5 Conflict Status

5.0. Introduction

On a most basic level, essentials of the law of armed conflict/international humanitarian law (LOAC/IHL) are 1907 Hague Regulation IV, the four 1949 Geneva Conventions, and 1977 Additional Protocols I and II. In what circumstances do they apply, and how do they interact? In a given case, do they all apply, do they apply only in part, or do they apply at all?

Now we can resolve those questions, as well as the first of the two questions a law-of-war student should always be prepared to answer: What is the conflict status? (The second foundational question, addressed in the next chapter, is: What is the status of the individuals involved in the conflict?) In determining conflict status, one asks what law of war, if any, applies in the armed conflict under consideration?

It is not always an obvious determination. "The problem is that the Geneva Conventions do not provide an authoritative definition of 'armed conflict.' Substantial evidence suggests, in fact, that the drafters of the Conventions purposely avoided any rigid formulation that might limit the applicability of the treaties."[1] As in many matters of law, there is no "bright line test," no formula to determine whether there is an armed conflict in progress, let alone what LOAC/IHL may apply. With an understanding of the basics, and a modest tolerance for ambiguity, one can make a sound assessment.

5.1. Determining Conflict Status

The Judge Advocate General of the Canadian Armed Forces writes: "The application of the law of war is dependent upon the categorization of conflict. . . . Law and order is ultimately dependent upon the drawing of jurisdictional lines."[2] Why does the characterization of a conflict matter? Prior to the 1949 Geneva Conventions, when customary law and treaty rules applied without reference to conflict characterization, it mattered little. That is no longer true. Today, "in view of the fact that an international conflict is subject to the law of war, while this is not so with a non-international conflict, the issue of

[1] Derek Jinks, "The Applicability of the Geneva Conventions to the 'Global War on Terrorism,'" 46–1 *Virginia J. of Int'l L.* (2006), 1, 20–1.

[2] BGen. Kenneth Watkin, "Chemical Agents and Expanding Bullets: Limited Law Enforcement Exceptions or Unwarranted Handcuffs?" in Anthony M. Helm, ed., *International Law Studies, vol. 82, The Law of War in the 21st Century: Weaponry and the Use of Force* (Newport, RI: Naval War College, 2006), 193, 199.

classification becomes of major significance, particularly in so far as the law concerning 'atrocities' and other 'breaches' is concerned."[3]

What conflict characterizations – what statuses – are possible? "The classification of an armed conflict presents few difficulties in the case of a declared war between two states. Such a conflict would clearly qualify as an international armed conflict to which the Geneva Conventions would apply in their entirety. Such conflicts have also become rare."[4]

If two or more Geneva Convention High Contracting Parties are fighting, it may be a common Article 2 interstate conflict, in which all of the 1949 Geneva Conventions and Additional Protocol I apply. Depending on whether they are fighting each other or both are fighting an armed opposition group, it could be a common Article 3 intrastate conflict – a non-international conflict in which common Article 3 and, perhaps, Additional Protocol II apply. It may be a non-international armed conflict in which domestic law applies, and the Geneva Conventions and the Protocols do not figure at all. If a nonstate armed opposition group is fighting a High Contracting Party, the situation may be more difficult to unravel. As Yoram Dinstein says, "drawing the line of demarcation between inter-State and intra-State armed conflicts may be a complicated task . . ."[5] There are guidelines, however.

5.1.1. *Common Article 2 International Armed Conflicts*

In 1949 Geneva Convention common Article 2, one category of armed conflict is defined: " . . . the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them." (Because all states – countries – have ratified the 1949 Conventions, all states are "High Contracting Parties.")

In a common Article 2 conflict – an international armed conflict – two or more states are engaged in armed conflict against each other. All four of the 1949 Geneva Conventions apply, plus, for states that have ratified it, 1977 Additional Protocol I. World War II, Korea, Vietnam, the U.S. invasion of Afghanistan – in each case at least two states were fighting each other, so they were common Article 2 conflicts. Why does Additional Protocol I also apply? Because, as Protocol I, Article 1.3, notes, "This Protocol . . . *supplements* the Geneva Conventions," and "shall apply in the situations referred to in Article 2 common to those Conventions."

Also, recall that Protocol I, Article 1.4, specifies that the situations referred to in Geneva Convention common Article 2 "*include* armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes . . . " (CARs) Thus, any declared CARs conflict implicates the same LOAC: the Geneva Conventions *and* Protocol I.

A declaration of war is not required for a common Article 2 international armed conflict to exist. If the armed conflict is between two states, how the conflict is characterized by

[3] L. C. Green, *The Contemporary Law of Armed Conflict*, 2nd ed. (Manchester: Juris Manchester University Press, 2000), 65–6.

[4] Jennifer Elsea, *Treatment of "Battlefield Detainees" in the War on Terrorism* (Congressional Research Service, Rpt. for Congress, 13 Jan. 2005), 12.

[5] Yoram Dinstein, *The Conduct of Hostilities Under the Law of International Armed Conflict* (Cambridge: Cambridge University Press, 2004), 14.

the parties is irrelevant. The last declaration of war was on August 8, 1945, when, one day before Nagasaki was atom-bombed, Russia declared war on Japan. Given the UN Charter, we are unlikely to see another formal declaration of war. Call it a war, a police action, or a conflict, if it is an armed conflict between two or more states, it is a common Article 2 conflict in which all four Geneva Conventions and Additional Protocol I apply.

5.1.2. *Armed Conflicts Short of War*

Confusing the issue, there sometimes are armed conflicts involving two or more states that fall short of what might be called "war." There is a long history of such events. From 1798 to 1801, American naval operations against France were violent and protracted. America and France seized each other's vessels as prize, others were sunk, and U.S. citizens were captured and imprisoned. Yet, although an 1801 convention ended the dispute, "[t]he French and United States governments did not consider that a war existed between them and the American legislation [ratifying the convention] referred only to 'the existing differences' . . . "[6]

The British officially called their 1827 naval battle at Navarino with the Turkish fleet, in which sixty Turkish ships were sunk and 4,000 men perished, an "accident." The 1900–1901 Boxer Rebellion involved armed forces from a host of states fighting Chinese militias. U.S. forces involved in the Boxer Rebellion received combat pay, and the level of fighting is indicated by the fifty-nine Medals of Honor awarded U.S. combatants. Except France, no government involved chose to describe the conflict as a war, however.[7] And a U.S. federal court held that the Boxer Rebellion was not a war.[8] The early twentieth century saw a flurry of American armed forays in Mexico and Central America, none of which were denominated wars. The United States saw brief but heavy fighting in Vera Cruz, Mexico, in 1914. A short time later, in 1916, the United States launched an abortive expedition into Mexico led by Brigadier General John Pershing to capture Villa. ("Explanations of an agreement between the United States and Mexico concerning mutual border crossings for 'hot pursuit' swayed [resisting Mexican military officers] not at all . . . "[9]) Between 1917 and 1941, U.S. Marines landed and fought nonwars in Siberia, Cuba, Haiti, Santo Domingo, and Nicaragua (twice).[10] None of these events were considered or were referred to as "wars."

Common Article 2 conflicts are usually easily recognized, one country engaged in armed conflict against another, but sometimes it is not clear. If an Indian soldier on sentry duty on the India–Pakistan border, bored and without orders, were to fire at and kill a Pakistani sentry several hundred meters away, is that "an armed conflict"? What if several Pakistani sentries return fire and wound the Indian shooter? Is *that* an armed conflict between two states? What if a young Indian lieutenant, alarmed at the sudden volume of fire his sentry post is receiving, calls for artillery support and the Pakistani position receives preregistered 155 mm fire, killing several Pakistani soldiers? Is

[6] Ian Brownlie, *International Law and the Use of Force by States* (Oxford: Oxford University Press, 1963), 29.
[7] Id., at 31.
[8] *Hamilton v. McClaughry*, 136 F. 445, 450 (C.C.D. Kan. 1900).
[9] Frank E. Vandiver, *Black Jack: The Life and Times of John J. Pershing*, vol. II (College Station: Texas A & M University Press, 1977), 610.
[10] Edwin Howard Simmons, *The United States Marines: A History*, 4th ed. (Annapolis: Naval Institute Press, 2003), 107–17.

that an armed conflict? Two states are clearly involved, and obviously there is conflict in progress that involves arms.

In LOAC, such a situation would be viewed as a border "incident," falling short of an armed conflict. A key indicia is whether the incident is protracted. The longer an incident continues, the more difficult it is to describe it as merely an incident.

> Incidents involving the use of force without reaching the threshold of war occur quite often . . . Border patrols of neighboring countries may exchange fire; naval units may torpedo vessels flying another flag; interceptor planes may shoot down aircraft belonging to another State; and so forth. . . . In large measure, the classification of a military action as either war or a closed incident ('short of war') depends on the way in which the two antagonists appraise the situation. As long as both parties choose to consider what transpired as a mere incident, and provided that the incident is rapidly closed, it is hard to gainsay that view. Once, however, one of the parties elects to engage in war, the other side is incapable of preventing the development.[11]

An armed conflict is characterized by the specific intention of one state to engage in armed conflict against another specific state. In the border incident just described, if India *intended* to initiate an armed conflict, it would be a different situation. If somewhere in the escalating violence, Pakistan formed the view that an armed conflict was necessary to its self-defense and *intended* to engage in a state-on-state armed conflict, it would be a different situation.

Generally speaking, an armed *incident*, even when between two states, is not sufficient to constitute an armed conflict in the sense of common Article 2; however, when one of the parties decides to engage in an armed conflict, the other party cannot prevent that development.[12] The British *Manual* says, "Whether any particular intervention crosses the threshold so as to become an armed conflict will depend on all the surrounding circumstances."[13] The way in which the two states choose to characterize the action (incident or war) can make the difference.

5.1.3. *Common Article 3 Non-international Armed Conflicts*

Common Article 3, examined in Chapter 3, section 3.8.6., describes another category of conflict: "**. . . armed conflict not of an international character occurring in the territory of one of the High Contracting Parties. . . .**" A common Article 3 non-international conflict arises in cases of "internal" armed conflicts. In other words, if there is armed conflict within a state and the government's opponents are not combatants of another state's armed force, it is a common Article 3 non-international conflict. At some point, the conflict may be formally recognized as a belligerency. Recognition of belligerency indicates that the parties are entitled to exercise belligerent rights, thus accepting that the rebel group possesses sufficient international personality to support the possession of such rights and duties. Recognition of belligerency, which applies the laws and customs of war to the parties in an internal armed conflict, can come from the government fighting the rebels or, more often, from another state. "The government was therefore

[11] Yoram Dinstein, *War, Aggression and Self-Defence*, 4th ed. (Cambridge: Cambridge University Press, 2005), 11.

[12] Id.

[13] U.K. Ministry of Defence, *The Manual of the Law of Armed Conflict* (Oxford: Oxford University Press, 2004), para. 3.3.1., at 29.

putting the belligerents under an obligation to respect the customs of war against its own forces, and at the same time freeing itself from any responsibility for acts committed by the recognised belligerents."[14] Today, formal recognition of belligerency has fallen into disuse. **In a non-international armed conflict, common Article 3 and, perhaps, Additional Protocol II, apply. No other portion of the Geneva Conventions applies**.

Examples of common Article 3 non-international armed conflicts are those in Iraq and Afghanistan, in which the governments of those two states are opposing insurgents. They are not opposing combatants of the armed force of a second state. (Recall the more detailed discussion of common Article 3's application in Chapter 3, section 3.8.6.1.)

A constant issue in deciding if fighting within a state rises to common Article 3 armed conflict status is whether "[t]he absence of a precise definition of internal armed conflict, coupled with the absence of any mechanism for the monitoring and enforcement of its application in common Article 3, enabled states on whose territory such a conflict was taking place to argue that the hostilities encountered did not amount to an armed conflict."[15]

Riot, disorder, and banditry do not rise to common Article 3 conflict status. For example, in the 1970s, in California's San Francisco Bay area, a group of disaffected individuals formed the Symbionese Liberation Army (SLA), a radical leftist group. The SLA declared themselves revolutionaries and financed their violent operation through kidnapping, bank robbery, and murder. One of their number, Sara Jane Moore, attempted to assassinate President Gerald Ford.[16] Another was captured only in 2001.[17] Patricia Hearst, heiress to the Hearst newspaper fortune, was kidnapped and briefly converted to the SLA's cause, famously posing before the SLA flag while brandishing an automatic weapon. Revolution? Armed conflict? Within U.S. borders? Was this a common Article 3 armed conflict, then? No, it was not. Despite their rhetoric of "revolution," the SLA was no more than a criminal conspiracy to be dealt with by local police and domestic law.[18] (In May 1974, most of the SLA membership were killed in a police shootout in Oakland, California.)

The International Criminal Tribunal for the former Yugoslavia (ICTY) has articulated a basis for differentiating common Article 3 armed conflicts from other forms of internal violence:

> The test applied by the Appeals Chamber to the existence of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict. In an armed conflict of an internal . . . character, these closely related criteria are used solely for the purpose, as a minimum, of distinguishing an armed conflict from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law . . . [19]

LOAC has virtually no application in a common Article 3 conflict. "Legally . . . the Parties to the conflict are bound to observe Article 3 and may ignore all other Articles [of the

[14] Eve La Haye, *War Crimes in Internal Armed Conflicts* (Cambridge: Cambridge University Press, 2008), 35.
[15] Id., at 8.
[16] Randal C. Archibald, "One of Ford's Would-Be Assassins Is Paroled," *NY Times* (Jan. 1, 2008), A15.
[17] Associated Press, "Former '70s Radical is Back in Custody After a Parole Error," *NY Times* (March 23, 2008), A14.
[18] "The Fascist Insect Bites Back," *The Economist* (Jan. 26, 2002), 31.
[19] *Prosecutor v Tadić*, IT-94–1-T, Judgment (7 May 1997), para. 562.

Geneva Conventions]."[20] To an ever greater degree, IHL and other elements of LOAC are making their way into common Article 3 conflicts. Generally speaking, though, the domestic law of the state involved, along with common Article 3, and human rights law, apply in non-international armed conflicts.

