

XXXIV

Panel IV

Discussion—Bringing Terrorists to Justice

On the Distinction Between Armed Conflict and Armed Attack

Yoram Dinstein

Care must be taken to distinguish between the two, markedly different phrases of “armed conflict” and “armed attack.” The expression “armed attack” is derived from Article 51 of the UN Charter and it constitutes the trigger for the exercise of the individual or collective right of self-defense. “Armed conflict,” on the other hand, is the term of art characteristic especially of the 1977 Protocol I Additional to the Geneva Convention, where it is used in the sense of war as well as hostilities short of war between states.¹

September 11th—Armed Attack, Armed Conflict, Ordinary Criminal Acts

Michael Newton

The United States was in an armed conflict with al Qaeda at the very least by September 11th. There were, in fact, a long series of armed attacks against US personnel and facilities beginning arguably with the downing of the Blackhawk helicopters in Mogadishu, including the bombings of the Khobar towers, the attacks on the US embassies in Nairobi and Kenya, and the bombing of the USS *Cole* in the Yemeni port. These armed attacks were reinforced and called for by

1. See generally Protocol Additional (I) to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, arts. 51.5(a) & 57.2(a) (iii) & (b), Dec. 12, 1977, 1125 U.N.T.S. 3, 16 I.L.M. 1391 (1977).

various al Qaeda members as well as by bin Laden himself. Each time one of these armed attacks occurred, the United States had the authority under Article 51 of the UN Charter to engage in self-defense against al Qaeda. The 1998 missile attacks in Afghanistan are one manifestation of the United States pursuing its lawful right to self-defense.

Christopher Greenwood

I disagree that an armed conflict existed before, or even after, the events of September 11th between the United States and al Qaeda. Al Qaeda does not have the capacity to make a declaration of war any more than an individual in a non-official governmental capacity has the ability to do so. Politicians and academics alike, within the United States and outside, did not take the position before September 11th that the United States was party to an armed conflict with al Qaeda. It is only subsequent to these horrible events that some have argued this to be the case. One reason some have taken this position is that it then makes the unlawful targeting of civilians a war crime which may be properly brought before a military commission. I believe this to be a perversion of the law and quite incorrect. In this respect, I agree with Yoram Dinstein. The events preceding and including those on September 11th were armed attacks within the meaning of Article 51 of the UN Charter. These acts were threats to international peace and security and the Security Council, nations, and alliances clearly identified them as such.²

Is there an armed conflict against Afghanistan? To be sure there is. The fighting between the United States and al Qaeda personnel alongside the Taliban is regulated and governed by the law of armed conflict but not because they are al Qaeda members but instead because they are fighting with a party to an armed conflict—Afghanistan. The fact that an al Qaeda member turns up in another country does not mean that they are automatic targets for they are not. By claiming to be in an armed conflict with al Qaeda, the United States is giving a degree of legitimacy to people who are really nothing more than horrible criminals. This is a terrible error. I believe this error will make it exceedingly difficult to proceed against al Qaeda members before military tribunals. The United States will have to try and fit what is essentially a terrorist crime into a framework of criminal offenses designed for crimes of war.

Michael Newton

It is doubtful that anyone at this conference would contest the statement that the attacks on the World Trade Center and the Pentagon on September 11th

2. See S. C. Res. 1368, U.N. SCOR, 56th Sess. U.N. Doc. S/1378/(2001).

were indeed armed attacks within the meaning of Article 51 of the UN Charter. This clearly means that the United States may properly invoke its right to self-defense under Article 51 as against al Qaeda members—since they were the threat that caused the events of September 11th. The right of self-defense allows the United States then to do what? Not to engage in intentional attacks on civilians but instead to attack those who have attacked you. This is done in the context of an armed conflict. Recall that the United States is not a signatory to Protocol I of the Geneva Conventions so as far as the United States is concerned, these al Qaeda members are not proper combatants within the meaning of Article 44 of this Protocol.³ They are not civilians since they are taking an active part in hostilities. Nor are they proper combatants. Instead, they are unprivileged or unlawful combatants with none of the protections of

3. See Protocol I, *supra*, art. 44, which provides in relevant part:

Article 44 — Combatants and prisoners of war

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
 - a. during each military engagement, and
 - b. during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.
 - c. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 (c).
4. A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

the Geneva Conventions. As unlawful combatants, however, they are committing war crimes which is exactly what al Qaeda members did on September 11th.

