THE FIGHT AGAINST TERRORISM AND THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW A CASE STUDY OF THE MIDDLE EAST.

BY

ISINGOMA ESAU
LLB/ 16162/71/DU.

A DISSERTATION SUBMITTED IN PARTIAL FULFILLMENT OF THE REQUIREMENT OF THE AWARD OF BACHELORS DEGREE IN LAW AT KAMPALA INTERNATIONAL UNIVERSITY.

SUPERVISER: MR KALINAKI EDMOND

MAY, 2011

DECLARATION

I ***ISINGOMA ESAU*** do hereby declare that the work presented herein is my own except where acknowledged and it has never been submitted or examined in any university as an academic requirement for any award.

Signed DATE

..... 23/05/2011.....

ISINGOMA ESAU

CERTIFICATION

The undersigned certifies that, he has read and hereby recommends for acceptance by the Kampala International University a dissertation entitled "the fight against terrorism and the applicability of international humanitarian law", a case study of Middle East, in partial fulfillment of the requirements of the Degree of Bachelor of Laws.

Signed ..... Date 23/05/2011

MR. KALINAKI EDMOND
(SUPERVISOR)

DEDICATION

I dedicate this dissertation to my beloved family most especially my mum Katsara Faibe, my brothers Kizza Yona and Jacob Kato, my sisters Diana Tumukunde Sarah and Kantura Tabisa and all other relatives whose love, support, encouragement and understanding has brought me this far. No words can describe my appreciation. I thank them and may the Almighty God bless them.

ACKNOWLEDGEMENT

First of all, I give thanks to the Almighty God for his mercy and grace granted to me during my studies and through this research project.

I would like to thank my mum **Faibe Katsara** and my brothers and sisters Yona, Jacob, Sarah, Diana and Tabisa for their financial support.

I wish to acknowledge and express my thanks to my supervisor at the sometime who is my lecturer for IHL Mr. **Edmond Kalinaki** whose intellectual and professional input enabled me to come up with this work.

My gratitude is equally extended to the staff and members of the ICRC Kampala for their guidance and good cooperation throughout my research and the materials they gave me.

I would also thank the staff faculty of law Kampala International University and their entire academic staff, for their guidance and good cooperation throughout the course.

I also owe gratitude to my course mates in the struggle especially my group discussion members and those who helped me in one way or the other i.e Agrey Muhwezi, Kimera Johnson, Musoke Moses, Jagwer Benedict, Linet Meicha, Augustine Siamieto, Cliff, Asimwe Steven, Obed, Toskin and those I have not mentioned, and the entire class May the Almighty God reward you abundantly.

Finally, I wish to convey my deep felt thanks to Ms. Model Ruth Namutebi who has typed all my works throughout my course.

TABLE OF CONTENTS

ACRONYMS

U.S	United States
U.N	United Nations
NGOs	Non Government Organizations
LOAC	Law of Armed Conflicts
U.K	Uganda Kingdom
POW	Prisoner of War
POWs	Prisoners of War
ICRC	International Committee of the Red Cross and Red Crescent
IHL	International Humanitarian Law
AP1	Additional Protocol 1 of 1997 to the Geneva Convention of 1949
ie	That is to say
ICC	International Criminal Court
EPWs	Enemy Prisoners of War

CHAPTER ONE

1.1. INTRODUCTION

International humanitarian law is the law of armed conflict or law of war and their effects. Humanitarian law is the branch of public international law that comprises the rules, which, in times of armed conflict, seek to, protect persons who are not or are no longer taking part in the hostilities, restrict the methods and means of warfare employed, and, resolve matters of humanitarian concern resulting from war[1]. The goal of international humanitarian law is to limit the effects of war on people and property and to protect particularly vulnerable persons.

States have always been limited in the ways in which they conduct armed conflicts, from the adherence to national laws and bilateral treaties, to the observance of time-honored customary rules. However, throughout history these limitations on warfare varied greatly among conflicts and were ultimately dependant on time, place, and the countries involved[2]. Not until the 19th century was there a successfully effort to create a set of internationally recognized laws governing the conduct and treatment of persons in warfare.

In the mid-1850s, Henri Dunant - founder of the International Red Cross - helped champion the first universally applicable codification of international humanitarian law the Geneva Convention of 1864. From these roots, international humanitarian law evolved over the course of a century and a half. The Hague Conventions of 1899 and 1904 limited the means by which belligerent states could conduct warfare.

Many of the international treaties on armed conflict were made in response to the many new methods of warfare. World War I (1914-1918) witnessed the first large-scale use of poison, aerial bombardments and capture of prisoners of war. World War II (1939-1945) saw civilians and military personnel killed in equal numbers.

[1] ICRC commentary 07/2004
[2] ibid

1.1.1. Types of armed conflict

International armed conflict

International armed conflicts are conflicts between states. The four 1949 Geneva Conventions and Protocol I deal extensively with the humanitarian issues raised by such conflicts. The whole body of law on prisoners of war, their status and their treatment is geared to wars between States (Third Convention). The Fourth Convention states inter alia the rights and duties of an occupying power, i.e. a state whose armed forces control part or all of the territory of another state. Protocol I deals exclusively with international armed conflicts.

Under Protocol I of 8 June 1977, *wars of national liberation* must also be treated as conflicts of an international character[3]. A war of national liberation is a conflict in which a people are fighting against a colonial power, in the exercise of its right of self- determination. Whereas the concept of the right of self-determination is today well accepted by the international community[4], the conclusions to be drawn from that right for the purposes of humanitarian law and, in particular, its application to specific conflict situations are still somewhat controversial.

The majority of today's armed conflicts take place within the territory of a state: they are conflicts of a non-international character. A common feature of many such internal armed conflicts is the intervention of armed forces of another state, supporting the government or the insurgents.

The substantive rules of humanitarian law governing *non-international armed conflicts* are much simpler than their counterparts governing international conflicts. They are derived from one main source, namely article 3 common to the four Geneva Conventions of 1949, which obliges the parties to an internal conflict to respect some basic principles of humanitarian behavior. Article 3 is binding not only on governments but also on insurgents, without, however, conferring any special status upon them.

Additional Protocol II of 1977 supplements Article 3 common to the Geneva Conventions with a number of more specific provisions. This is a welcome contribution to the strengthening of

[3] Article 1 paragraph 4.

[4] UN charter and international customary law. The opinion of the ICJ on the legality of building a wall on occupied Palestinian territory.

humanitarian protection in situations of internal armed conflict. Protocol II has, however, a narrower scope of application than common Article 3. It applies only if the insurgent party controls part of the national territory.[5]

1.1.2. Humanitarian law prior to its codification

It would be a mistake to claim that the founding of the Red Cross in 1863, or the adoption of the first Geneva Convention in 1864, marked the starting point of international humanitarian law as we know it today. Just as there is no society of any sort that does not have its own set of rules, so there has never been a war that did not have some vague or precise rules covering the outbreak and end of hostilities, as well as how they are conducted[6]

Taken as a whole, the war practices of primitive peoples illustrate various types of international rules of war known at the present time: rules distinguishing types of enemies; rules determining the circumstances, formalities and authority for beginning and ending war; rules describing limitations of persons, time, place and methods of its conduct; and even rules outlawing war altogether.[7]

The first laws of war were proclaimed by major civilizations several millennia before our era: I establish these laws to prevent the strong from oppressing the weak[8]. Many ancient texts such as the Mahabharata, the Bible and the Koran contain rules advocating respect for the adversary. For instance, the Viqayet a text written towards the end of the 13th century, at the height of the period in which the Arabs ruled Spain contains a veritable code for warfare. The 1864 Convention, in the form of a multilateral treaty, therefore codified and strengthened ancient, fragmentary and scattered laws and customs of war protecting the wounded and those caring for them.

[5] Common article 3 to the four Geneva conventions
[6] ICRC commentary 01/2003
[7] Quincy Wright
[8] Hammurabi, King of Babylon.

1.1.3. What law governed armed conflicts prior to the advent of contemporary humanitarian law.

First there were unwritten rules based on customs that regulated armed conflicts. Then bilateral treaties (cartels) drafted in varying degrees of detail gradually came into force. The belligerents sometimes ratified them after the fighting was over. There were also regulations which States issued to their troops. The law then applicable in armed conflicts was thus limited in both time and space in that it was valid for only one battle or specific conflict. The rules also varied depending on the period, place, morals and civilization.

1.1.4. Terrorism

Today in the field of international law there is a trend that has come up which was there though but not well defined by international body and not included in the written laws and conventions however a number of scholars have tried to define what terrorism is.

Terrorism is the systematic use of terror especially as a means of coercion. At present, the International community has been unable to formulate a universally agreed, legally binding, and criminal law definition of terrorism.

1.1.5. The elusive definition of terrorism

The exasperating inability to define terrorism is betrayed in the vague terms of the UN's Global Counter-Terrorism Strategy approved in 2006. It resolved to "strongly condemn terrorism in all its forms and manifestations, committed by whomever, wherever and for whatever purposes.

The UN has been striving for decades to find a wording which narrows down "all its forms and manifestations" into specific circumstances which can be labeled as terror. Civilian populations deserve something better than routine condemnations for the climate of fear of indiscriminate death and injury that they suffer.

The absence of an agreed definition matters for many other reasons. It blocks the possibility of referring terrorist acts to an international court, as for genocide and war crimes. It leaves individual countries free to outlaw activity which they choose to classify as terrorism, perhaps

for their own political convenience. And crucially it enabled the US administration of former president Bush to conjure in the public mind parallels between the 9/11 destruction of the World Trade Center and the Iraqi regime of Saddam Hussein.

The vocabulary of terrorism has therefore become the successor to that of anarchy and communism as the catch-all label of opprobrium, exploited accordingly by media and politicians.

1.1.6 Terrorism turns international

International terrorism became a prominent issue in the late 1960s, when hijacking became a favored tactic. In 1968, the Popular Front for the Liberation of Palestine hijacked an El Al Flight. Twenty years later, the bombing of a Pan Am flight over Lockerbie, Scotland, shocked the world.

The era also gave us our contemporary sense of terrorism as highly theatrical, symbolic acts of violence by organized groups with specific political grievances.

The bloody events at the 1972 Munich Olympics were politically motivated. September, a Palestinian group, kidnapped and killed Israeli athletes preparing to compete. Black September's political goal was negotiating the release of Palestinian prisoners. They used spectacular tactics to bring international attention to their national cause.

Munich radically changed the United States' handling of terrorism: "The terms *counterterrorism* and *international terrorism* formally entered the Washington political lexicon," according to counterterrorism expert Timothy Naftali.

Terrorists also took advantage of the black market in Soviet-produced light weaponry, such as AK-47 assault rifles created in the wake of the Soviet Union's 1989 collapse. Most terrorist groups justified violence with a deep belief in the necessity and justice of their cause.

Terrorism in the United States also emerged. Groups such as the Weathermen grew out of the non-violent group Students for a Democratic Society. They turned to violent tactics, from rioting to setting off bombs, to protest the Vietnam War.

