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#376: Jihad and 'just war': Twisting the law on the way to the battlefield

VOICEOVER

This is Up Close, the research talk show from the University of Melbourne, Australia.

LYNNE HAULTAIN

I'm Lynne Haultain. Thanks for joining us for Up Close. Recent conflicts, particularly in the Middle East, have thrown a real curve ball into the academic discourse on war. More particularly, the discussion of what is a just war. In one arena there have been extraordinary contortions on the part of thinkers and advisers to accommodate or to reject the military actions of successive US and other governments in the various manifestations of the so called War on Terror, or more recently, the actions against Islamic State. In another, in Islamic scholarship, there's debate about what just war means. How aggressive is the doctrine of jihad and when is it justified?

Our guests today look at both these issues separately and together and offer great insights into the debates, both legal and academic. Naz Modirzadeh and Andrew March are in Melbourne as visiting professorial fellows, with the Laureate Program in International Law at Melbourne Law School. Naz is the founding director of the Program on International Law and Armed Conflict and a Professor of practice at Harvard Law School. Andrew is an Associate Professor of political science at Yale and also an adjunct Associate Professor at the Yale Law School. So welcome to you both. Thank you indeed for joining us.

ANDREW MARCH

Thanks very much for having us.

NAZ MODIRZADEH

Thanks for having us.

LYNNE HAULTAIN

Can we just set the scene in terms of the legal thinking since 9/11, which engaged, not only a legal audience with the twists and turns in international human rights law and international humanitarian law, but other broader audiences as well and play it out in couple of landmark cases? Naz, how do you define international humanitarian law and international human rights law and how do they intersect?

NAZ MODIRZADEH

Thanks Lynne. So yes, there's definitely been an almost 15 year journey or story now of the relationship between human rights law and international humanitarian law and perhaps more importantly, the vexing question of what is the difference between war and peace? Where is the line between war and criminality? In some ways, those questions are more difficult today than they were in the days after the September 11th attacks.

So, I'll try to just very briefly sketch out I think what some of the big themes are that we've seen in these debates. So international human rights law, which has developed over the last three to four decades in particular quite robustly. So we've seen a tremendous growth of international law in this arena and I would say broadly speaking, it is a body of international law that governs how states interact with individuals on their territory. So the idea, the core notion of international human rights law, is it protects the individual. It reaches through the state. It reaches beyond the sovereign and comes into the state and says we, international law, are going to provide protections for you, the individual.

LYNNE HAULTAIN

Which I think is broadly understood.

NAZ MODIRZADEH

Yes. So that concept, the big question for us today in this area of the so called War on Terror, is what happens with that body of law when we have war? In the minds of some scholars and increasingly many courts, that body of law continues to apply during armed conflict, during war. It never stops. So it is not a law of peace. It is a law that applies continuously and as many scholars and courts have argued, it is also a body of law that travels with soldiers when they go to other countries.

So this is perhaps the most controversial area of this body of law today when we

think about armed conflict, is the question of whether human rights law applies to the actions of the armed forces during an armed conflict when they are acting abroad, outside of the territory of their own state. Some states and their courts have argued no, it does not. It stops at the end of the borders of the state. So the United States has quite clearly taken this position. Other states and other courts have argued that indeed, international human rights law applies extraterritorially, as we call it. So it travels in the backpacks of the soldiers, if you will, to wherever they are fighting.

LYNNE HAULTAIN

So that's one strand.

NAZ MODIRZADEH

Yes.

LYNNE HAULTAIN

International humanitarian law, however, despite the similarity in their nomenclature, is quite different.

NAZ MODIRZADEH

Quite different. Or at least in my view, quite different. So international humanitarian law, a much older body of law, at least since 1864 we've had a continuous development of this body of law. So in international lawyers, it's quite a bit older and, if you will, a bit more of a deeper pedigree in international law. International humanitarian law claims to do a rather striking thing. It claims to try to regulate how armed forces, states and armed groups behave during warfare, during armed conflict.

So it seeks in the words of some to maintain some measure of humanity during our least humane times. It lays out what it claims to be a relatively simple, pragmatic and clear set of rules and regulations applicable to armed conflict.

LYNNE HAULTAIN

So, the Geneva Convention.

NAZ MODIRZADEH

Yes.

LYNNE HAULTAIN

Centrepiece of international humanitarian law?

NAZ MODIRZADEH

Yes, definitely.

LYNNE HAULTAIN

In terms of what's happened over the last 15 or 16 years in this area of the law, given the so called War on Terror, what's the impact? How is the War on Terror a real war in the humanitarian context?

