



The military response to terrorism and the international law on the use of force

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The contemporary threat of international terrorism and the strategies of its eradication challenge our moral, political and legal imagination. States have a variety of tools at their disposal to deal with this threat, including mechanisms of criminal justice, financial and economic measures, but in recent years, they have increasingly considered the use of military means in confronting terrorist groups abroad and, occasionally, governments that harbour them. This trend has posed several challenges to both branches of international law regulating the use of armed force in international relations: the law on the recourse to force, or jus ad bellum, and the law on the conduct of hostilities, or jus in bello. Some of these challenges are addressed in this paper, which discusses the applicability of the international legal regime on the use of force to contemporary terrorism. It addresses some of its most moot features and attempts to evaluate some of the emerging doctrines, developing in face of the various problems presented by the modern terrorist threat. The first part examines the whether and when military force may be a legally valid response to terrorist activities, focusing particularly on the unilateral armed response and its limits. The second part proceeds to discuss whether and how the law of armed conflict applies in the circumstances of military counter-terrorist operations, paying special attention to the legal status of terrorists, the requirement of protection of civilians, and the treatment of detainees. While recognising that terrorism does not fit easily into the traditional international legal framework on the use of force, the paper concludes that despite some uncertainties, the fundamental concepts and principles of this framework are flexible enough to deal with the challenges posed by this serious contemporary threat and provide an elaborated system of standards to guide any related military action.

Introduction

The contemporary threat of trans-national terrorism and the strategies of its eradication challenge our moral, political and legal imagination. States have a variety of tools at their disposal to deal with this threat, including mechanisms of criminal justice as well as diplomatic and economic measures, but in recent years, leaders have increasingly considered the use of military means in confronting terrorist groups abroad and, occasionally, governments that harbour them. Apart from provoking fierce debates on the efficacy of a military response to the terrorist threat, this trend has also posed serious challenges to both branches of international law regulating the use of armed force in international relations: the law on the recourse to force, or *jus ad bellum*, and the law on the conduct of hostilities, or *jus in bello*. Since this body of law was developed on the basis of the state-centred paradigm of international order, contemporary terrorist violence does not fit easily within its traditional parameters. This mismatch has generated a degree of scepticism among statesmen and scholars as to whether the existing international rules are still applicable to the rapidly changing security context.

Set against the backdrop of uncertainties and scepticism, this paper considers the applicability of the international legal regime on the use of force to contemporary terrorism. It addresses some of its most moot features and attempts to evaluate some of the emerging concepts and doctrines, developing in face of the various problems presented by the modern terrorist threat. The first part examines whether and under what circumstances military force may be a legally acceptable options to States in their fight against terrorism, focusing on the unilateral armed response to terrorist attacks, particularly on the proper interpretation of the right of self-defence and its legal limits. The second part proceeds to discuss whether and how the law of

armed conflict applies in the circumstances of military counter-terrorist operations, paying special attention to the legal status of terrorist fighters, the requirements of discrimination in targeting and protection of civilians, as well as the controversial issue of the treatment of detainees.

Jus ad Bellum

The central norm of the post-1945 international order, articulated in the UN Charter, is the prohibition of the threat or use of armed force in international relations in all but narrowly defined circumstances: in case of a) a collective military enforcement action taken or authorized by the UN Security Council in case of a threat to peace, breach of the peace, or act of aggression; and b) in exercise of individual or collective self-defence as outlined in Article 51 of the Charter. The legality of any military action against terrorism must, therefore, be assessed in light of either of these two exceptions.

Collective military action against terrorism

The Security Council has been given the primary and authoritative role in the maintenance of international peace and security by the Charter and has been fully empowered to deal with all kinds of threats that States may confront, even with military force if necessary. The Council enjoys very broad (if not unlimited) discretionary powers when determining whether a particular situation or issue is a threat to international peace and security, regardless of whether the threat is emanating from a State or a non-state actor and whether it is immediate or more remote in time.

Since 1992, the Council has frequently condemned specific acts of terrorism as well as specific cases of state support for or failure to prevent terrorist activities as threats to international peace and security and has often authorized non-military sanctions on that basis.¹ More recently, the Council members have begun to characterize terrorism in general as a threat to international peace and security and have, particularly in the aftermath of 11 September 2001 attacks, expressed their readiness to take '*all necessary steps*' to combat all forms of terrorism, but have so far stopped short of actually authorizing a collective military action.² Nonetheless, these decisions seem to indicate awareness that collective military action might in extreme circumstances be necessary when dealing with this global security threat.

The right of self-defence against terrorist attacks

Without a Security Council authorization, States may use force only in individual or collective self-defence against an armed attack. The provision of Article 51 of the Charter provides, *inter alia*, that: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.' In the context of terrorism, the following questions need to be addressed: (a) can a terrorist attack constitute an 'armed attack' within the meaning of Article 51?; (b) if so, does such an attack give rise to a right of self-defence as understood in international law?; and (c) if so, what are the conditions of a lawful exercise of self-defence?

Terrorist attacks as armed attacks

While the phrase 'armed attack' has traditionally been understood as referring to State actions, nothing in the language of Article 51 or elsewhere in the Charter indicates that an armed attack can emanate *only* from States. In contemporary international law, the concept of 'armed attack' seems to have been considered broad enough to cover terrorist armed actions, provided that they reach a certain level of intensity or, in other words, where such acts are equivalent, by their 'scale and effects', to an armed attack by a State. This understanding of Article 51 was expressed by the International Court of Justice (ICJ) in the *Nicaragua* case, where the majority of the Court confirmed that self-defence could in certain circumstances include response to non-state armed actions "of such gravity as to amount to" (*inter alia*) an actual armed attack conducted by regular armed forces' (ICJ, 1986: paras 194-95). Even earlier, in the *Diplomatic and Consular Staff* case, the storming by irregular militants of the US Embassy in Tehran was also regarded by the ICJ as an armed attack (1980: paras 57 and 91).