1.1.7 The Twenty First Century: Religious Terrorism and Beyond

Religiously motivated terrorism is considered the most alarming terrorist threat today. Groups that justify their violence on Islamic grounds- Al Qaeda, Hamas, Hezbollah AL SHABAB—come to mind first. But Christianity, Judaism, Hinduism and other religions have given rise to their own forms of militant extremism.

In the view of religion scholar Karen Armstrong this turn represents terrorists' departure from any real religious precepts. Muhammad Atta, the architect of the 9/11 attacks, and "the Egyptian hijacker who was driving the first plane, was a near alcoholic and was drinking vodka before he boarded the aircraft." Alcohol would be strictly off limits for a highly observant Muslim.

Atta, and perhaps many others, are not simply orthodox believers turned violent, but rather violent extremists who manipulate religious concepts for their own purposes.

1.1.8 The Origins of Modern Terrorism

The word terrorism comes from the Reign of Terror instigated by Maxmilien Robespierre in 1793, following the French revolution. Robespierre, one of twelve heads of the new state, had enemies of the revolution killed, and installed a dictatorship to stabilize the country. He justified his methods as necessary in the transformation of the monarchy to a liberal democracy:

Subdue by terror the enemies of liberty, and you will be right, as founders of the Republic.

Robespierre sentiment laid the foundations for modern terrorists, who believe violence will usher in a better system. For example, the 19th century Narodnaya Volya_hoped to end Tsarist rule in Russia.

But the characterization of terrorism as a state action faded, while the idea of terrorism as an attack against an existing political order became more prominent.

1.1.9. The Rise of Non-State Terrorism

The rise of guerrilla tactics by non-state actors in the last half of the twentieth century was due to several factors. These included the flowering of ethnic nationalism (e.g. Irish, Basque, Zionist), anti-colonial sentiments in the vast British, French and other empires, and new ideologies such as communism.

Terrorist groups with a nationalist agenda have formed in every part of the world. For example, the Irish Republican Army grew from the quest by Irish Catholics to form an independent republic, rather than being part of Great Britain.

Similarly, the Kurds, a distinct ethnic and linguistic group in Turkey, Syria, Iran and Iraq, have sought national autonomy since the beginning of the 20th Century. The Kurdistan Worker's Party (PKK), formed in the 1970s, uses terrorist tactics to announce its goal of a Kurdish state. The Sri Lankan Liberation Tigers of Tamil Eelam are members of the ethnic Tamil minority. They use suicide bombing and other lethal tactics to wage a battle for independence against the Sinhalese majority government.

1.1.10 North Atlantic Treaty Organization Involvement In The Fight Against Terrorism

The Alliance's 1999 Strategic Concept already identified terrorism as one of the risks affecting NATO's security. The Alliances response to September 11, however, saw NATO engage actively in the fight against terrorism, launch its first operations outside the Euro-Atlantic area and begin a far-reaching transformation of its capabilities.

1.1.11. Response to September 11

On the evening of 12 September 2001, less than 24 hours after the attacks, and for the first time in NATO's history, the Allies invoked Article 5 of the Washington Treaty, the Alliance's collective defence clause.

The North Atlantic Council - NATO's principal political decision-making body - agreed that if it determined that the attack was directed from abroad against the United States, it would be regarded as an action covered by Article 5, which states that an armed attack against one or more of the Allies in Europe or North America shall be considered an attack against them all.

Earlier on the same day, NATO Partner countries, in a meeting of the Euro-Atlantic Partnership Council, condemned the attacks, offering their support to the United States and pledging to *"undertake all efforts to combat the scourge of terrorism"*. This was followed by declarations of solidarity and support from Russia, on 13 September, and Ukraine, on 14 September.

On 2 October, Frank Taylor, the US Ambassador at Large and Co-ordinator for Counter-terrorism, briefed the North Atlantic Council on the results of investigations into the 11 September attacks.

As a result of the information he provided, the Council determined that the attacks were directed from abroad and shall be regarded as an action covered by Article 5 of the Washington Treaty.

Two days later, on 4 October, NATO agreed on eight measures to support the United States:

- to enhance intelligence sharing and co-operation, both bilaterally and in appropriate NATO bodies, relating to the threats posed by terrorism and the actions to be taken against it;
- to provide, individually or collectively, as appropriate and according to their capabilities, assistance to Allies and other states which are or may be subject to increased terrorist threats as a result of their support for the campaign against terrorism; .
- to take necessary measures to provide increased security for facilities of the United States and other Allies on their territory;
- to backfill selected Allied assets in NATO's area of responsibility that are required to directly support operations against terrorism;
- to provide blanket over flight clearances for the United States and other Allies' aircraft, in accordance with the necessary air traffic arrangements and national procedures, for military flights related to operations against terrorism;
- to provide access for the United States and other Allies to ports and airfields on the territory of NATO nations for operations against terrorism, including for refueling, in accordance with national procedures;
- that the Alliance is ready to deploy elements of its Standing Naval Forces to the Eastern Mediterranean in order to provide a NATO presence and demonstrate resolve; and
- that the Alliance is similarly ready to deploy elements of its NATO Airborne Early Warning Force to support operations against terrorism.

Shortly thereafter, NATO launched its first ever anti-terror operation - Eagle Assist. On request of the United States, from mid-October 2001 to mid-May 2002, seven NATO AWACS radar

aircraft were sent to help patrol the skies over the United States; in total 830 crewmembers from 13 NATO countries flew over 360 sorties.

This was the first time that NATO military assets were deployed in support of an Article 5 operation.

On 26 October, the Alliance launched its second counter-terrorism operation in response to the attacks on the United States, Active Endeavour. Elements of NATO's Standing Naval Forces were sent to patrol the eastern Mediterranean and monitor shipping to detect and deter terrorist activity, including illegal trafficking. On 10 March 2003, the operation was expanded to include escorting civilian shipping through the Strait of Gibraltar.

In addition, although it is not a NATO-led operation, most of the NATO Allies also have forces involved in Operation Enduring Freedom, the US-led military operation against the Taliban and al-Qaida in Afghanistan.

1.2. STATEMENT OF THE PROBLEM

Today there is a wide debate about terrorism. There is no consensus about the definition of terrorism and when does an act of terrorism takes place many countries like the US, BRITAIN, FRANCE, have come up strongly to wage wars against terrorism yet the questions to be asked which law applies since it is a well settled principle that international humanitarian law only applies in armed conflict of both international and non international armed conflict. The United Nation and other international agencies have played an important role in the wide spread of all human kind to refrain from the acts of terrorism. However the inability of the organization to stop the atrocities in the most parts of the world has seen the current trend of the new wars that have been and are being fought in various forms in disguise of the fight against terrorism .The past cases of use of force in such context have not resulted in a commonly accepted doctrine and have neither established a practice of the international community.

There is still no consensus on whether international humanitarian law applies in such non organized groups of people that either fight governments or those that just attack civilian population.

Notwithstanding the controversy international humanitarian law play every important role in the control and regulation of all sorts of armed conflicts.

1.3. METHODOLOGY

Due to limited financial resources and geographical limitations the field research will not be possible. Thus the research will be qualitative and heavily dependent on prior published documents; secondary data. ICRC publications, text books reports from libraries and other NGO publications. United Nation resolutions and all the Geneva conventions of 1949 and their additional protocols of 1977.

1.4. OBJECTIVES

The study will turn to the premise that international humanitarian law is applicable in all situations of conflicts.

To show that however much there is need to fight terrorism there must always be a preserve of Hunan nature.

To see how IHL encourages and engages in limited methods and means of warfare;

To see how IHL differentiate between civilian population and combatants, and work to spare civilian population and property;

To ensure that combatants abstain from harming or killing an adversary who surrenders or who can no longer take part in the fighting;

To make the readers understand how combatants abstain from physically or mentally torturing or performing cruel punishments on adversaries.

To come up with conclusions and recommendations on how to apply international humanitarian law in times of the fight against terrorism and non international armed conflict.

1.5. HYPOTHESIS

The hypothesis of the study considers the legal basis for humanitarian law application and moral context by concentrating on the motivations of the ICRC to act or not to act in the case of the so called fight against terrorism and the extent to which a principled application of international humanitarian law can prevent or bring to an end the flagrant violations of human rights committed in the context of the fight against terrorism in the middle east.

"Terrorism " is a phenomenon. Both practically and legally, war cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict. For these reasons, it would be more appropriate to speak of a multifaceted "fight against terrorism" rather than a "war on terrorism".

1.6. SCOPE OF THE STUDY

The study will be approached from legal and moral perspectives. In this regard it will consider the extent which Humanitarian law intervenes to the current trend against terrorism in the Middle East.

The study focuses on the Humanitarian intervention in times of conflicts. The study will analyze the grounds for the use of force in situations of wiping out terrorism in the contemporary world. And also the paper will look at how the international community has reacted in such cases and in particular in the Middle East and want is the take of international organization like the international committee of the Red Cross and its role.

1.7. THE SIGNIFICANCE OF THE STUDY

This study is intended to build upon prior research done by human scholars and jurists' international bodies NGOs and promoters of humanitarian law. The study aims at promoting humanitarian law and preservation of human rights in situations of armed conflicts. The study seeks to analyze the legal status of the IHL in the contemporary world in the global campaigns against terrorism. Proposals will be made in relation to ways in which terrorist wars should be conducted.

1.8. LITERATURE REVIEW

David E Kellogg, PhD

In the past year, we have seen the humiliation and physical abuse of Iraqi enemy prisoners of war (EPWs) by U.S. military police and contractors, the parading of body parts of fallen Israeli soldiers by members of the Palestinian terrorist organization Hamas, the murder and mutilation of U.S. and coalition military and civilian contract personnel by Iraqi rebels, the bombing of Spanish commuter trains by Islamic terrorists, and other grave breaches of the LOAC. It would appear that all parties to the current Middle Eastern conflict, legal combatants or otherwise, have committed egregious breaches of international treaty law and customary practice concerning the humane treatment of persons protected under the Geneva Conventions. While it is tempting to condemn all alike, I will not present a simple "tu atque" ("you, too") argument for a moral equivalency between conventional war and terror warfare. To the contrary, the Geneva Conventions, particularly Additional Protocol I, reveal a significant moral and corresponding legal difference besides an arguable one of degree between breaches that coalition troops commit and those terrorists commit.

Our enemies have used law fare to imply a moral equivalency between breaches of the rules of warfare committed in the course of conventional war and during terror warfare. Some breaches of the Geneva Conventions, however, arise as the result of the illicit execution of a legally permissible act. Others occur because the commission of war crimes is intrinsic to a particular way of war.

Detaining enemy combatants as EPWs, for instance, is permissible; mistreating them while in legal detention is not. The breaches that apparently took place at Abu Ghraib prison in Iraq are an example. As grave as such actions are, they can be remedied by timely, appropriate prosecution and punishment of those responsible for such crimes and by the subsequent enforcement of appropriate measures to prevent further abuses.

