THE APPLICABILITY OF THE LAW OF ARMED CONFLICT TO ANTI-TELEORIST 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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issues they highlight have dominated the academic and policy discourse. 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’. It has raised certain problematic aspects to the question of the applicability of LOAC to the ‘war on terror’. 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 Land (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 1949 (which codify what is generally referred to as international humanitarian law).


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/instree/y1geacw.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/instree/y1geacws.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/instree/y3gctpw.htm>;
Additional Protocol I and II of 1977 of the Geneva Conventions\(^9\) 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

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\(^{13}\) ibid.

liberation movements.\textsuperscript{15} Solis says, ‘the African National Congress, the National