Most States, at least in the post-9/11 era, seem to support such view: the NATO Member States have expressed their understanding that the incident of 9/11 amounted to an 'armed attack' against the United States; the members of the Security Council carefully worded resolutions 1368 and 1373 so as to affirm the inherent right of self-defence within a context of a broader response to terrorism; and most other States have not objected to the US-claimed right of self-defence in response to this particular attack. Same can be said about the 2006 Israeli military intervention in southern Lebanon, where most States have rejected Israel's 'disproportionate use of force' rather than its basic right to military action in response to acts by Hezbollah (UNSC, 2006).

Selecting the target: the attributability requirement

Although it is safe to claim that armed activities of private actors may amount to an 'armed attack', the right of the victim State to respond with military force does not extend smoothly to such situations. As a fundamental rule, measures of self-defence can only be directed against the attacker. Since most defensive military measures will, as a matter of fact, involve incursions into neutral sovereign States,³ the main question remains such measures are restricted to situations where the initial attack can be attributed to that particular State. On its face, the right approach seems to be that in order to balance between one State's right of self-defence and another State's right not to be the victim of the threat or the use of force a certain degree of the latter's involvement in the illegal attack must be established before a defensive military action can be launched against it. However, the necessary level of 'involvement' is not altogether clear.⁴

The ICJ has developed a rather restrictive test of attributability to a State of non-state attacks. In its 1986 *Nicaragua* decision, the Court held that the acts of the Nicaraguan *contras* could not be imputed to the United States because the latter had not exercised 'effective control' over each specific operation at issue (*Nicaragua* case: paras 110-15). On the other hand, the International Criminal Tribunal for the Former Yugoslavia (ICTY) used a looser standard in its 1999 decision in the *Tadić* case, and concluded that the acts of the Bosnian Serb Army could be attributed to Serbia because the latter exercised '*overall control*' over them, which did not necessarily require that each illegal operation had to be controlled by the particular State (ICTY, 1999: paras. 116-145). This alternative approach had little impact on the stringent 'effective control' test: the ICJ explicitly dismissed the *Tadić* standard as too broad in its most recent decision in the *Bosnia Genocide* case (ICJ, 2007) and again

applied its *Nicaragua* standard, which has also been accepted as valid by the International Law Commission (ILC) (2001: Art 8).

Alternatively, a State may be held responsible for a terrorist armed attack, which it subsequently endorses, either explicitly or tacitly. The ILC accepts the responsibility of a State 'if and to the extent that the State acknowledges and adopts the conduct in question as its own' (ILC, 2001: Art 11). The ICJ found such a situation to have occurred in relation to the attack and seizure by militants on the United States embassy in Tehran in 1979. According to the Court's decision in the *Diplomatic and Consular Staff* case, Iran's policy of not ending the hostage taking in order to put pressure on the United States and the compliance to this policy by various Iranian authorities which endorsed the policy on several occasions, transformed the occupation of the American embassy into acts of Iran (ICJ, 1980: paras 31-34).

On the other hand, State assistance to private actors in form of arms supplies, financial or other support, does not by itself make their specific attacks attributable to the supporting State and it does not render that State a legitimate target of a defensive strike by the victim State (ICJ, 1986: para. 195). A fortiori, mere harbouring of terrorists, although a violation of international law, does not justify a military invasion of the host State's territory, when that State was otherwise not substantially involved in the particular attack. Similarly, a State that fails to control or prevent illegal terrorist activities on its territory can be held responsible for not having complied with its international obligations regarding international terrorism, but a mere failure to comply with its international obligations does not by itself tantamount to an armed attack attributable to that State, thus the victim State has no right to direct its defensive military actions *against* that State. The ICJ reconfirmed this view in two of

its post-9/11 decisions, the *Legal Consequences of the Wall* (ICJ, 2004: para 189) and *DRC v. Uganda* (ICJ, 2005: para 146).

Admittedly, this traditional approach fails to adequately address the question as to what kind of action a victim State *is* entitled to take in response to a large-scale armed attack by non-state actors where such acts cannot be attributed to a foreign State, a question of utmost relevance in the contemporary security context characterized by terrorist threats emanating from largely independent armed groups, often operating in a territory with no effective governmental presence or authority. Several authors have suggested that the victim State might be justified to carry out defensive military strikes directed only against terrorist targets from such territory within a State which failed to take adequate measures to prevent terrorists from carrying out the specific attack (Dinstein, 2001: 215-217). Although no definite answer can be derived from the practice, there are signs that States might be increasingly supporting this position. In a very recent case, Israel justified its invasion in southern Lebanon in July 2006 as an action carried out in self-defence in response to the kidnapping of two Israeli soldiers by Hezbollah operating in Lebanese territory. Although Lebanon officially disassociated itself from the attack, most members of the Security Council acknowledged Israel's inherent right of self-defence against armed actions of Hezbollah; however, some members of the Council simultaneously reiterated the need to respect the sovereignty and territorial integrity of Lebanon, thus indicating their view that Lebanon *as such* was not a legitimate target of the Israeli counter-attack (UNSC, 2006).

Conditions of legitimate self-defence

There are a number of authoritative views on what constitutes a legitimate self-defence. One of them is encapsulated in the *Webster formula*, formulated in the context of the UK-US *Caroline* dispute of 1837, in which forcible reaction (to attacks by non-state actors) was deemed legitimate only if the ‘necessity of self-defence [was] instant, overwhelming, leaving no choice of means, and no moment for deliberation...’ (British and Foreign State Papers, 1857: 1129-38) and when the force used in response was necessary and proportional to the threat at hand. The ICJ confirmed the customary character of the necessity and proportionality requirements in the *Nicaragua* case (ICJ, 1986: para 176), and in the *Nuclear Weapons* advisory opinion (ICJ, 1996: paras 41-42).