Terrorism, on the other hand, is defined and prohibited as an act or threat of violence directed at civilians with the object of spreading terror among them. Thus terrorist breaches are, by virtue of their defining tactics and overarching strategy, inherently illegal and cannot be otherwise. The

irremediability of terror warfare lies in the fact that its tactics and overarching strategies rely on methods and means specifically prohibited under Part IV of Protocol I. Therefore, it is impossible to conduct terror warfare without intentionally committing criminal breaches of the Geneva Conventions.

Among the worst of these criminal breaches is perfidy. Article 37 of Protocol I to the Geneva Conventions defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Such acts seek to take advantage of the opposing force's intent to respect Protocol / provisions.

For the protection of innocents in time of war in order to gain some tactical advantage. Examples include engaging in combat while feigning noncombatant status, using noncombatants as shields, using ambulances to carry troops or ammunition, and sitting command posts or weapons systems in or near specially protected places such as houses of worship, shrines, hospitals, or schools.

Not all war crimes fall under the heading of perfidy. Directly attacking noncombatants openly, while clearly a war crime does not constitute perfidy. The Geneva Conventions place perfidious acts in a class of especially egregious war crimes because such acts cynically abuse those provisions that make it permissible to incur collateral casualties or damage so long as certain Just War criteria are fulfilled. The perfidious use of mosques, shrines, schools, ambulances, hospitals, and so on turns such protected places (and, inevitably, the protected persons, voluntarily or involuntarily, housed within their precincts) into legally permissible targets. In this way, a perfidious act of war performs an illegal end run around the foundational moral principle of the Geneva Conventions—the protection of innocent noncombatants.

In terrorist hands, law fare routinely places blame for casualties at the feet of coalition forces. Instructive to note is that the Geneva Conventions recognize that collateral damage to protected persons or places as a result of acts of perfidy is entirely the responsibility of the perpetrator, and not of his opponent who has struck what has become, by virtue of his perfidious act, a legitimate military target.

Resorting to perfidy is pernicious for another reason; it makes it emotionally easier for an otherwise careful opponent to justify indiscriminately or disproportionately striking a perfidious enemy's own noncombatants and protected structures during future engagements. I believe the perfidious acts terrorists engage in are the genesis of much of our own abuses of prisoners suspected of committing acts of terrorism.

Marcosassli and Antoine A Bovvier in their book how does law protect in war focuses on the relevance of IHL and its applicability to specific practical situations arising in armed conflict is one of the messages which if integrated by students will make them respect in the future . thus these writers focuses on the academic point of IHL and its implications thus they say that related teaching of IHL in their view is the best fulfils the obligation of states in time of peace as in time of war to encourage the study there of by the civilian population .

They say that this book is dedicated to those who do not yet study IHL. To many and even the most excellent professors omit or neglect this subject in their teaching, perhaps because they fear that when confronted with its vanishing point their students will definitely conclude that international law is not law.

1.9. CHAPTER BREAKDOWN

This research paper comprise of five chapters

Chapter one will discuss the general introduction of the research topic

Chapter two will discuss the convention visa viz terror war fare, the legal responsibility for acts of terrorism and the challenges it poses against IHL.

Chapter three will discuss the treatment and or position of civilian and the detainees by the forces of the US and other allied powers in the Middle East.

Chapter four will discuss the justifications and the moral case against terrorism.

Then chapter five will comprise of the recommendations and conclusions.

CHAPTER TWO

2.1. CONVENTIONAL VS. TERROR WARFARE AND THE CHALLENGES IT POSES AGAINST IHL

2.1.1. The "Acts of Terror"

If I have to identify the two cornerstones of IHL, these would be the principle of distinction and the prohibition of attacks on civilians. Since violations of these two rules are the cornerstone of terrorism, it is obviously a threat to IHL. If these acts are committed in times of armed conflict, what does IHL say about, and how does it respond to, them? In answering this, I have to confess that I take the path of least resistance. In my view, IHL adopts a very categorical and very simple approach. As I have tried to define terrorism and without going down the thorny road of attempting to find the most appropriate one (definition) which IHL does not contain - IHL lays down categorical prohibitions of the acts which form the very essence of terrorism. In particular, it prohibits:

- attacks against civilians;
- indiscriminate attacks;
- the taking of hostages;
- murder;
- attacks on places of worship; and
- Attacks on installations containing dangerous forces.

Furthermore, all the basic minimum prohibitions laid down in Common Article 3 of the Geneva Conventions apply to acts of terrorism in non-international armed conflict.

The response of IHL First, it prohibits those acts that are commonly considered terrorism. Second, most of these acts are in fact grave breaches of the Geneva Conventions and war crimes; thus, the stringent rules of IHL regarding their repression apply. These are much more developed and binding (as they form part of customary law) than the rules on repression found in the various international treaties on terrorism.

The GENEVA CONVENTIONS provide for more prohibitions. The first prohibits acts aimed at spreading terror among the civilian population. Found in both Additional Protocols [Article

51(2) of Additional Protocol I (AP I) and Article 13(2) of Additional Protocol II (AP II)], it specifically contains the word "terror." But what exactly does it mean, for armed conflict, by its very nature, spreads terror among the civilian population? The prohibitions cover acts of violence whose primary purpose is to spread terror among civilians without offering substantial military advantage - for example, the aerial carpet-bombing of cities during the Second World War designed to undermine morale. Attacks on lawful military targets in civilian areas may well cause terror, but would not fall foul of this prohibition because they result in a military advantage. Interestingly, this provision has been recently examined on two occasions by the International Criminal Tribunal for the former Yugoslavia (ICTY), thereby providing some insight into what acts are covered. The mere fact the prohibition is being considered by ICTY is interesting in and of itself, as violations of this provision are not war crimes under AP I nor the Statute of the ICC.

In its review of the indictment in the ***Martic*** **case**, the ICTY considered the cluster bomb attacks on the city of Zagreb. It found that the use of the rockets was not intended to hit military targets, but rather to terrorize the population of Zagreb in violation of the prohibition. The prohibition was also invoked in the ***Gallic*** **indictment** in relation to the campaign of shelling and sniping against the civilian population in Sarajevo.

There is one provision of IHL that specifically mentions "terrorism." it provides no definition and, in my view, covers acts that are not quite acts of terrorism as that term is commonly understood. That said, some argue that they are in fact acts of State terrorism.

Article 33 of Geneva Convention IV and Article 4(2) of AP II expressly prohibit terrorism. However, nowhere is a definition provided for this "terrorism."

Moreover, if one looks at the location of these provisions in the instruments, they are among the rules relating to individual responsibility and the prohibition on collective penalties. The ICRC *Commentaries* support the view that, rather than covering acts of terrorism as commonly understood, these measures aim to prohibit acts during past conflicts where a belligerent attacked civilians in order to forestall breaches of the law.

IHL specifically mentions and in fact prohibits "measures of terrorism" and "acts of terrorism". The Fourth Geneva Convention (Article 33) states that "Collective penalties and likewise all

measures of intimidation or of terrorism are prohibited", while Additional Protocol II prohibits "acts of terrorism" against persons not or no longer taking part in hostilities. The main aim is to emphasize that neither individuals, nor the civilian population may be subject to collective punishments, which, among other things, obviously induce a state of terror. Both Additional Protocols to the Geneva Conventions also prohibit acts aimed at spreading terror among the civilian population. "The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited" (AP I, Article 51(2) 13 (2) and AP II, (2)).

These provisions are a key element of IHL rules governing the conduct of hostilities i.e. the way military operations are carried out. They prohibit acts of violence during armed conflict that do not provide a definite military advantage. It is important to bear in mind that even a lawful attack on military targets can spread fear among civilians. However, these provisions outlaw attacks that specifically aim to terrorize civilians, for example campaigns of shelling or sniping of civilians in urban areas.

The rules of IHL apply equally to all parties to an armed conflict. It does not matter whether the party concerned is the aggressor or is acting in self-defence. Also, it does not matter if the party in question is a state or a rebel group. Accordingly, each party to an armed conflict may attack military objectives but is prohibited from direct attacks against civilians. The equality of rights and obligations under IHL enables all parties to a conflict to know the rules within which they are allowed to operate and to rely on similar conduct by the other side. It is the existence of at least two parties to an armed conflict and the basic equality among them under IHL, as well as the intensity of violence involved and the means used, which distinguishes warfare from law enforcement.

As already mentioned IHL is only applicable in armed conflict. A central element of the notion of armed conflict is the existence of "parties" to the conflict. The parties to an international armed conflict are two or more states (or states and national liberation movements), whereas in non-international armed conflict the parties may be either states or armed groups – for example, rebel forces- or just armed groups. In either case, a party to an armed conflict has a military-like

formation with a certain level of organization and command structure and, therefore, the ability to respect and ensure respect for IHL.

Specific aspects of the so-called "war on terrorism" launched after the attacks against the United States on 11 September 2001 amount to an armed conflict as defined under IHL. The war waged by the US-led coalition in Afghanistan (Middle East) that started in October 2001 . The 1949 Geneva Conventions and the rules of customary international law were fully applicable to that international armed conflict, which involved the US-led coalition, on the one side, and Afghanistan, on the other side.

However, much of the ongoing violence taking place in other parts of the world that is usually described as "terrorist" is perpetrated by loosely organized groups (networks), or individuals that, at best, share a common ideology. On the basis of currently available factual evidence it is doubtful whether these groups and networks can be characterized as a "party" to a conflict within the meaning of IHL.

2.1.2. Terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement.

Even if IHL does not apply to such acts they are still subject to law. Irrespective of the motives of their perpetrators, terrorist acts committed outside of armed conflict should be addressed by means of domestic or international law enforcement, but not by application of the laws of war.
Most of the measures taken by states to prevent or suppress terrorist acts do not amount to armed conflict. Measures such as intelligence gathering, police and judicial cooperation, extradition, criminal sanctions, financial investigations, the freezing of assets or diplomatic and economic pressure on states accused of aiding suspected terrorists are not commonly considered acts of war.

In the past year, there have seen the humiliation and physical abuse of Iraqi enemy prisoners of war (EPWs) by U.S. military police and contractors, the parading of body parts of fallen Israeli soldiers by members of the Palestinian terrorist organization Hamas, the murder and mutilation of U.S. and coalition military and civilian contract personnel by Iraqi rebels, the bombing of

Spanish commuter trains by Islamic terrorists, and other grave breaches of the LOAC. It would appear that all parties to the current Middle Eastern conflict, legal combatants or otherwise, have committed egregious breaches of international treaty law and customary practice concerning the humane treatment of persons protected under the Geneva Conventions. While it is tempting to condemn all alike, it is not good to present a simple "tu atque"[9] argument for a moral equivalency between conventional war and terror warfare. To the contrary, the Geneva Conventions, particularly Additional Protocol I, reveal a significant moral and corresponding legal difference besides an arguable one of degree between breaches that coalition troops commit and those terrorists commit. Protocol I delineates a clear hierarchy of gravity among various specified breaches to its provisions. Specifically, Part 2 of Protocol I list murder, torture, and mutilation ahead of outrages on personal dignity as "acts which shall remain prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents." Article 85 of Protocol I lists those breaches that are so grave as to be considered war crimes. These are essentially the sort of deliberate attacks against protected persons and sites that constitute precisely the methods that are characteristic of terror warfare.