5.1.4. *"Transformers": Common Article 3 Conflict, to Common Article 2, and Back*

A common Article 2 conflict can become a common Article 3 conflict. On March 19, 2003, the United States invaded Iraq, opening a common Article 2 armed conflict. On May 1, aboard the *USS Abraham Lincoln*, President Bush announced an end of major combat operations in the Iraq conflict. On or about that date, a U.S. occupation of Iraq began, during which all of the Geneva Conventions remained applicable.[21] The U.S. occupation lasted until Iraq regained its sovereignty on June 28, 2004, when Ambassador Paul Bremmer, head of the Coalition Provisional Authority, passed control of the country to the new interim Iraqi government. In terms of LOAC, at that point the continuing conflict in Iraq became one between insurgents operating in Iraq and the new government of Iraq – a common Article 3 non-international conflict. The United States remains present in Iraq ostensibly to aid and assist Iraq in its fight against its insurgents – a common Article 3 conflict in which Iraqi domestic law is paramount; aside from common Article 3, the Geneva Conventions and Protocol I no longer apply.

In other words, "consider an armed conflict to remain internal where a foreign state intervenes on behalf of a legitimate government to put down an insurgency, whereas foreign intervention on behalf of a rebel movement would 'internationalize' the armed conflict."[22]

This illustrates a wrinkle in LOAC. If Arcadia is fighting rebels within its own borders, it is a common Article 3 non-international armed conflict. If Arcadia seeks and receives assistance from another state, Blueland, then the subsequent presence of Blueland's armed forces in Arcadia to provide assistance such as training and logistical help for Arcadia does not alter the character of the conflict; It continues to be a common Article 3 conflict.[23] That remains true even if Blueland forces engage the rebels in combat. Arcadia continues to combat its rebels, aided by Blueland. The ICTY has held:

> It is indisputable that an armed conflict is international if it takes place between two or more States. In addition, in case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State

[20] Jean S. Pictet, ed., *Commentary, IV Geneva Convention* (Geneva: ICRC, 1958), 42.

[21] Common Article 2: "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party . . . " For those of the Allied coalition who had ratified Additional Protocol I, it, too, applied throughout the occupation.

[22] Elsea, *Treatment of "Battlefield Detainees,"* supra, note 4, at 13, citing John Embry Parkerson, Jr., "United States Compliance with Humanitarian Law Respecting Civilians During Operation Just Cause," 133 *Mil. L. Rev.* (1991), 31, 41–2 . Elsea's full quote indicates that she is not necessarily among those accepting such a status transformation.

[23] In disagreement, one ICTY Trial Chamber held that the significant and continuous intervention of Croatian armed forces in support of Bosnian Croats against its rebels transformed the Bosnian internal armed conflict into an international armed conflict. *Prosecutor v. Rajić*, IT-95–12, Review of Indictment (13 Sept. 1996), at para. 21.

> intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.[24]

Foreign financial assistance or logistical support for a rebel movement will not internationalize the conflict unless the foreign state also has overall control of the rebel group. "In practice, many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international. For example, an internal conflict may become internationalized, with the armed forces of outside states actively involved."[25] If the Arcadian rebels, rather than the Arcadian government, seek and receive assistance from Blueland, the LOAC situation changes. Now Arcadia is fighting Arcadian rebels *and* Blueland armed forces – two High Contracting Parties, Arcadia and Blueland (plus Arcadian rebels), are engaged in combat. This defines a common Article 2 international armed conflict.

A continuing question is the degree of intervention required to bring about a circumstance of armed conflict. The mere supply of arms to rebels does not appear to qualify. "But there comes a point – for instance, when the weapons are accompanied by instructors training the rebels – at which the foreign country is deemed to be waging warfare."[26]

Both the International Court of Justice (ICJ) and the ICTY have ruled on the level of a state's involvement in an armed conflict that brings that state into the conflict as a party. This is a significant issue in the so-called "war on terrorism." Books have been written on this narrow issue, but suffice it to say that the ICTY employs an "overall control" test,[27] whereas the ICJ uses a more strict "sending by or on behalf of" test.[28]

> The general principle that States can technically commit an armed attack through association with non-State actions . . . remains intact. What appears to have changed is the level of support that suffices. It would seem that in the era of transnational terrorism, very little State support is necessary to amount to an armed attack; at least in this one case [the post 9/11 U.S. attack of Afghanistan] merely harboring a terrorist group was enough. This is a far cry from *Nicaragua*'s "sending by or on behalf" or *Tadic*'s "overall control."[29]

Appropriately, normative interpretations are changing – or have changed – in response to changed circumstances.

[24] *Prosecutor v Tadić*, IT-94–1-A (15 July 1999), para. 84.

[25] U.K., *The Manual of the Law of Armed Conflict*, supra, note 13, para. 1.33.6., at 16. The ICJ examined such a circumstance in the 1986 *Nicaragua* case and arrived at a contrary conclusion. Nicaragua was fighting Nicaraguan rebels (*contras*) who were aided by the United States. The ICJ held that "The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* toward the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts." The court chose to consider as separate conflicts that of the *contras* versus Nicaragua, and that of their supporters, the United States versus Nicaragua. That approach is not customary. *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), (1986) *ICJ Rpt*. 14, at para. 114.

[26] Dinstein, *War, Aggression and Self-Defence*, supra, note 11, at 10.

[27] *Prosecutor v. Tadić*, Opinion and Judgment (7 May 1997), paras. 585–608.

[28] *Military and Paramilitary Activities in and Against Nicaragua*, supra, note 25, at paras. 109, 219.

[29] Michael N. Schmitt, "Responding to Transnational Terrorism Under the *Jus ad Bellum*: A Normative Framework," in Michael Schmitt and Jelena Pejic, eds., *International Law and Armed Conflict: Exploring the Faultlines* (Leiden: Martinus Nijhoff, 2007), 157–95, at 187.

5.1.5. *Dual Status Armed Conflicts*

A mixed category of armed conflict, what might be called a dual status conflict, is one in which both international and internal conflicts are occurring *at the same time within the same state*. In northern Afghanistan in 2001, the Taliban government was fighting the rebel Northern Alliance – a common Article 3 non-international armed conflict. In October 2001, while Afghanistan's Taliban government continued to fight its rebels in the north, the U.S.-led coalition invasion of Afghanistan commenced – one High Contracting Party invading a second High Contracting Party; that is, a common Article 2 international armed conflict in the south, occurring simultaneously with the continuing common Article 3 armed conflict in the north. "The fact that a belligerent State is beset by enemies from both inside and outside its territory does not mean that the international and the internal armed conflicts necessarily merge."[30]

Common Article 2, common Article 3, transforming, and dual status armed conflicts. It can be confusing. Witness the December 1997 report of a Belgian appellate review of a court-martial acquittal:

> The military Court upheld a verdict of acquittal in the case of two Belgian soldiers, members of the UNOSOM II operation in Somalia in 1993. The soldiers had been accused of causing bodily harm with intent and of threatening a Somali child. The Court refused to proceed under the 1993 Law on the repression of grave breaches of humanitarian law [the Belgian law implementing the Geneva Conventions] as the Geneva Conventions were not applicable in this particular case. According to the Court, there was no [common Article 2] international conflict at that time in Somalia, as the UN troops were "peace troops" which were neither party to the conflict nor an occupying power. The Court also stated that there was no [common Article 3] non-international conflict in the sense of common Article 3 as the fighting involved irregular, anarchic armed groups with no responsible command.[31]

The acquittal of the soldiers was based not on insufficient evidence, but on the prosecutor's procedural error in charging; the court-martial was forced to acquit the soldiers on the basis of the charges before it, which incorrectly alleged the offenses as occurring in the course of an armed conflict. As the appellate report notes, a U.N. peace-keeping mission is neither a common Article 2 nor a common Article 3 conflict; it is, uniquely, a peace-keeping mission. Because armed conflict was an element to be proved by the prosecution, which could not do so because of the facts of the conflict, the charge was fatally defective. (One suspects that after acquittal the soldiers were recharged, alleging the same offenses, absent the element that they occurred during armed conflict, reducing the maximum possible punishment.) Such cases lend weight to Sir Adam Roberts's suggestion that, when a conflict has elements of both common Article 2 and common Article 3, perhaps one should not attempt to categorize it as either.

[30] Dinstein, *The Conduct of Hostilities*, supra, note 5, at 14.

[31] Military Court, 17 Dec. 1997 (*Ministère public and Centre pour l'égalitè des chances et la lutte contre le racisme v.* C . . . et B . . .), *Journal des Tribunaux* (April 4, 1998), 286–9. Unofficial French translation, available at www.icrc.o.../c6907de3c449dea541256641005c6d00?Open Document&ExpandSection=.

5.2. Nonstate Actors and Armed Opposition Groups Are Bound by LOAC/IHL

What LOAC applies when nonstate actors like al Qaeda, not controlled by any state, are the opposing "armed force" in an armed conflict? "[T]he application of the laws of war in counter-terrorist operations has always been particularly problematical."[32]

Terrorist groups are most often criminal organizations, a variety of armed opposition group. (Until they defeat the government forces and *become* the government.) They are not states and therefore may not be parties to the Geneva Conventions, the Additional Protocols, or any multi*national* treaty. Terrorist attacks, if the terrorists have a sufficient organization and if the attacks are sufficiently violent and protracted, may be instances of non-international common Article 3 conflicts. If not sufficiently organized, and if the attacks are not lengthy in nature, they are simply criminal events.

Terrorist attacks, no matter how organized the group violent or protracted the fighting, cannot be considered an international armed conflict for the same reason that terrorist groups cannot be parties to the Conventions: Terrorist attacks are conducted by nonstates.* More than a half century ago, Professor Oppenheim expressed the traditional law of war view: "To be war, the contention must be *between States*."[33] When engaged in armed combat, terrorists and other armed opposition group members in a common Article 3 conflict enjoy no combatant's privilege (Chapter 2, section 2.3.1) and upon capture they may be prosecuted for their illegal combatant-like acts prior to capture. (Chapter 6, section 6.5) provides a discussion of the status of Taliban and al Qaeda fighters and their individual status in LOAC.) Rebels, terrorists, and insurgents, including nonstate actors such as al Qaeda and the Taliban, may be held accountable not only for their violations of the domestic law of the state in which they act but, if their attacks rise to a common Article 3 non-international armed conflict, for their violations of common Article 3 and Additional Protocol II.

"While the practice concerning criminalization of individual members of rebel groups under international law is now well-established (with regards to *inter alia* war crimes and crimes against humanity), the question of whether the groups *as such* can be said to have violated international criminal law remains, however, under explored."[34] Underexplored perhaps, but not undetermined. "The obligations created by international humanitarian law apply not just to states but to individuals and non-state actors such as a rebel faction or secessionist movement in a civil war."[35]

[32] Adam Roberts, "The Laws of War in the War on Terror," in Wybo P. Heere, ed., *Terrorism and the Military: International Legal Implications* (The Hague: Asser Press, 2003), 65.

* Terrorists and their attacks can be state-sponsored, of course – a subject beyond the scope of this chapter.

[33] Lassa Oppenheim, *International Law: A Treatise*, vol. II, *Disputes, War and Neutrality*, 7th ed. H. Lauterpacht, ed. (London: Longman, 1952), 203. Emphasis in original.

[34] Andrew Clapham, "Extending International Criminal Law beyond the Individuals to Corporations and Armed Opposition Groups," 6–5 *J. of Int'l Crim. Justice* (Nov. 2008), 899, 920. A footnote suggesting a lack of unanimity among commentators regarding the criminalization of individual members of nonstate armed opposition groups is omitted.

[35] Christopher Greenwood, "Scope of Application of Humanitarian Law," in Dieter Fleck, ed., *The Handbook of Humanitarian Law in Armed Conflict*, 2d ed. (Oxford: Oxford University Press, 2007), 45, 76. In the first edition of *The Handbook*, Greenwood writes at p. 48, "Both common Art. 3 and the [second 1977] Protocol apply with equal force to all parties to an armed conflict, government and rebels alike."

If armed groups are to be held to LOAC/IHL standards, determining *which* armed groups may be accountable is an issue. To be accountable "they must have a minimum degree of organization, but the exact degree is not settled in law."[36] In common Article 3, the words of application mandating that "*each party* to the conflict shall be bound to apply" (emphasis supplied) indicate that both sides of a non-international armed conflict shall be bound.

Viewed on an imaginary "armed group" continuum, at one end there are revolutionary groups that are loosely organized, if at all, committing only intermittent acts of armed violence. These groups are outlaws, to be dealt with by the state's domestic criminal laws. At the other end of the armed group continuum there are organizations like the Taliban, with something akin to a chain of command (or an actual chain of command), and with an ability to plan and carry out acts of armed violence. Groups at this end of the continuum, with an organization and a certain level of territorial control are armed opposition groups to which the international community assigns the responsibility of respecting LOAC/IHL, and imposes sanctions on the group membership for their violations. Of course, "an armed group whose aim constitutes per se a flagrant violation of international humanitarian law, such as a group that pursues a policy of ethnic cleansing, is unlikely to be concerned about sanctions."[37] Nevertheless, "international practice confirms . . . that armed opposition groups are bound by Common Article 3 and Protocol II, and that they are so [bound] as a group."[38] It was once believed that no customary international law applied to non-international armed conflicts, but today it is apparent that customary rules concerning the protection of civilians in hostilities also apply to armed opposition groups in non-international armed conflicts.[39]

There have been cases in which armed groups (none of them nonstate groups, however) have attempted to declare their adherence to the 1949 Geneva Conventions. Traditionally it is not possible for both the government of the state in which the armed group operates and the armed group itself to claim to represent the government of that state, and such efforts have been rebuffed.[40]

> As armed opposition groups cannot become parties to the Geneva Conventions or Additional Protocols, and are not required to declare themselves bound by the relevant norms, they derive their rights and obligations contained in Common Article 3 and Protocol II through the state on whose territory they operate. Once the territorial state has ratified the Geneva Conventions and Protocol II, armed opposition groups operating on its territory become automatically bound by the relevant norms laid down therein.[41]

[36] Marco Sassòli, "The Implementation of International Humanitarian Law: Current and Inherent Challenges," in Timothy L.H. McCormack, ed., *Yearbook of International Humanitarian Law* (The Hague: Asser Press, 2009), 45, 56.