Necessity demands, essentially, that all non-military means of redress have been exhausted and the use of force remains the only viable option to prevent the attack or frustrate its continuation in the particular circumstances (Schmitt, 2003: 530). Schachter (1984: 1620) has stressed that defensive military action cannot be deemed necessary ‘until peaceful measures have been found wanting or when they clearly would be futile...’. Accordingly, there must also be no ‘undue time-lag between the armed attack and the exercise of self-defence...’ (Dinstein, 2001: 184) or, in other words, self-defence must be an *immediate* reaction to aggression. However, the immediacy requirement seems to have already been more broadly construed in practice in the age of terrorist attacks, which are ‘usually over and done with before the victim [S]tate is in a position to undertake a military response’, (Greenwood, 2006: 422), arguably allowing a *reasonably delayed* response ‘where there is a need to gather evidence of the attacker’s identity and/or collect the intelligence and [organize the] military force in order to strike back in a targeted manner’ (Martyn, 2002).

The third traditional requirement of customary law is that any armed response in self-defence must be *proportionate*. Although the content of this requirement is not entirely clear, the prevailing view in legal scholarship seems to be that a military action in self-defence must be proportionate to its defensive purpose, i.e. no more than necessary to repel the attack (Ago, 1980: 64, 69);⁵ the purpose of self-defence cannot be retribution, general deterrence, punishment or any other motive. According to this view, the intensity of response may sometimes be disproportionate to the intensity of the initial armed attack as long as it is not designed to do anything more than what is necessary to achieve its legitimate aim to protect the territorial integrity or other vital rights of the defending State (McDougal and Feliciano, 1961: 217; Dinstein, 2001: 184). In the context of terrorism, the legitimate purpose of self-defence might extend to detention of persons allegedly responsible for the attacks, and destruction of the legitimate military objectives, such as infrastructures, training bases and similar facilities used by the terrorists (Cassese, 2001: 999).

Anticipatory self-defence: pre-empting an anticipated terrorist attack

Another complex question to which the Charter gives no clear answer is whether unilateral military action against a *threat* of a (terrorist) armed attack may ever be justified. Before the Second World War, international customary law traditionally endorsed the idea that a State can respond to an impending attack leaving no sufficient alternative choice of means. But the applicability of this customary law doctrine after the entry into force of the UN Charter and its general ban on the unilateral force is somewhat debatable. The language of Article 51 makes it clear that self-defence is lawful only when an armed attack *occurs* and not as a first strike option. However, the Charter does not define at which point in time an 'armed attack'

begins and nothing in this provision itself implies the legality or illegality of the use of force in cases when an armed attack is *about to occur*. In practice, States have mostly refrained from invoking the doctrine of anticipatory self-defence to justify their military actions after 1945. Although in the aftermath of 9/11, some of the key actors, (such as the US, the UK, Australia, France, and Russia) have explicitly accepted its validity in case of an *imminent* armed attack, this doctrine has still not been widely accepted. International legal scholars have made numerous arguments on the issue and although there is no clear consensus, the prevailing view seems to be that anticipatory self-defence might be permitted in the post-Charter international law, but only in extreme circumstances, in order to pre-empt an *imminent* threat (Jennings and Watts, 1991).⁶

Yet, the concept of an *imminent* threat remains without a precise definition in international law and it may be difficult to ever express the imminence of a particular threat in a legally robust fashion. The traditional customary requirement seems to centre on the temporal dimension of the notion and it is very stringent: it considers the threat to be imminent when the attack is just about to occur or, in other words, when an attack is 'in evidence' (O'Connell, 2001: 11). Such a restrictive condition could hardly ever be satisfied in the context of modern warfare and the specific nature of contemporary terrorism characterized by stealth attacks with potentially catastrophic consequences. Although it is difficult to assess where exactly international law stands in this regard, States might increasingly feel compelled to use force without a prior Security Council authorization, even when an armed attack is not menacingly near, but the threat of it is particularly grave and could materialize in attack without a reasonable degree of warning and time for defence.

Clearly, international law should not give States a *carte blanche* for aggression under the flag of anticipatory self-defence. To improve the unilateral decision-making and to reduce the risk of error in such situations, clear and verifiable criteria for evaluation of the threat need to be developed in international law. By way of suggestion, a framework governing unilateral defensive actions against the non-conventional threats could be built along the following lines: (a) the specific character of the threat, including the magnitude of potential harm and methods of its delivery (stealth attacks, sophisticated technology, non-conventional weapons); (b) the capacities and the specific hostile intent of the alleged adversary; (c) the proximity of the threat and time available for defence; (d) the likelihood of the threat being realized in case of inaction; (e) availability of credible and convincing evidence; (f) complicity with the general principles of self-defence: necessity, proportionality, duty to report to the Security Council and termination of unilateral action after the Council has taken over.

Preventive military intervention

Although the doctrine of anticipatory self-defence itself implies a certain re-interpretation of traditional standards of self-defence, the most radical and far-reaching post-9/11 challenge to the *jus ad bellum* has been posed by the US-proposed doctrine of unilateral preventive military intervention as a means of reduction or prevention of the terrorist threat. Unlike anticipatory action, preventive strikes are not about pre-empting an immediate and credible security threat, but about foiling the unspecified threats that might have occurred at some uncertain time in the future. It is an offensive strategic response to a long-term threat, not a defensive tactical response to an impending attack. In 2002, the Bush administration

made their case for military strikes against the non-conventional threats even where 'uncertainty remains as to the time and place of the enemy's attack' (US National Security Strategy, 2002: 15).