Some scholars have used law fare to imply a moral equivalency between breaches of the rules of warfare committed in the course of conventional war and during terror warfare. Some breaches of the Geneva Conventions, however, arise as the result of the illicit execution of a legally permissible act. Others occur because the commission of war crimes is intrinsic to a particular way of war.

Detaining enemy combatants as EPWs, for instance, is permissible; mistreating them while in legal detention is not. The breaches that apparently took place at Abu Ghraib prison in Iraq are an example. As grave as such actions are, they can be remedied by timely, appropriate prosecution and punishment of those responsible for such crimes and by the subsequent enforcement of appropriate measures to prevent further abuses. The irremediability of terror warfare lies in the fact that its tactics and overarching strategies rely on methods and means specifically prohibited under Part IV of Protocol I. Therefore, it is impossible to conduct terror warfare without intentionally committing criminal breaches of the Geneva Conventions.

[9]. Tu atque is, literally, a countercharge leveled at an accuser that "you, too" have behaved in a similarly reprehensible manner.

Among the worst of these criminal breaches is perfidy. Article 37 of Protocol I to the Geneva Conventions defines perfidy as "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence." Such acts seek to take advantage of the opposing force's intent to respect Protocol I.

Provisions for the protection of innocents in time of war in order to gain some tactical advantage. Examples include engaging in combat while feigning noncombatant status, using noncombatants as shields, using ambulances to carry troops or ammunition, and sitting command posts or weapons systems in or near specially protected places such as houses of worship, shrines, hospitals, or schools.[10]

Not all war crimes fall under the heading of perfidy. Directly attacking non-combatants openly, while clearly a war crime does not constitute perfidy. The Geneva Conventions place perfidious acts in a class of especially egregious war crimes because such acts cynically abuse those provisions that make it permissible to incur collateral casualties or damage so long as certain Just War criteria are fulfilled. The perfidious use of mosques, shrines, schools, ambulances, hospitals, and so on turns such protected places (and, inevitably, the protected persons, voluntarily or involuntarily, housed within their precincts) into legally permissible targets. In this way, a perfidious act of war performs an illegal end run around the foundational moral principle of the Geneva Conventions—the protection of innocent noncombatants.

Just war criteria include good faith efforts to avoid or at least minimize damage to protected persons and places and to ensure that collateral damage be kept proportional to the expected tactical gain.

In terrorist hands, law fare routinely places blame for casualties at the feet of coalition forces. Instructive to note is that the Geneva Conventions recognize that collateral damage to protected persons or places as a result of acts of perfidy is entirely the responsibility of the perpetrator, and not of his opponent who has struck what has become, by virtue of his perfidious act, a legitimate military target.

Resorting to perfidy is pernicious for another reason; it makes it emotionally easier for an otherwise scrupulous opponent to justify indiscriminately or disproportionately striking a

[10] MILIT ARY REVIEW ⊡⊡September-October 2005

perfidious enemy's own noncombatants and protected structures during future engagements. I believe the perfidious acts terrorists engage in are the genesis of much of our own abuses of prisoners suspected of committing acts of terrorism.

2.1.3. Legal Responsibility for Acts of Terrorism

If the Geneva Conventions and Additional Protocol I are acknowledged as the pertinent provisions of the LOAC (and not the misconstructions, opinions, and pronouncements of terrorist propagandists, anti-American leftists, cultural relativists, barracks lawyers, and NGOs that, however well-intentioned, have placed an unrealistic and unreasonable expectation of zero collateral damage on conventional fighters), then terror warfare is always irremediably illegal[11].

Article 85 of Protocol I states that such characteristic acts of terror warfare as "making the civilian population or individual civilians the object of attack [and] the perfidious use . . . of the distinctive emblem of the Red Cross [and so on] or of other protective signs . . . when committed willfully . . . shall be regarded as grave breaches." This statement is significant because Article 85 also states that "grave breaches of these instruments shall be regarded as war crimes." And, according to Article 86, the High Contracting Parties as well as all Parties to the conflict are required "to repress grave breaches, and to take all measures necessary to suppress all other breaches, of the Conventions or of [Additional Protocol I], which result from a failure to act when under a duty to do so." Arguments for terrorism, based on religion, politics, or frustration with the prevailing socioeconomic situation (the so-called root-causes arguments), which do not acknowledge the possibility of appeal to the Law of Nations, are not honest or exculpatory.

Articles 85 and 86 restate and reinforce Article 80, which states that the High Contracting Parties and the Parties to the conflict "shall without delay take all necessary measures for the execution of their obligations under the Conventions and this Protocol, shall give orders and instructions to ensure observance of the Conventions and this Protocol; [and] shall supervise their execution." The operative verb form in all three of these injunctions is "shall" (not "might"), signifying a positive legal duty to take timely, substantive action to prevent or curtail the grievous harm deliberately done to innocents by resorting to the tactics of terror warfare. According to Protocol

[11] The misconstructions pronouncements and opinions of terrorist propagandist are not recognized by international law.

I, this duty is incumbent on all High Contracting Parties and all Parties to a conflict, whether they are internationally recognized states or officially sponsored state actors.

Contrary to popular belief, terrorist organizations that recruit and operate across national borders with varying degrees of passive or active state cooperation are not exempt on the grounds of their lack of national status or official state responsibility. Neither are those states that covertly sponsor or tolerate such organizations exempt from the Article 86 responsibility for war crimes committed by terrorist organizations that act in effect as their subordinates "if [those sponsor states] knew, or had information which should have enabled them.

To conclude in the circumstances at the time, that [these organizations were] committing or [were] going to commit such a breach, and if they did not take all feasible measures within their power to prevent or suppress the breach."[12] Erickson makes the point that "there is in international law the concept of state responsibility, that is, the duty that one state owes to another state and to the community of nations. Suppression of international terrorism is part of that duty. When states fail in their responsibility, either through inaction or through active sponsorship or support of terrorism, they commit a delict, or international wrong. The injured state is entitled to economic compensation and, in certain instances, to use military force to correct the wrong.

Article 87 sets forth the duties that High Contracting Parties and all Parties to a conflict shall require of their military commanders with regard to war crimes and criminals. In so doing, it implicates those states and organizations as the ultimately responsible parties. But even if it did not, the international legal principle of Respondent Superior would shift the duty to prevent or suppress the commission of terrorist war crimes up an obscured but existing chain of command to states that hide their responsibility for such crimes behind a facade of feigned helplessness, especially when they could have appealed to the UN at any time for aid.

[12] LTC Richard Erickson legitimate use of military force against state sponsored international terrorism.(Maxwell Air force base: Albama Air university press 1989

2.1.4. The case of non-signatories.

Left unspecified, however, is whether Protocol I's provisions are universally binding on all warring parties or only those states and their "subordinates" who accede to the Geneva Conventions. The question also arises as to how to reconcile this situation with the preexisting Vienna Convention on Law of Treaties of 1969, the relevant provision of which states that no two states might make a treaty that binds a third without its consent. Although it might be argued that this provision was meant to protect a nation's citizenry from undue foreign influence, exempting non signatories from the Geneva Conventions would appear to place reasons of state above the welfare of innocent victims of war to whom the Geneva Conventions give precedence.[13] Both are legal goods, but in any moral contest between the rights of the state and human rights, especially those to life and limb, we are compelled to argue strenuously from an ethical point of view that human rights must take precedence. Logically, too, we must argue from the premise that states are formed for the protection of peoples. A state that guards its sovereignty over the lives and welfare of its citizens is little more than a hollow legal construct, if that.

The effect of this apparent conflict between the two Conventions is to leave an unintended loop-hole in international treaty law through which terrorist organizations and their sponsor states might slip by the simple means of non accession. Unless Protocol I might be read as taking precedence over the Vienna Conventions with regard to terror warfare, the protections afforded innocents under the Geneva Conventions might be effectively negated at the will of those whose political, religious, and socioeconomic purposes are served by a strategy of deliberate indiscriminate attack on noncombatants.

2.1.5. Legal recourse against terrorists.

In the Geneva Conventions, the civilized nations of the world have forged a powerful instrument for the protection of innocent victims of war, but an apparent disconnect between the potential power of the instrument itself and its application has rendered it virtually ineffective. This disconnect might be attributed in large part to two counterproductive factors. For instance,

[13] At issue is the relative position of state sovereignty vice protection of innocent persons in the context of the LOAC

Article 90 provides at length for establishing international fact-finding commissions to "enquire into any facts alleged to be a grave breach as defined in Protocol I." But, although the composition and administration of these commissions are set out in detail, consequences to parties guilty of breaches and grave breaches are left unspecified, with the exception of possible financial liability covered in only one sentence of Article 91. And, although timeframes are specified to establish these commissions, no such limits are specified for the cessation of violations before steps (up to and including military intervention) are taken to keep the peace (while the commission proceeds with discovery and deliberation).

Exacerbating this deficiency is the UN's unwillingness to approve the actions these instruments call for to prevent or suppress violations. Although Part 1 of Article 88 specifies that "the High Contracting Parties shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of grave breaches of the Convention or of this Protocol," and Article 89 calls for action "jointly or individually, in cooperation-operation with the UN" [which might, among other things, deploy peacekeeping troops], there has been a notable lack of will among High Contracting Parties, in general, and Security Council members under the current Secretary General, in particular, to condemn grave breaches of the Conventions in regard to inhumane and perfidious methods of terror warfare and to intervene on behalf of the victims of these illegal attacks. This reluctance to enforce the LOAC against terrorist organizations and their sponsor states might be caused, in large part, by a desire not to alienate UN constituents who are sympathetic to the terrorists' religious agenda and whose notions about the provisions of the Geneva Conventions might be fanciful, to say the least.

In particular, States are under an obligation to prosecute or extradite persons accused of these offences, if necessary, due to the existence of universal jurisdiction. Moreover, in terms of mechanisms for such repression, there are both national courts and international tribunals, specifically the *ad hoc* tribunals and the International Criminal Court (ICC).

The ICC currently does not have jurisdiction over acts of terrorism as a distinct category of international crime, although discussions on their inclusion are foreseen for a review conference. So, if committed in times of peace, acts of terrorism can only be brought under the Court's jurisdiction as crimes against humanity. But then they must meet the crimes against humanity requirement that the acts be committed as part of a widespread or systematic attack directed against a civilian population.

However, if committed in time of armed conflict, as we have just seen, the very same acts would constitute war crimes and therefore fall within ICC jurisdiction.

2.1.6. The challenge of terrorism to IHL

I will start with the more traditional aspect of the problem - the challenge which terrorism itself poses to IHL.

Acts of terrorism that are committed in times of peace, although they violate the humanitarian principles that underlie IHL and which are applicable *a fortiori* in times of peace, are not addressed by IHL.