NAZ MODIRZADEH

So this is, in my view, the most interesting story of what has happened with the law and with legal language in the last 14 years. Famously, the Bush Administration in power, at the time of the 9/11 attacks, declared that the Geneva Conventions were quaint. They said that this is a war unlike any war that has ever happened in history and that for a new war we need new laws. There was a real sense, I think, of abject fear that the Bush Administration and the United States Government was going to just reject outright the application of this body of law to their military conduct.

LYNNE HAULTAIN

So they were just throwing out the rule book?

NAZ MODIRZADEH

It seemed that way. Much of their political rhetoric suggested that they were. So for several years it was not at all clear what rule book was applying to the actions of the Bush Administration, in particular, the CIA and some of the detainee sites and detainee treatment that of course we all now know involved a range of war crimes and domestic crimes. Arguably, the military tried very hard during those difficult years to cling to the rules and to push back against the Administration's exhortations to walk away from some of those restrictions.

But indeed, it was a time when it seemed that the United States Government was ready to reject the applicability of the Geneva Conventions and other rules of IHL

with the idea that this war simply was too different for the rules to apply.

LYNNE HAULTAIN

Fascinatingly, in one of your articles Naz, you talk about the desperation on the part of IHL or International Humanitarian Law, practitioners, in their desperate search for relevance at this time, to maintain that they actually still had a game to play.

NAZ MODIRZADEH

Yes. So at this time in those early years, I think on the one hand, human rights lawyers in the United States were very focussed on saying this is not a war. You have a war, which is the conflict in Afghanistan and of course later, the conflict in Iraq. But the War on Terror is not a war and you should not use the term war. It's a criminal, global criminal network that is being pursued through and ought to be pursued through global criminal means. IHL lawyers on the other hand, I think were indeed profoundly concerned that the Bush Administration was pursuing warlike actions around the world.

At that time, largely capturing detainees and interrogating them in black sites and in the Guantanamo Bay facility in Cuba, without at all clarifying what were the set of norms they were using to do that.

LYNNE HAULTAIN

That's where it becomes really critical. That's where the legal semantics hit the road, in terms of the way in which, particularly in this instance, detainees were treated and what was regarded as acceptable or not. That has all sorts of ramifications, as you've described. Detention, rendition, torture and whether or not they were legal, acceptable and the debates raged.

NAZ MODIRZADEH

Absolutely and the question, of course, of also if you did not apply the rules, was there any accountability structure? If it is not clear that there are rules, then one of the implications is that no-one can be held responsible for breaking the rules. Indeed, now that we can go back and see some of these unclassified documents from that time, it certainly seems to be the case that the fact that the existing rules that had been in place for so many years were destabilised and that top political leaders, all the way up to the President and certainly the Secretary of Defence, seemed to be suggesting that the rules did not apply.

Helped along the way at key points by Administration lawyers, who were writing

memos that we now can read, suggesting that indeed the rules did not apply, created a structure where many argue it made it easier to abuse detainees and torture individuals who were held in detention.

LYNNE HAULTAIN

So rules imply that there is accountability, as you've described and that there is some consequence. Where are the jurisdictions or what jurisdiction was relevant, acceptable?

NAZ MODIRZADEH

That's a very good and very difficult question. In the view of the US Government, certainly at the time and I would say still today, the only relevant jurisdiction is the United States courts. There will be no other courts that will ever hold any US official accountable for their actions. That, I think, is the view of certainly Bush era Administration officials and even arguably the Government today. Some human rights groups and others have sought to hold US officials accountable in other court systems, in Europe and elsewhere. Those efforts continue.

But certainly the US view is really the US is the only place where US officials can be held accountable. Other coalition allies of the United States can be held accountable, not only in their domestic systems, but also at the International Criminal Court and for many European allies, at the European Court of Human Rights.

LYNNE HAULTAIN

I want to go to case, which was in fact run in the US system in just a minute. But does this point to a great fissure in the international comprehension of which jurisdictions are appropriate in these circumstances? Or is it just a manifestation of something we always knew was going to happen if these sorts of non-legal conflicts arose?

NAZ MODIRZADEH

I think that depends who you ask. I think there are some who would say this is merely a manifestation of the fact that the rules were never as strong as we thought they were. That we have a tendency to look back and be nostalgic about a body of rules that really have not applied to the west in several decades. That we largely refer to in order to talk about the bad acts of State somewhere else. Others, I think feel strongly that we are in the midst of an existential crisis. That international humanitarian law today, in 2016, is under a tremendous amount of strain and that much of that strain indeed comes from this sense that rules are fragmenting and that

states do not share a clear sense of the rules that bind them all at the same time.

LYNNE HAULTAIN

If we don't have that, then what's the point?

NAZ MODIRZADEH

Precisely.