Christopher Greenwood

Al Qaeda members are not unlawful, lawful, or any other type of combatants at all. Clearly, no one would suggest that they are lawful combatants, even under Article 44 of GP I. You continue to give al Qaeda members a status they do not deserve. I agree that al Qaeda members who are fighting alongside Taliban members in Afghanistan are entitled to be called combatants because that is truly an armed conflict. However, the attack on the World Trade Center was not perpetrated by unlawful, unprivileged, or any other sort of combatant or belligerent. It was perpetrated by common criminals. Do not pretend that what these people did was a war crime. It was simple murder. Murder under the ordinary criminal code of the United States and New York, nothing more, nothing less.

By bringing this notion of an existing armed conflict dating back into the middle of the 1990s, I believe you are undermining the very laws of armed conflict. Taking this position, that an armed conflict exists, will make it much more difficult for the United States to bring them to justice.

Michael Newton

Inasmuch as your position suggests that these types of crimes are best prosecuted by domestic tribunals, I agree. That is not to say, however, that I believe these people to be the same as the ordinary criminal on the streets of New York City. Terrorism clearly overlaps the boundaries between criminal law and the law of armed conflict. As practitioners, however, we must be careful not to rush to apply domestic criminal law restrictions to what are international law of armed conflict issues.

Manuel Supervielle

This is an excellent point given the authorizations typically contained in rules of engagement when an opposing force is designated hostile. As we all know, when this occurs, US soldiers may target the enemy on sight, regardless of enemy actions—except of course if they meet the requirements of effectively attempting to surrender. With that being said, when we apply a domestic law paradigm to these situations, does it mean that the US sniper on the rooftop who suddenly sees an al Qaeda member must attempt to first arrest him for prosecution through domestic courts, or alternatively, when al Qaeda forces

are declared hostile, should he not simply be able to target an al Qaeda member on sight? These are the very real types of issues that must be resolved so soldiers have clear guidance and instruction in such difficult situations.

Harvey Rishikof

The tension that exists between these two positions is the problem associated with the current classification schemes. Professor Greenwood would have conference participants believe that al Qaeda members who committed the attacks on September 11th are garden variety, ordinary criminals. If this is the case, then the correct domestic response would be to mobilize the Federal Bureau of Investigation and bring them all to trial in federal court. This would mean that the appropriate response would not be one using the military but instead one using available police. On the other hand, these same al Qaeda members do not fit neatly within the established classification system of combatants or non-combatants. Importantly for the future here, these conflicts between the classification systems must be resolved. In the future, groups that are likely to cause such problems are likely to be one part criminal, one part terrorist, and one part political. How then do we resolve the classification scheme to deal with each category independently as well as different categories when combined?

Michael Newton

Fortunately, the law of armed conflict has demonstrated its ability to evolve over time and that is exactly what is happening now. It is no longer enough to treat terrorism in general within the paradigm of ordinary criminal conduct. The United States has proven since September 11th that it is unwilling to continue to treat terrorists this way. So the paradigm must expand or shift and that shift is to treat such behavior as war crimes precisely because the United States is unwilling to recognize the right of a group to attack a sovereign state. So the United States will treat them as unlawful combatants, participants if you do not like the word combatant, in what is an organized armed conflict, war if you will, controlled, directed, and funded against the United States.

