states over non-state actors. The Geneva Conventions articulate an understanding that IHL remains dependent on the agency of states – the sovereign monopolisation of power – that defines who should be included or excluded from the protection of IHL. This reveals a set of discriminatory practices that rely on the 'Othering' of terrorists in a denial of human rights protection. It is paramount that how an identification of the linkages between a discursive construction of human rights and terrorism can contribute to the human rights violations in the global 'War on Terror'.

II. DISCOURSES

What is the meaning of discourse? Hall defines discourse as "sets of ready-made and preconstituted 'experiencings' displayed and arranged through language". [1]. For example, Elkins explores how the conceptualisation of the *Mau Mau* as terrorists during the Kenyan Emergency in the 1950s has changed over time. The *Mau Mau* uprising was a "militant culmination of years of oppressive colonial (British) rule and resistance to it" [2]. Initially, Colonialist representations of the *Mau Mau* uprising were depicted as an "atavistic reversion to savagery amongst an unstable people disoriented by the impact of modernity" [3]. In recent years, Elkins identifies contrasting accounts that interpreted the *Mau Mau* insurgency as the result of class conflict and civil war in addition to being an anti-colonial struggle against the British [4]. The acceptance of this new discourse has resulted in the mainstreaming of the *Mau Mau* into the Kenyan political consciousness through multi-party elections and representations in Kenya [5]. More importantly, the legitimisation of *Mau Mau* as a coherent political and social group in Kenya has allowed them to seek compensation from the British government for human rights violations during the Kenyan Emergency. In contrary to the Colonialist discourse depicting *Mau Mau* as terrorists, there is a crucial shift from the margins of IHL to its core, providing redress for historical grievances. This highlights the fluid nature of discourses, and different understandings of social identities could affect the implementation of IHL.

III. BETWEEN THE NEW AND OLD: UNIVERSALISING HUMAN RIGHTS

Determined to mitigate the harmful consequences of waging war, IHL was developed to regulate the conduct of warfare

between nations. Traditionally, the positivist nature of law emphasised the “state as the sole source of law and thus as the methodological and substantive framework of international law” [6]. Therefore, IHL only recognised states in situations of conflict, since the status of a sovereign state was also a qualifying condition for being party to an international treaty. For example, in the Preamble to the 1907 Hague Convention respecting the Laws and Customs of War on Land, its aim is described as preventing “armed conflicts between nations” [7]. If IHL only governs the conduct between nations, then there is no provision for societies that did not possess statehood. In fact, this gap was made intentional by way of the Martens Clause, specifying IHL as the “principles of the law of nations, as they result from the usages established between civilised nations, from the laws of humanity and the dictates of the public conscience” [8]. The consequences of this deliberate omission of ‘non-civilised’ peoples meant that humanitarian protection was not universal. At a superficial level, IHL was designed to exclude non-Western societies on the basis of ‘civilised’ and ‘non-civilised’ differences that created and allowed patterns of exclusion and oppression of human rights to such societies.

Given the growing prominence of the International Committee of the Red Cross in negotiating and revising existing IHL, the Geneva Conventions were adopted in 1949 and updated with four significant innovations to the law of armed conflict. D.Solis sums it up as follows:

“First, the Conventions require each ratifying State to enact domestic legislation to prosecute those having committed grave breaches of the conventions; second, ratifying States agree to seek out and try those who have committed grave breaches; third, the conventions create the concept of ‘grave’ breaches itself; and fourth, the conventions create Common Article 3 protections” [9].

In contrast with earlier versions of IHL from the Hague Conventions, the updated Geneva Conventions of 1949 broadened the definition of conflict beyond inter-state warfare through Article 3. This indicated an attempt to universalise different forms of conflict subject to IHL. In other words, the indiscriminate oppression and exclusion of non-Western peoples could no longer be perpetuated. More importantly, the Geneva Conventions contain provisions that articulate the recognition of all human rights, and by criminalising any breach of the Conventions, states were restrained from employing over-proportionate means of violence in armed conflicts. No longer would human rights be indiscriminately violated on the basis of differences such as ‘civilised’ and ‘non-civilised’.

IV. TERRORISM AND THE NEW GENEVA CONVENTIONS

Terrorism is a controversial concept. The pejorative use of the term, ‘terrorism’ is both political and emotionally charged that has resisted attempts to be labeled by the international community. For purposes of definition, terrorism shall be referred to the “(deliberate) and violent targeting of civilians for political purposes” [10]. It is a complex social, political and cultural phenomenon that has confounded attempts to enforce consistent standards in an application of IHL. The definition of terrorism has been contrived at best, due to

“differences of opinion between various members (in the United Nations) about the use of violence in the context of conflicts over national liberation and self-determination” [11]. The proliferation of non-state actors such as *al-Qaeda*, *Jemaah Islamiah* and the *Taliban* have resulted in the need to rethink how a universal approach to human rights under the Geneva Conventions can be applied in a consistent and just manner.

It is worth returning to Common Article 3 of the Geneva Conventions in an attempt to locate the role of terrorism in IHL. Common Article 3 provides:

“In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, at a minimum, the following provisions:

Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat (out of the fight) by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely” [12].

By considering the impact of terrorism on IHL, it is necessary to ask if non-state groups such as *al-Qaeda* and the *Taliban* have affected the implementation of the Geneva Conventions. Based on the legal framework provided by Article 3 of the Geneva Conventions, we can now consider these questions. Are they bound by the Geneva Conventions? Yes. Can they be charged for gross violations of human rights? Yes. Are the basic protections of human rights enshrined in the Geneva Convention applicable to them? Yes. Groups such as *al-Qaeda* and the *Taliban* are bound by the Geneva Conventions because the ‘War on Terror’ is being conducted in the territories of Iraq and Afghanistan as a war between the states and organised armed resistance groups. Therefore, they can be classified as Common Article 3 non-international armed conflicts (NIAC). They can also be charged for human rights abuses by virtue of their classification under Common Article 3 of the Geneva Conventions under domestic and international criminal law. At the same time, Common Article 3 also guarantees the humane treatment of detainees captured in the ‘War on Terror’.