On its face, this proposal radically departs from the existing regulation of the use of force. States themselves are reluctant to endorse it; apart from the US, Russia and Israel, most other key actors have expressed both political and normative resentment to the idea of preventive strikes. Contrary to the above discussion on adapting the existing legal standard of imminence to make it more responsive to the present-day circumstances, the doctrine of preventive strikes is not a matter of degree, but a step into a different kind of legal order, free of any constraints on the unilateral use of force. The doctrine lacks any conceptual clarity as to the actual scope and objective criteria for its implementation; such an excessively vague and politically attentive reading of self-defence would enable the powerful actors to freely determine when and how the rule applies, increase the danger of abuse, and jeopardize the validity of the principle of non-use of force itself. Replacing even the minimum legal standards with purely subjective and arbitrary judgments of States would completely deny any normative role of international law on the use of force. Admittedly, power politics will always play an important role in the international system and the legal constraints on that power will probably never be completely free from uncertainties. But opening the way to military actions subject only to the more or less reliable threat assessment by single States and incapable of formal legal scrutiny, could lead to an unrestricted exercise of power against some perceived threats. There must remain at least some non-political standards by which the military actions of States can be evaluated and either supported or condemned as illegitimate. Besides, the existing collective security system combined with the self-defence regime already enables States to

respond fully – reactively or preventively, to the necessities of the modern security environment. It is both needless, as a matter of law, and too perilous for the stability of international order, to further eradicate the normative restraints on the unilateral military action.

Jus in Bello

Once force has been used, the law of armed conflict (*jus in bello*), commonly referred to as the 'international humanitarian law', seeks to regulate the conduct of hostilities and to protect victims of an armed conflict, regardless of whether or not that force was used in conformity with the *jus ad bellum*. This body of rules, the core of which has been codified in the four Geneva Conventions of 1949 (hereinafter: GC I - IV) and their two Additional Protocols of 1977 (hereinafter: AP I; AP II), is explicitly applicable only in the context of armed conflict. The largest and most developed part of international humanitarian law regulates the international armed conflicts, i.e. the armed conflicts between two or more States (GC I-IV, common Article 2) and those in which 'people are fighting against colonial domination and alien occupation and against racial regimes in the exercise of their right of self-determination' (AP I, Art 1(4)). But some, although more rudimentary, parts of international humanitarian law apply also to certain armed conflicts not of an international character, which are generally understood as involving hostilities between government armed forces and organized armed groups, or between such groups, within a State.

Application of the laws of war in the fight against terror

The problems posed by contemporary terrorism relate not so much to the content of the *jus in bello* as to its formal applicability in its current form. Due to the peculiar character of both terrorist activities and counter-terrorist military operations, the application of international humanitarian law in the fight against terrorism is not exactly an elegant fit. Most of its provisions were developed in times when non-state violence was not considered a matter of international law and those, which developed later, make no specific reference to fighting between States and terrorist movements. In addition, terrorist attacks frequently occur in peacetime and not all measures taken by States to prevent or suppress terrorism involve military operations in any form, let alone amount to an armed conflict of a character that triggers the applicability of the laws of war.

But whenever these two phenomena manifest themselves in either of the two forms of armed conflict, international humanitarian law is the primary source of rules that should determine the legality of any action. Clearly, the relevant rules of *international* armed conflict are applicable to hostilities between the regular armed forces of two or more States in the context of a counter-terrorist military campaign.⁷ The same can be said for situations in which a government has been joined by irregular forces (such as paramilitary or even terrorist groups) that have been integrated into the government's armed forces.⁸ Cassese suggests that 'an armed conflict which takes place between an Occupying Power and rebel or insurgent groups – whether or not they are terrorist in character – in an occupied territory, [likewise] amounts to an international armed conflict' (Cassese, 2005: 420).⁹ However, since contemporary trans-national terrorist groups increasingly operate independently from any State and rarely fit the definition of a national liberation movement in the sense of AP I, eventual hostilities between them and a State or group of States would more often than not have the character of a

non-international rather than international armed conflict. This covers scenarios in which a State is fighting terrorist groups either in its own territory or abroad, where the host State is not involved in hostilities.¹⁰ As already indicated, such situations are governed by the smaller and more elementary legal regime relating to the non-international armed conflicts: by provision of Article 3, common to all four Geneva Conventions (common Article 3)¹¹ and (in more limited circumstances) AP II, as well as certain other agreements and relevant customary rules.

While the provision of the common Article 3 extends certain fundamental humanitarian protections to non-combatants in non-international armed conflicts and applies automatically to all parties, whether state actors or non-state actors, it does not provide a comprehensive or even adequate guide for the conduct of hostilities in such conflicts (Roberts and Guelff, 2003: 481-82). To that end, the provisions of AP II were intended to develop and supplement the very rudimentary protections of common Article 3, but their application is limited *rationae materiae* and *rationae loci* to hostilities, which take place in the territory of a State Party '[B]etween its armed forces and dissident armed forces or other *organized armed groups*, which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol¹² (AP II, Art 1(1), emphasis added). Art 1(2) of AP II also explicitly excludes from the scope of its application 'situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature'. Thus, AP II is itself an unreliable source of humanitarian protections in non-international armed conflicts, since its application depends on the nature of the non-state armed group (responsible command and the ability to implement AP II), on the exercise of a minimum control of territory thereby and on intensity of military

operations. The underlying difficulty in the context of terrorism is that much of the terrorist violence is perpetrated by loosely organized groups or networks, or by individuals that, at best, share a common ideology, but could hardly be characterised as a well organized insurgency, qualifying as a 'party' to a conflict within the traditional meaning of AP II.¹³