Christopher Greenwood

An armed conflict has always been defined as a war or conflict between two states or possibly, in more modern times, between a state and an entity such as a national liberation movement which may have many of the attributes of the state. Suggesting that the current conflict between al Qaeda and the United States is an armed conflict within the meaning of that term elevates al Qaeda to a status it does not deserve nor is it entitled to. On what basis does a terrorist

movement such as al Qaeda acquire the right to declare war on a sovereign state such as the United States? By suggesting that it has that ability, you confer upon it a status that it does not otherwise possess. In doing so, you are legitimizing its activities. Finally, I am concerned that this is simply a matter of convenience of the moment to refer to al Qaeda in this fashion. It is certainly inconsistent with US actions towards al Qaeda in the past.

Adam Roberts

It is important to remember that the Military Order's jurisdictional mandate is for violations of the laws of war and for other applicable laws.⁴ As I understand it then, there has been no exclusion within that framework for trying people for murder exactly as Professor Greenwood suggested they should be.

On Military Commissions

Michael Newton

Military commissions are an ad hoc mechanism that have existed in history for many years. A perception exists that these commissions will somehow not live up to the requirements of international humanitarian law but if one takes the time to look at the Executive Order and the Secretary of Defense's Implementing Rules, it will be quickly noted that these commissions will in fact provide the required due process and substantial fairness, fairness not found in a number of domestic court systems spread throughout the world.⁵ Additionally, military commissions are not the only option for the prosecution of those detainees who ultimately are prosecuted, they are merely one option available. The United States may also release some detainees to other nations' courts and or to its own federal courts.

Christopher Greenwood

The idea of military tribunals does not actually bother me. I do find objectionable, however, the specific provision of the military order which provides that when a trial before a tribunal is ordered closed, the defense counsel may not disclose what transpired during the closed session to his own client. I do not

4. See Executive Order, Detention, Treatment, and Trial of Non-Citizens in the War Against Terrorism, 13 November 2001, art. 1.(e), available at <http://www.whitehouse.gov/news/releases/2001/11/20011113-27.html> (Oct. 10, 2002).

5. See generally *id.* See also Department of Defense, Military Commission Order No. 1, March 21, 2002, available at <http://www.defenselink.mil/news/Mar2002/d20020321ord.pdf> (Oct. 10, 2002).

believe that practicing lawyers could be, nor should they be, required to work under such conditions. Many lawyers I know consider such a provision unethical.

Michael Newton

Some commentators have taken the position that when armed conflict occurs, people must either be combatants or non-combatants. When captured, the combatants become prisoners of war while the non-combatants are civilians and should be released. The problem with this approach is that it leaves out a whole third category of individuals. These are people who do not qualify for lawful combatant status but yet have taken part in the hostilities. For example, members of al Qaeda are not lawful combatants if for no other reason than they do not meet the four-part test for becoming a lawful combatant as set out in the Hague Regulations of 1907 or the Geneva Conventions of 1949.⁶ This third category is one of an unprivileged combatant in an armed conflict. That is to say by virtue of taking a part in the hostilities, this combatant is properly a target but is not entitled to the protection of the Geneva Conventions as he is not a lawful combatant. The United States has taken the position that for so long as these combatants are unprivileged/unlawful, they may be punished.

On the Challenges Associated with Defining and Addressing Terrorism

Michael Newton

The underlying act of killing in a political context, killing to create fear as in terrorism, or killing in an armed conflict context from an *actus reus* view is essentially the same. That is to say, it is the taking of a life. The difficulty comes in defining when it is a lawful taking of life and when the taking of life is done outside the law. As Daniel Helle indicated, this is a significant challenge in defining the applicable substantive legal provisions that set out what is terrorism versus what is a political murder versus what is the act of a lawful combatant taking part in armed conflict. The conventions on terrorism correctly point out in a number of places that certain acts do not comprise terrorism when committed by a lawful combatant taking part in armed conflict. For example, Article 19(2) of the Convention for the Suppression of Terrorist Bombings specifically

6. See Hague Convention (IV) Respecting the Law and Customs of War on Land, Anx. 1, Ch. 1, Art. 1(1–4); Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, Art. 4(2(a–d)), 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31.

states that the activities of armed forces during an armed conflict are governed by international humanitarian law rather than the Convention.