LYNNE HAULTAIN

Let's go to the Hamdan case, which was a really critical turning point, given the War on Terror. This was the case where there was a challenge about the Military Commissions that were set up and certainly Australia has deep experience of the Military Commissions too, through other cases and other Guantanamo detainees. But this case in particular was taken in order to show that those Military Commissions violated, not only US codes, but the Geneva Convention as well. Is that right?

NAZ MODIRZADEH

I think the key to why was Hamdan this pivotal moment in the way the US thought about this question, is that at the time the Administration's position was the Geneva Conventions don't apply at all in any way. It is a strikingly bold position. So the idea was the United States can be at war with this enemy and it can utilise international humanitarian law, insofar as it seeks to detain or target individuals. That the enemy has absolutely no protections under this body of law because it is a kind of war that was not anticipated by the Geneva Conventions.

LYNNE HAULTAIN

Because they're not a nation state.

NAZ MODIRZADEH

Precisely.

LYNNE HAULTAIN

The other side.

NAZ MODIRZADEH

Yes. So the idea was in the words of the Bush Administration, which come back to seem not as problematic perhaps as we thought they were then. Bush Administration lawyers, some of them, said this is not a civil war. It's a war in another country. It's not on the territory of the United States. Yet it is against a party that is not a state. So it is neither an international armed conflict, a war between states, nor is it a non-international armed conflict, a civil war. So it exists in some interstitial point that is not regulated by the law. So it's not our fault. We just can't apply the rules.

LYNNE HAULTAIN

Is that where we get the semantic joy, transnational, non-international armed conflict?

NAZ MODIRZADEH

Yes. So Hamdan essentially - the Supreme Court says wait, stop, no. You cannot say there are no rules. There are rules and in the view of most readers, the Hamdan decision says Common Article 3, what we sometimes call the Convention in miniature, the most core aspect of the Geneva Conventions, which applies to non-international armed conflicts, applies to the conflict between the United States and al-Qaeda.

Now, some say that the court was indicating that indeed anywhere the United States fights al-Qaeda, in any nation, on any territory it is under the umbrella of a single Common Article 3 conflict. This is where the very unfortunate term transnational non-international armed conflict comes from. So in essence what is it? It's the idea that you have the makeup of a civil war, but all over the world.

LYNNE HAULTAIN

Global, yeah.

NAZ MODIRZADEH

Anywhere those armed actors go, they carry the war with them. That's the fundamental notion.

LYNNE HAULTAIN

So, the rules were imposed.

NAZ MODIRZADEH

So the rules were imposed at a very basic level at least to the detainees in the Guantanamo Bay detention facility. The question becomes does Hamdan then create the precedent to argue that the Supreme Court has given its stamp of approval to this notion of global war?

LYNNE HAULTAIN

And the answer is?

NAZ MODIRZADEH

I think the Obama Administration interprets the answer to be yes. So they flip this argument and say very good. There are rules. We are a nation of laws. We will not make the mistakes of our predecessors. But if this is a war and if it's a non-international armed conflict and if it's global, then just as we respect that the rules apply to detainees, now we are going to apply the rules that apply to killing. Now, if we seek to attack, to target, to use lethal force against al-Qaeda, the Taliban and associated forces outside of the armed conflicts in Afghanistan and Iraq, those set of rules apply.

LYNNE HAULTAIN

You're listening Up Close and today our guests are Professor Naz Modirzadeh from Harvard and Associate Professor Andrew March of Yale. We are talking about war and the law from two perspectives. What just war means in the US and through international agencies and what it means in Islamic Law, which we'll get to in a moment. But Andrew, we've just been talking about one case, the Hamdan case, and the importance of that in terms of reasserting some sort of legal framework around the War on Terror.

Let's skip forward, because you've been looking more recently at a particularly interesting case that is still on foot. This is the case involving Captain Nathan Smith. Can you give us a bit of a precis of what's going on here?

ANDREW MARCH

Yes. So if you pick up on what Naz was just saying about this idea of a transnational global non-international armed conflict, one of the basic assumptions that allows the

Government to justify this is that the individuals and the groups that they're targeting are covered by a particular authorisation of the use of military force from 2001. So the argument from a domestic standpoint, rather than an international standpoint, is that because Congress has authorised the President to prosecute a war against those that were responsible for the September 11th attacks or associated forces, that if those original perpetrators or members of that organisation or associated forces happen to be found in different countries, then from a domestic constitutional standpoint, the Government is authorised by Congress to use lethal force abroad.

LYNNE HAULTAIN

Is that in perpetuity? I mean 2001. We're now 2016.