On its face, this inadequacy further narrows the scope of application of international humanitarian law in the context of counter-terrorism. However, a common-sense approach requires that even if non-state actors lack some or all the hallmarks of the classic organized armed groups, the basic humanitarian principles of the 'Geneva law' should still be upheld as a minimum standard. After all, according to the explicit provision of common Article 1, the rules of the Conventions should be respected in the broadest range of situations, beyond those already foreseen by the Conventions and their Protocols. Besides, the Martens Clause stresses the obligation of the parties to any armed conflict to act, even in the absence of specific treaty language, in accordance with 'principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience'.¹⁴ Last but not least, the Security Council confirmed the international obligation of States to take *any* measures against international terrorism in accordance with international law, including international humanitarian law.¹⁵

Targeting: Protection of civilians

At the root of international humanitarian law lies the principle that armed force may only be used against enemy combatants and infrastructure with a view of weakening or neutralizing the enemy's military capability. Article 48 of AP I reflects this basic rule and requires that: 'In order to ensure respect for and protection of the civilian

population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.’ (AP I, Art. 48). This principle of distinction forms a part of customary international law, and must be respected in both international and non-international armed conflicts. In order to effectuate it, all targeting decisions must begin with the initial identification of legitimate military targets, i.e. combatants and military objectives as defined in Article 52(2) of AP I. All other objects that are civilian by nature are immune from attacks or reprisals; where there is doubt about the nature of a target, it must be presumed to be civilian (AP I, Art 52(1), (3)).

Likewise, non-combatants, i.e. civilians and other persons not taking a direct or active part in hostilities may not be made the object of deliberate attacks (GC III, Arts 4(1)-(3) and (6); AP I, Art 43). For the purposes of an international armed conflict, civilians are defined in Article 51(1) of AP I as persons who do not belong to one of the categories of persons defined as ‘combatants’ in GC III or AP I. In the context of non-international armed conflicts, there is no *formal* distinction between ‘combatants’ and ‘civilians’, but the ‘direct participation in hostilities’ is the factual threshold that triggers a loss of the aspect of the civilians’ protected status the guarantees protection from military attack. According to the explicit provisions of Article 51(3) of AP I and Article 13(3) of AP II, civilians enjoy the general protections against dangers arising from military operations ‘unless and for such time as they take a direct part in hostilities’, at which point they forfeit their immunity from attacks and become legitimate military targets to the extent and for the duration of their participation in hostilities.

The related customary principle of 'proportionality' recognizes that it is not always feasible to limit damage to military objectives, even if a chosen target has been properly identified as such and is the exclusive target of attack.¹⁶ By allowing the opposing sides to invoke 'military necessity' to validate acts that produce civilian harm through so-called collateral damage, there is an acknowledgment that war may result in extensive civilian death and devastation. However, the principle of proportionality requires that every feasible precaution must be taken to minimize harm to innocent civilians and their property (AP I, Art 57(1)). Even legitimate military objectives must be attacked in such a manner as to keep civilian casualties and damage to a minimum and refrain from attacks that are likely to result in incidental civilian damage or casualties that are excessive in relation to the concrete and direct military advantage anticipated (AP I, Art 57(2)(a)).

The principles of distinction and proportionality are quintessential principles of customary international humanitarian law and have to be respected in all circumstances, by all parties to an armed conflict, whether international or non-international.¹⁷ Many specific rules aimed at protection of civilians derive from them, such as the prohibition of deliberate or direct attacks against civilians and civilian objects (AP I, Art 51; common Article 3), the prohibition of indiscriminate attacks (AP I, Art 51(4)-(5)) or the use of 'human shields' (GC IV, Art 28; AP I, Art 51(7)), and of hostage taking (GC IV, Art 34; AP I, Art 75). Moreover, international customary law forbids the use of means and methods of warfare that cannot be used sufficiently discriminately in regards to civilian and military targets as also other means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering (AP I, Art 35(2)).

In the course of counter-terrorist operations, the targeting of terrorists and other persons, who are directly or actively involved in hostilities, and also targeting of military objectives such as terrorist camps and weaponry is inherent in the nature of armed conflict as such and should generally be considered legitimate. However, it is important to note that members of those terrorist groups that are not associated with a State, or that do not fulfil the criteria for an 'organized armed group' in the sense of international humanitarian law, technically remain civilians (AP I, Art 50(1)) and are subject to the rules governing the treatment of civilians as long as they do not take a direct (or active) part in the fighting (see *also* Israeli High Court of Justice, 2005: para 25-26). In other words, members of terrorist groups who do not qualify as *de jure* or *de facto* combatants under international law may not be subject to deliberate military attacks. Since a majority of contemporary counter-terrorist military operations will be carried out in a territory where terrorists are more often than not intermixed with a civilian population and hardly ever wear uniforms or carry arms openly, the need to carefully distinguish between non-combatants or objects that are not used for military purposes and military targets, extremely critical.

The treatment of detainees

Challenges, posed to international humanitarian law by contemporary terrorism, have to a large extent arisen from the concept of 'unlawful combatants'. Despite its specific political undertone in the post-9/11 era, the term is not novel and there is a long historical record of certain people being characterized as unlawful combatants—pirates, spies, saboteurs, and others. The main problem with its recent usage is a

proposition that certain persons, qualified as 'unlawful' or 'illegal' or even 'enemy' combatants within the context of the 'war on terror', are deemed beyond the ambit of law, shorn of even the minimum humanitarian and human rights protections, open to attack whenever and wherever. Controversy of such suggestions aside, even mere determination of who exactly might be included in such a category is neither easy nor clear-cut. These questions have no simple answers and merit further discussion.