[37] Anne-Marie LaRosa and Carolin Wuerzner, "Armed Groups, Sanctions and the Implementation of International Humanitarian Law," 870 *Int'l Rev. of the Red Cross* (June 2008), 327, 331.

[38] Liesbeth Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), 10.

[39] *Prosecutor v Tadić*, IT-94–1, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995), para. 127: "[I]t cannot be denied that customary rules have developed to govern internal strife. These rules . . . cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks . . . protection of all those who do not (or no longer) take active part in hostilities . . . and ban of certain methods of conducting hostilities."

[40] Zegveld, *The Accountability of Armed Opposition Groups*, supra, note 38, at 14–15, citing the Provisional Revolutionary Government of Algeria when it was considered a part of France; the breakaway Smith government of Rhodesia; and the Kosovo Liberation Army in the former Yugoslavia.

[41] Id., at 15. Footnote omitted.

The obligations of armed opposition groups, including nonstate actors and groups of nonstate actors such as al Qaeda and the Taliban, are essentially to respect the basic humanitarian norms of common Article 3, to not kill outside combat, and to not attack civilians or civilian objects. "Or, in other words, international bodies have focused on what armed opposition groups must *not* do. Examples of practice according *rights* to armed opposition groups have been exceptional."[42]

5.2.1. *Cross-border Terrorist Attacks by Nonstate Actors*

"Is it lawful for a state to invade its neighbor if that neighbor fails to prevent its territory from being used to launch attacks across the common border? Are illegal attacks across a border by insurgents to be attributed to the state from which they are launched? There may be a growing inclination to answer that question in the affirmative."[43] This is an emerging category of armed conflict relating to terrorism, to nonstate actors, and to a state's right of self-defense.

In 1916, U.S. forces crossing into Mexico after Villa called their cross-border foray a "punitive expedition."[44] Today such events are sometimes referred to as "extra-territorial law enforcement." Theodor Meron warns, "Deliberate terrorist attacks on civilians, accompanied by complete disregard of international law, diminish the incentives for other parties to comply with the principles of international humanitarian law and increase pressure for deconstruction and revision of the law, or simply disregard of the rules."[45] Extraterritorial law enforcement may be seen as such a revision of the law. "Use of force on necessity grounds may be permitted," one scholar argues, "as an extraordinary remedy, to the extent that this is indispensable to safeguard an essential interest of the acting state against a grave and imminent peril."[46] Two ICJ cases, *Nicaragua*[47] and *the Congo*,[48] address cross-border activities. "While both decisions appear to imply that the provision of sanctuary and support for a cross-border insurgency might potentially rise to the level of an armed attack, justifying a military response, neither offers a principled rule by which that threshold may be determined in subsequent disputes."[49]

In July 2006, an armed unit of the Lebanese terrorist organization Hezbollah, crossed into Israel from Lebanon and attacked an Israeli Defense Force patrol. Several soldiers were killed and two Israelis were captured by the Hezbollah force. There was, of course, a long and highly charged background to these events, each side blaming the other for provoking the incident. Israeli forces responded and entered Lebanon. Their efforts to rescue the Hezbollah-held prisoners resulted in further casualties. The fighting escalated into a thirty-three-day armed conflict involving thousands of Israeli

[42] Id., at 92. Emphasis in original.
[43] Thomas M. Franck, "On Proportionality of Countermeasures in International Law," 102–4 *AJIL* (Oct. 2008), 715, 764.
[44] Brig. Gen. John J. Pershing, "Report of the Punitive Expedition to June 30, 1916," (7 Oct. 1916), cited in Vandiver, *Black Jack*, supra, note 9, at 605, fn. 34.
[45] Theodor Meron, *The Humanization of International Law* (Leiden: Martinus Nijhoff, 2006), 86.
[46] Tarcisio Gazzini, "A Response to Amos Guiora: Pre-Emptive Self-Defence Against Non-State Actors?" 13–1 *J. of Conflict & Security L.* (Spring 2008), 25, 28.
[47] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua* (Merits), (1986) *ICJ Rpt.* 14. See *Nicaragua*, paras. 199, 211, Cases and Materials, this chapter.
[48] *Armed Activities on the Territory of the Congo* (*Dem. Rep. Congo v. Uganda*), ICJ, 19 Dec. 2005, available at http://www.icj-cij.org.
[49] Franck, "On Proportionality of Countermeasures in International Law," supra, note 43, at 722.

air strikes and artillery fire missions and, on Hezbollah's part, thousands of rockets fired into Israel.[50] Ultimately, 159 Israelis and 1,084 Lebanese, including approximately 650 Hezbollah fighters, were reportedly killed.[51] Israel's 2006 cross-border attack of Hezbollah in Lebanon may be considered an example of extraterritorial law enforcement. Central LOAC/IHL issues were Hezbollah's indiscriminate rocket attacks on Israeli civilian areas and, with regard to Israel's response, proportionality both in the sense of Israel's decision to resort to cross-border armed force – *jus ad bellum* – and proportionality in the sense of Israel's response viewed against the backdrop of noncombatants killed and civilian objects destroyed – *jus in bello*.[52]

In terms of *jus ad bellum*, Hezbollah's firing of rockets incapable of precise targeting into civilian areas was a LOAC/IHL violation. Was the armed Israeli reaction proportionate to the Hezbollah incitements? The culminating cross-border raid by Hezbollah was only one in a series of incursions, including hundreds of rockets fired into Israeli cities and villages over an extended period. Hezbollah, in contrast, might argue that Israeli's control of Lebanese border-crossing points, depriving civilians of basic necessities, constituted an unlawful punishment of the civilian population, justifying Hezbollah's actions and depriving Israel of a lawful right to initiate a cross-border action.

In terms of *jus ad bellum*, was Israel's decision to attack Lebanon proportional to Hezbollah's incitement? In terms of *jus in bello*, when the decision to attack was made, was Israel's military reaction, spearheaded by infantry, tanks, and air strikes, proportionate, or was it excessive in relation to the concrete and direct military advantage anticipated?

> We are referring here to necessity and proportionality . . . Necessity in the context of self-defense is closely related to the existence of an ongoing armed attack and/or the credible threat of (renewed) attack within the immediate future . . . With respect to proportionality within the context of self-defense, we are dealing with the overall scale of the measures taken in self-defense. [T]he response must be roughly equivalent in scale and effects to the attack and the nature of the threat posed by the attacker.[53]

One writer objects, "Localized border encounters between small infantry units, even those involving the loss of life, do not constitute an armed attack . . . It follows that minor violations . . . falling below the threshold of the notion of armed attack do not justify a corresponding minor use of force as self-defense."[54] Support for that viewpoint is found

[50] U.N. Report of the Commission of Inquiry on Lebanon Pursuant to Human Rights Council Resolution S-2/1 (27 Nov. 2006), available at: http://www.unhcr.org/refworld/publisher,UNHRC,,LBN,45c30b6e0,0.html.

[51] Col. Reuven Erlich, "Hezbollah's Use of Lebanese Civilians as Human Shields," Part 1, paras. 44–5, at 55, available at: http://www.ajcongress.org/site/PageServer?pagename=secret2, an Israeli-oriented site.

[52] E.g., Enzo Cannizzaro, "Contextualizing Proportionality: *jus ad bellum* and *jus in bello* in the Lebanese War," 864 *Int'l Rev. of the Red Cross* (Dec. 2006), 779, in which the author, at 792, chides Israel: "[A] state cannot freely determine the standard of security for its own population if the achievement of that standard entails excessive prejudicial consequences for civilians of the attacked state. Even if the destruction of rocket bases and the eradication of paramilitary units . . . were proved to be the only means by which Israel might prevent further attacks, these objectives cannot be attained if they entail, as a side effect, a disproportionate humanitarian cost."

[53] Terry D. Gill, "The Eleventh of September and the Right of Self-Defense," in Wybo P. Heere, ed., *Terrorism and the Military* (The Hague: Asser Press, 2003), 23, 32–3.

[54] Cannizzaro, "Contextualizing Proportionality," supra, note 52, at 782.

in ICJ rulings.[55] On the other hand, Mary Ellen O'Connell notes that "a series of [such] acts amounts to armed attack justifying armed force in self-defense either against a foreign state or against a group within the state."[56] Rosalyn Higgins, before she was appointed an ICJ judge, wrote: "Proportionality here cannot be in relation to any specific prior injury – it has to be in relation to the overall legitimate objective, of ending the aggression or reversing the invasion. And *that*, of course, may mean that a use of force is proportionate, even though it is a more severe use of force than any single prior incident might have seemed to have warranted."[57] Professor O'Connell adds, "if terrorists have conducted a series of significant attacks, planned future ones, and their identities and whereabouts are known to the defending State, the conditions of lawful self-defense may be met, as long as the defense is necessary and proportional."[58] Proportionality is not a matter of tit-for-tat response, mandating a reaction weighted similar to only the last assault.

What of the fact that, in the eyes of Israel and others, the aggressor was Hezbollah, a Muslim extremist group and nonstate actor? Does LOAC/IHL allow for an exercise of armed cross-border defensive action by a victim state, Israel in this case, against a grouping of nonstate actors entrenched in another state, Lebanon in this case? What of the Lebanese government that hosts or harbors (or endures) the terrorist nonstate actors? What of the host state's sovereignty and right of self-defense against a responding victim state whose armed forces cross its border? "[T]he question arises whether recourse to unilateral (individual or collective) measures can be made as a reaction to acts of terrorism, in exercise of the right of self-defense under Article 51 [of the U.N. Charter] . . ."[59] Michael Schmitt suggests,

> [T]he only sensible balancing of the territorial integrity and self-defense rights is one that allows the State exercising self-defense to conduct counter-terrorist operations in the State where the terrorists are located *if* that State is either unwilling or incapable of policing its own territory. A demand for compliance should precede the action and the State should be permitted an opportunity to comply with its duty to ensure its territory is not being used to the detriment of others. If it does not, any subsequent nonconsensual counter-terrorist operations into the country should be strictly limited to the purpose of eradicating the terrorist activity . . . and the intruding force must withdraw immediately upon accomplishment of its mission . . . "[60]

It was not contended that Lebanon controlled Hezbollah. To the contrary, Lebanon was seen as unable to exert either political or police control over the nonstate group that makes its base within Lebanon's borders. Judge Higgins writes: "It must be remembered that the Charter does indeed have its own procedures for dealing with international threats to peace . . . At the same time, in a nuclear age, common sense cannot require

[55] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, supra, note 25, at paras. 195, 230, holding that a mere cross-border flow of arms and supplies does not constitute a violation of the prohibition against use of force justifying a use of armed force in response.

[56] Mary Ellen O'Connell, *The Power & Purpose of International Law* (New York: Oxford University Press, 2008), 182.

[57] Rosalyn Higgins, *Problems & Process* (Oxford: Oxford University Press, 1994), 232.

[58] O'Connell, *The Power & Purpose of International Law*, supra, note 56, at 187.

[59] Yoram Dinstein, "*Ius ad Bellum* Aspects of the 'War on Terrorism,'" in Heere, *Terrorism and the Military*, supra, note 32, at 13, 16.

[60] Michael N. Schmitt, "Targeting and Humanitarian Law: Current Issues," 33 *Israel Yearbook on Human Rights* (2003), 59, 88–9.

one to interpret an ambiguous provision in a text in a way that requires a state passively to accept its fate before it can defend itself."[61] Ruth Wedgwood, more direct in her assessment, adds, "If a host country permits the use of its territory as a staging area for terrorist attacks when it could shut those operations down, and refuses requests to take action, the host government cannot expect to insulate its territory against measures of self-defense."[62] Nor is an ineffective government a defense:

> If the Government of Arcadia does not condone the operations of armed bands of terrorists emanating from within its territory against Utopia, but it is too weak (militarily, politically or otherwise) to prevent these operations, Arcadian responsibility *vis-à-vis* Utopia (if engaged at all) may be nominal. Nevertheless, it does not follow that Utopia must patiently endure painful blows, only because no sovereign State is to blame for the turn of events.[63]

Professor Dinstein addresses the issue of nonstate actor cross-border aggression using the United States and al Qaeda as examples: "[I]f Al Qaeda terrorists find a haven in a country which . . . declines to lend them any support, but all the same is too weak to expel or eliminate them, the USA would be entitled (invoking the right of self-defense) to use force against the terrorists within the country of the reluctant host State."[64] Dinstein refers to this as extra-territorial law enforcement.[65] It is an assertion of the right to self-defense in the age of terrorism: **If a nonstate terrorist group attacks a state from a safe haven in another host state that will not or cannot take action against the nonstate armed group, the attacked state may employ armed force against the terrorist group within the borders of the host state. Extraterritorial law enforcement is not an attack on the host state, but on its parasitical terrorist group**. It is an asserted right that will likely be embraced by states with the ability to employ such armed force, and likely be rejected by states without such ability.

A state's cross-border attack in self-defense against terrorist strongholds does not appear to be a common Article 2 international armed conflict because it is not between two high contracting parties.[66] Given that the fighting in the Israel–Lebanon example – the armed conflict – does not directly involve the State of Lebanon or its armed forces, or those of any second state, it is reasonable to view the conflict as a common Article 3 conflict. "[M]odern conflict often does not appear to fit nicely into the strict traditional legal concepts of what constitutes international and non-international 'armed conflict.'"[67]

If a cross-border response to terrorist attacks is considered lawful, before exercising self-defense in the form of a nonconsensual violation of a terrorist-host state's sovereignty, an attacked state must allow the host state a reasonable opportunity to take action against

[61] Higgins, *Problems & Process*, supra, note 57, at 242. On the Court, Judge Higgins has maintained her position. See her Separate Opinion, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (9 July 2004), para. 33.

[62] Ruth Wedgwood, "Responding to Terrorism: The Strikes Against bin Laden," 24 *Yale J. of Int'l L.* (1999), 559, 565.

[63] Dinstein, *War, Aggression and Self-Defence*, supra, note 11, at 245.

[64] Dinstein, "*Ius ad Bellum* Aspects of the 'War on Terrorism,'" supra, note 59, at 21.