ANDREW MARCH

Well in principle, it is in perpetuity. It doesn't give a specific time limit. It's not necessarily temporally bound. But it is bound by a designation of a particular set of agents. So despite all of the rhetoric around the War on Terror and so forth, the original authorisation to use military force did not designate all global terrorists or all Islamic terrorists or something that vague, as the enemy. It was al-Qaeda and those that were responsible for the September 11th 2001 attacks.

LYNNE HAULTAIN

So it was quite specific?

ANDREW MARCH

Well, I don't know if you'd consider that to be very specific. It's more specific than all global terrorists. It is somewhat less specific than those particular persons in that organisation that were responsible for 9/11. So presumably, everybody that was responsible for the 9/11 attacks has now been killed or captured. So we're talking about sometimes people that were children or small children at the time of the September 11th attacks.

There is a notion that as long as this particular organisation and its affiliates exist, from a domestic standpoint the President is authorised to use military force against them. Then the kinds of international complexities that Naz was talking about, if we are authorised in some sense to wage war in Afghanistan, how does that authorise us to wage war in Yemen or Mali or Somalia? Those are the dimensions that Naz was talking about.

Now from a domestic standpoint, the question is not only what authorises this broad

interminable war against al-Qaeda, but who counts as a group that is associated force with al-Qaeda? Sometimes it's very clear. Sometimes groups like the Shabab organisation in Somalia will be very public about their declaration of loyalty to al-Qaeda central in Afghanistan or Pakistan. But very often it's not that specific.

Now in the present case, we have the United States leading the coalition against the Islamic State, or as the US Government calls them, ISIL, in Syria. Now, you have a number of complexities. First of all, the kinds of things that Naz was talking about. How are we authorised to wage war in Syria? We are not at war with the Syrian Government. To what extent do we regard this organisation the Islamic State, as an affiliated force with al-Qaeda? The problem arises because not only is ISIL at the present moment not affiliated, they're actually themselves at war with al-Qaeda.

So they have definitively split from al-Qaeda, definitively in 2013, although the fissures go back a number of years before that. They have fought each other on the ground in Syria and they are ideological, political and religious enemies at this point in the war for the global hearts and minds of pro jihadi Muslims or activists. So what's this have to do with this Captain Nathan Smith? A colleague of mine at the Yale Law School, Bruce Ackerman, published an article in The Atlantic Magazine - I believe it was last August - saying that if Congress won't step in and reign in the President, he argues that any individual soldier who is being asked to fight in this war, in fact has legal standing to bring a request for declaratory relief against the President.

The argument, I think, goes something like this. That if you are yourself participating in an unlawful war, you are personally potentially in some kind of legal jeopardy.

LYNNE HAULTAIN

The way Smith describes this as he is in breach of his oath.

ANDREW MARCH

Yes, that's right. So in general he has an obligation to uphold the Constitution. So there is a kind of crisis of conscience. That he feels that he is violating his own oath to uphold the Constitution. But the argument also goes that if he were let's say somehow arrested and put on trial for participation in this illegal war, he could be personally responsible. So he has that kind of standing. So there is a number of complex American constitutional issues, in which I'm not the greatest expert.

But one important dimension is the argument that whatever else is true about the never-ending War on Terror and the transnational non-international armed conflict. It can't be true that the coalition war in Syria is justified domestically by the 2001 AUMF.

LYNNE HAULTAIN

That's an Authorisation for Use of Force.

ANDREW MARCH

Use of Military Force.

LYNNE HAULTAIN

Yeah.

ANDREW MARCH

Because the Islamic State is not an associated force with al-Qaeda. So you might say to a certain extent they could be authorised by the war in Iraq because of the Iraqi Government's invitation, but not by the 2001 AUMF. So we are in the legal limbo that neither the President nor Congress has been willing to address together.

LYNNE HAULTAIN

What are Captain Smith's chances?

ANDREW MARCH

I think they're very slim. In most cases, the chances of this kind of judicial action against the executive, you're really climbing an uphill battle. There is a number of generic issues. You might see this first of all as a political policy decision, more than a constitutional one. Historically, courts are very, very reluctant to overstep their own boundaries and to usurp the authority of the legislative and the executive branches, when it comes to what is regarded as a political or a policy decision. That's sometimes called the political doctrine.

You also have issues around the standing of this particular soldier. So how plausible do you find it that an individual soldier might be at some kind of legal jeopardy or is violating his oath by participating in this. You also have some issues around whether Congress has in fact authorised the use of force by appropriating funds, which they do every year. So there is a lot of very complicated legal issues. I think everybody will be surprised if this one - the war against ISIS also may be over by that time, because they seem to be crumbling at the moment. But I would not look to this case to be a landmark decision, like the Hamdan decision.

