

of the new Government. Similarly, the international armed conflict phase of the war in Iraq, which began in March 2003, is believed to have ended with the UN Security Council's determination in June 2004 that the continued multinational presence in Iraq is subject to the Government's consent.⁶² A re-qualification downward has, among others, the consequence of excluding from legal analysis controversial issues such as combatant and prisoner-of-war status that are only relevant in international armed conflicts. The treatment and rights of persons detained are governed by common Article 3, Additional Protocol II if applicable, customary international humanitarian law and, to the extent applicable, human rights law.

The 'Global War on Terrorism'

The 'war on terrorism' has given rise to queries about how situations of violence, perceived as new, may be classified and about the applicable rules of international law.⁶³ According to one approach, the 'war on terrorism' is an international armed conflict not covered by the Geneva Conventions, but by the principles of the Conventions.⁶⁴ It has also been suggested that the new practices being applied in the 'war on terrorism' constitute evidence of the development of customary international law.⁶⁵ While it remains unclear who exactly is the other party in that 'global war' (any terrorist group or individual?⁶⁶), more recently it has been suggested that the 'war' is being waged against 'Al-Qaeda, its supporters and affiliates'.⁶⁷

⁶² See Security Council resolution 1546, S/RES/1546 (2004), 8 June 2004.

⁶³ See J. Pejic, *Terrorist Acts and Groups: A Role for International Law?* in *The British Year Book of International Law* 2004, (Vol. 75), at pp. 71-100.

⁶⁴ See text of February 7, 2002 Order signed by US President Bush: 'However, the war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of states. Our nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva'. Available at: http://lawofwar.org/Bush_torture_memo.htm. Last visited December 22, 2006.

⁶⁵ See W. K. Lietzau, *Combating Terrorism: Law Enforcement or War?* in *Terrorism and International Law, Challenges and Responses*, Michael N. Schmitt and Gian Luca Beruto (eds.), International Institute of Humanitarian Law and George C. Marshall European Center for Security Studies, 2003, at p. 80: 'In making these and related decisions about the treatment accorded our terrorist enemies, we are reminded daily that the current international law templates do not provide guidance clearly applicable to present circumstances. Simply put, we are operating in areas not addressed by applicable treaties and thus are participating in the development of customary international law'. It is submitted that this is a debatable proposition given the fact that the formation of customary law requires the widespread practice of States and a sense that such practice is followed as a matter of legal obligation.

⁶⁶ See, for example, the very broad definition of 'enemy combatant' in the US Draft Joint Doctrine for Detainee Operations, Joint Publication 3-63, Final Coordination, 23 March 2005, at <http://hrw.org/campaigns/torture/jointdoctrine/jointdoctrine040705.pdf>. Last visited December 22, 2006.

⁶⁷ As stated by John Bellinger III, US State Department Legal Adviser at a session of the UN Committee against Torture attended by the author on May 8, 2006 at which the Committee reviewed the US's Second Periodic Report to the Committee. (See: www.ohchr.org/english/bodies/cat/cats36.htm. Last visited December 22, 2006.) More recently, the US Supreme Court seemed to suggest that there was global armed conflict with al Qaeda, but not of an international character, to which common Article 3 of the Geneva Conventions applies. See *Hamdan v. Rumsfeld*, No. 05-184, 548 ___, 2006, Section VI-D-ii.

According to a different legal reading espoused, *inter alia*, by the ICRC, the ‘war on terrorism’ is a non-legal designation that encompasses the range of steps that States may take - including diplomatic, financial and military - to prevent, stop and punish acts of terrorism. In legal terms, however, each situation of violence arising from the fight against terrorism must be assessed on a case-by-case basis to determine whether it constitutes an international armed conflict, a non-international armed conflict, or whether the situation involved falls outside armed conflict.⁶⁸ Thus, when the ‘war against terrorism’ amounts to an international armed conflict, as was the case initially in Afghanistan, persons captured must be accorded the status and treatment provided for by the Geneva Conventions. Some persons will therefore be entitled to be treated as prisoners of war unless a competent tribunal established under Article 5 of the Third Geneva Convention otherwise determines in case of doubt.

It is the status and treatment of ‘unlawful combatants’, persons who have taken a direct part in hostilities without being authorised to do so, that has generated the most debate since September 11, 2001.⁶⁹ It cannot be emphasised enough that the notion of unlawful belligerency exists only in international armed conflict. There are several consequences of unlawful belligerency under existing law:

First, it is undisputed that a person who takes a direct part in hostilities without being authorised to do so loses protection from direct attack during such participation and may be targeted.

Second, upon capture, such person may be detained until the end of active hostilities, subject to appropriate procedural safeguards. In the ICRC's view, his or her status and rights will depend on whether the criteria for ‘protected person’ status under the Fourth Geneva Convention are fulfilled or whether the person is covered by the Fundamental Guarantees provisions of Article 75 of Additional Protocol I, either as treaty or customary law. It should be noted that unlawful combatants may, under certain conditions, be deprived of some of the privileges of the Fourth Convention in accordance with Article 5 of that Convention.

Third, as opposed to lawful combatants, ‘unlawful belligerents’ may be criminally prosecuted and punished for mere participation in hostilities under the domestic law of the detaining State. They do not enjoy ‘combatant immunity’ from prosecution for such acts.

Lastly, ‘unprivileged belligerents’, like privileged belligerents, may be tried for any war crimes they may have committed.