Although this seems simple enough, there is immediately a complication.

When does an armed conflict exist? While the position may be simple enough for international armed conflict - IHL is applicable to any use of force - the state of affairs is more complex with regard to non-international armed conflicts.

Hostilities must factually reach the application threshold of IHL, i.e., protracted armed violence between the government and an organized armed group or between such groups. This of itself raises the issue of the law that is applicable in situations of unrest falling short of this threshold, human rights law, and national law. However, even where the threshold is met, one is often faced with a denial by the State involved of the existence of a conflict and the consequent denial of the application of IHL. "This isn't a conflict. This is … terrorism!"

An initial challenge is persuading parties that - whatever the tactics adopted a particular situation amounts to an armed conflict in which IHL applies. Both parties must respect its provisions, even during responses to "terrorism." In particular, certain protections must be granted to captured fighters.

A point which must be emphasized; is that this application of IHL will not amount to impunity for those who have committed these so-called terrorist acts. It is very probable that most of the terrorist acts in question violate IHL and are thus subject to its measures of repression.

2.1.7. The challenge posed by the international community's response to terrorism

Terrorism negates the most fundamental principles of humanity, which underlie international humanitarian law IHL, human rights and refugee law. The challenge it poses is obvious and immediate and the response of IHL is something to which I am more concerned. Tragically, this challenge is nothing new. Terrorism is a scourge to which the international community has been striving to respond for decades. What is new is the challenge posed to international law , but also the rules on the use of force -by the recent response of the international community to terrorist acts.

In the past years, IHL has come under an important challenge, both in terms of violations and of rhetoric. I do not propose to discuss the actual violations that may have been committed. Instead, I wish to focus on the rhetoric to which IHL has been subjected.

Paradoxically, perhaps, a denial of the application and relevance of the law is much more damaging to a body of law than its violation. This damage is not just an abstract concern for lawyers and scholars. Undermining the law in this manner is an unfortunate precedent that can very easily lead to its violation in practice in the future. We are thus also witnessing a second challenge to international law – that posed by the response to terrorism.

Let me turn now to the second challenge to IHL, that posed by the international community' response to terrorism.

International conventions for the prevention and punishment of terrorism

First, at a legal level, a number of conventions exist to prevent and punish terrorism. There are certain acts of warfare that are not prohibited by IHL - attacks against military targets, such as barracks or military personnel-which are often nonetheless labeled as terrorism by the State against which they are committed. This is much more likely to occur in non-international armed conflicts.

In practical terms, the fact these acts are not a violation of IHL is probably of little relevance in the State experiencing the armed conflict because mere participation in the hostilities is likely to be a criminal offence. (Query whether labeling such acts as "terrorist" in nature dissuades the person or group committing them from even attempting to comply with IHL because regardless of whether it respects the IHL prohibition or not it is still condemned).

The relationship between terrorism and lawful and unlawful acts under IHL must be properly articulated in the convention. A risk exists that acts that are not unlawful under IHL might nevertheless be included in the definition of the offences falling with the scope of a particular convention. The very practical consequence of this would be that Third States would be under an obligation to prosecute or extradite persons who have not in fact committed an unlawful act under IHL.

There has been a lot of problems in the negotiations for the Comprehensive Convention. This problem can be avoided by carefully drafting the crimes covered by the Convention to avoid including acts that are not unlawful under IHL in situations of armed conflict. Another approach is to include a safeguard clause excluding acts covered by IHL - i.e., committed in the course of an armed conflict - from the scope of the Convention. Of course, care must be taken when drafting such safeguard clauses to ensure the exclusion of acts committed in either international or non-international armed conflict. Similarly, if the exclusion clause uses the term "armed forces," it must be made clear this covers the forces of government *and* organised armed groups. Obviously, excluding acts covered by IHL from the scope of the terrorism conventions does not grant impunity to those who commit them. It merely regulates the applicable body of law. The repression provisions of IHL would address violations of that body of law.
A proper articulation between instruments for the punishment of terrorism and IHL is extremely important, but it is by no means a new development and I am not sure I would call it a challenge to ILH. Instead, it is just something for which to keep an eye open.

2.1.8. Assertions that IHL is inadequate or not applicable to the "war against terror"

What is new and what is definitely a challenge are the allegations made in recent years that IHL is not appropriate or adequate to deal with the "war against terror." I wonder if these allegations would have been made if a different term had been adopted instead of the *war* against terror, reserving the term "war" for the point when the struggle or fight against terror actually took the form of an armed conflict.
The struggle against terror can take different forms. These forms include judicial co-operation and punishment of those responsible for acts of terrorism; freezing of assets used to finance terrorism; and, as in the wake of the attacks of 11 September - armed conflict.

When the struggle takes the form of an armed conflict, the position is uncontroversial: IHL is applicable. Factually, if an armed conflict exists, whatever the causes, whatever the aim, whatever the name, IHL is applicable. And when I say "applicable," I mean applicable in its entirety - the rules regulating the actual conduct of hostilities and the rules protecting captured combatants. It is not possible to pick and choose which of the rules are applicable. There has been concern about people captured during armed conflict.

First, these persons cannot exist in a legal vacuum. If captured in the context of hostilities, they are protected by IHL, either under the Third or Fourth Geneva Convention, or, failing all else, under Article 75 of AP I, which is accepted as reflecting customary law.

And this is just when speaking of the protection afforded by IHL. There is complementary protection from human rights law, as well as national law. A legal vacuum cannot exist. The protection afforded to these persons by IHL does not amount to impunity from persecution. Captured persons can be brought to justice both for violations of IHL committed during the hostilities and any prior involvement in terrorist acts.

When prosecuted, these individuals are entitled to certain fundamental rights. Again, these are found in the complementary norms of IHL, human rights law, and national law. These rights cannot be taken away.

Finally, the law is applicable as a matter of obligation and not as a gesture of courtesy. The rules of IHL as a whole are binding and it is not possible to pick and choose those to apply.

IHL is thus applicable to the "war against terrorism" when it is fought by means of armed conflict. However, as indicated, this struggle can take other different forms. IHL is not relevant to those approaches and does not purport to be. That does not make IHL inadequate. It is merely inapplicable.

2.1.9. Assertions that IHL is outdated

Another challenge that has been raised is that IHL is outdated or inadequate. Even assuming this claim in the context of a "war against terror" fought by means of armed conflict, we have not found a single indication that the law is inadequate or outdated. It is therefore difficult to respond to these assertions.

Terrorism involving non-State actors is an eventuality that has long been foreseen by IHL. If the struggle against terror takes the form of an armed conflict against a non-State actor, the rules of Additional Protocol II and Common Article 3 to the Geneva Conventions apply. The fact that terrorist groups may not have a territorial base does not pose a problem. Common Article 3 of the Geneva Conventions would regulate the hostilities, for it contains no territorial requirement.

There is another body of law that has recently come under challenge:(jus ad bellum) the rules regulating the use of force. Although it has not come under attack by rhetoric, this is the body of law placed under possibly the greatest strain in practice.

I am thinking in particular of the interpretation of the right to self-defence, specifically the notion that an armed attack gives rise to this right, as well as application of the limits on it, such as necessity and proportionality. In terms of being outdated, it is probably this body of law that sits most uncomfortably with modern reality. The rules relating to the use of force regulate relations between States. They do not take into account the possibility that a State may be the victim of an armed attack by a non-State actor that is acting wholly independent of any State; nor do they regulate the response to such an attack.

Regardless of the lawfulness of the attacked State's response, if it takes the form of military action, IHL regulates that response.

CHAPTER THREE

3.1. INTRODUCTION

Chapter three will discuss the treatment of civilian by both the terrorist and the forces of the US and other allied powers in the Middle East.

International humanitarian law (IHL) is the body of international law applicable when armed violence reaches the level of armed conflict, whether international or non-international. The best known IHL treaties are the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, but there are a range of other IHL treaties aimed at reducing human suffering in times of war, such as the 1997 Ottawa Convention on landmines. IHL - sometimes also called the Law of Armed Conflict or the Law of War - does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered "terrorist if they were committed in peacetime.

It is a basic principle of IHL that persons fighting in armed conflict must, at all times, distinguish between civilians and combatants and between civilian objects and military objectives. The "principle of distinction", as this rule is known, is the cornerstone of IHL. Derived from it are many specific IHL rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks or the use of "human shields". IHL also prohibits hostage taking.

In situations of armed conflict, there is no legal significance in describing deliberate acts of violence against civilians or civilian objects as "terrorist" because such acts would already constitute war crimes. Under the principle of universal jurisdiction, war crimes suspects may be criminally prosecuted not only by the state in which the crime occurred, but by all states.

3.2. WHAT LAW APPLIES TO PERSONS DETAINED IN THE FIGHT AGAINST TERRORISM

States have the obligation and right to defend their citizens against terrorist attacks. This may include the arrest and detention of persons suspected of terrorist crimes. However, this must

always be done according to a clearly defined national and/or international legal framework.

Persons detained in relation to an international armed conflict involving two or more states as part of the fight against terrorism – the case with Afghanistan until the establishment of the new government in June 2002 - are protected by IHL applicable to international armed conflicts.

Captured combatants must be granted prisoner of war status (POW) and may be held until the end of active hostilities in that international armed conflict. POWs cannot be tried for mere participation in hostilities, but may be tried for any war crimes they may have committed. In this case they may be held until any sentence imposed has been served. If the POW status of a prisoner is in doubt the Third Geneva Convention stipulates that a competent tribunal should be established to rule on the issue.

3.3. THE ROLE OF ICRC WITH RESPECT TO PERSONS DETAINED IN THE FIGHT AGAINST TERRORISM

Under the Geneva Conventions, the ICRC must be granted access to persons detained in an international armed conflict, whether they are POWs or persons protected by the Fourth Geneva Convention.

The ICRC has repeatedly called for a determination of the precise legal status of each individual held at Guantanamo Bay [and a] legal framework applicable to all persons held in the fight against terrorism.

It is in this context that the ICRC has been visiting a number of persons detained, for example, as a result of the international armed conflict in Afghanistan, both in Afghanistan and at the US naval base in Guantanamo Bay, Iraq. The ICRC has repeatedly called for a determination of the precise legal status of each individual held at Guantanamo Bay, as well as for a determination of the legal framework applicable to all persons held in the fight against terrorism by the US authorities.

If the fight against terrorism takes the form of a non-international armed conflict, the ICRC can offer its humanitarian services to the parties to the conflict and gain access to persons detained with the agreement of the authorities involved.

Outside of armed conflict situations, the ICRC has a right of humanitarian initiative under the Statutes of the International Red Cross and Red Crescent Movement. Thus, many persons regularly visited by the ICRC have been detained for security reasons in peacetime.
Some of the existing international conventions on terrorism include specific provisions providing that states may allow ICRC access to persons detained on suspicion of terrorist activities.

These provisions, as well as the ones included in IHL treaties and in the Statutes of the International Red Cross and Red Crescent Movement are in recognition of the unique role played by the ICRC, based on its principles of neutrality and impartiality.

