

THE APPLICABILITY OF THE LAW OF ARMED CONFLICT TO ANTI-TERRORIST MILITARY OPERATIONS

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ABSTRACT

The various international treaties governing armed conflicts – the main Hague Conventions from 1907, to the most recent Geneva Conventions of 1949 and additional protocols to the Geneva Conventions, and the Conventions on certain conventional weapons from 1977 and 1980 etc. – were mostly enacted focusing on the traditional warfare between or among the states. Therefore, these laws on armed conflict does not encompass directly on the present day complex armed conflict situations involving non-state actors, especially terrorist organisations, which makes the application of the law of armed conflict extremely complicated. This article examines to what extent the law of armed conflict can be applicable, formally or practically, in the present global war on terrorism.

I. INTRODUCTION

‘Terrorism’ is an increasingly popular moniker attached to a wide variety of circumstances. The current United States (US) led ‘war on terrorism’ has emerged as a direct result of the events of 11 September 2001 (hereafter 9/11), though the concept of a ‘war on terrorism’ existed, certainly from an American perspective, prior to those incidents.¹ Bianchi and Naqvi claim that ‘Terrorism has almost always been a factor in war, sometimes as a trigger for it. In short, acts of terrorism are usually part of or indirectly linked in some ways to an armed conflict.’² The law of armed conflict (hereafter LOAC), also known as the laws of war or international humanitarian law (IHL), was developed and codified in times of more traditional state-state conflicts.³ The term ‘LOAC’ is generally used in this article because it is favoured by militaries, the key players of this article, and when referring to IHL, this article will also use LOAC interchangeably. However, conflict between states and non-state actors are certainly not a new phenomenon, but over the past decade or more, the legal

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¹ Ferris, L., “Terrorism: Application of a Law of Armed Conflict”, (2003) *New Zealand Armed Forces Law Review*, pp. 27-35, at p. 27.

² Bianchi, A. and Naqvi, Y., *International Humanitarian Law and Terrorism*, Oxford, 2011 at p. 1.

³ Blank, L. and Guiora, A., “Teaching an Old Dog New Tricks: Operationalizing the Law of Armed Conflict in New Warfare”, 1 (2010) *Harvard National Security Journal*, pp. 45-85, at p. 45.

issues they highlight have dominated the academic and policy discourse.⁴ One group of scholars argues that the international terrorism does not fit comfortably into any existing LOAC analysis, and global terrorism has produced a new kind of ‘warrior’.⁵ It has raised certain problematic aspects to the question of the applicability of LOAC to the ‘war on terror’.⁶ The purpose of this article is to examine the extent of applicability of the LOAC, theoretically and practically, to anti-terrorist military operations. To that end, Section 2 of this article reviews the theoretical and legal framework about the concepts of terrorism and armed conflict as well as examines whether the acts of terrorism constitute armed conflict situations. The law applicable to armed conflicts is codified principally in the Hague Convention of 1907 and the annexed Regulations Concerning the Law and Customs of War on Land⁷ (which codify what is properly defined as the law of war, i.e. the rules governing the conduct of hostilities), and by the Fourth Geneva Conventions of 1949⁸ (which codify what is generally referred to as international humanitarian law).

⁴ Blank, L. R., “Extending Positive Identification from Persons to Places: Terrorism, Armed Conflict, and the Identification of Military Objectives”, 5 (2013) *Utah Law Review*, pp. 1227-1261, at p. 1227.

⁵ Sulmasy, G. M., “The Law of Armed Conflict in the Global War on Terror: International Lawyers Fighting The Last War”, 19 (2005) *Notre Dame Journal of Law, Ethics & Public Policy*, pp. 309-316, at p. 311.

⁶ Condorelli L. and Naqvi, Y., “The War against Terrorism and *Jus in Bello*: Are the Geneva Conventions Out of Date?”, in Bianchi, A. (ed.), *Enforcing International Law Norms Against Terrorism*, Oxford, 2004, at p. 30.

⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS, Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulations concerning the Laws and Customs of War on Land, 187 CTS 227 (adopted 18 October 1907, entered into force 26 January 1910), at <<http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6?>>.

⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 UNTS 31 (12 August 1949), at <<http://hrlibrary.umn.edu/instreet/y1gcacws.htm>>; INTERNATIONAL COMMITTEE OF THE RED CROSS, Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 75 UNTS 85 (12 August 1949), at <<http://hrlibrary.umn.edu/instreet/y1gcacws.htm>>; INTERNATIONAL COMMITTEE OF THE RED CROSS, Geneva Convention Relative to the Treatment of Prisoners of War, 75 UNTS 135 (12 August 1949), at <http://hrlibrary.umn.edu/instreet/y3gctpw.htm>; INTERNATIONAL COMMITTEE OF THE RED CROSS, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 75 UNTS 287 (12 August 1949), at <http://hrlibrary.umn.edu/instreet/y4gcpcp.htm>.

Additional Protocol I and II of 1977 of the Geneva Conventions⁹ contain provisions developing the law in both of these areas. Section 3 of this article examines the extent of the applicability of these laws, with practical examples, to combating terrorism. Finally, Section 4 draws the conclusion.

II. TERRORISM AND ARMED CONFLICT: AN OVERVIEW

A. What is ‘Terrorism’

The ordinary meaning of ‘terror’ refers to ‘intense fear, fright or dread’ and ‘terrorism’ refers to a ‘policy intended to strike with terror those against whom it is adopted; [or] the employment of methods of intimidation.’¹⁰ Although there are thirteen international treaties as well as numerous regional treaties which criminalise specific acts of terrorism,¹¹ there is no universally agreed upon definition for terrorism.¹² However, Hoffman defines terrorism as non-state actors’ activities which ‘in time of peace, would qualify as armed interstate hostilities if the same were attributed to a state; during international armed conflict, center on deliberate targeting of protected persons or infrastructure.’¹³

Terrorism is not new to the world or the law, but ‘modern terrorism’ was not a major concern of the United Nations (UN) or the international community until the 1960s when a wave of decolonisation occurred throughout the globe.¹⁴ This ‘early’ modern age of terrorism was consisted of national

⁹ International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (8 June 1977), 1125 UNTS 3 (1977), at <http://www.refworld.org/docid/3ae6b36b4.html>>; International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (8 June 1977), 1125 UNTS 609 (1977), at <<http://www.refworld.org/docid/3ae6b37f40.html>>.

¹⁰ Saul, B., *Defining Terrorism in International Law*, Oxford, 2008, at p. 297.

¹¹ Olson, L. M., “Prosecuting Suspected Terrorists: the ‘War on Terror’ Demands Reminders about War, Terrorism, and International Law”, 24 (2010) *Emory International Law Review*, pp. 479-496, at p. 487.

¹² Hoffman, M. H., “Terrorists are Unlawful Belligerents, not Unlawful Combatants: A Distinction with Implication for the Future of International Humanitarian Law”, 34 (2002) *Case Western Reserve Journal of International Law*, pp. 227-230, at p. 229.

¹³ *ibid.*

¹⁴ Chadwick, E., *Self-Determination, Terrorism and the International Humanitarian Law of Armed Conflict*, The Hague, at pp. 15-42 and 92-128.

liberation movements.¹⁵ Solis says, ‘the African National Congress, the National

¹⁵ Creegan, E., “Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Treatment of Terrorist Combatants (Protocol IV) – A Proposal”, 41 (2011) *California Western International Law Journal*, pp. 345-396, at p. 366.