[65] Dinstein, *War, Aggression and Self-Defence*, supra, note 11, at 247.

[66] Id., at 245: "[S]ince Utopia resorts to forcible measures on Arcadian soil in the absence of Arcadian consent, and thus two States are involved in the use of force without being on the same side. But there is no war between Utopia and Arcadia: the international armed conflict is 'short of war.'"

[67] Brig. Gen. Kenneth Watkin, "21st Century Conflict and International Humanitarian Law: Status Quo or Change?" in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 29, at 273.

the terrorist group. If an incursion by the attacked state follows, care must be taken that only objects connected to the terrorists be targeted. Of course, if the terrorist group is merely a surrogate, acting for the state within which it is harbored, or if the host state is capable of effectively acting against the group but refuses to do so, the host state itself may be open to attack.[68]

What law does extraterritorial law enforcement enforce? It enforces customary international law of self-defense, described in Article 51 of the UN Charter. The Security Council has repeatedly characterized international terrorism as a threat to international peace and security,[69] most notably after the attacks of September 11, 2001 on the United States.[70] "In Resolution 1368, the Council affirmed 'the inherent right of individual or collective self-defense in accordance with the Charter,' an important recognition of the applicability of the right of self-defense in response to terrorist attacks."[71] Professor Schmitt writes, "[A]lthough traditionally viewed as a matter for law enforcement, States and inter-governmental organizations now style terrorism as justifying, within certain conditions, the use of military force pursuant to the jus ad bellum. It is not so much that the law has changed as it is that existing law is being applied in a nascent context."[72] He adds, "with 9/11, international law became unequivocal vis-à-vis the propriety of using armed force to counter transnational terrorism. The military has been added as yet another arrow in the quiver of international counter-terrorism strategy."[73]

The possibility of abuse of extraterritorial law enforcement is evident: How strong must the evidence be to allow a state to act in self-defense? Whatever the answer, the right to self-defense cannot be ignored. If "a State suffers a series of successive and different acts of armed attack from another State, the requirements of proportionality will certainly not mean that the victim State is not free to undertake a single armed action on a much larger scale in order to put an end to this escalating succession of attacks."[74]

There are limitations on a state's right to self-defense against terrorist attacks, as Israel, widely criticized for violating *jus in bello* proportionality, has repeatedly found. Those limitations are immediacy, necessity, and most significant, proportionality. Israel was

[68] James Crawford, *The International Law Commission's Articles on State Responsibility* (Cambridge: Cambridge University Press, 2002), 110. Discussing Article 8, Conduct directed or controlled by a state: "The attribution to the State of conduct in fact authorized by it is widely accepted in international jurisprudence . . . More complex issues arise in determining whether conduct was carried out 'under the direction or control' of a State."

[69] E.g., in regard to Bali (SC Res. 1438 (14 Oct. 2002)); in regard to Moscow (SC Res. 1440 (24 Oct. 2002)); in re Kenya (SC Res. 1450 (13 Dec. 2002)); in re Bogatá (SC Res. 1465 (13 Feb. 2003)); in re Istanbul (SC Res. 1516 (20 Nov. 2003)); in re Madrid (SC Res. 1530 (11 March 2004)); in re London (SC Res. 1611 (7 July 2005)); and in re Iraq (SC Res. 1618 (4 Aug. 2005)).

[70] SC Res. 1368 (12 Sept. 2001), reaffirmed by SC Res. 1373 (28 Sept. 2001). In subsequent resolutions, neither the Security Council nor the General Assembly has considered U.S. operations in Afghanistan a violation of the charter.

[71] Jane Stromseth, David Wippman, and Rosa Brooks, *Can Might Make Rights?* (New York: Cambridge University Press, 2006), 40–1, citing S.C. Res. 1368 (2001), operative para. 1.

[72] Schmitt, "Responding to Transnational Terrorism Under the *Just ad Bellum*," in Schmitt and Pejic, *International Law and Armed Conflict*, supra, note 29, at 159.

[73] Id., at 167. Another professor agrees, "Hence, all these [U.N.] resolutions provided legitimacy for the resort to force against terrorist bases on the territory of states that are unable or unwilling to prevent terrorist actions." Muge Kinacioglu, "A Response to Amos Guiora: Reassessing the Parameters of Use of Force in the Age of Terrorism," 13–1 *J. of Conflict & Security L.* (Spring 2008), 33, 41.

[74] Robert Ago, International Law Commission rapporteur in: Addendum – Eighth Report on State Responsibility, para. 121, UN Doc. A/CN.4/318/Adds.5–7, reprinted in 2 *Y.B. Int'l Comm.*, pt. 1, at 13, 69–70 (1980), UN Doc. A/CN.4/SER.A/1980/Add. 1 (Part 1).

widely criticized for its "excessive, indiscriminate and disproportionate"[75] response to the July 2006 attack by Hezbollah. "But proportionate to what? To the casualties inflicted by Hezbollah's July 12 raid? Or to the whole panorama of hostilities that Israel has endured . . . from Lebanese territory?"[76] Professor Schmitt writes:

> Proportionality does not require any equivalency between the attacker's actions and defender's response. Such a requirement would eviscerate the right of self-defence, particularly in the terrorist context . . . Instead, proportionality limits defensive force to that required to repel the attack. This may be less or more than used in the armed attack that actuated the right to self-defence; in essence, the determination is an operational one . . . To the extent that law enforcement is likely to prevent follow-on attacks, the acceptability of large-scale military operations drops accordingly.[77]

"In short, there is no barrier in international law of either a customary or conventional nature to the applicability of the right of self-defense to acts of terrorism which are comparable in their scale and effects to an armed attack carried out by more conventional means. This is particularly the case when there is a close relationship between a host or supporting State and a terrorist organization."[78]

Instances of state action alleged to have been self-defense in response to cross-border terrorist attacks are many. They include the 1837 British incursion into U.S. territory to end American waterborne shipments of men and materiel to Britain's enemies – the *Caroline* incident; America's already-mentioned 1916 punitive expedition into Mexico against "Pancho" Villa; Israel's invasion of Lebanon in 1982 in response to Palestinian Liberation Organization (PLO) attacks; the 1985 Israeli bombardment of PLO headquarters in Tunisia; the U.S. bombardment of an alleged chemical weapons factory in response to al Qaeda attacks on American embassies in Kenya and Tanzania in 1999; the 1986 U.S. bombing of Libyan targets in response to a terrorist attack on a Berlin discothèque; and Israel's invasions of Lebanon in 2006 and Gaza in 2009. Virtually all of the modern day actions have been decried by the international community as violations of proportionality.

Extraterritorial law enforcement is far from attaining customary law status, and the concept is hardly objection-free. There have been few objections to its recent invocation, however. "[P]ost-September 11, Security Council resolutions have in effect extended the definition of armed attack to include acts undertaken by non-state actors operating from the territory of a state that is unable or unwilling to prevent terrorist acts. The extension of the right to self-defence as such has largely remained controversy free."[79]

5.3. Criminal Justice Model or Military Model?

The traditional approach to combating terrorism, internationally and within the United States, is to employ the criminal justice model: Investigate, arrest, and try terrorists for their

[75] Implementation of United Nations General Assembly Resolution 60/251, "Human Rights Council" Report of Commission of Inquiry on Lebanon (15 March 2006).
[76] Franck, "On Proportionality of Countermeasures in International Law," supra, note 43, at 733.
[77] Id., at 172.
[78] Gill, "The Eleventh of September and the Right of Self-Defense," in Heere, *Terrorism and the Military*, supra, note 32, at 28.
[79] Muge Kinacioglu, "A Response to Amos Guiora," supra note 73, at 39.

criminal acts that violate domestic law.[80] The British and the Spanish have employed the criminal justice model in the face of repeated terrorist bombings of civilians and civilian objects, even within the capitol cities of London and Madrid.[81] Until the 9/11 attacks, the United States usually looked to the criminal justice model, as well.

After 9/11 the United States took a different approach: Maintaining the "war on terrorism" theme, it turned to the military model. The Taliban and al Qaeda represent "a different dimension of crime, a higher, more dangerous version of crime, a kind of super-crime incorporating some of the characteristics of warfare. . . . They are criminals who are also enemies."[82] Although the United States has, for the most part, adopted the military model in fighting transnational terrorism, government officials continue to use law enforcement-related language like "punishment," "justice," "evidence," and "perpetrators." Without examining the lawfulness of going to war – *jus ad bellum* – there are arguments that terrorist acts, including those perpetrated by al Qaeda, should be met with a criminal justice response, rather than with military force. However, a criminal justice model in many situations would be unworkable against most armed opposition groups – in tribal areas of Pakistan, for example.

The military model does not necessarily lead to a common Article 2 or 3 armed conflict. Oppenheim writes, "A contention may, of course, arise between armed forces of a State and a body of armed individuals, but this is not war."[83] Another writer adds, "While acts of violence against military objectives in internal armed conflicts remain subject to domestic criminal law, the tendency to designate them a 'terrorist' completely undermines whatever incentive armed groups have to respect international law."[84]

In the "war against terrorism," although the U.S. admixture of military and criminal justice models, particularly as to detention practices, has resulted in confusion[85] and litigation, there clearly are bases for concluding that the 9/11 attacks were an armed attack meriting a military response.[86] Indeed, "all lingering doubts on this issue have been

[80] Steven R. Ratner, "Predator and Prey: Seizing and Killing Suspected Terrorists Abroad," 15–3 *J. of Pol. Philosophy* (2007), 251, in which the author, at 254, points out U.S. use of the criminal justice model in terrorist incidents including the 1988 bombing of Pan Am flight 103, and the 1993 World Trade Center bombing; and, at 255, examples of the military model, including the 1986 bombing of Libya, and the cruise missile attacks against al Qaeda targets in Sudan and Afghanistan, after 1998 U.S. embassy bombings.

[81] Clive Walker, "Clamping Down on Terrorism in the United Kingdom," 4–5 *J. of Int'l Crim. Justice* (Nov. 2006), 1137, 1145.

[82] George P. Fletcher, "The Indefinable Concept of Terrorism," 4–5 *J. of Int'l Crim. Justice* (Nov. 2006), 894, 899. Douglas Feith, Under Secretary of Defense for Policy (2001–2005) agrees. "[T]he magnitude of 9/11, and the danger of more terrorist attacks, had driven home the inadequacy of treating terrorism as a law enforcement matter . . . No police force is organized and equipped to stop a campaign of sophisticated, internationally supported terrorist attacks." Douglas J. Feith, *War and Decision* (New York: Harper, 2008), 9.

[83] Oppenheim, *International Law*, supra, note 33, at 203.

[84] Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law?" 75 *BYIL* (2004), 71, 75. Also, Marco Sassòli, "The Status of Persons Held in Guantanamo under International Humanitarian Law," 2–1 *J. of Int'l Crim. Justice* (March 2004), 96.

[85] Major Richard V. Meyer, "When a Rose is Not a Rose: Military Commissions v. Courts-Martial," 5–1 *J. of Int'l Crim. Justice* (March 2007), 48.

[86] Sean D. Murphy, "Terrorism and the Concept of 'Armed Attack' in Article 51 of the U.N. Charter," 43 *Harvard Int'l L. J.* (2002), 41, 47–50. Professor "Murphy gives six reasons for concluding that the attacks of September 11 were an 'armed attack': the scale of the incidents was akin to that of a military attack; the United States immediately perceived the incidents as akin to military attack; the U.S. interpretation was largely accepted by other nations; the incidents could properly be viewed as both a criminal act and an armed attack; there was prior state practice supporting the view that terrorist bombings could constitute an

dispelled as a result of the response of the international community to the shocking events of 9 September 2001. . . . that these acts amounted to an armed attack. . . . "[87] To employ armed force against terrorists is not the same as employing it against individual terrorist suspects captured in Pakistan, Bosnia, or other locales removed from the combat zones of Iraq and Afghanistan. Nevertheless, the Geneva-based International Commission of Jurists has charged:

> The United States . . . has adopted a war paradigm in the expectation that this provides a legal justification for setting aside criminal law and human rights law safeguards, to be replaced by the extraordinary powers that are supposedly conferred under international humanitarian law . . . [C]onflating acts of terrorism with acts of war, is legally flawed and sets a dangerous precedent . . . Where terrorist acts trigger or occur during an armed conflict, such acts may well constitute war crimes, and they are governed by international humanitarian law . . . The US's war paradigm has created fundamental problems. Among the most serious is that the US has applied war rules to persons not involved in situations of armed conflict, and in genuine situations of warfare, it has distorted, selectively applied and ignored otherwise binding rules. . . . [88]

The sometimes questionable nature of the American response to transnational terrorism, such as the dubious provisions of the Military Commissions Act of 2006 for instance,[89] does not lessen the obligation to provide humane treatment and fair trials for detainees. The United States continues to be bound by the Geneva Conventions even if non-state opponents recognize no battlefield law. Reciprocity is not a requirement for U.S. adherence to LOAC treaties.[90] Common Article 1 says, "The High Contracting Parties undertake to respect . . . the present Convention in all circumstances." Upon capture, terrorists are not prisoners of war, but neither are they outside the bounds of LOAC/IHL. "In each case, such persons shall nevertheless be treated with humanity . . . "[91] and in compliance with Additional Protocol I, Article 75's fundamental guarantees to persons held by a party to a conflict.

If the military model is the U.S. choice for combating terrorism, military directives require that, as a matter of policy, if not law, American military forces "comply with the law of war during the conduct of all military operations and related activities in armed conflict, however such conflicts are characterized, and . . . will apply law of war principles during all operations that are characterized as Military Operations Other Than War."[92] Moreover, "All detainees shall be treated humanely and. . . . All [armed service

armed attack; and 'the fact that the incidents were not undertaken directly by a foreign government cannot be viewed as disqualifying them from constituting an armed attack.'" 98–1 *AJIL* (Jan. 2004), 3, fn.11.

87 Dinstein, *War, Aggression and Self-Defence*, supra, note 11, at 206–7.

88 International Commission of Jurists, *Report of the Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights*, Executive Summary (Geneva, 2009), available at: http://www.icj.org/IMG/EJPExecutiveSummaryLatest.pdf.