But it does bring out some of the core legal ambiguities of the war in Syria. It also points out the value of being able to have this kind of legal or judicial avenue, when

both of the other branches of the Government acknowledge the problem. Obama has asked for an AUMF. Congress has prepared one. Things that they wouldn't bother to do if it were obvious that the war against ISIS is merely a continuation of the war against al-Qaeda. But nonetheless, in these cases the courts tend to be a very unlikely avenue for success.

LYNNE HAULTAIN

Mm, the irony that emerges for me in this is that given the Hamdan case, as Naz described it, was received by the Obama Administration as being an expression of the legal framework applying in this otherwise what would look to be fairly chaotic military environment. You can read the Smith case as being one in which the Obama Administration itself is seen as flouting the law.

ANDREW MARCH

Well yes, of course. That was the original motivation by my colleague, Bruce Ackerman, who...

LYNNE HAULTAIN

Yes, who described it as an ongoing violation of the Constitution, one of the most severe of the 21st Century.

ANDREW MARCH

That may be slightly hyperbolic. But no, very much. If you are concerned about the expansion of executive power and if you are somebody that let's say since Vietnam, when Congress passed the War Powers Resolution in 1973. That expressly put into statutory form the requirement that the President has to get congressional authorisation for the use of force beyond a certain period. If you take this seriously, then you are bothered by a number of military interventions that have happened since that period. A lot of people may find this to be not important or naïve or well, this is what the executive is supposed to be doing. It's not that big of a deal.

But if you do take it seriously, then you don't see a big difference between the Republicans and the Democrats. In terms of the use of force in general, the Obama Administration has represented a continuity with many of the aspects of the Bush-Cheney Administration.

LYNNE HAULTAIN

Now, as we've ended up talking a lot about the United States and its various legal responses to this. But where is the UN in this? One would have thought from an external and international perspective, that they might have something to add. Silent?

NAZ MODIRZADEH

No. So the Security Council, of course, in the eyes of some, is itself a subject of critique insofar as obviously the permanent five members of the Security Council have a tremendous amount of power to drive the way the Security Council views some of these contentious issues and of course the resolutions are often held up or highly politicised by the makeup of the Security Council. But at various key points, the UN Security Council has appeared to support certain aspects of what I would say the fight against global terrorism, so not the US specific War on Terror.

But certainly the idea that we need a global concerted effort, legal and otherwise, to fight terrorist networks around the world and key moments they are - come in a number of counterterrorism resolutions and I think two important ones that we've seen. One is Security Council Resolution 1373, which was promulgated in the weeks after the September 11th attacks. There was still ash coming up from the World Trade Center site when the Security Council was deliberating this resolution in New York.

The key message of the Security Council Resolution is every member state of the United Nations in the world, everywhere, we must see new counterterrorism laws and enforcement measures that tackle the flow of resources to terrorists and tackle the various types of activities that individuals might engage in to support terrorist groups like al-Qaeda.

LYNNE HAULTAIN

What became known as material support.

NAZ MODIRZADEH

Exactly. So in some countries it has a different name. Various countries like Australia have their own approach to this type of crime. But overall, I would say the Security Council Resolution is - I think historians will probably look back as one of the most momentous Security Council Resolutions just in its sheer effectiveness, that the Security Council says something and we see a ripple effect across the world of new laws and enforcement mechanisms seeking to target support for terrorism and terrorist groups.

More recently, the Council has spoken, I would say with an even more unified and loud voice, against ISIS. A real sense that the Security Council by 2014/15 was

profoundly concerned and sought to weigh in on the question of ISIS in two ways, one, a Security Council Resolution on foreign terrorist fighters. Seeking to tackle the problem of individuals travelling to a place in order to engage in terrorism and second, a statement that appears to suggest that Governments should engage in whatever means necessary in order to tackle ISIS. A quite difficult to read statement and not entirely clear that it has any legal meaning.

But I think an expression that the Council views ISIS as a threat on a global level, perhaps in a very different way than it saw al-Qaeda in 2001/2002. On the specific question, we were talking about global non-international armed conflict, we have no clear word from the United Nations on this. Similarly, I would argue no emergence of either an absolute rejection of this legal construct from key US allies or other powerful states, nor an embrace. So this is something that gets debated all the time in the US.

Those who think that this is a solid legal theory say all over the world our allies agree with us that this is a solid and well supported legal concept. Those who disagree say no other state in the world thinks that this is a legitimate legal construct. The truth is probably somewhere in the middle.

LYNNE HAULTAIN

You're listening to Up Close and in this episode we're discussing legal understandings of war from a couple of perspectives with our two guests, legal academics, Associate Professor Andrew March and Professor Naz Modirzadeh.

