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The 'War on Terror': Do the Rules Need Changing?

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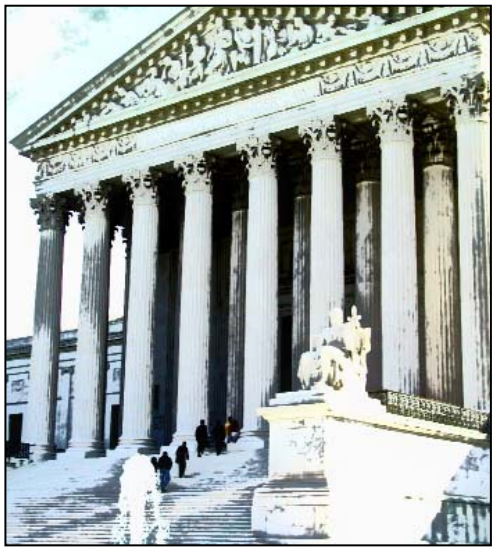

SUMMARY

- Does the term 'war on terror' have any legal significance or is it just a figure of speech?
- What is the law applicable to the 'war on terror'?
- How does international law deal with non-State actors such as Al-Qaeda or Hizbullah?
- Is there a potential clash between human rights law and the law of armed conflict?
- Are the rules adequate to deal with the current situation or do they need changing?

This paper explains the author's view that there need to be international efforts to agree on the law applicable to the new kind of conflict in the age of the 'war on terror'.

INTRODUCTION

The National Defense Strategy of the United States opens with the sentence 'America is a nation at war'. It goes on to say that: 'Today's war is against terrorist extremist networks including their state and non-state supporters.' This war has been given many names. For the purposes of this paper, it is referred to as the 'war on terror' but it has also been called the 'global war on terror (GWOT)' and, in more recent times, the 'long war'. All refer to the same thing, the use of military – and other – force to defeat terrorists wherever they may be found. Most of Europe would probably be prepared to accept such terms merely as a political statement. The UK government, for example, is on record as saying that: 'The term "the war against terrorism" has been used to describe the whole campaign against terrorism, including military, political, financial, legislative and law enforcement measures.'[1] But within the United States it is intended as a statement of fact with political and legal consequences. It is those legal consequences that it is necessary for us to examine. Is this a 'war' at all? If so, is it a 'war' within the existing legal framework or is it, as President Bush described it in his White House Memorandum of 7 February 2002, 'a new paradigm'? His statement is worth quoting in full:

> The war against terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our Nation recognizes that this new paradigm – ushered in not by us, but by terrorists – requires new thinking in the law of war, but thinking that should nevertheless be consistent with the principles of Geneva.

By 'Geneva', the President was referring to the traditional law of armed conflict, often described in the United States as the 'law of war', as exemplified by the four Geneva Conventions of 1949. Have they failed to meet the test of 21st-century warfare and do the rules need changing?

This paper will examine the existing legal framework, the differing applications of the various legal regimes to the 'war on terror' and the problem areas that these have thrown up, and finally will make some suggestions as to the way ahead.

THE EXISTING LEGAL FRAMEWORK

9/11 was in many ways a classic military operation. It struck at the boundaries of legal regimes, causing confusion in the international response. In order to understand where that confusion has arisen and how it can best be resolved, it will be necessary to examine the various legal regimes, as exemplified by the differing international responses both to 9/11 itself and to subsequent terror attacks. Where does the 'war on terror' fit in to the existing legal framework, or is it necessary to carry out some 'new thinking'? If 'new thinking' is required, where should it be applied and how best can an international response to what is indeed a global phenomenon be coordinated?

By tradition and practice over many years, terrorism has been seen as primarily a domestic problem governed by domestic law. The United Kingdom made this quite plain when, in 1998, it ratified the 1977 Additional Protocol I to the 1949 Geneva Conventions, an international treaty dealing with the law of armed conflict. The United Kingdom made a series of 'statements of understanding' including the following:

> It is the understanding of the United Kingdom that the term 'armed conflict' of itself and in its context denotes a situation of a kind which is not constituted by the commission of ordinary crimes including acts of terrorism whether concerted or in isolation.

Stripped of its legal niceties, this statement reflects the position that acts of terrorism are normally 'ordinary crimes' to be dealt with under domestic law. They cannot in themselves create a level of violence sufficient to invoke the international law of armed conflict. This is in contradistinction to the view of the United States that the terrorist acts committed by Al-Qaeda, particularly the attacks on New York and Washington, were 'acts of war', thus invoking the law of armed conflict, or, as it is sometimes known, international humanitarian law.

The law of armed conflict deals with both the conduct of hostilities and the protection of victims affected by armed conflict. Its application is dependent upon the existence of an armed conflict. It does not seek to rule on the legitimacy or otherwise of the cause of the conflict but applies across the board to all parties. Indeed, its strength lies in the fact that both parties have the same rights and responsibilities, regardless of the cause of the conflict. Its application is 'blind', not distinguishing between the 'aggressor' and the 'aggressed'. The difficulty is in defining 'armed conflict' and when it starts.