89 See, Michael C. Dorf, "The Orwellian Military Commissions Act of 2006," 5–1 *J. of Int'l Crim. Justice* (March 2007), 10; and, James G. Stewart, "The Military Commissions Act's Inconsistency with the Geneva Conventions: An Overview," Id., at 26.

90 See: *Prosecutor v. Kupreškič* IT-95–16-T (14 Jan. 2000), paras. 511, 517, and 518. "Instead, the bulk of this body of [international humanitarian] law lays down absolute obligations, namely obligations that are unconditional or in other words are not based on reciprocity."

91 1949 Geneva Convention IV, Article 5, para. 3.

92 Chairman of the Joint Chiefs of Staff Instruction 5810, "Implementation of the DOD Law of War Program," 12 Aug. 1996, para. 4. Policy.

members] shall observe the requirements of the law of war, and shall apply, without regard to a detainee's legal status, at a minimum the standards articulated in Common Article 3. . . . "[93]

Whatever response to terrorism a nation takes, "states neither need, nor should be allowed, to 'pick and choose' different legal frameworks concerning the conduct of hostilities or law enforcement, depending on which gives them more room to manoeuver . . . "[94]

5.4. U.S. Military Practice

U.S. practice, mandated by Department of Defense (DoD) directive, is to apply LOAC in all conflicts. Military commanders are required to "[e]nsure that the members of their Components comply with the law of war during all conflicts, *however such conflicts are characterized*, and with the principles and spirit of the law of war during all operations."[95]

The war on terrorism does not meet the criteria for common Article 2 armed conflicts. "Particularly doubtful is the misconception by the US Government of its large-scale counter-terrorism campaign as an actual war, the so-called 'war on terrorism' . . . [T]his misleading rhetoric conflates diplomatic efforts, economic measures, law enforcement operations, international and non-international armed conflicts in a manner that does not withstand juridical scrutiny."[96] Nevertheless, the fact of armed conflict is clear.[97] DoD Directive 5100.77 removes any doubt that U.S. forces are required to comply with the principles and spirit of the law of war in fighting the Taliban, al Qaeda, and other terrorists and insurgents. The same directive requires that commanders implement programs to prevent LOAC violations.[98]

When it is said that LOAC will apply "in all conflicts," that does not mean that every article of Hague Regulation IV, of each Geneva Convention, and of each Additional Protocol will automatically apply. That would negate, for example, distinctions between international and non-international conflicts, and differences between lawful combatants and unprivileged belligerents. Rather, it means that the basic protections and the humanitarian spirit of LOAC/IHL apply in every conflict, no matter how it is characterized.

5.5. Summary

In studying any LOAC issue, the first question is: what law of war provisions apply to this conflict? For example, what LOAC applies in an armed conflict between two or more High Contracting Parties? This circumstance describes a common Article 2 conflict ("between two or more High Contracting Parties"), in which the 1949 Geneva Conventions apply, *en toto*, along with 1977 Additional Protocol I. A "war," or a "declared war" is not required; only armed conflict, even if one of the parties does not recognize it as such.

[93] DoD Directive 2310.01E, "The Department of Defense Detainee Program," 5 Sept. 2006, paras. 4.1, 4.2.
[94] Pejic, "Terrorist Acts and Groups: A Role for International Law?" supra, note 84, at 91.
[95] DoD Directive 5100.77, "DoD Law of War Program," Dec. 9, 1998, para. 5.3.1. Emphasis supplied.
[96] Nils Melzer, *Targeted Killing in International Law* (Oxford: Oxford University Press, 2008), 396.
[97] Geoffrey S. Corn, "'Snipers in the Minaret – What is the Rule?' The Law of War and the Protection of Cultural Property: A Complex Equation," *The Army Lawyer* (July 2005), 28–40, 31, fn. 27.
[98] Directive 5100.77, supra, note 95.

What LOAC applies in an internal armed conflict – an insurrection, rebellion, or civil war – a common Article 3 conflict? Common Article 3, and no other part of the Geneva Conventions, applies. Additional Protocol II *may* also apply, if the rebels control sufficient territory from which to launch concerted military operations.

When is an "internal armed conflict" indicated? When there is protracted armed violence between governmental authorities and an organized group, or between such organized groups, within a single state.[99] In deciding if an internal armed conflict exists, consider the degree of rebel organization,[100] the territory they control, the duration and intensity of the fighting, and the seriousness and recurrence of the rebel attacks and whether they have spread.[101] The ICTY case, *Prosecutor v. Limaj* (Cases and Materials, this chapter) provides guidance in distinguishing a common Article 3 conflict.[102]

In CARs conflicts, what LOAC applies? All four Geneva Conventions apply, *en toto*, along with 1977 Additional Protocol I, just as in a common Article 2 conflict. (Lack of conformance with Protocol I Article 96.3, the registration requirement, has not been tested or adjudicated, so the result of a failure to register is unknown.) When a CARs conflict is initiated, it is treated as an international armed conflict, even if occurring within the borders of a single state.

When does 1977 Additional Protocol I apply? Any time the 1949 Conventions apply – whenever there is armed conflict between two or more High Contracting Parties – a common Article 2 conflict. Protocol I never applies alone; it always goes hand in hand with the four 1949 Conventions.

When does Protocol II, alone, apply? In any non-international armed conflict – a conflict occurring within the borders of a High Contracting Party; in common Article 3 conflicts in which the rebels control sufficient territory from which to launch concerted military operations. Protocol II does not apply in cases of criminality or mere banditry, and it does not apply if the rebels do not hold sufficient territory.

In cases of mere criminality and banditry, what LOAC applies? No LOAC applies, not even common Article 3. Domestic law applies, which includes human rights law.

What LOAC applies if State A is combating an internal insurgency and asks for assistance from State B, and State B sends trainers from its army to assist State A in its armed conflict? Because the conflict remains between State A and its insurgents, and not between State B and the insurgents, it continues to be a common Article 3 internal armed conflict.

What LOAC applies if State A is combating an internal insurgency and the insurgents ask for assistance from State B, and State B sends the insurgents trainers from its army to assist the insurgents in their armed conflict against State A? Now the conflict is between the insurgents *and* armed forces from State B, both engaged in armed conflict against State A. It has become a common Article 2 international armed conflict.[103]

[99] *Prosecutor v Tadić*, Decision on Interlocutory Appeal, supra, note 39, at para. 70.

[100] *Prosecutor v. Mrkšić, et al.*, IT-95–13/1-T (27 Sept. 2007), para. 407: "Some degree of organization" by the parties will suffice to establish the existance of an armed conflict, citing *Tadić*, supra, note 27, at para. 562: "The test applied . . . to the existance of an armed conflict for the purposes of the rules contained in Common Article 3 focuses on two aspects of a conflict; the intensity of the conflict and the organization of the parties to the conflict."

[101] *Tadić*, Opinion and Judgment, supra, note 27, at paras. 566–8; *Prosecutor v. Kordić and Čerkez*, IT-95–14, (26 Feb. 2001), para. 29–30; *Prosecutor v. Delalić* (aka *Mucić*/"Čelebici"), IT-96–21-T (16 Nov. 1998), paras. 190–2.

[102] *Prosecutor v. Limaj*, IT-03–66-T (30 Nov. 2005), paras. 167–70. See Cases and Materials, this chapter.

[103] *Prosecutor v Tadić*, IT-94–1-A (15 July 1999), para. 84.

Additionally, case law makes clear that common Article 3, despite its wording apparently limiting it to non-international conflicts, applies in all armed conflicts – international, non-international, peace-keeping or peace-enforcing operations, *et cetera*.[104] The United States, although not bound by it, has respected case law in this regard.

Some argue that "[t]he 'distinction' between international wars and internal conflicts is no longer factually tenable or compatible with the thrust of humanitarian law, as the contemporary law of armed conflict has come to be known . . . Paying lip service to the alleged distinction simply frustrates the humanitarian purpose of the law of war . . . "[105] Yet the distinction continues to be recognized.

Whether viewed as common Article 2 or 3 conflict, extraterritorial law enforcement, although not universally embraced, is becoming an accepted concept. When a state is attacked by a terrorist group, whether or not the terrorists make physical entry into the victim state, and the attack is sufficient to raise a *jus ad bellum* right to self-defense, and the terrorist group is based in another state that will not or cannot act to control the terrorist group, the victim state has the right to cross the other state's borders to enforce the international law of self-defense and attack the terrorist group.

Finally, if all this is less than crystal clear, do not be discouraged. It is sometimes challenging to classify armed conflicts. Difficult examples include the long-running British–Irish Republican Army (IRA) conflict in Northern Ireland, and the December 1989 U.S. invasion of Panama (Operation Just Cause). In The Hague, "the ICTY Prosecutor maintained Article 2 charges and successfully established the international nature of the armed conflict in only seven cases out of eighteen. In the other eleven cases, the Prosecutor only established the existence of an armed conflict."[106] American jurists can find it difficult to determine the status of an armed conflict. For example, the U.S. conflict in Afghanistan, the status of which is blithely decided in these pages has trod a twisted trail in American courts:

> These three [U.S. court] decisions offer three separate opinions on the way in which the conflict in Afghanistan with al Qaeda should be classified: . . . [The trial court decided it was] an international armed conflict within the *Geneva Conventions*;[107] the Court of Appeals also characterized it as an international conflict (but one that was outside the scope of the *Geneva Conventions*);[108] and the Supreme Court decided (at the very least) that the protections afforded in non-international armed conflicts should be applied.[109] The *Hamdan* cases demonstrate the painstaking and sometimes frustrating discussions that take place in applying (or misapplying) the law of armed conflict to a situation that may not easily be characterized as either an internal or international armed conflict. . . . The different rulings encapsulate . . . the difficulties in utilizing these definitions in a system that lacks a formal mechanism for classifying conflicts.[110]

We are not alone in our occasional confusion.

[104] *Prosecutor v. Delalić, et al.*, (IT-96–21-A) Appeal Judgment (20 Feb. 2001), para. 143, footnote omitted.
[105] W. Michael Reisman and James Silk, "Which Law Applies To the Afghan Conflict?" 82–3 AJIL (July 1988), 459, 465.
[106] La Haye, *War Crimes in Internal Armed Conflicts*, supra, note 14, at 322.
[107] *Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense*, 344 F Supp.2d 152, 161 (2004).
[108] *Salim Ahmed Hamdan v. Donald H. Rumsfeld, Secretary of Defense*, 415 F.3d 33, 41–2 (2005).
[109] *Hamdan v. Rumsfeld*, 548 U.S. 557 (2006).
[110] Alison Duxbury, "Drawing Lines in the Sand – Characterising Conflicts for the Purposes of Teaching International Humanitarian Law," 8–2 *Melbourne J. of Int'l L.* (2007), 259, 263. Footnotes as in original.

CASES AND MATERIALS

Determining Conflict Status: An Exercise

Upon reading of an armed conflict in a newspaper, magazine, or blog, or seeing a televised or online account of one, it usually is not difficult to determine the conflict status, the first question a student of LOAC/IHL should answer. Most conflicts will reveal their nature with a little informed thought. For example, what conflict status does this scenario suggest?

Scenario

On the night of November 26, 2008, ten individuals of Pakistani origin landed by boat in the Indian port city of Mumbai. The ten young men, members of the radical Muslim Lashkar-e-Taiba group, were led by a twenty-five-year-old Pakistani. They had received prior military-like training in Pakistan over an extended period, allegedly from the Pakistani army. Armed with automatic rifles, handguns, hand grenades, and explosives, the ten men had departed from Karachi, Pakistan, by sea, in a small boat. They commandeered a fishing boat, murdered the crew, and, at about 2030, landed in Mumbai. Well rehearsed, they split into two-man teams and proceeded to five targets. Directed by GPS devices, they maintained communication via cell phones with each other and with others still in Pakistan. One team of attackers struck Mumbai's crowded train station, another team fired on a popular tourist restaurant, and a third team attacked a Jewish center. Two other teams entered two luxury hotels. Each team fired at random targets of opportunity as they progressed. The small band of attackers reunited and took over the two popular tourist hotels, killing occupants as they went room to room, receiving instructions and advice by cell phone from handlers in Pakistan: "At the Oberoi [hotel], an attacker asked whether to spare women ('Kill them,' came the terse reply) . . . "[111]

The next day, Indian commandos rappelled from helicopters onto the roofs of the two hotels, one of which had been set afire by the attackers. For the next two days, Indian army and navy troops, along with National Security Guard commandos, cleared the two hotels, room by room. At the train station, the restaurant, the Jewish center, and the hotels, Indian police and armed forces eventually killed nine of the raiders and captured the remaining attacker. Before they were killed or captured, the attackers killed 163 noncombatants and 18 Indian security force members. Additionally, they wounded two hundred ninety-three civilians.

Question: Was this a common Article 2 international armed conflict, a common Article 3 non-international armed conflict, or a domestic law enforcement event?

Answer: A basic question is whether the event was an armed conflict at all. An armed robbery of a bank by a gang of well-trained criminals is simple criminality not constituting "armed conflict" in the sense of LOAC/IHL. A simple exchange of shots between border guards of two unfriendly states on a contested national boundary approaches armed conflict between two states, but is unlikely to be considered more than a border incident. There is no internationally accepted definition of "armed conflict" because the circumstances that might or might not constitute an armed conflict are numerous and nuanced. A common sense assessment of the facts of a given situation will usually indicate whether an event constitutes an armed conflict. It is settled, however, that a terrorist attack, or series of terrorist attacks, like al Qaeda's 9/11 attacks on the United States, may give rise to an attacked state's

[111] Somini Sengupta, "In Mumbai Transcripts, an Attack Directed From Afar," NY *Times* (Jan. 7, 2009), A5.

resort to armed force in self-defense. Pictet writes, "Any difference arising *between two States* and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 . . . "[112]

The situation described in the scenario evolved over a period of days and involved police, security and military forces, as well as the deaths of nearly 200 people. Violence of this duration and intensity, involving military units and a well-organized armed group, could be viewed as an armed conflict, but in examining situations in which the conflict status is not obvious, like this scenario, the prudent student should examine the two possible armed conflict statuses before deciding if the event was armed conflict or something less, such as a domestic law enforcement problem.