While it is argued that the Colonialist account of IHL was discriminatory and exclusionary on the basis of differences such as ‘civilised’ and ‘non-civilised’, and that the resulting Geneva Conventions heralded a new universal human rights approach in a broadened definition of conflict, it is necessary to assess if the proliferation of terrorism has affected any changes in the implementation of IHL. In other words, we need to ask what has been the impact of the Geneva Conventions in relation to terrorism, what actions have been taken by the international community to ensure a consistent and universal application of human rights law to such situations, and lastly, do the Geneva Conventions signify a new way of understanding and accounting for human rights violations such that the perpetuation of ‘racialised’ forms of oppression and exclusion can be prevented?

V. ASSESSING THE IMPACT OF TERRORISM ON INTERNATIONAL HUMANITARIAN LAW

In assessing the impact of terrorism on IHL, the literature has focused on three areas of impact: (a) the impact of terrorism in IHL inside international organisations such as the United Nations and ICRC; (b) the impact of terrorism in states' application of IHL; and (c) the impact of terrorism on the way in which prevailing understandings of human rights in the Geneva Convention come to be challenged by notions of civilizational 'differences'.

A. Impact within International Organisations

In assessing the impact of terrorism within the UN, analysts have examined how tensions between preserving human rights and state sovereignty have affected the implementation of IHL. For example, Argentina has stated "that it does not accept the argument that the acts of international terrorism constitute a human rights violation, since, by definition, only States are capable of violating human rights" [13]. This position is reflective of the traditional legal positivism in IHL that relegates the issue of human rights and terrorism to within the purview of the sovereign state. Kielsgard notes that this understanding ties in with the UN Charter's preamble on state sovereignty, where Article 2(7) mandates that the United Nations shall not interfere with matters within the domestic jurisdiction of any state [14]. Arguably, the tension between adhering to IHL and enforcing state sovereignty preferences the treatment of terrorism as a matter of national security, providing "greater insulation from international oversight with respect to their domestic adherence to human rights norms" [15].

It is worth noting that the UN's characterisation of human rights under international law contributes to this inconsistent application of IHL through the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR). Article 5(1) of the ICCPR contains provisions that "express the obligations of any state, group, or person with respect to abstaining from human rights violations" [16]. While the ICCPR is a legally binding document, states' preference to exercise their sovereignty in the 'War on Terror' highlights the potential opposition to any consistent approach to IHL.

B. Impact within States

Assessments of the impact of terrorism in IHL often focus on the nature of counter-terrorism measures that inevitably violates human rights. Reitan argues that the then U.S. Secretary of Defence, Donald Rumsfeld, in response to allegations of torture in Guantanamo Bay, that all "international conventions on the treatment of prisoners were being respected, but refused to designate the detainees as prisoners of war, which would grant them more explicit protections under the Geneva Conventions" [17]. The blatant denial of prisoner of war status through the selection interpretation of IHL permits the violation of human rights as necessitated by the exigency of counter-terrorism measures operating under the guise of national security. Similarly, Otto also examines the secretive nature of states' ability to adhere to IHL noting that the UN Committee Against Torture (UNCAT) has expressed concerns over Australia's anti-

terrorism laws and practice, "including the lack of judicial review and the character of secrecy surrounding imposition of preventive detention and control orders" [18]. This literature, therefore, has focused on examining states' obligation to IHL with regards to terrorism, highlighting the contradictory ways in which the application of IHL has been rendered subservient to the needs of national security.

C. The Impact of Understandings of Terrorism in International Humanitarian Law

While the literature assessing the impact of terrorism on IHL within and outside of the international organisations has analysed the operationalisation of mainstreaming universal human rights in IHL rather than critiquing the conceptual basis of IHL and terrorism, the broader IHL literature, while not limited to discussions of state sovereignty and international law, examines how the epistemological origins of terrorism and human rights can affect the universality of human rights. The literature frequently draws upon Gregory's work on how the existing human rights discourse indicates the persistent influences of Orientalism and Colonialism that essentialised racial and cultural differences. Gregory argues that the 'War on Terror' represents a cartography of good versus evil, designed to "bring relief to 'us' while bring 'them' into relief, its object was to reveal the face of the other as other" [19]. This is indicative of the tendency to dichotomous differences, as U.S. President Bush in an 2001 address to Congress stated, "either you are with us or you are with them" [20]. Gregory's approach serves as a useful frame of reference in illustrating the reductionist and exclusionary practices of IHL in the 'War on Terror', where the policies and politics of IHL exhibit consistent allusions to the separation of the civilised world and the 'barbaric' other.

VI. CONCLUSION

In examining the distinction between terrorists and Western civilisation, these findings have indicated that the Geneva Conventions and the practice of IHL rest upon the generalised logic of differences. While these differences can be in terms of civilised and non-civilised, they can also be extrapolated into racial, religious, political and social differences that serve as the basis for discriminating the rights of terrorists under IHL. This is problematic in that despite the Geneva Convention's attempt to reconceptualise human rights as universal, its discursive nature still centres on the state centric mode of analysis. In addition, the discursive effects of race, religion, civilisation and barbarism have compounded its applications in the 'War on Terror'. It is hoped that this study would provide a clearer idea of the relationship between IHL and terrorism, and provide alternative insights on the exceptional treatment of terrorism under the Geneva Conventions.

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