Civilians detained for security reasons must be accorded the protections provided for in the Fourth Geneva Convention. Combatants who do not fulfill the requisite criteria for POW status (who, for example, do not carry arms openly) or civilians who have taken a direct part in hostilities in an international armed conflict (so-called " unprivileged " or " unlawful " belligerents) are protected by the Fourth Geneva Convention provided they are enemy nationals.

Contrary to POWs such persons may, however, be tried under the domestic law of the detaining state for taking up arms, as well as for any criminal acts they may have committed. They may be imprisoned until any sentence imposed has been served.

Persons detained in relation to a non-international armed conflict waged as part of the fight against terrorism – as is the case with Afghanistan since June 2002 - are protected by Article 3 common to the Geneva Conventions and the relevant rules of customary international humanitarian law. The rules of international human rights and domestic law also apply to them. If tried for any crimes they may have committed they are entitled to the fair trial guarantees of international humanitarian and human rights law.

All persons detained outside of an armed conflict in the fight against terrorism are protected by the domestic law of the detaining state and by international human rights law. If tried for any crimes they may have committed they are protected by the fair trial guarantees of these bodies of law.

What is important to know is that no person captured in the fight against terrorism can be considered outside the law. There is no such thing as a "black hole" in terms of legal protection.

3.4. THE STATUS OF TALIBAN DETAINEES

The U.S. has reached the wrong conclusion in deciding that members of the Taliban armed forces are per se not POWs, and it has reached it the wrong way[14]. Article 5 of the Third Convention clearly provides that: "Should any doubt arise as to whether persons having committed a belligerent act and having fallen into the hands of the enemy, belongs to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal." The point is that the presumption of POW status rests with the detainee, and if any doubt arises, the onus is on the detaining power to establish the proper procedures for making a final determination of the matter.

As members of the armed forces of the State of Afghanistan, Taliban who have been captured on the battlefield are prima facie prisoners of war. The U.S. grounds for denying them this status are legally incorrect and at odds with U.S. domestic law[15]. The four conditions of belligerency set out in Article 4(2) of the Third Convention only apply to militias and volunteer corps that do not form part of the armed forces. Even if Taliban soldiers allied or associated themselves with members of Al Qaeda, per se this would not be enough to deny them their presumptive status of

[14] Terrorism and international law challenges and responses. Contributions presented at the meeting of independent experts on terrorism and international law challenges and responses. Contemporary nature of human rights law, international humanitarian law and refugee law organized by the international institute of humanitarian law sanremo, 30 may to 1 June 2002.presented by AVRIL MCDONALD on terrorism; counter terrorism and the jus in Bello. Page 68.

[15] Including the U.S. Army's Operational Law Handbook (2002) p. 22, and Department of Defense's Directive 5100.77 on the Law of War Program. See Sean D. Murphy, "Contemporary Practice of the United States Relating to International Law", 93 *AJIL* (1999) p. 476.

POW. In any event, a determination of status is supposed to be made in each case, not in a blanket fashion.

The United States cannot deny the Taliban detainees their presumptive POW status based on the fact that it refused to recognize the Taliban government.

Article 4(2) (3) of the Third Convention provides that those benefiting from POW status include: "Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power."

One reason for the refusal of the U.S. to recognize the POW status of the Taliban may be because, under Article 102 of the Third Convention, captured combatants have to be treated to the same conditions of trial and sentencing as a State's own armed forces, and this would make it illegal to, for instance, try them before military commissions of a type contemplated by the President's Military Order of 13 November 2001, and which have jurisdiction only over non nationals.

Furthermore, under Article 103 of the Third Geneva Convention, prisoners of war should be tried as soon as possible. Once the conflict ends, they should be released unless they are being prosecuted for a war crime or some other crime committed in hostilities. They should not, of course, be tried merely for the fact of having engaged in hostilities. Since it seems that the conflict between the U.S. and its allies and Afghanistan is now over, captured Taliban should be released or tried. On the other hand, President Bush and other members of the U.S. administration they made it clear that they are really not being held so much in connection with the international armed conflict in Afghanistan, but instead with the global war on terror, a war that may have been possibly infinite duration. In the eyes of the U.S., they can therefore apparently be held until the end of time, or until the terrorist threat is finally crushed, whichever is sooner. Indeed, the U.S. has indicated that while it may try some of the captured Taliban, their detention is not really as a prelude to trial, but more in the way of internment. Even if some of them were prosecuted and acquitted, they would continue to be held as long as they are deemed to constitute a potential terrorist threat, or as long as they might have some use intelligence information.

On 12 March 2002, the Inter-American Commission on Human Rights issued its Decision on Request for Precautionary Measures (Detainees) at Guantanamo Bay, Cuba, in which it asked the United States "to take the urgent measures necessary to have the legal status of the detainees at

Guantanamo Bay determined by a competent tribunal."[16] The Decision on Request defended its own competence to refer to international humanitarian law for the purposes of interpretation as the *lex specialis*. It pointed out that: "doubt exists as to the legal status of the detainees. This includes the question of whether and to what extent the Third Geneva Convention and/or other provision of international humanitarian law apply to some or all of the detainees and what implications this may have for their international human rights protections.

... The information available suggests that the detainees remain entirely at the unfettered discretion of the United States government. Absent clarification of the legal status of the detainees, the Commission considers that the rights and protections to which they may be entitled under international or domestic law cannot be said to be the subject of effective legal protection by the State."

Response of the United States to Request for Precautionary Measures - Detainees in Guantanamo Bay, Cuba, the United States rejected the competence of the Inter-American Commission to apply Geneva Law or customary international humanitarian law. Moreover, it stated that even if the Commission was competent to apply international humanitarian law, which it is not, the precautionary measures sought by the Inter-American Commission were not appropriate in this case. This is because, in the U.S. view, the legal status of the detainees in Guantanamo Bay is already clear ... and even if unclear; there is no risk, let alone an immediate risk, of irreparable harm to the detainees. Finally, the U.S. rejected the competence of the Inter-American Commission to make requests for precautionary measures in respect of non-States Parties to the American Convention.

A number of cases have been brought in U.S. courts on behalf of persons detained at Guantanamo Bay. So far, they have all been decided against the applicants. **In *Coalition of Clergy* v. *Bush*[17]** the District Court of California rejected a petition for *habeas corpus* filed on behalf of the Guantanamo detainees.

---

[16] Terrorism and international law challenges and responses. Contributions presented at the meeting of independent experts on terrorism and international law challenges and responses. Contemporary nature of human rights law, international humanitarian law and refugee law organized by the international institute of humanitarian law sanremo, 30 may to 1 June 2002.presented by AVRIL MCDONALD on terrorism; counter terrorism and the jus in Bello. Page 68.

[17] No. CV 02-570 AHM (JTLX), 2002 WL 272428 (C.D. Cal. Feb. 21 2002).

The court found, first, that the petitioners lacked a sufficiently close relationship with the detainees and therefore did not have standing to bring a claim. Second, relying on the decision in ***Johnson* v. *Eisenrager***,[18] it found that Guantanamo Bay is not a part of U.S. territory but a part of Cuban territory, and that it had therefore no jurisdiction over the detainees, as they are not present on U.S. sovereign territory. Third, since no other court has jurisdiction, the case could not be remitted.[19] **However, it is not insignificant that, in its conclusions, the court had this to say:**

"The Court understands that many concerned citizens, here and abroad, believe this case presents the question of whether the Guantanamo detainees have *any* rights at all that the United States is bound, or willing, to recognize. That question is *not* before this Court and nothing in this ruling suggests that the captives are entitled to no legal protection whatsoever. For this Court is not holding that these prisoners have no right which the military authorities are bound to respect.

The United States, by the [1949] Geneva Convention . . . concluded an agreement upon the treatment to be accorded captives. These prisoners claim to be and are entitled to its protection. It is, however, the obvious scheme of the Agreement that responsibility for observance and enforcement of these rights is upon political and military authorities. Rights of alien enemies are vindicated under it only through protests and intervention of protecting powers as the rights of our citizens against foreign governments are vindicated."

Recognition that the U.S. is not correct in asserting that the Guantanamo detainees have no legal rights whatsoever has also come indirectly from the U.K. Court of Appeals. **The *Abassi* case**,[20] before the Court of Appeals, concerned a judicial review of an earlier decision of the High Court that denied the applicant—who is detained without charge in Guantanamo Bay—a legal remedy before the British courts. The case concerned questions of diplomatic protection. Abassi had asked the court to order the Foreign and Commonwealth Office to make representations on his behalf to the U.S. Government regarding his detention.

While not granting the relief sought, including on the grounds that appeals on the question of the rights of the detainees were still pending before U.S. courts, the court expressed concern over the possibility of his infinite detention without the possibility of challenging its legality, and went so

[18] 339 U.S. 763 (1950).

[19] Ibid. at pp. 3-7.

[20] Court of Appeal (civil division), The Queen on the application of R. (Abbasi & Another) v. Secretary of State for Foreign and Commonwealth Affairs & Secretary of State for the Home Department, 6 November 2002, [2002] EWCA Civ. 1598.

far as to state that "in apparent contravention of fundamental principle recognized by both jurisdictions and by international law, Mr. Abbasi is at present detained in a "legal black-hole."

3.5. THE STATUS OF CAPTURED AL QAEDA

George Aldrich has argued that detained members of Al Qaeda are clearly not entitled to POW status. They are illegal combatants. If captured while accompanying Taliban forces, once they have been identified, they may be "lawfully prosecuted and punished under national laws for taking part in the hostilities and for any other crimes, such as murder and assault, that they may have committed."

While prima facie this is correct, it is also the case that Al Qaeda captured in Afghanistan may not be considered as combatants at all, unlawful or otherwise.

Unless they were somehow affiliated with Taliban armed forces, they can simply be considered as criminals, under either international law or the domestic law of most States. To make an across the board determination that they are "unlawful combatants" is to obscure the reality that many of them took no role in combat per se and were not part of or linked with the armed forces.

If members of Al Qaeda captured in Afghanistan should in the main be considered as civilian criminals, rather than unlawful combatants, the absurdity of applying the legally vacuous expression of unlawful combatant to members of Al Qaeda captured outside of Afghanistan, in conditions of peacetime, as part of the ongoing war on terror, is even more obvious. For example, regarding the defendant Abdullah al Mujahir (Jose Padilla), the so-called "dirty bomber"[21] at a special Department of Justice/Department of Defense Press Conference to announce his arrest, Deputy Attorney General Larry Thompson stated that Padilla was being detained under the laws of war as an enemy combatant and that there was clear Supreme Court and circuit court authority for such a detention[22]. He cited the cases of *ex parte Quirin*[23] and *In re Territo*[24] as legal authority. According to Paul Wolfowitz: "Under the laws of war, Padilla's

[21] According to the U.S., Muhajir was engaged on a mission for *al-Qaeda* to build and detonate a radiological explosive devise somewhere in the United States in order to inflict serious casualties and to spread terror.