First consider the most significant LOAC/IHL possibility: Was the situation a common Article 2 international armed conflict? What facts and circumstances suggest satisfaction of the requirements of common Article 2? " . . . [T]he present Convention shall apply to all cases of declared war or of any other armed conflict which may arise *between two or more High Contracting Parties*."

In the scenario, the attackers were trained in Pakistan, presumably by Pakistanis, and provided with Pakistani weaponry. They initiated their attack in Pakistan and landed in India; they were from one state and they acted in another state. The victims were from several states.

Presuming for the sake of analysis that there was armed conflict, was it armed conflict *between two or more high contracting parties*, as required by common Article 2? Clearly it was not. Although two or more states had roles in the attack, and although Pakistani attackers acted in India, this does not appear to be a case of one state (High Contracting Party) acting against a second state. It was a case of *individuals* from one state acting against *individuals* from other states. One could even argue that it was individuals from one state acting against another state, per se, but it does not appear to be one *state* acting against another *state*. Nor does it appear to be one state dispatching foreign or nonstate surrogates to attack another state. It was not a common Article 2 armed conflict.

It may be argued that there was sufficient Pakistani governmental involvement and control to consider the attack an act of Pakistan.[113] Additional facts may surface over time supporting or confirming that view but, as of this writing, the argument is weak and insufficient to confirm that position. Rather, the reported evidence indicates that the terrorist attackers were controlled by religious extremists located in Pakistan.

If not a common Article 2 conflict, next look at the remaining conflict status possibilities. Consider the two remaining possibilities jointly. What facts in the scenario suggest it was either a common Article 3 non-international armed conflict or a domestic law enforcement event?

[112] Jean S. Pictet, ed., *Commentary, I Geneva Convention* (Geneva: ICRC, 1952), 32, footnote omitted, emphasis supplied.

[113] The UN's 2001 *International Law Commission's Draft Articles on Responsibility of States for Internationally Wrongful Acts*, available at: http://www.ilsa.org/jessup/jessup06/basicmats2/DAS, in its Commentary to Article 8, reads in pertinent part: "(1) As a general principle, the conduct of private persons or entities is not attributable to the State under international law. Circumstances may arise, however, where such conduct is nevertheless attributable to the State because there exists a specific factual relationship between the person or entity engaging in the conduct and the State. Article 8 deals with two such circumstances. The first involves private persons acting on the instructions of the State in carrying out the wrongful conduct. The second deals with a more general situation where private persons act under the State's direction or control." The *Commentary* goes on to discuss the standards for finding state control as found in the ICJ's *Nicaragua* case and the ICTY's *Tadić* case.

What circumstances suggest satisfaction of the requirements of common Article 3? Was the incident an "... armed conflict not of an international character occurring in the territory of one of the High Contracting Parties ..."? The attack obviously occurred in the territory of a High Contracting Party, India. (The event should be considered a single attack, even though the attackers had multiple objectives.) Might the attack have been a domestic law enforcement event, rather than a common Article 3 armed conflict? Making a determination between the two choices requires review of the factors bearing on conflict status classification. What are the scenario's indicia of a non-international armed conflict, as opposed to a domestic criminal event, and vice versa?

For a finding of common Article 3 conflict status, there are two primary determining considerations: first, the level, intensity, and duration of violence that occurred; and second, the organization of the terrorist attackers who were involved. There are other considerations: Were the armed forces of the state required to meet the attackers' violence? Was territory controlled by the attackers? If so, how much territory and for how long? Were other assaults mounted by the attackers, or was it a one-time event?

There is no bright-line guide to the relative significance to be given these factors, other than that the first two are usually given greater weight than the others. A student should consider each of the two possibilities and make an assessment based on the totality of the circumstances that the event was either a common Article 3 armed conflict or a terrorist attack to be dealt with by domestic law enforcement, even if it involves the armed forces.

In the scenario, the armed violence was brief and, with due respect to those innocents killed and wounded, not particularly intense. (Media coverage does not necessarily correlate to level and intensity of violence.) The attackers were well-rehearsed but only ten in number, making their organization a less significant issue. Indian armed forces were employed, but that does not necessarily indicate a common Article 3 conflict. In the United States, the National Guard is called on to curb rioters, control posthurricane looters, and manage resisters of federal laws. Those situations are not considered armed conflicts. The scenario's attackers controlled no territory in their one-time attack. As Article 1.2 of 1977 Additional Protocol II notes, "This Protocol shall not apply in situations of internal disturbances ... such as riots, isolated and sporadic acts of violence ... as not being armed conflicts." Considering the totality of these circumstances, the November 26–29, 2008 attack on Mumbai was not a common Article 3 armed conflict and, in fact, was not an armed conflict as that term is used in LOAC/IHL. Contrary indicators may be cited and arguments raised in favor of common Article 3 but, all things considered, the attack on Mumbai constituted a sporadic act of violence to be resolved by India's domestic law enforcement system.

Could one consider the attack an exercise of armed force short of war? No, two states were not involved. More significantly, this was not a case of a state attacked by an armed opposition group retaliating by crossing the group's host state border.

With this suggested guidance in mind, what was the conflict status of al Qaeda's 9/11 attacks on the United States?

PROSECUTOR V. FATMIR LIMAJ

IT-03-66-T (30 Nov. 2005). Footnotes omitted.

Introduction. *When does an "armed conflict" arise? What factors indicate an armed conflict? The ICTY's* Limaj *case offers answers to these sometimes difficult questions.*

168. The Defence submit that a series of regionally disparate and temporally sporadic attacks carried out over a broad and contested geographic area should not be held to amount to an armed conflict. In the Chamber's view, the acts of violence that took place in Kosovo from the end of May 1998 at least until 26 July 1998 are not accurately described as temporally sporadic or geographically disperse. As discussed in the preceding paragraphs, periodic armed clashes occurred virtually continuously at intervals averaging three to seven days over a widespread and expanding geographic area.

169. The Defence further submit that a purely one-sided use of force cannot constitute protracted armed violence which will found the beginning of an armed conflict. In the Chamber's view, this proposition is not supported by the facts established in this case. While the evidence indicates that the KLA [Kosovo Liberation Army] forces were less numerous than the Serbian forces, less organized and less prepared, and were not as well trained or armed, the evidence does not suggest that the conflict was purely one-sided. KLA attacks were carried out against a variety of Serbian military, community and commercial targets over a widespread and expanding area of Kosovo. Further, KLA forces were able to offer strong and often effective resistance to Serbian forces undertaking military and police operations. While very large numbers of Serbian forces, well equipped, were deployed in the relevant areas of Kosovo during the period relevant to the indictment, the KLA enjoyed a significant level of overall military success, tying up the Serbian forces by what were usually very effective guerrilla-type tactics.

170. Finally, the Defence submit that the strength of the Serbian forces does not indicate that their purpose was to defeat the KLA, but to ethnically cleanse Kosovo. While it is true that civilians were driven out of their homes and forced to leave Kosovo as a result of military operations, the evidence discloses this to be true for both sides. Undoubtedly civilians fled as their homes and villages were ravaged and in some cases armed units of both sides set about ensuring this. It is not apparent to the chamber, however, that the immediate purpose of the military apparatus of each side during the relevant period, was not directed to the defeat of the opposing party, even if some further or ultimate objective may also have existed. The two forces were substantially engaged in their mutual military struggle. While the Serbian forces were far more numerous and better trained and equipped, it appears they were ill-prepared to deal effectively with small guerrilla type forces that would not engage them in prolonged fixed engagements. Serbian military intelligence may also have overestimated the strength and capability of the KLA at the time so that the Serbian forces were arraigned in greater number and with greater military resources than was warranted by the actual KLA forces. In this respect, as revealed by the evidence, many combat operations were carried out in the area of Drenica where the KLA developed earlier and was probably best organised. But, most importantly in the Chamber's view, the determination of the existence of an armed conflict is based solely on two criteria: the intensity of the conflict and organization of the parties, the purpose of the armed forces to engage in acts of violence or also achieve some further objective is, therefore, irrelevant.

(iii) Conclusion

171. The Chamber is satisfied that before the end of May 1998 an armed conflict existed in Kosovo between the Serbian forces and the KLA. By that time the KLA had a General Staff, which appointed zone commanders, gave directions to the various units formed or in

the process of being formed, and issued public statements on behalf of the organization. Unit commanders gave combat orders, and subordinate units and soldiers generally acted in accordance with these orders. Steps have been established to introduce disciplinary rules and military police, as well as to recruit, train, and equip new members. Although generally inferior to the VJ [Army of Yugoslavia] and MUP's [forces of the Ministry of Interior of the Republic of Serbia] equipment, the KLA soldiers had weapons, which included artillery mortars and rocket launchers. By July 1998 the KLA had gained acceptance as a necessary and valid participant in negotiations with international governments and bodies to determine a solution for the Kosovo crisis, and to lay down conditions in these negotiations for refraining from military action.

172. Further, by the end of May 1998 KLA units were constantly engaged in armed clashes with substantial Serbian forces . . . The ability of the KLA to engage in such varied operations is a further indicator of its level of organization. Heavily armed special forces of the Serbian MUP and VJ forces were committed to the conflict on the Serbian side and their efforts were directed to the control and quelling of the KLA forces. Civilians, both Serbian and Kosovo Albanian, had been forced by the military actions to leave their homes, villages and towns and the number of casualties was growing.

173. In view of the above the Chamber is persuaded and finds that an internal armed conflict existed in Kosovo before the end of May 1998. This continued until long after 26 July 1998.

Conclusion. *The difference between the facts in this case and those in the ten-man attack in the preceding scenario is evident. Here, in a case fraught with potential jurisdictional problems, the Chamber was careful to recite the facts in support of its finding of a common Article 3 conflict.*

PROSECUTOR V. DUSKO TADIĆ

(IT-94-1-A) Defense Motion for Interlocutory Appeal on Jurisdiction (2 Oct. 1995)

Introduction. *In the seminal Tadić case, the ICTY Appeals Chamber examines the character of international and non-international conflicts involving a bewildering array of combatant forces. The opinion wrestles with the question of the nature of the conflict: Is it an armed conflict at all? If so, what is its nature, international or internal (non-international), and what factors make it so? The opinion reflects the difficulty of applying seemingly clear-cut rules defining the nature of a conflict.*

Rulings of the ICTY are not binding on U.S. courts. On issues of LOAC/IHL they are, however, persuasive.

(Lieutenant Colonel Brenda Hollis, a U.S. Air Force judge advocate, and U.S. Marine Corps Major Michael Keegan, also a judge advocate, were both assigned temporary duty with the ICTY and were on the five-member Tadić prosecution team.)

66. Appellant [Dusko Tadić] now asserts the new position that there did not exist a legally cognizable armed conflict – either internal or international – at the time and place that the alleged offenses were committed. Appellant's argument is based on a concept of armed conflict covering only the precise time and place of actual hostilities. Appellant claims that the conflict in the Prijedor region (where the alleged crimes are said to have taken place) was limited to a political assumption of power by the Bosnian Serbs and did not involve armed

combat (though movements of tanks are admitted). This argument presents a preliminary issue to which we turn first.

67. International humanitarian law governs the conduct of both internal and international armed conflicts. Appellant correctly points out that for there to be a violation of this body of law, there must be an armed conflict. The definition of "armed conflict" varies depending on whether the hostilities are international or internal but, contrary to Appellant's contention, the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities. With respect to the temporal frame of reference of international armed conflicts, each of the four Geneva Conventions contains language intimating that their application may extend beyond the cessation of fighting. For example, both Conventions I and II apply until protected persons who have fallen into the power of the enemy have been released and repatriated . . .

68. Although the Geneva Conventions are silent as to the geographical scope of international "armed conflicts," the provisions suggest that at least some of the provisions of the Conventions apply to the entire territory of the Parties to the conflict, not just to the vicinity of actual hostilities. Certainly, some of the provisions are clearly bound up with the hostilities and the geographical scope of those provisions should be so limited. Others, particularly those relating to the protection of prisoners of war and civilians, are not so limited. With respect to prisoners of war, the Convention applies to combatants in the power of the enemy; it makes no difference whether they are kept in the vicinity of hostilities. In the same vein, Geneva Convention IV protects civilians anywhere in the territory of the Parties. . . .

69. The geographical and temporal frame of reference for internal armed conflicts is similarly broad. This conception is reflected in the fact that beneficiaries of common Article 3 of the Geneva Conventions are those taking no active part (or no longer taking active part) in the hostilities. This indicates that the rules contained in Article 3 also apply outside the narrow geographical context of the actual theater of combat operations. . . .

70. On the basis of the foregoing, we find that an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory under the control of a party, whether or not actual combat takes place there. Applying the foregoing concept of armed conflicts to this case, we hold that the alleged crimes were committed in the context of an armed conflict. Fighting among the various entities within the former Yugoslavia began in 1991, continued through the summer of 1992 when the alleged crimes are said to have been committed, and persists to this day. Notwithstanding the various temporary cease-fire agreements, no general conclusion of peace has brought military operations in the region to a close. These hostilities exceed the intensity requirements applicable to both international and internal armed conflicts. There has been protracted, large-scale violence between the armed forces of different States and between governmental forces and organized insurgent groups. Even if substantial clashes were not occurring in the Prijedor region at the time and place the crimes allegedly were committed – a factual issue on which the Appeals Chamber does not

pronounce – international humanitarian law applies. It is sufficient that the alleged crimes were closely related to the hostilities occurring in other parts of the territories controlled by the parties to the conflict. There is no doubt that the allegations at issue here bear the required relationship. The indictment states that in 1992 Bosnian Serbs took control of the Opstina of Prijedor and established a prison camp in Omarska. It further alleges that crimes were committed against civilians inside and outside the Omarska prison camp as part of the Bosnian Serb take-over and consolidation of power in the Prijedor region, which was, in turn, part of the larger Bosnian Serb military campaign to obtain control over Bosnian territory. Appellant offers no contrary evidence . . . In light of the foregoing, we conclude that, for the purposes of applying international humanitarian law, the crimes alleged were committed in the context of an armed conflict. . . .