Naz and Andrew, you jointly wrote a piece called Ambivalent Universalism, looking at modern Islamic legal discussion of war, which I found very fascinating. Andrew, the word jihad, which has just become globally thrown like confetti and has become, I suppose, a byword for the more extreme expressions of terror. But what does it mean in Islamic Law?

ANDREW MARCH

So, sometimes people will say the concept jihad has a broader linguistic, semantic meaning that very often has nothing to do with fighting or warfare, which is true. So as a concept in language, it is linked to the idea of struggle or striving or effort. So you may speak about a jihad to purify yourself, jihad against the devil, these sorts of things. In law there is a juridical meaning and that refers to military fighting.

So in classical Islamic Law there would be legal manuals that would cover a wide range of subjects. Everything from ritual purity before you pray, all the way up to things like fighting. In classical Islamic Law there was a distinction between the jihad of defence and the jihad of conquest or expansion. When you are looking at what this term means in classical Islamic Law, you have to understand that there is a

radical break, not only in the authority of Islamic Law and in the world in which this made sense, but also in terms of the world in which modern Muslims live and balance commitments to lots of different kinds of law and lots of different kinds of political authorities.

LYNNE HAULTAIN

So you're saying it's contextual?

ANDREW MARCH

Well, everything is contextual. But I'm saying that there is an effort on the parts of lots of groups to try to connect all modern day activity and loyalties and ways of viewing the world, to the ways in which they were viewed perhaps from the Seventh Century up until some indeterminate period. So whether they're right or wrong, is for Muslims to decide. But the important point is that we are dealing in a world where the institutions and geographic division of the world has in many ways moved on from the time in which those legal constructs were first developed.

LYNNE HAULTAIN

You talk about the classical understanding, if you like, the classical Islamic legal definition of jihad, as being aggressive and expansionist.

ANDREW MARCH

Well not solely. It was a legal concept and so the question would be what is the ruling on this legal activity and what are the conditions in which it's valid? What are some of the other various kinds of subsidiary rules belonging to that sort of thing? If the question is in classical Islamic just war theory, was warfare for the expansion of Islamic territory justified? The answer is yes.

LYNNE HAULTAIN

But that changes in the modern era, doesn't it? There is a couple of other definitions that you explore in your article. One is the exact opposite. One is very defensive in nature, very live let live kind of approach. Is that a fair summary?

ANDREW MARCH

Yes. So in the modern period, when the world is divided into nation states after the

collapse of various multinational empires, many Muslim scholars, in addition to ordinary Muslims, found that the creation of these new nation states was not an abomination. It was not something that they had a religious objection to. So many scholars and ordinary Muslims have said that there is nothing wrong with being a citizen of a particular country and being loyal to that country while also maintaining a transnational Muslim identity and some sort of loyalty and affection for the global community of Muslims.

Now with that, goes the idea that various kinds of laws can adapt themselves to this modern world. One of the corollaries of that is the view that there is no justification for a Muslim state waging war against another Muslim state or a non-Muslim state, except in self-defence. The justification for this has taken a number of forms. Some cases it might be argued that this is what Islam has always argued. That Islam has only ever argued for a defensive kind of just war. That war was only ever justified in repelling aggression or repelling the assault of others.

There would be ways of interpreting verses from the Quran or the life experiences of the Prophet Muhammad, in a way that would justify that view. Others have said well, the world can change and certain aspects of Islamic Law can change as well. So certain aspects of Islamic Law can never change. So aspects of worship, like prayer and visiting Mecca for the pilgrimage and ritual purification and almsgiving and things like that, as well, of course, as creedal views about what you believe about God and the universe and so forth.

But the argument goes that certain aspects of the law that pertain to social relations in the public world, are there for the benefit of Muslims. To a certain extent, those rulings can change with the change of time and place, because the application of them would not serve the welfare of Muslims and others if the letter of the law only were applied. So then the argument might go that for certain periods of time expansionary jihad or aggressive jihad was justified. But there is no objection to us in the modern period, restraining ourselves from that conception of war or perhaps the idea was that it was always meant to be superseded by some other kind of relationship to others.

LYNNE HAULTAIN

Then you introduced a third concept, which is about - to put it briefly, I think - that it's justified to wage war against a country which outlaws proselytisation, if you like or the invitation to Islam.

ANDREW MARCH

Yes, that's exactly right. This actually dovetails with the second kind of justification for a more defensive conception of jihad, where the view is that the law has changed because modern circumstances have allowed it. So briefly, the argument would go

something like this. God has revealed the Quran and Islam for all of humanity, like Christianity. This is a universal religion for all humankind. It is a call to all of humanity. Muslims have an obligation, a duty, a kind of humanitarian duty, to invite all of humanity to Islam.