Lawful combatants and the POW status in international armed conflicts

In an international armed conflict, lawful combatants comprise all members of the armed forces of a party to the conflict (except medical and religious personnel) as well as associated irregular forces as long as they fulfil the requisite criteria under Article 4(2) of GC III: they operate under a responsible command system; wear a fixed, distinctive sign; carry arms openly; and conduct their operations in accordance with the laws and customs of war.¹⁸ International humanitarian law permits these persons to directly engage in hostilities and they may generally not be prosecuted for the taking part in hostilities as long as they respect international humanitarian law. If captured, they are automatically entitled to prisoner of war (POW) status under the 1949 Prisoner of War Convention (GC III) and may be held only until the end of active hostilities in that particular conflict – after the cessation of hostilities they must be immediately released and repatriated (GC III, Art 118). POWs must at all times be treated humanely and, in particular, may not be subjected to torture or measures of reprisal (GC III, Art 13).

Since they are generally not held due to any violation of law, the purpose of their detention is not to punish POWs but rather to keep them away from active fighting in the battlefield. However, it is important to emphasize that the lawful combatants who

have committed criminal (terrorist or other) acts amounting to a grave breach of the Geneva Conventions, may be brought to justice and prosecuted for their acts: combatant or POW status does not grant immunity from criminal prosecution for acts contrary to international law. Members of terrorist groups may benefit from combatant status, if they are able to demonstrate sufficient discrimination in terms of GC III Article 4(2).¹⁹ At this point, it must be stressed that while members of the regular armed forces retain their 'combatant' and subsequent POW status even if they had violated the laws of war, irregulars who do not abide by the laws and customs of war lose their 'lawful combatant' and POW status.

Detentions of 'unlawful combatants'

The terms 'unlawful combatants' or 'unlawful belligerents' are not expressly contained in the treaties of international humanitarian law, but they are frequently used in legal literature, military manuals and case law to describe persons taking part in hostilities without being entitled to do so (Fleck, 1995: 68).²⁰ The concept generally includes civilians who directly engage in hostilities as well as irregular combatants such as terrorists, guerrillas, and members of resistance movements, who fail to meet or violate the GC III (or AP I) criteria, i.e. who fight out of uniform, do not bear arms openly, do not have a transparent chain-of-command, and do not respect the laws of war, for instance by deliberately attacking civilians. Due to their peculiar character, members of a terrorist group may more often than not fail to meet the necessary criteria and may consequently be denied the combatant and thus the POW status. In case of doubt, the GC III makes it mandatory for a 'competent tribunal' to be established to determine the entitlement of a detainee to a POW

status; until their status has been determined by a competent tribunal, the detainees should be treated as POWs (GC III, Art 5(2)).

Nonetheless, even persons who are rightly denied the POW status are not left in a legal vacuum. The provisions and protections of international humanitarian law remain applicable regardless of the status or label given to the detainee. The Geneva system must be interpreted as protecting all international armed conflict detainees either under GC III or GC IV. The official commentary to the Geneva Conventions notes the Geneva system must be interpreted as protecting all international armed conflict detainees either under GC III or GC IV and that ‘there is no “intermediate status”; nobody in enemy hands can be outside the law’ (Uhler and Coursier, 1950: 51; see also Israeli High Court of Justice, 2006: para 25). Hence, even members of terrorist groups, captured in the context of an international armed conflict or a belligerent occupation, who do not qualify for POW status, would generally have to be considered as protected persons under the Fourth Geneva Convention and should, as a minimum, be treated humanely and with respect for human dignity when in the hands of the detaining party provided they are enemy nationals (GC IV, Art 4).²¹

Admittedly, the idea of granting the ‘protected person’ status to terrorists might create some discomfort. But in terms of law, these persons are civilians, who may or may not have committed terrorist, i.e. criminal acts. Recognition of their entitlement to ‘protected person’ status under GC IV in no way precludes their interrogation and detention for the purpose of criminal prosecution or for individually determined imperative security reasons (GC IV, Arts 42 and 78). Since unlawful combatancy itself is a fundamental violation of the laws and customs of war, such individuals may be prosecuted and punished under the domestic law of the detaining State simply for having taken up arms, as well as for any criminal acts they may have committed.

They may be imprisoned beyond the temporal bounds of the conflict, if convicted of a crime, until any sentence imposed has been served (GC IV, Arts 64-68). Likewise, they may be subjected to administrative detention without trial, for the duration of the conflict, as long as they pose a serious security threat (GC IV, Arts 42 and 78). However, detentions carried out under administrative rather than judicial orders are considered exceptional security measures strictly limited to cases of absolute necessity (Uhler and Coursier, 1950: 367) and even in such situations, the basic due process rights must be observed and cannot be derogated by reference to national security considerations (Israeli High Court of Justice, 2002: paras 26-29 and 42-45).

Treatment of detainees in non-international armed conflicts

Neither the 'POW' nor the 'civilians' conventions (apart from the common Article 3) are formally applicable in the context of non-international armed conflicts, while the law governing non-international armed conflicts does not foresee privileges of POW or 'protected persons'. Consequently a government engaged in a non-international armed conflict with terrorist groups is not obliged to accord its armed members the POW or 'protected person' status. All persons directly participating in hostilities in the course of a non-international armed conflict may be detained and prosecuted for all hostile acts, including violations of ordinary domestic law, regardless of whether they have violated any rules of international law and without being entitled to any 'combatant' or 'protected persons' immunities and privileges. Nonetheless, once captured, even these persons are entitled to basic humanitarian protections with regard to the deprivation of liberty. Not only common Article 3, but also the provisions of AP II (where applicable *rationae personae*) and customary international humanitarian law, as well as basic human rights standards, require certain rights to

be afforded to detainees in non-international armed conflicts, including the right to humane treatment, appropriate and reasonable detention conditions and due process of law.²²

In light of the above, it is possible to conclude that *all* persons, detained in the course of an armed conflict, even those suspected of the most heinous terrorist acts, must be treated humanely and with respect for their human dignity. As an irreducible minimum, the rules contained in common Article 3 protect at any time and in any place all persons taking no active part in the hostilities.