72. In adopting resolution 827, the Security Council established the International Tribunal with the stated purpose of bringing to justice persons responsible for serious violations of international humanitarian law in the former Yugoslavia, thereby deterring future violations and contributing to the re-establishment of peace and security in the region. The context in which the Security Council acted indicates that it intended to achieve this purpose without reference to whether the conflicts in the former Yugoslavia were internal or international.

As the members of the Security Council well knew, in 1993, when the Statute [of the ICTY] was drafted, the conflicts in the former Yugoslavia could have been characterized as both internal and international, or alternatively, as an internal conflict alongside an international one, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof. The conflict in the former Yugoslavia had been rendered international by the involvement of the Croatian Army in Bosnia-Herzegovina and by the involvement of the Yugoslav National Army ("JNA") in hostilities in Croatia, as well as in Bosnia-Herzegovina at least until its formal withdrawal on 19 May 1992. To the extent that the conflicts had been limited to clashes between Bosnian Government forces and Bosnian Serb rebel forces in Bosnia-Herzegovina, as well as between the Croatian Government and Croatian Serb rebel forces in Krajina (Croatia), they had been internal . . . It is notable that the parties to this case also agree that the conflicts in the former Yugoslavia since 1991 have had both internal and international aspects . . .

73. The varying nature of the conflicts is evidenced by the agreements reached by the various parties to abide by certain rules of humanitarian law. Reflecting the international aspects of the conflicts . . . representatives of the Federal Republic of Yugoslavia, the Yugoslavia People's Army, the Republic of Croatia, and the Republic of Serbia entered into an agreement on the implementation of the Geneva Conventions of 1949 and the 1977 Additional Protocol I . . . Significantly, the parties refrained from making any mention of common Article 3 . . . concerning non-international armed conflicts.

By contrast, an agreement . . . between the various factions of the conflict within the Republic of Bosnia and Herzegovina reflects the internal aspects of the conflicts. The agreement was based on common Article 3 . . . which, in addition to setting forth rules governing internal conflicts, provides . . . that the parties to such conflicts may agree to bring into force provisions of the Geneva Conventions that are generally applicable only in international armed conflicts. In the Agreement, representatives of [Bosnia and Herzegovina, Serbia, and Croatia] committed the parties to abide by the substantive rules of internal armed conflict contained in common Article 3 and in addition agreed, on the strength of common Article 3, paragraph 3, to apply certain provisions of the Geneva Conventions concerning international

conflicts . . . Clearly, this Agreement shows that the parties concerned regarded the armed conflicts in which they were involved as internal but, in view of their magnitude, they agreed to extend to them the application of some provisions of the Geneva Conventions that are normally applicable to international armed conflicts only. . . .

Taken together, the agreements reached between the various parties to the conflict(s) . . . bear out the proposition that, when the Security Council adopted the Statute [of the ICTY], it did so with reference to situations that the parties themselves considered at different times and places as either internal or international armed conflicts, or as a mixed internal-international conflict.

74. The Security Council's many statements leading up to the establishment of the [ICTY] reflect an awareness of the mixed character of the conflicts. . . . The Prosecutor makes much of the Security Council's repeated reference to the grave breaches provisions of the Geneva Conventions, which are generally deemed applicable only to international armed conflicts. This argument ignores, however, that . . . it has also referred generally to "other violations of international humanitarian law," an expression which covers the law applicable in internal armed conflicts as well. . . .

77. On the basis of the foregoing, we conclude that the conflicts in the former Yugoslavia have both internal and international aspects, that the members of the Security Council . . . and that they intended to empower the [ICTY] to adjudicate violations of humanitarian law that occurred in either context. . . .

CASE CONCERNING MILITARY AND PARAMILITARY ACTIVITIES IN AND AGAINST NICARAGUA

Judgment (Merits) of 27 June 1986 (ICJ Rep. 14). Footnotes and case citations omitted.

Introduction. *This ICJ judgment demonstrates some of the considerations involved in determining conflict status. The opinion concerns collective self-defense and non-intervention in another state's government, and the UN Charter's interpretation of those subjects. It also focuses on the elements of control necessary for a foreign state to be said to control forces, including insurgents, of another state. In the 275-page opinion, customary law is frequently mentioned, the Geneva Conventions seldom spoken of. Conflict status is mentioned only briefly, although it is an underlying issue throughout. As you read these excerpts going to conflict status ask yourself what that status was. Do you agree with the Court's assessment in paragraph 219?*

19. The attitude of the United States Government to the "democratic coalition government" was at first favorable; and a programme of economic aid to Nicaragua was adopted. However, by 1981 this attitude had changed . . . According to the United States, the reason for this change of attitude was reports of involvement of the government of Nicaragua in logistical support, including provision of arms, for guerrillas in El Salvador . . . In September 1981, according to testimony called by Nicaragua, it was decided [by the U.S.] to plan and undertake activities directed against Nicaragua.

20. The armed opposition to the new Government in Nicaragua, which originally comprised various movements, subsequently became organized into two main groups: the Fuerza Democrática Nicaragüense (FDN) and the Alianza Revolucionaria Democrática (ARDE) . . . However, after an initial period in which the "covert" operations of United

States personnel . . . were kept from becoming public knowledge, it was made clear . . . that the United States Government had been giving support to the *contras*, a term employed to describe those fighting against the present Nicaraguan Government . . . It is contended by Nicaragua that the united States Government is effectively in control of the contras . . . and that the purpose of that Government was, from the beginning, to overthrow the Government of Nicaragua. . . .

75. . . . [T]he Court will first deal with events which, in the submission of Nicaragua, involve the responsibility of the United States in a more direct manner. These are the mining of Nicaraguan ports or waters in early 1984; and certain attacks on, in particular, Nicaraguan port and oil installations . . . It is the contention of Nicaragua that these were not acts committed by members of the *contras* . . . but either United States military personnel or persons of the nationality of unidentified Latin American countries, paid by, and acting on the direct instructions of, United States military or intelligence personnel. . . .

92. . . . Nicaragua claims that the United States has on a number of occasions carried out military maneuvers jointly with Honduras . . . ; it alleges that much of the military equipment flown in to Honduras for the joint maneuvers was turned over to the *contras* when the maneuvers ended . . .

100. [I]n the affidavit of the former FDN leader, Mr. Chamorro . . . he gives considerable detail as to the assistance given to the FDN. The Court does not however possess any comparable direct evidence as to support for the ARDE. . . .

101. According to Mr. Chamorro, training was at the outset provided by Argentine military officers, paid by the CIA, gradually replaced by CIA personnel. The training was given in "guerrilla warfare, sabotage, demolitions, and in the use of a variety of weapons. . . . ". . . .

106. In light of the evidence and material available to it, the court is not satisfied that all the operations launched by the contra force, at every stage of the conflict, reflected strategy and tactics wholly devised by the United States. . . .

107. To sum up . . . at least initially, the financial support given by the Government of the United States to the military and paramilitary activities of the *contras* in Nicaragua is a fully established fact. . . .

114. [A]ccording to Nicaragua, the *contras* are no more than bands of mercenaries which have been recruited, organized, paid and commanded by the Government of the United States. This would mean that they have no real autonomy in relation to that Government. Consequently, any offenses which they have committed would be imputable to the Government of the United States, like those of any other forces placed under the latter's command. . . .

164. The Court, while not as fully informed on the question as it would wish to be, therefore considers as established the fact that certain trans-border military incursions into the territory of Honduras and Costa Rica are imputable to the Government of Nicaragua. . . .

172. The Court now has to turn its attention to the question of the law applicable to the present dispute. . . .

199. At all events, the Court finds that in customary international law . . . there is no rule permitting the exercise of collective self-defence in the absence of a request by the State which regards itself as the victim of an armed attack. . . .

211. [F]or one State to use force against another, on the ground that the State has committed a wrongful act of force against a third State, is regarded as lawful, by way of exception, only when the wrongful act provoking the response was an armed attack . . . States do not have a right of "collective" armed response to acts which do not constitute an "armed attack". . . .

218. . . . Article 3 which is common to all four Geneva Conventions of 12 August 1949 defines certain rules to be applied in the armed conflicts of a non-international character. There is no doubt that, in the event of international armed conflicts, these rules also constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court's opinion, reflect what the Court in 1949 called "elementary considerations of humanity". . . .

219. The conflict between the *contras*' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts. . . .

241. The Court however does not consider it necessary to seek to establish whether the intention of the United States to secure a change of government policies in Nicaragua went so far as to be equated with an endeavor to overthrow the Nicaraguan Government. It appears to the Court to be clearly established first, that the United States intended, by its support of the *contras*, to coerce the Government of Nicaragua in respect of matters in which each State is permitted, by the principle of State sovereignty, to decide freely . . . and secondly that the intention of the *contras* themselves was to overthrow the present Government of Nicaragua . . . Even if it be accepted, for the sake of argument, that the objective of the United States in assisting the *contras* was solely to interdict the supply of arms to the armed opposition in El Salvador, it strains belief to suppose that a body formed in armed opposition to the Government of Nicaragua, and calling itself the "Nicaraguan Democratic Force", intended only to check Nicaraguan interference in El Salvador and did not intend to achieve violent change of government in Nicaragua.

Conclusion. *In its decision, the ICJ rejected the U.S. justification of collective self-defense for its activities against Nicaragua, found that the United States had wrongfully intervened in the affairs of Nicaragua and had employed armed force against Nicaragua in breach of customary international law, and decided that the United States owed reparations to Nicaragua. The amount of reparations was later fixed at seventeen billion dollars. The check is not in the mail.*

For our purposes, the most interesting conclusion of the Court was the conflict's status: a dual status conflict.

HAMDAN V. RUMSFELD

548 U.S. 557 (2006), at 630–631; 126 S. Ct. 2749, 2795–2796 (2006)*

Introduction. *In 2006, a plurality of the Supreme Court of the United States had its own difficulties characterizing the conflict with al Qaeda. The Court had little doubt, however, as to whether common Article 2 or common Article 3 applied, and what protections therefore applied to "detainees" held by the United States. In this extract from the plurality opinion,*

* Citations and footnotes omitted.

the Court discusses whether the appellant, Hamdan, an accused member of al Qaeda confined at Guantanamo, Cuba, awaiting trial before a military commission, is protected by common Article 3, with its requirement that "those placed hors de combat *by . . . detention" be tried by a regularly constituted court.*

The Court several times refers to Geneva Convention High Contracting Parties as "signatories." In fact, High Contracting Parties are ratifiers, not merely signatories of the Conventions.

. . . . The Court of Appeals thought, and the Government asserts, that Common Article 3 does not apply to Hamdan because the conflict with al Qaeda, being "international in scope," does not qualify as a "conflict not of an international character." That reasoning is erroneous. The term "conflict not of an international character" is used here in contradistinction to a conflict between nations. . . . Common Article 2 provides that "the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." High Contracting Parties (signatories) also must abide by all terms of the Conventions vis-à-vis one another even if one party to the conflict is a nonsignatory "Power," and must so abide vis-à-vis the nonsignatory if "the latter accepts and applies those terms. Common Article 3, by contrast, affords some minimal protection, falling short of full protection under the Conventions, to individuals associated with neither a signatory nor even a nonsignatory "Power" who are involved in a conflict "in the territory of" a signatory. The latter kind of conflict is distinguishable from the conflict described in Common Article 2 chiefly because it does not involve a clash between nations (whether signatories or not). In context, then, the phrase "not of an international character" bears its literal meaning. . . .

Although the official commentaries accompanying Common Article 3 indicate that an important purpose of the provision was to furnish minimal protection to rebels involved in one kind of "conflict not of an international character," *i.e.*, a civil war, the commentaries also make clear "that the scope of the Article must be as wide as possible." In fact, limiting language that would have rendered Common Article 3 applicable "especially [to] cases of civil war, colonial conflicts, or wars of religion," was omitted from the final version of the Article, which coupled broader scope of application with a narrower range of rights than did earlier proposed iterations.

Common Article 3, then, is applicable here and . . . requires that Hamdan be tried by a "regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples."

Conclusion. *The Court goes on to find that "the [military commission] procedures adopted to try Hamdan . . . fail to afford the requisite guarantees," required by common Article 3, and remands the case to a lower court for further proceedings. The opinion is significant because it settles that, in the "war on terrorism," accused members of al Qaeda and, presumably, captured members of any nonstate sponsored insurgency, fall under the protection of common Article 3.*

OSIRAK: ARMED CONFLICT?

Introduction. *Thirty years ago, Israel attacked and destroyed a nuclear facility inside Iraq, much as they did in 2007, in Syria.*[114] *As you read this brief account of the 1979 attack, look for indicia of conflict status. Could it be considered an instance of extraterritorial law enforcement?*

[114] "Syria: Uranium Traces Found At Bombed Site, Diplomats Say," *NY Times* (Nov. 11, 2008), A11.

Or armed conflict short of war? Brief as the engagement was, what kind of conflict was it and what LOAC applied, if any?

The OPEC oil embargo of 1973–1974 had recently ended, but the Western world still shuddered at the thought of losing Middle-Eastern oil, a considerable portion of which is held by Iraq. At about that time, France, dependent on Iraq for much of its oil, agreed to build a nuclear reactor for Iraq, at al-Tuwaitha, near the Tigris River. The original name of the facility was Osiris, the Egyptian god of the underworld. Ironically, several of the French contractors who worked on the Osiris project had also secretly built Israel's Dimona nuclear reactor in the 1960s. Italian firms provided critical chemical-reprocessing equipment. A second, smaller reactor, Isis, was to be built alongside Osiris and it was in the early stages of construction. France also agreed to provide Iraq with weapons-grade enriched uranium, U-235, as start-up fuel. U-235 can be converted to use in atomic weapons.

As Osiris neared completion, Saddam Hussein renamed the reactor Osirak, incorporating his nation's name in the reactor's designation. In May 1977, Israeli intelligence officers came into possession of photos of the rapidly rising structures at al-Tuwaitha. Laboratories, a reprocessing unit, administration buildings, and a thirty-foot high aluminum-domed nuclear reactor were already in place. As an oil-rich nation, Iraq had little need for nuclear power. Despite Israeli efforts to have the United States exert pressure on France to halt the project, the French carried on. They considered the financial aspects of the agreement with Iraq too lucrative to abandon. Osirak would apparently be fueled with radioactive uranium within three or four years of the construction start-up. It was estimated that the facility could produce enriched uranium to annually build several Hiroshima-sized nuclear bombs. Israel, Iraq's traditional enemy, was extremely concerned.