In the modern period, if you have human rights and if you have freedom of religion and countries allow their own citizens to hear the invitation to Islam and accept it and convert to Islam and practice the religion. That those states and those peoples have in fact adopted a kind of non-hostile or aggressive attitude towards Islam, because they allow Islam to coexist, to live within their own societies. They don't regard somebody being a Muslim as itself an act of hostility towards their own way of being.

So the argument would go that in these circumstances, we are able to make good on Islam's universalism and its obligation to reach all of humanity. In those circumstances there is no justification whatsoever for waging war against such a society merely for the purpose of bringing it under Muslim Hegemony or rule. But it's an odd kind of just war theory because it's not purely self-defence. It's not purely humanitarian. It's this kind of hybrid. I would argue that it's a kind of legal fiction. That it's a doctrine that only exists in the realm of ideal theory or scholarship. It's there for modern scholars to create a hybrid theory that reconciles traditional commitment and reconciles the idea that Islam is the true religion for all humans. But that can coexist with a certain kind of acceptance of modern expectations of non-belligerence.

LYNNE HAULTAIN

So Naz, how does this structure work for non-nation states? The way that Andrew's described it, we are talking about sovereign states and war like action. How does the judicial framework of Islamic Law work with organisations like IS?

NAZ MODIRZADEH

So for those who are wondering why would one even talk about Islamic Law in thinking about the contemporary conflicts that we see raging around the world and destroying so many lives and so many communities. I think one possible answer, and certainly a contentious one, is because these armed groups, like ISIS, like al-Qaeda and several others, claim to have a very clear and robust legal system.

LYNNE HAULTAIN

Which is exactly where I was going, so this is - do they claim justification under this legal framework?

NAZ MODIRZADEH

Yes. Yes. So for someone like myself, who is interested in law and who is interested in the role that law and people who think about law play in how we think about, talk about and carry out warfare, it matters. So you could imagine a group like ISIS could say simply we wish to be martyred. We are waiting for the end of this world and the beginning of the next. We have had our lands invaded and we are now simply going to kill as many people as possible. That's it.

LYNNE HAULTAIN

So extrajudicial. They're outside any framework.

NAZ MODIRZADEH

Absolutely, right. Or even, as some have argued, the Lord's Resistance Army, Joseph Kony. To lay out a seemingly very thin structure of norms that is not rooted in any existing legal tradition and seems to not regulate anything or anyone. One could imagine that that could be the way these groups could behave. Indeed, if you read the headlines of most newspapers around the world that is how these groups are portrayed. Barbaric, lawless, murderess, sadistic and again, all of those terms may be absolutely accurate as a matter of discretion.

But what is interesting to me is here we have an armed group. In the case of ISIS, an armed group that, at the moment, controls a tremendous amount of territory and controls many millions of lives. An armed group that is saying we apply a legal system. It is a legal system that is older than international law, by quite a few centuries, and it is legal system that we use, not only to justify the use of force, but also to regulate force within and outside of our territory.

LYNNE HAULTAIN

So they say we are applying classical Islamic Law?

NAZ MODIRZADEH

Yes. What is interesting in terms of where the encounter occurs with foreign forces or with other government nation states, is their argument appears to be we are applying Islamic Law to the exclusion of any other positive law system and we absolutely reject man-made law or positive law, in the way that we use force. That is a real challenge to international law and the way international law works in armed conflict.

International law tends to assume that it is always in the enemy's interest to apply the law of war. That we all benefit, in other words. If I have your soldiers under my control and you have my soldiers under your control, if we both know we're going to

apply basic rules as to the treatment of prisoners of war, then there is a reciprocal incentive to apply the rules. ISIS, in the way that it interprets Islamic Law, in its claim to applying classical Islamic Law, rejects that very reciprocity and argues that that is not the way that the rules will apply.

LYNNE HAULTAIN

Andrew and Naz, we've talked about two very separate, different structures around how we understand law and war and just war. But it seems at the end of both those conversations we end up with a lot of rhetoric, a lot of theorising, a lot of legal academic twists and turns. But in the end, both seem to make it up as they go along. Is that fair enough Andrew?

ANDREW MARCH

Well, there is making it up as they go along is one concern. The other concern is that, for example, in the case of a group like the Islamic State, that they are very scrupulously pointing to those aspects of their behaviour that do seem to comport with certain rules, where they seem to be using classical rules to justify what they're doing. One concern is that the rules that describe certain kinds of actions are stretched to cover all other kinds of actions that don't seem to be what's described by the original rule.