Conclusion

The fight against terrorism should primarily be understood in a long-term perspective, which requires a careful reconsideration of the relationship between the rise of terrorism and the deep social inequalities such as poverty, economic, social and cultural underdevelopment, lack of political pluralism and democracy, and so on. Looking at it through a military lens can thus be merely a short-term approach and not the most effective in strategic terms, or politically wise. That is why it is especially important for military force to be used only in the last resort and strictly within the limits of international law, so as not to collide with the generally accepted principles of international system. International law on the use of force has been one of the greatest achievements of the international community in the 21st century and whilst contemporary terrorism carried out by largely independent private actors does not fall smoothly into its traditional paradigms, the relevant decision-makers must strive to respect and develop it further, where necessary, to ensure its continued relevance and to prevent anarchy, so eagerly pursued by terrorists themselves.

The current international system of collective security combined with the contemporary regime of self-defence allows States to respond to terrorism fully, reactively or preventively, even with military force. As much as possible, military counter-terrorist operations should be taken on a multilateral basis; especially any eventual *preventive* military action should be taken *only* with the prior Security Council authorization. In case of an actual or imminent large-scale attack by terrorists, the victim State may react unilaterally, but may direct its defensive military action against another State only if those attacks can be attributed to that State. Whenever counter-terrorist military operations amount to an armed conflict, they must be carried out in full compliance with the relevant provisions of international humanitarian law. As a minimum yardstick, the principles of distinction and proportionality, as well as the minimum requirements of protection of non-combatants, including members of terrorist groups, apply at all times and in any circumstances.

As was shown in this paper, the fundamental concepts and principles of both *jus ad bellum* and *jus in bello* are flexible enough to cover contemporary terrorism and provide an elaborated system of standards to guide any related military action. Any (necessary) normative developments in this regard should thus be more a matter of careful re-interpretation of its traditional parameters, rather than re-writing or dropping them altogether.

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¹ UNSC Resolutions 748 (1992); 1054 (1996); and 1267 (1998).

² UNSC Resolutions 1269 (1999); 1373 (2001); 1456 (2003); 1566 (2004); and 1735 (2006).

³ The rare exceptions would be military actions on the high seas or in the international air space.

⁴ The only clear-cut scenario involves an attack committed by private actors acting in capacity of *de jure* or *de facto* organs of a foreign State, which is regarded as an attack of that State under international law, even when the attack had been carried out contrary to the rules or directions of that State's authorities (International Law Commission, 2001: Arts 4-7).

⁵ For a different view see, eg Dinstein, 2001: 184; Schachter, 1984: 1637.

⁶ This view has been shared by many other prominent commentators, including Dinstein, Greenwood, Higgins, and Schachter.

⁷ Hostilities between the US-led coalition forces and the Taliban government forces in Afghanistan fit into this category.

⁸ The military portion of al-Qaeda in Afghanistan, sometimes referred to as the 55th Brigade, appeared to have such an integrated relationship with the Taliban, although this remains somewhat debatable.

⁹ This view was recently adopted by the Israeli High Court of Justice in *The Public Committee against Torture in Israel v Israel* (2005: para 18).

¹⁰ Examples of the latter include Israel's interventions against Palestinian terrorists across the Syrian border and against Hezbollah in southern Lebanon, as well as the US armed forces fighting against those al-Qaeda members without a substantial relationship with the Taliban in Afghanistan.

¹¹ Common Article 3 applies, as a matter of law, to both non-international as well as international armed conflicts. This has been confirmed by the ICJ in *Nicaragua* (1986: para 218) and by the ICTY in *Tadić* (1996: para 67).

¹² Common Article 3 is not thus limited and applies automatically to all parties taking part in hostilities in any armed conflict not of an international character within the meaning of common Article 2 or article 1(4) of AP I. This view was recently supported by the US Supreme Court in *Hamdan v Rumsfeld* (2006).

¹³ A rare exception is the armed conflict between the Israeli armed forces and Hezbollah in southern Lebanon in 2006.

¹⁴ First articulated in The Hague Conventions of 1899 and 1907, and incorporated into the four Geneva Conventions and AP I.

¹⁵ UNSC Resolution 1566 (2004), adopted under Chapter VII of the UN Charter and thus legally binding.

¹⁶ For example, civilians may reside or be present inside or in the vicinity of a military target or there might be an error in intelligence or targeting itself, accidentally harming civilians instead of a military target.

¹⁷ These two principles have been described by the ICJ as 'intransgressible' principles of international customary law in *Nuclear Weapons* (1996: para 78).

¹⁸ On the other hand, Articles 43 and 44 of AP I do not require irregulars to identify themselves as combatants, but only to be under a proper command and carry their arms openly when attacking or deploying preparatory to an attack. But since these provisions do not reflect customary law, they apply in practice only where both parties to the conflict are parties to the AP I.

¹⁹ Or in terms of Arts 43-44 of AP I, where applicable.

²⁰ See also the decision of the US Supreme Court in *Ex parte Quirin et al* (1942: 30-1), later quoted in *Hamdi v Rumsfeld* (2004: 518). The term has likewise been used by humanitarian organizations (e.g. Human Rights Watch, 2002).