[22] See DOD News Briefing/Department of Justice, Deputy Secretary of Defense Paul Wolfowitz, Deputy Attorney General Larry Thomson, and FBI Director Robert Mueller, June 10, 2002, http://usinfo.state.gov/topical/rights/law/02061001.htm.

[23] 317 US 1 (1942). 317 US 1 87 L.Ed. 7.

[24] 156 F.2d 142, 145 (9th Cir. 1946).

activities and his association with al-Qaida make him an enemy combatant. For this reason, Jose Padilla has been turned over to the Department of Defense."[25]

In *Ex Parte Quirin*, a U.S. citizen, part of a group of German nationals secretly put ashore in the United States from German U-boats during World War II for the purpose of engaging in acts of sabotage on behalf of Nazi Germany, was captured and then held, tried, and convicted by the armed forces. The Court noted:

"By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as prisoners of war by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."[26]

In *Re Territo*, a U.S. citizen fighting in the Italian Army against the United States during World War II was captured by American forces and held as a prisoner of war. Territo sought a writ of *habeas corpus*, claiming that his Incarceration as a prisoner of war was unlawful. The court found that "all persons who are active in opposing an army in war may be captured and except for spies and other non-uniformed plotters and actors for the enemy are prisoners of war."[27]

U.S. citizenship was no bar to being treated as an enemy combatant. The court held that "Territo upon capture was properly held as a prisoner of war."[28] Al Mujahir is a U.S. national who has never left U.S. territory. These cases are not relevant *vis-à-vis* him since they deal with legal issues arising during an international armed conflict, whereas he was not a member of a party to an armed conflict, nor were his alleged actions committed during a time of international armed conflict.

---

[25] See DOD News Briefing/Department of Justice, Deputy Secretary of Defense Paul Wolfowitz, Deputy Attorney General Larry Thomson, and FBI Director Robert Mueller, 10 June 2002, http://usinfo.state.gov/topical/rights/law/02061001.htm. Ibid.

[26] Terrorism and international law challenges and responses. Contributions presented at the meeting of independent experts on terrorism and international law challenges and responses. Contemporary nature of human rights law, international humanitarian law and refugee law organized by the international institute of humanitarian law sanremo, 30 may to 1 June 2002 at page 37 to 38

[27] Ibid 27

[28] Ibid

CHAPTER FOUR

4.1. THE MORAL CASE AGAINST TERROR WARFARE

Chapter four will discuss the justifications and the moral case against terrorism. The argument that terror warfare is inherently and irremediably illegal, especially because of its use of perfidious means to deliberately target noncombatants, is also a deeply moral one that proceeds in a straight line of reasoning from Just War Theory to the LOAC. The LOAC is specifically intended to encode and enact the moral principles the Just War Tradition embodies. Under Just War criteria, it is not enough that war be undertaken for just cause; it must be justly fought as well. Consequently, to be legal under the first article of Protocol I and the LOAC, war must be fought in accordance with established custom, the principles of humanity, and the dictates of public conscience.

Protocol I makes it unequivocally clear that the guiding, overarching spirit of the LOAC is concern that innocents be spared from intentional infliction of at least the cruelest depredations of war, insofar as it is possible to do so. Contrary to terrorist apologetics, no statute exists in the International Law of War (a law that recognizes the Thomist principle of double effect) to the effect that no civilians might be harmed under any circumstances.[29]

Wording to the effect that the "provisions of this Protocol must be fully applied in all circumstances to all persons who are protected by these instruments" would appear to give precedence to concern for the welfare of noncombatants even over respect for "the sovereignty, territorial integrity or political independence of States [or of peoples aspiring to statehood] without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflicts." This order of precedence has legal significance; it effectively invalidates so-called root-causes arguments as exculpatory

[29]. Innocents include those not actively engaged in combat, including but not limited to civilians, medical personnel, chaplains, and those rendered hors de combat (out of the fighting or disabled) by virtue of having been wounded or taken prisoner of war.

Thomas Aquinas is credited with introducing the principle of double effect in his discussion of the permissibility of self-defense in *Summa Theologica* (II-II, Qu. 64, Art. 7). See also "Doctrine of Double Effect," Stanford Encyclopedia of Philosophy, on-line at <http://plato.stanford.edu/entries/double-effect/>, accessed 14 April 2005.

justifications for terrorism. This concept is extremely important to grasp because the root causes of Middle Eastern terrorism are at bottom religious in nature, and in our society minority religions are treated as sacred cows and are not to be criticized. But when religiously inspired warfare is deliberately directed against innocent noncombatants in contravention of the laws of civilized nations and most recognized religions, it is certainly possible to deny the legitimacy and the morality of such warfare. The fact that such abomination is wrapped in the cloak of religion only makes terrorism more egregious.[30]

If any doubt remains, Article 35, dealing with methods and means of warfare, declares outright that "in any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited." Furthermore, Protocol I, "which supplements the Geneva Conventions . . . for the protection of war victims, shall apply in all situations . . . including armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination. . . .". Because peoples fighting against colonial domination, for example, might not be recognized nations in their own right, the quibbling argument that terrorist organizations are exempt from the restraints placed on the behavior of parties to a conflict by Protocol I on the grounds of their statelessness would appear to be immaterial.[31]

---

[30] The wording of Protocol I does not imply that no strike is permissible if there is any risk of collateral casualties as some antiwar and pro-terrorist activists maintain. To the contrary, while the Geneva Conventions state that the deliberate targeting of noncombatants (the defining strategy of terror warfare) is unjustifiable under any pretext, inadvertent and unintended (collateral) casualties are permissible under Article 57, although limited by certain Just War criteria. In this, the framers of the LOAC have followed St. Augustine in recognizing that the soldier in the field is not God and is neither omniscient nor omnipotent. He is, however, human and expected to act humanely, even in combat. That itself is a great deal to ask, especially when facing an enemy as inhumane as terrorists, but Jus in Bello (justice in war) criteria of the Just War tradition to which we subscribe absolutely requires it. See also "China-America The Great Game: Interview with LT Gen Liu Yazhou of the Air Force of the People's 'Liberation Army,'" *Heartland: Eurasian Review of Geopolitic,* Gruppo Editoriale L'Espresso/Cassan Press, Hong Kong: January 2005, on-line at <www.freerepublic.com/focus/f-news/1402564/posts>, accessed 7 September 2005

[31] Protocol I supplements the Geneva Conventions for the protection of war victims in all situations, including war against colonial domination. The argument that terrorist organizations are exempt from restraints on behavior by Protocol I on the grounds of their statelessness appears immaterial, especially in cases in the occupied territories of Israel, where the Palestinian Liberation Organization (PLO) has assumed the function of a proxy Palestinian

Incumbent on all warring parties proceeding from obligations is the duty of "combatants to distinguish themselves from the civilian population while they are engaged in an attack" or, at the very least, to carry their arms openly "in order to promote the protection of the civilian population from the effects of hostilities."

Because acts of perfidy fly in the face of efforts to identify and safeguard protected persons under the provisions of Protocol I, they constitute "methods of warfare of a nature to cause superfluous injury or unnecessary suffering" to protected persons. Resorting to perfidy is therefore especially prohibited under Protocol I provisions dealing with methods and means of warfare.

Because specifically prohibited acts that target civilians directly (or indirectly through perfidy) constitute the very tactics that define terror warfare, any resort to this style of warfare is inherently in contravention of the LOAC in general and Protocol I of the Geneva Conventions in particular and, thus, is not only illegal but, by its most fundamental defining characteristics, irremediably so.

Parties to armed conflicts who are engaged in conventional warfare and experience such system-wide failures as apparently occurred in the Abu Ghraib prison can remediate their situation vis-à-vis the LOAC by prosecuting those responsible, however high up the chain of command, and instituting proper operating procedures. But there is nothing that terrorists can do to remediate their actions short of abandoning their preferred style of warfare.

---

state. Hezbollah is heavily funded by Iran and holds seats in parliament in Lebanon where it is based. In such cases, where terrorist organizations operate with the tacit approval, if not the covert support, of host nations, responsibility for adherence to the Geneva Conventions still devolves on the sponsor nations, many, but not all, of whom are signatories to these legal instruments.

To ensure the safety and welfare of protected persons, Protocol I requires, among other things, that all parties to armed conflicts "[d]o everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protections but are military objectives [and] take all feasible precautions in the choice of means and methods of attack with a view to avoiding and, in any event, minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects."

CHAPTER FIVE

5.1. RECOMMENDATIONS, OBSERVATIONS AND CONCLUSION

After I have analyzed this study on this topic I have come up with the following recommendations which should be addressed by all stake holders from the UNITED NATIONS to individual states and non government organizations at both national and international level.

Addressing the terrorism phenomenon is a very complex and challenging task. While condemnation of terrorist activities by the international community has been unanimous and unequivocal, efforts to regulate this phenomenon have been marred by differences of approach and competing concerns. A number of key issues remain unresolved and the solution has been further complicated by the emergence of new forms of terrorism. The challenge facing the international community is translating the statements and well-elaborated declarations of condemnation of terrorism into concrete measures (legal, political, military) that can effectively address the very negative effects and consequences of terrorist activities. There is a clear need for further discussion not only at UN and/or governmental levels but also within NGOs.
The negative impact of terrorism should be analyzed in an objective and impartial way. The existing legal framework should be reaffirmed and interpreted by competent legal authorities, first of all, within the UN system.

Terrorism is one of the threats against which the international community, above all States, must protect their citizens. They have not only the right but also the duty to do so. But States must also take the greatest care to insure that counter-terrorism does not become an all-embracing concept, anymore than sovereignty, used to block or justify violations of human rights and recognized humanitarian standards. We are faced with desperate situations in some regions of the world that have become an insult to the conscience of mankind. But we are also confronted with the aftermath of what happened in the U.S. on September 11^{th} and has happened in many countries since then - as a direct or indirect consequence.(the Kampala 7^{th} July bombing) We must be aware that these terrorist claim thousands of human beings, innocent civilians, are brutalily deprived of the most fundamental of all human rights - the right to life - by a very premeditated act of terror which we should consider as a crime against humanity. It is very difficult to grasp

the reasons of the people who are prepared for this kind of crime, but we cannot achieve security by sacrificing human rights. If we did, we would be handing the terrorists a victory beyond all their expectations. On the contrary, a greater respect for human rights, democracy and social justice, which is well-established and elaborated in most important international instruments, such as the UN Charter, international covenants on human rights, and the Geneva Conventions for the protection of war victims, will in the long-term prove the only effective cure against terror.

Certainly, there must be a continued struggle to give everyone in the contemporary world a reason to value their own rights and to respect those of others. At the same time, we must constantly confirm and reaffirm the primacy of the rule of law and the principle that certain acts are so evil that no cause whatsoever can justify their use.

But this fight for democracy and social justice must be led in accordance with the law. There should be an objective and impartial interpreter of the most fundamental humanitarian standards to be respected and implemented in everyday life. Security measures must be firmly founded in law. In defending the rule of law, we must ourselves respect and be bound by law.