The United States and U.K. also expressed concern, but European heads of state, recalling the recent oil embargo, had no desire for a confrontation with oil-rich Iraq. Believing that it had to act, Israel began plans to destroy the facility at Osirak. Initially, Israeli intelligence opposed a military raid, considering any military effort to shut down the reactor a risky undertaking tantamount to an act of war. Besides, should the timing of any raid be off, even by only a few days, and the reactor activated, it could be "hot" and its destruction might release radiation that could kill thousands of civilians as far away as Baghdad. Nevertheless, Israeli Prime Minister Menachem Begin ordered contingency plans for a military operation to target Osirak.

In April 1979, at La Seyne-sur-Mer, France, heavily guarded French trucks carrying the two nuclear reactor cores to port for shipment to Iraq were bombed by Israeli agents. At a rest stop, the Israelis created a diversionary car accident while other Israelis placed plastic explosives at critical points on the huge reactor shipping containers. Although the explosives would not destroy the heavy metal cores, they would damage them. After the bombing it was determined that it would take two years to remanufacture replacement cores. Iraq insisted the damaged cores be repaired, instead. They were willing to accept the French reactor cores with hairline cracks. Despite the Israeli sabotage, and the mysterious deaths of two critical Iraqi engineers who were visiting France, work at Osirak continued.

In Israel, military planning proceeded. An Entebbe-like mission was not feasible because of the complex logistics involved in the ingress and egress of combatant troops. Tall earthen embankments surrounding Osirak, topped by electrified fencing and antiaircraft gun towers, made a commando-style raid unlikely. An air attack seemed the only alternative. Israel had recently purchased from the United States eight F-16 fighters originally intended for the Iranian Air Force. The Shah's fall had voided the sale. Now, a search was mounted for the

best pilots in the Israeli Air Force. In Israel's view, time was growing short. Israeli intelligence, aided significantly by U.S. KH-11 reconnaissance satellite photos, predicted that Osirak would be operational within six months. Operation Babylon was no longer a contingency plan.

In October 1980, Prime Minister Begin ordered the attack. F-16s, flying 600 miles nonstop and without midair refueling, would strike Osirak just before sundown on a Sunday, minimizing civilian casualties while at the same time providing necessary light for bombing. The Israelis were concerned that as few French scientists and civilians as possible be killed. The handpicked Israeli pilots began training for a long-range, low-level mission.

The question of munitions was considered. "Smart" bombs externally mounted on the F-16s were not an option. Their weight and drag would increase fuel use, which was already a critical factor. The six-hundred-mile round-trip was forty miles beyond the F-16's maximum range. Instead, each F-16 would carry two 2,000-pound "dumb" bombs to penetrate Osirak's dome and destroy the reactor inside.

The Israeli pilots, used to flying only seconds before they engaged enemy targets in adjacent enemy countries, would have to fly for hours at treetop level, violating Jordanian airspace on the way in and out of Iraq. Nearing the target, pairs of F-16s would pop up to 5,000 feet and approach the reactor at high speed as they dove at a steep angle while under Iraqi antiaircraft fire. Aiming visually, they would release their bombs and then seek high altitude beyond surface-to-air missile range. While in training, two of the twelve pilots collided in midair and died. A third pilot died in another training mishap. (Another Israeli pilot on the Osirak mission, Ilan Ramon, later was selected as an astronaut in the American space flight program. He died when Columbia exploded on reentry, in February 2003.)

At 1601 on Sunday, June 7, 1981, eight F-16s took off from the Israeli Air Force base at Etzion in the northern Sinai. Israel estimated that Osirak would be operational within weeks. French technicians installing the reactor later said it was scheduled to be operational only by the end of 1981. Regardless, on June 7, as the F-16s took off, six F-15s were already airborne to shadow the eight attackers and keep any Baghdad-based MiGs off their backs. At a modest speed of 360 knots to minimize fuel consumption, they flew toward Iraq in radio silence. Although the setting sun would be behind them, they were on their own in evading shoulder-fired SA-7 antiaircraft missiles, and the far deadlier SAM-6s.

An hour and a half after takeoff, the attackers crossed their initial point, a lake just west of Osirak. Moving into tight formation, the F-16s prepared to attack in pairs at thirty-second intervals. Amazingly, there was no antiaircraft fire. Surprise was complete. Flying on full military power, in four seconds the F-16s popped up to 5,000 feet, rolled belly-up for a few moments to maintain positive Gs until the diving 480-knot bomb run commenced. In a deep dive, the F-16s released their bombs at 3,400 feet, pulled left, dumped chaff, and climbed for altitude and safety from Iraqi SAMs and MiGs. The final two F-16 pairs flew through a storm of antiaircraft fire and SA-7s – but no SAMs. Later it was learned that half an hour before the Israelis arrived, Iraqi soldiers manning the SAM batteries had left for chow, shutting down their radars as they left.

As the final pair of F-16s released their ordnance, the Osirak dome exploded in a fireball. In little more than two minutes, years of French and Iraqi work was destroyed. Fourteen of the sixteen bombs had been on target. The first two delay-fused bombs penetrated the dome, opening a gaping hole for twelve succeeding bombs. Isis and the Italian laboratories remained intact, but the crucial nuclear reactor was gone, destroyed without casualties among the attackers.[115]

[115] See Rodger W. Claire, *Raid on the Sun* (New York: Broadway Books, 2004), for a full account of the raid on Osirak.

International repercussions were immediate. Israel asserted that its attack was a matter of anticipatory self-defense, and some scholars agreed.[116] Israel said that it acted to remove a nuclear threat to its existence, claiming "pre-emptive self-defense for the strike on the basis that a nuclear-armed Iraq would constitute an unacceptable threat, given Saddam Hussein's overt hostility towards the Jewish state. Israel also claimed to have met the requirement of proportionality, having bombed the construction site on a Sunday in order to lessen the risk to foreign workers."[117] But UN Security Council Resolution 487, unanimously passed, denounced the attack as being "in clear violation of the Charter . . . and the norms of international conduct."[118] Prior to the UN vote on a resolution to denounce Israel, Canada "argued that the General Assembly should not use the term 'acts of aggression'; it was a matter for the Security Council to make such determinations."[119] The United States, which might have been expected to abstain, voted to condemn Israel. The international community's reaction was damning.

> [A]ssuming for purposes of legal analysis that the government of Israel perceived an imminent danger in the Iraqi nuclear program . . . it is clear that it undertook at most very limited peaceful procedures or diplomatic measures to deal with the threat. . . . In evaluating the Israeli claim of actual necessity, it is decisive that the community of states has rejected the Israeli claim. So far as is known, not one single state has accepted its validity.[120]

Was the Israeli bombing successful in ending the Iraqi nuclear threat? "Israeli intelligence . . . was convinced that their strike in 1981 on the Osirak nuclear reactor about 10 miles outside Baghdad had ended Saddam's program. Instead [it initiated] covert funding for a nuclear program code-named 'PC3' involving 5,000 people testing and building ingredients for a nuclear bomb . . . "[121]

Conclusion. *The UN, of course, considered the issue of the Osirak bombing. During the debate, a range of viewpoints were put forward, including the following exchange*:

SECURITY COUNCIL CONSIDERATION OF A COMPLAINT BY IRAQ

36 U.N. S.C.O.R., 2280–2288 (1981)

Ambassador Yehuda Blum (Israel):

57. On Sunday, 7 June 1981, the Israeli Air Force carried out an operation against the Iraqi atomic reactor called "Osirak".

[116] See, e.g., Stanimar A. Alexandrov, *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer, 1996); and Timothy L.H. McCormack, *Self-Defense in International Law: The Israeli Raid on the Iraqi Nuclear Reactor* (New York: St. Martin's Press, 1996).

[117] Michael Byers, *War Law* (New York: Grove Press, 2005), 72. Although Israel intelligence was convinced that the strike had ended Saddam's nuclear program, "Saddam was [still] on a crash program to build and detonate a crude nuclear weapon in the desert . . . " Bob Woodward, *State of Denial* (New York: Simon & Schuster, 2006), 215.

[118] UN Security Council Resolution 487, June 19, 1981.

[119] Christine Gray, *International Law and the Use of Force* (Oxford: Oxford University Press, 2000), 13.

[120] Mallison, "The Disturbing Questions," 63 *Freedom at Issue* (Nov.–Dec. 1981), 9, 10, 11 cited in John Norton Moore, et al., *National Security Law* (Durham, NC: Carolina Academic Press, 1990), 154–5.

[121] Bob Woodward, *State of Denial* (New York: Simon & Schuster, 2006), 215.

58. In destroying Osirak, Israel performed an elementary act of self-preservation, both morally and legally. In so doing, Israel was exercising its inherent right of self-defense as understood in general international law and as preserved in Article 51 of the Charter of the United Nations.

59. A threat of nuclear obliteration was being developed against Israel by Iraq, one of Israel's most implacable enemies. Israel tried to have the threat halted by diplomatic means. Our efforts bore no fruit. Ultimately, we were left with no choice. We were obliged to remove that mortal danger. . . .

97. The Government of Israel, like any other Government, has the elementary duty to protect the lives of its citizens. In destroying Osirak last Sunday, Israel was exercising its inherent and natural right to self-defense. . . .

99. In a similar vein, Professor Morton Kaplan and Nicholas de B. Katzenbach wrote in their book, *The Political Foundations of International Law*:

> "Must a state wait until it is too late before it may defend itself? Must it permit another the advantages of military build-up, surprise attack, and total offense, against which there may be no defense? It would be unreasonable to expect any State to permit this – particularly when given the possibility that a surprise nuclear blow might bring about the total destruction, or at least total subjugation, unless the attack were forestalled."

102. We sought to act in a manner which would minimize the danger to all concerned, including a large segment of Iraq's population . . . Our Air Force was only called in when . . . we learned on the basis of completely reliable information that there was less than a month to go before Osirak might have become critical.

Ambassador Anthony Parsons (United Kingdom):

Mrs. Thatcher was asked about the fact that, whereas Iraq has signed the nuclear Non-Proliferation Treaty and . . . Israel has not. She replied:

". . . . A tragedy of this case was that Iraq was a signatory to the Agreement and had been inspected, but neither of these facts protected her. It was n unprovoked attack, which we must condemn. Just because a country is trying to manufacture energy from nuclear sources, it must not be believed that she is doing something totally wrong."

151. **The President . . . :** "I shall now put to the vote the draft resolution . . .

A vote was taken by show of hands. The draft resolution condemning Israel's action was unanimously adopted.

Ambassador Jeane Kirkpatrick (United States of America):

156. Like other members of the Council, the United States does not regard the resolution just adopted as a perfect one.

157. . . . In addition, our judgment that Israeli actions violated the Charter of the United Nations is based solely on the conviction that Israel failed to exhaust peaceful means for the resolution of this dispute.

158. Nothing in this resolution will effect my Government's commitment to Israel's security. . . .

***Conclusion**: On June 19, 1981, Security Council Resolution 487 condemned Israel's military attack on Osirak.*

What conflict status is indicated by the Osirak raid? Two states were involved. Unlike the 2007 Israeli bombing of a Syrian nuclear facility that was under construction[122] and the 1979 Israeli bombing of nuclear reactor storage sites in France,[123] there was a heavy volume of enemy fire, indicating armed conflict. Was this a common Article 2 "armed conflict . . . between two or more of the High Contracting Parties" or was it essentially a border incident writ large? Neither state chose to call it an outbreak of war or armed conflict. Was it a case of armed conflict short of war, then?

In terms of conflict status, how does the Osirak raid compare with the 1986 U.S. bombing raid of Libya?[124] How does it compare with the 1967 Israeli attack on the USS Liberty, *a U.S. Navy combatant ship? In international waters, Israelis killed 34 U.S. personnel and wounded 172 others aboard the* Liberty. *The day-long armed conflict between the two well-organized forces was between two states, and the level of combat was heavy. For his actions in the fighting, the* Liberty's *captain, Commander William L. McGonagle, was awarded the Medal of Honor. The Executive Officer was awarded a posthumous Navy Cross.[125] The words "war," or "armed conflict" were never uttered by either government in regard to the* Liberty *incident.*

The Osirak incident, and responses to it within the UN, illustrates that some events involving armed conflict allow their being "assigned" a status, but an unthinking application of what appears to be a conflict status rule does not always lead to the correct LOAC result. As pointed out earlier, Dinstein writes, "In large measure, the classification of a military action as either war or a closed incident . . . depends on the way in which the two antagonists appraise the situation. As long as both parties choose to consider what has transpired as a mere incident, and provided that the incident is rapidly closed, it is hard to gainsay that view."[126] In this instance, Iraq chose to not respond militarily to Israel's incursion, and Israel chose to not further militarily attack Iraq. The bombing of the Osirak nuclear power plant might be characterized merely as an "incident" – armed conflict short of war.

[122] David E. Sanger and Mark Mazzetti, "Analysts Find Israel Struck a Syrian Nuclear Project," NY *Times* (Oct. 14, 2007), A1; David E. Sanger, "Bush Administration Releases Images to Bolster Its Claims About Syrian Reactor," NY *Times* (April 25, 2008), A5.

[123] Loch K. Johnson, "On Drawing a Bright Line for Covert Operations," 86–2 *AJIL* (April 1992), 284, 292.

[124] See, Anthony D'Amato, "Editorial Comment," 84–3 *AJIL* (July 1990), 705.

[125] Lt.Cmdr. Walter L. Jacobsen, "A Juridical Examination of the Israeli Attack on the *U.S.S. Liberty*," 36 *Naval L. Rev.* (Winter 1986), 1; David C. Walsh, "Friendless Fire," *U.S. Naval Institute Proceedings* (June 2003), 58; James Bamford, *Body of Secrets* (New York: Doubleday, 2001), 187–239. For a contrary view: A. Jay Cristol, *The Liberty Incident* (New York: Brassey's, 2002).

[126] Dinstein, *War, Aggression and Self-Defence*, supra, note 11, at 11.