²¹ Art 75 of AP I expanded the eligible group of 'protected persons' by omitting the nationality requirement.

²² For a more detailed elaboration see Goldman and Tittmore, 2002.

References

Ago, Roberto, 1980. "Addendum to the 8th Report on State Responsibility," *Yearbook of ILC* 2: 13-70.

Cassese, Antonio. 2001. "Terrorism is Also Disrupting Some Crucial Legal Categories of International Law," *European Journal of International Law* 12 (5): 993-1001.

Cassese, Antonio. 2005. *International Law*. Oxford: Oxford University Press.

Dinstein, Yoram. 2001. *War, Aggression and Self-Defence* 3rd edition. Cambridge: Cambridge University Press.

Fleck, Dieter, ed. 1995. *The Handbook of Humanitarian Law in Armed Conflicts*. Oxford: Oxford University Press.

Goldman, Robert K. and Brian D. Tittlemore. 2002. "Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights Under International Humanitarian and Human Rights Law," ASIL Task Force on Terrorism Papers, <http://asil.org/taskforce/goldman.pdf>.

Greenwood, Christopher. 2006. *Essays on War in International Law*. Cambridge: Cambridge University Press.

Human Rights Watch, 2005. "Background Paper on Geneva Conventions and Persons Held by U.S. Forces," <http://www.hrw.org/backgrounder/usa/pow-bck.htm>.

ICJ. 1980. "Case Concerning United States Diplomatic and Consular Staff in Tehran (USA v Iran)," ICJ Reports.

ICJ. 1986. "Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America) (Merits)," ICJ Reports.

ICJ. 1996. "Legality of the threat or use of nuclear weapons (Advisory Opinion)," ICJ Reports.

ICJ. 2004. "Legal Consequences of the Construction of a Wall (Advisory Opinion)," <http://www.icj-cij.org/icjwww/idocket/imwp/imwpframe.htm>.

ICJ. 2005. "Case Concerning Armed Activities on the Territory of the Congo (DRC v Uganda)," <http://www.icj-cij.org/icjwww/idocket/ico/icoframe.htm>.

ICJ. 2007. "Application of the Convention on the Prevention and Punishment of the Crime of Genocide (BiH v Serbia and Montenegro) (Judgment)," <http://www.icj-cij.org/icjwww/idocket/ibhy/ibhyframe.htm>.

ICTY. 1996. "Prosecutor v Duško Tadić (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)," International Law Materials 35.

ICTY. 1999. "Prosecutor v. Duško Tadić, Appeal of the Judgment, No. IT-94-1-A (15 July 1999)," International Law Materials 38: 1518, 1546.

ICRC. 2005. "The relevance of IHL in the context of terrorism," available at <http://www.icrc.org/web/eng/siteeng0.nsf/iwpList488/8C4F3170C0C25CDDC1257045002CD4A2>.

ILC, 2001. "Draft Articles on Responsibility of States for Internationally Wrongful Acts with commentaries" in *Report of the International Law Commission on the Work of its Fifty-third Session*, UN Doc A/56/10.

Israeli High Court of Justice, 2002. "HCJ 3239/02: Marab v IDF Commander in the West Bank," http://elyon1.court.gov.il/Files_ENG/02/390/032/a04/02032390.a04.pdf.

Israeli High Court of Justice. 2005. "HCJ 769/02: The Public Committee against Torture in Israel v Israel," elyon1.court.gov.il/Files_ENG/02/690/007/a34/02007690.a34.pdf.

Levy, Jack S. 1987. "Declining power and the Preventive Motive for War," *World Politics* 40 (1): 82-107.

Martyn, Angus. 2002. "The Right of Self Defence Under International Law: The Response to the Terrorist Attacks of 11 September," <http://www.aph.gov.au/library/pubs/CIB/2001-02/02cib08.pdf>.

McDougal, Myers S. and Florentino P. Feliciano. 1961. *Law and Minimum World Public Order: the Legal Regulation of International Coercion*. New Haven: Yale University Press.

O'Connell, Ellen. 2002. "The Myth of Preemptive Self-Defense," ASIL Task Force Papers, <http://www.asil.org/taskforce/oconnell.pdf>.

Roberts, Adams and Richard Guelff, eds. 2004. *Documents on the Laws of War* 3rd edition. Oxford: Oxford University Press.

Sandoz, Yves, Cristophe Swinarski and Bruno Zimmermann, eds. 1987. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Dordrecht: Martinus Nijhoff.

Schachter, Oscar. 1984. "The Right of States to Use Armed Force," *Michigan Law Review* 82 (5-6): 1620-1646.

Schmitt, Michael N. 2003. "Preemptive Strategies in International Law," *Michigan Journal of International Law* 24 (2): 513-548

Uhler, Oscar and Henri Coursier, eds. 1950. *Geneva Convention relative to the Protection of Civilian Persons in Time of War: Commentary*. Geneva: ICRC.

United Nations Security Council. 2006. "Security Council Debates Escalating Crisis between Israel, Lebanon; UN Officials Urge Restraint, Diplomacy, Protection Of Civilians," Press Release SC/8776.

US Supreme Court. 1942. "Ex parte Quirin et al" 317 US 1.

US Supreme Court. 2004. "Hamdi v Rumsfeld" 507 US 542.

US Supreme Court. 2006 "Hamdan v Rumsfeld" US 548 US ____.

----- 1857. "Letter from Daniel Webster, US Secretary of State, to Henry Fox, British Minister in Washington (24 April 1841)," in 29 British and Foreign State Papers, 1840-1841.

----- 2002. "The National Security Strategy of the United States of America," <http://www.whitehouse.gov/nsc/nss.pdf>.