In fairness, ISIS does have courts, where they hold their own soldiers accountable or they claim to. It's very important for them as a propaganda issue to claim that their own soldiers are held accountable by the law. The problem is that the people that are protected by the law are fairly few. So they would say that innocent Sunni Muslims that are under their own protection have certain kinds of rights. But other sects, like Shiites or Alawites or so forth, don't have any default protection. So their own conception of who an innocent protected civilian is, is fairly narrow.

The other big concern is that it's all well and good to apply the law when you are in a position of strength or when it comports with your own strategic or political objective. But the hard question to ask is what are they not doing that they may otherwise want to do and they're only not doing it because they feel constrained by their own legal tradition that they are regulating themselves by or because of some other kind of accountability. Certainly in the case of a group like ISIS, it seems that in the case of military or political necessity, there is almost no other person or group that they are not willing to label as an enemy or an apostate to justify their slaughter.

So yes, from an outside perspective, it certainly does appear that law is playing as much of a rhetorical and justificatory role, a propaganda role, as it is a regulatory and restraining role, but to my mind, that also raises certain kinds of questions that many people often have about international law. To what extent is law a mechanism that justifies behaviour, but doesn't have as much of a restraining or accountability effect

on the other side.

LYNNE HAULTAIN

Naz, looking at something like the Chilcot Report, which was the British investigation of the action taken by then Prime Minister Tony Blair, to commit British forces to the conflict against al-Qaeda. The consequences were severe for him from a reputational point of view, but doesn't look as if he's going to spend any time behind bars. So really there is not much accountability, in the end, is there?

NAZ MODIRZADEH

When I saw the Chilcot Report and also saw the United States Senate Report on the use of torture against detainees in the United States and by officials and those hired by the United States. I think what's most striking to me is what happens if you have a lot of truth telling with no accountability. What happens when the public opens the newspapers day after day and sees detailed reports from the Government articulating in very specific terms wrongs committed by the Government and then nothing?

That is a profoundly undermining of law. Over time, I think it has a very corrosive effect on public trust in law, of the idea that these laws can restrain any action by Government.

LYNNE HAULTAIN

But surely a corrosion of public trust in all three branches of Government...

NAZ MODIRZADEH

Yes, absolutely.

LYNNE HAULTAIN

The executive, the legislative and the legal.

NAZ MODIRZADEH

I think that's right and so I think one perspective might be to say that what we have seen is a demonstration of the laws' weakness to begin with, that these laws were never written to restrain anyone. After all, they were written in the wake of World War

It by the victors. That there was a sense that these laws were simply window dressing for whatever states wanted to do, in order to exert power and defend themselves against perceived threats.

My sense it that's a bit too cynical of a perspective on the law. I think in some ways the question is if you believe that international law has a role today in restraining warfare, in regulating warfare and in restraining the use of force, what needs to be done for the law to regain ground and to regain trust. To regain a sense amongst the public that law does stand outside of power and play a role in regulating and restraining power.

I think one is the accountability question. If there is no accountability of senior officials coming out of some of these truths that we have been told about what has happened over the course of the last 15 years that may create a level of disregard and disrespect for the law that will be impossible to come back from, at least for the law as currently written. Second, I think is for lawyers, people like myself, academics, practitioners, to remind themselves that this body of law was meant to be a relatively simple enterprise.

After all, this is a body of law that one must be able to explain to an 18 year old soldier in a way that they are able to go onto the battlefield and respect that law. Once we begin to have arguments that are so acrobatic, so complex in nature that one needs to have studied for several years just to understand the debate, my sense is we have a problem there. It might be time to stop, take a moment and reflect on some of the core concepts of the law, but also the ultimate purpose of this body of law.

LYNNE HAULTAIN

Which is another whole conversation, but thank you again, both of you.

NAZ MODIRZADEH

Thank you very much.

LYNNE HAULTAIN

It's been a delight.

ANDREW MARCH

Thank you.

NAZ MODIRZADEH

Thank you.

LYNNE HAULTAIN

Naz Modirzadeh is the founding director of the program on International Law and Armed Conflict and a Professor of Practice at Harvard Law School. She regularly advises and briefs international humanitarian organisations, UN agencies and governments on issues related to international humanitarian law, human rights and counterterrorism. Her research focuses on the intersections between international humanitarian law, international human rights law and Islamic Law.

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They're both visiting professorial fellows with the Laureate Program in International Law at the Melbourne Law School. You will find more details of both Andrew and Naz's publications on the Up Close Website, together with a full transcript of this and all our other programs.

Up Close is a production of the University of Melbourne, Australia. This episode was recorded on 1st August 2016, produced by Eric van Bommel with audio-engineering by Gavin Nebauer. I'm Lynne Haultain. Thanks for listening and I hope you can join us again soon.

VOICEOVER

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