But there must also be precaution taken not to place communities under suspicion and subject them to harassment because of acts committed by a few of their members. Nor must those concerned allow the struggle against terrorism to become a pretext for the suppression of legitimate opposition or dissent. The right to national sovereignty cannot justify violations of human rights or fundamental freedoms of people.

There must always be organization of different humanitarian law and human rights law courses for military people and for governmental officials.

Unfortunately, the competent international organizations do not pay special attention to the adoption of a clear policy for the dissemination and teaching of human rights law, international humanitarian law. We need a kind of mobilization, first of all, of public opinion, to acquire more knowledge and to be conscious of the importance of the respect of humanitarian standards. It would be very useful to have a form of steering committee composed of competent, international organizations for a co-coordinated policy in the promotion and dissemination of humanitarian standards. In my view, this is also a key factor for the elimination of one of the root causes of the phenomenon of terrorism.

In this regard, I would like to quote Mrs. Mary Robinson, United Nations High Commissioner for Human Rights in her Report at the 58th session of the United Nations Commission on Human Rights: "At the same time, building a durable global human rights culture, by asserting the value and worth of every human being, is essential if terrorism is to be eliminated. In other words, the promotion and protection of human rights should be at the centre of the strategy to counter terrorism." (p.15, para. 55 of the Report).

What is certain today is that we cannot abandon the existing legal framework. For the moment, we do not have alternative detailed rules. The existing laws of war, in spite of some lacunas, are irreplaceable. As I said before, we need more clarity concerning the interpretation and observances of the existing law, and the principles to be followed.

In this battle against terrorism, we need an elaborated and stable structure, a "command structure" in military terms, at international and regional levels. Unity at political, legal, humanitarian and, if necessary, military levels is an issue which should be urgently resolved if the fight against terrorism is to be effective. Certainly, this kind of unity can be obtained by competent recognized bodies that are already engaged in counter-terrorist campaigns and operations. To my mind, this unity is an essential factor for the successful conduct in counter-terrorist policy and operations. The protection afforded to individuals by international humanitarian law must not be seen as an obstacle to justice. The Geneva Conventions and their Additional Protocols do not prevent justice. They require that due process of law be applied when dealing with persons accused of violating their norms. Indeed, the application of international humanitarian law brings with it categorical obligations to repress violations. The Conventions and Protocols oblige States to bring perpetrators of war crimes to justice, including by means of the exercise of universal jurisdiction of national courts.

There is certainly need to respond to the scourges of terrorism. There is no doubt that there should be no avenue for those who plan, support or commit terrorist acts to find safe haven, avoid prosecution, secure access to funds, or carry out further attacks. Security Council Resolution 1373 creates an important framework for the prevention and punishment of terrorism. There is need to corporate with the counter-terrorism committee established by the Security Council to assist States in complying with Resolution 1373. It is urged that States'

implementation of Resolution 1373 also have full and good faith account of their international human rights obligations.

The world community needs, however, to go beyond security measures to provide an effective answer to terrorism. There is need to give every person on this globe a reason to cherish his or her own rights, and to respect those of others. There is need also to ensure that innocent people do not become the victims of counterterrorism measures. There must be commitment to a unifying framework that is grounded in the harmony of common values, common standards, and common obligations to uphold universal rights. It is that framework which defines us as one global community and which enables us to reach beyond our differences.

In the context of terrorist warfare, captured persons who are members of the leadership, armed militants, or collaborators and actively/directly taking part in hostilities do not enjoy the status of a *combatant*. Nor are they to be considered as *fighters*, who are persons taking direct part in an armed conflict of non international character. These individuals are, instead, unlawful fighters, i.e., civilians taking part in an armed conflict. Briefly stated, they are terrorists who are subject to criminal laws of the territorial State.

With regard to the right to a fair trial, the criteria and procedures for detention, access to lawyers, offering a defence and other fundamental guarantees, I believe that treaty or customary norms of the law of armed conflict, as *lex specialis*, have precedence over human rights law. A tricky legal question relates to professional medical and legal assistance provided to the terrorists. Nuances between a collaborator and a professional are important. A terrorist suspect will obviously be entitled to receive legal assistance from a lawyer of his choice. But difficult legal questions arise when the relationship is not limited to professional assistance, but in fact amounts to illegal collaboration between the armed bandit and the professional.

There must be separate issues relating to the prosecution of crimes under criminal law from security measures applied in the context of an armed conflict, namely, internment. In my view, even if no other specific criminal charge seems to be possible, merely being captured as a leader, armed militant, or a collaborator who has taken a direct/active part in hostilities will suffice to permit internment until the end of hostilities. So long as the terrorist warfare continues, it would not make any sense to release such individuals. One must understand that the internment is not a

prosecutorial measure, but rather simply a security measure. It is inherent in the nature of any armed conflict.

However, there may be cases of doubtful status. In this regard, I believe a military tribunal or commission must be available to review and remedy the situation, to determine whether the person in question is an innocent civilian or a leader or armed militant of the terrorist organization, or a collaborator who took direct/active part in hostilities as it is stated in the Geneva conventions as I have discussed above in chapter three.

- In investigating and prosecuting collaborators, the international community has a tendency to see the tree but miss the forest. As a result, isolated, individual assessments on the activities of collaborators end in flawed conclusions. In this context, *democracy and human rights* become *legal shields* that, through professional schemes, function as a *de facto* law of terrorist privileges and immunities.
- As to operational matters, successful planning and conduct of operations requires the efficient and systematic education and training of responsible personnel; this is so even if the existing laws and regulations are sound. It is particularly important to educate the troops in the field that in law enforcement operations the use of force does not necessarily mean the use of firearms. Similarly, the use of firearms does not necessarily imply the application of deadly force. Everything depends on the circumstances at the time of the incident.

5.2. CONCLUSION

Terrorism is not a matter of political aim; it is a matter of the means and methods employed to launch an armed campaign. Further, whereas terrorism is a means & methods issue, armed conflict is a strategic situation.

Terrorism may be committed both in time of peace and in times of armed conflict and terrorist organizations consist of three categories of individuals or other entities: leadership (command and control), militants (combat arms) and collaborators (service arms).

Here I think we have a challenge - a clear and specific definition for "terrorism." Although, the term might seem self-evident, in practice it is hard to agree upon a legal definition at the international level. An analogous example of this dilemma is the definition of "aggression," a subject discussed in Rome during the drafting of the International Criminal Court Statute. The Statute did not include aggression" as one of its "grave crimes" because the Conference could not agree upon its definition, even though efforts to define the crime of aggression have been underway since 1948 and despite the fact that Article 51 of the UN Charter had shed the light on this issue until of recent in Kampala in the review conference I mention this to show how important definitions are in international law.

There is a resemblance between the cases of aggression and terrorism, for in neither is unanimity on a definition. This remains so despite the fact that the first attempt to define terrorism took place with the Convention for the Prevention and Punishment of Terrorism in 1937.
But is it really hard to find a legal definition for a certain act? Or is it the policy of certain Nations to avoid clear-cut definitions, thereby giving them ample discretion in their actions? I am saying this because some years ago the "Eleventh Round Table on Current Problems of IHL" took place in Sanremo. The issue at that time was defining terrorism and the problems of "terminology." But I want to mention it to emphasize that regardless of the different opinions expressed at the Round Table, what was obvious to all participants was that terrorism is a "crime."

Regardless of how one interprets this latter express prohibition on terrorism, the other prohibitions are of direct relevance to acts that amount to terrorism as commonly understood, and their violation brings into play IHL's strict obligations to repress violations. And despite having tried to define terrorism, I will recommend one suggested definition which I find quite compelling and which highlights the interface with IHL. It was suggested by Marco Sassoli: terrorist acts are those acts that would be unlawful even if committed by parties to an armed conflict.

This contribution has sought to highlight some "through the looking glass" effects of September 11, 2001 and the war against terrorism led by the US on the *jus in bello*. Since that date, due to what we are informed is a unique threat of monumental proportions, the rule of international law has been called into question. The *jus in bello* has not escaped this fate. What are clear and binding rules are being willfully misread, misapplied or not applied at all. That the laws of war are adequate to the phenomenon of terrorism in war has been rightfully defended. Where terrorism poses a threat outside situations of armed conflict, national and international criminal law are the appropriate legal tools for responding to it. International humanitarian law does not provide a menu of options for States Parties to select from: it is binding in its entirety on High Contracting Parties. Nor can the law be applied in situations where it is not applicable. To do so risks opening a debate about the meaning of armed conflict that may not produce the result intended by those initiating it and which could in fact give legitimacy to terrorists.

BIBLIOGRAPHY / REFERENCES

Books

1. How Does Law Protect in War. Second Expanded and Updated edition volume ii by Marcosassli & Antoine A Bovvier. In co-operation with Susan Carr, Lindsey Cameron and Thomas de saint Maurice ICRC Geneva 2oo6.
2. Rogers AP V Law on Battlefield, 2nd Edition, Manchester University Press Manchester 2004.
3. Deter, The Law of War, 2nd edition, Cambridge University Press, Cambridge 2000.
4. Christopher Greenword in, Fleck Dicker ed 2008, The Handbook of Humanitarian law in armed conflict, oxford university press.
5. Michael Greenberger is criminal justice a causality of the Bush Administration war on Terror in American Bar Associations Human Right magazine, Winter 2004.

Articles

1. International Committee of the Red Cross Report of 25 May 2011.
2. International law and terrorism by David .S. Kellong PhD. 2006
3. U.S Military Review September – October 2005 Terrorism & Law.
4. LTC Richard Erickson Legitimate use of Military Against State Sponsored International (Maxwell Air force Base Alabama Air University Press 1989.
5. ICRC 05.05.2004 FAQ. IHL and Terrorism questions and answers
6. International humanitarian law and the challenges of contemporary armed conflicts report prepared by ICRC for the 28th International Conferences of the Red Cross and Red Crescent Geneva, 2nd to 6th December 2003.
7. Jane Meyer: The Memo. How an Internal Effort to ban the abuse and torture of detainees was thwarted the New Yorker Article posted 20 February 2006.
8. Terrorism and international law challenges and responses contributions presented at the meeting of independent experts on terrorism and international law challenges and responses complementary nature of HHRL, IHL and Refugee Law Reports.

Internet sources

En.wikipedia.org/wiki/terrorism 2006

Wordnetweb.princeton.edu/peri/webwn

CASES CITED

1. ReTerrito 156 F2d 142 145 (9th Cir 1946)
2. Expert quirin 317 US 1 (1942) 317 US 187 L Ed 7
3. The Abassi case court of appeal the queen on the application of R (abbasi v secretary of state for foreign and commonwealth affairs and secretary of state for home office 6 november 2002 EWCA civ 1598
4. Johnson V Eisenrager 339 US 763 (1950)
5. Clergy V Bush No. V.C 02 – 570 AHM (JTLX) 2002 W.L 272428 (CDcal Feb 21 2002.