⁶⁸ See International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Report prepared by the International Committee of the Red Cross, 28th International Conference of the Red Cross and Red Crescent, 03/IC/09, Geneva, 2003, at pp. 17-19.

⁶⁹ See K.Doermann, The Legal Situation of Unlawful/Unprivileged Combatants, International Review of the Red Cross, March 2003, Vol. 85, No. 849, at p. 46. See also, J. Pejic, ‘Unlawful/Enemy Combatants’: Interpretations and Consequences, in International Law and Armed Conflict: Exploring the Faultlines, M. N. Schmitt and J.Pejic (eds.), Nijhoff (Brill), 2007 (forthcoming).

Given the measures humanitarian law allows in response to unlawful belligerency, it is unclear what it is that is lacking for the effective prosecution of the 'war on terrorism' when it amounts to an international armed conflict. The claim that the current laws of war are too restrictive in terms of detaining States' ability to interrogate 'unlawful combatants' must be rejected. The prohibition of torture and other forms of cruel, inhuman or degrading treatment is a fundamental tenet of humanitarian law applicable to any person detained in relation to an armed conflict. Humanitarian law does not prohibit interrogation per se; it simply upholds humane treatment as a time-tested and non-negotiable standard in dealing with all categories of persons deprived of liberty.

It is believed, under the already mentioned case-by-case approach, that the 'war on terrorism' may in specific circumstances also amount to a non-international armed conflict when the fighting does not oppose two or more States. The current hostilities in Afghanistan - and Iraq - are cases in point. The applicable legal framework is common Article 3, other rules of customary humanitarian law, human rights law and domestic law.

With respect to acts of violence committed outside situations of armed conflict - e.g. the bombings in London, Madrid, Bali, New Delhi, etc. - the ICRC's view is that these terrorist acts must be dealt with not by application of humanitarian law, but pursuant to other bodies of law such as international criminal law and human rights law, as well as domestic law. Importantly, this position is supported by the practice of the affected countries who responded to those tragic events using the tools of law enforcement instead of humanitarian law. Persons detained in relation to the terrorist bombings were deemed criminal suspects, not 'unlawful combatants'.

The 'war on terrorism' has given rise not only to controversies about the legal qualification and the status of persons captured, but has also exposed discrete issues about which international law may be - genuinely - unclear. One such issue is the legal framework applicable to cross-border operations undertaken by a State against a terrorist group or individuals located in another State (sometimes referred to as 'extra-territorial law enforcement').⁷⁰ An example is the US Predator missile strike carried out in November 2002 that killed six alleged Al-Qaeda members traveling in a car in the Yemeni desert.⁷¹ While the attack was largely met with silence on the part of many governments, the late Swedish Foreign Minister Anna Lindh publicly - and controversially - called it a 'summary execution'.⁷²

Acts of violence carried out by the forces of one State on the territory of another without the latter's consent would usually be regarded as constituting an international armed conflict. Can the same legal assessment be made, however, when the intervening State's aim is not to threaten the host's independence or sovereignty but to neutralise a terrorist group operating from its territory? Leaving aside the *ius ad bellum* aspects of such a

⁷⁰ Dinstein, note 11, at p. 244.

⁷¹ See Brian Whitaker and Duncan Campbell, 'CIA Missile Kills Al-Qaida Suspects', the Guardian, November 5, 2002, at: www.guardian.co.uk/print/0,3858,4539624-111026,00.html. Last visited December 22, 2006.

⁷² Quoted in Howard Witt, 'U.S.: Killing of Al Qaeda Suspects Was Lawful', Chicago Tribune, November 24, 2002.

scenario (i.e. whether the intervention is justifiable under the right of self-defence), what is the legal regime governing the way in which force is used? For some commentators the Yemen incident was part of the ‘war on terrorism’ requiring the application of rules of international armed conflict. For others, because the Yemeni government gave its consent at least implicitly, it was governed by the international human rights regime.

Consideration is invited of another, hypothetical, example. If a State is unwilling or unable to deal with a terrorist group in its own territory and another State’s military intervenes to remove the organisation resulting in an intense and prolonged campaign, how should such a situation be legally characterised? In the example given, there will be no difficulty in characterising the conflict as international if the ‘host’ State engages in the hostilities against the intervening State. If it joins the intervening State in battling the armed group the violence will constitute an internationalised non-international armed conflict. But what if the host does nothing at all? Will the intervening State’s forces be guided by the rules regulating international or non-international armed conflict or will the rules governing the use of force in law enforcement apply? Alternatively, should each specific operation be legally characterised depending on the facts of the case?

Clearly, the protection of uninvolved civilians in the host State will differ greatly depending on what legal regime controls. Given the likelihood of increased cross-border operations of various kinds, it is submitted that this is an issue on which legal clarification would be both necessary and desirable.

Final Remarks

Determining the status of an armed conflict, and prior to that whether a situation of violence can be classified as an armed conflict at all, is a preliminary and yet crucial step in establishing the applicable humanitarian law framework. The challenge is to first establish the facts on the ground and then to apply the law to the facts. The absence, in law, of a properly elaborated definition of the possible types of conflicts is an additional hurdle. It is also likely, however, that no definition would be able to encompass the reality of war and could risk creating a legal straight-jacket that would not be more useful than the currently existing criteria. While the Customary Law Study does not provide a definition of the various types of armed conflicts, it should nevertheless significantly simplify the task of protecting persons affected by such conflicts regardless of the legal classification involved.