Overlapping national law and the law of armed conflict is human rights law. This body of law, which has developed since 1945, is primarily designed to provide protection for the citizens of States from their own governments. Growing out of the atrocities of the Second World War, especially the Holocaust, it lays

[1] Answer by the Parliamentary Under-Secretary of State, Foreign and Commonwealth Office (Baroness Amos) in the House of Lords (Hansard 22 Nov 2001: Col. WA153).

down a number of basic rights, which a State is obliged to grant to all within its jurisdiction. This was traditionally seen as a control mechanism on national law, but States were given authority to derogate from (i.e. not apply) some human rights provisions in cases of public emergency. Certain rights were considered to be so fundamental that States could not derogate from them. Examples taken from the International Covenant on Civil and Political Rights include the right to life, freedom from torture or cruel, inhuman or degrading treatment and freedom from slavery. These rights must be made applicable at all times and in all circumstances and there is thus an absolute prohibition on their breach.

The law of human rights developed alongside the law of armed conflict as a separate branch of international law. As the nature of conflict changed so that the majority of armed conflicts took place within the territorial boundary of a single State, so the law of armed conflict and human rights law began to rub up against each other like two tectonic plates. In peacetime, the relationship between the State and dissidents is governed wholly by human rights law but as the level of violence rises so that it can be said that an 'armed conflict' exists, both legal systems become applicable. The relationship has been ill-defined and uneasy both as to applicability – when does internal violence reach the level of an 'armed conflict'? – and as to how the two systems work alongside each other.

THE LEGAL RESPONSE TO THE 'WAR ON TERROR'

The 'war on terror' in turn overlaps all three of these discrete legal regimes and so it will be necessary to examine how all three fit together. Do they provide a coherent and joined-up framework for dealing with international terrorism or do acts such as the 9/11 attacks strike at the very boundaries between the differing legal systems causing different – and contradictory – responses from the advocates of each? If the latter, what can be done to rectify matters?

National law

In Europe, as has been previously mentioned, terrorism has long been seen as a law enforcement problem. States have traditionally been reluctant to admit that internal strife has risen to the level of 'armed conflict'. Many acts of terrorism have taken place within the context of such internal strife. Other terrorist groups have been anarchists with no substantive political agenda. National law, by its very nature, has its principal effect only in the particular State where the legislation is enacted and thus the response to terrorism in national law will vary according to the State and to the nature of the threat, both perceived and real.

National responses

There has, of course, in the past been cross-border terrorism, not just within the context of internal strife. Middle Eastern terrorists have not restricted their activities to their own territories and there have been attacks throughout Europe by groups associated with entities in the Middle East, both State and non-State. Terrorist activities place difficult challenges in the way of national law enforcement agencies. Terrorist groups are often organized in a military manner with their own disciplinary system, wreaking punishment on those who step out of line. Obtaining evidence as to the activities of such groups is difficult. They operate in the shadows and any people who are minded to cooperate with the authorities are subject to intimidation, or punishment including murder. Infiltration will be dangerous and indeed the whole process of evidence-gathering is unlikely to fit within normal parameters. Even should evidence be available, the judicial process is itself subject to pressure. Lawyers in some cases may be under the influence of the group and, in common law jurisdictions, it may be difficult to obtain jurors who are both unbiased and not subject to pressure. Fear for family and friends may discourage jurors. Even judges are not immune and face intimidation and assassination.

However, these factors are not necessarily new. Over the years, States have faced many challenges to the rule of law and legal systems have adapted to respond. Organized crime, particularly the Mafia in Italy, required special laws and procedures if it was to be defeated and today many drug cartels and organizations engaged in people-trafficking can be brutal to those who might interrupt their operations. States have adapted to the threat of terrorism too. In Northern Ireland, a generation of violence led to a number of innovative solutions, including the introduction of 'Diplock Courts', judges sitting without juries to hear cases associated with terrorism, and changes to the laws of evidence to allow greater discretion to courts to admit evidence that might not be admissible under the ordinary rules of evidence. Even the burden of proof was amended in certain cases to allow presumptions to be drawn against an accused or to require the accused to prove certain facts within his or her own knowledge on the balance of probabilities. All such changes to normal procedures were carefully weighted to ensure that the balance did not tip so far in the other direction as to remove fair trial provisions altogether. Human rights law provided a useful base line, particularly with the recognized (though constrained) power to derogate in time of public emergency contained within the human rights provisions.

Indeed, as Northern Ireland gradually began to return to normality, these 'variants' from normal procedures became less justifiable. The burden placed on the accused was relaxed so that he or she was only required to adduce some evidence to support his or her argument, evidence which was sufficient to require the prosecution to call further evidence to prove its case beyond reasonable doubt. Recently, it was announced that the 'Diplock Courts' would cease to function except where the Director of Public Prosecutions for Northern Ireland certifies in a particular case that there is a risk of intimidation.

In addition to judicial procedures, it was on occasion thought necessary to introduce some form of administrative detention – internment, as it is often described. It is perhaps here that there has been the most controversy and the greatest threat of conflict with human rights provisions. It is a fundamental principle that there should be no restriction of liberty of the individual unless sanctioned by law and any such restriction should be subject to judicial supervision. 'Indefinite detention' is seen as an anathema and thus it has been necessary to build in to any system procedural safeguards including a regular review mechanism subject to legal challenge. 'Internment' of any sort can be a two-edged sword, as the United Kingdom discovered in Northern Ireland, and has normally only been adopted as a last resort when other control mechanisms have failed.

International cooperation

In recent decades, an increasing number of steps have been taken to coordinate the response to terrorism under national law through a series of international treaties. The difficulty that has been uncovered is in the defining of 'terrorism'. While it has become a cliché to say that 'one man's terrorist is another man's freedom fighter', there is a considerable problem with perception, particularly when it comes to political issues. Indeed, the only universal treaty that sought to deal with terrorism in general, adopted in 1937, has never entered into force. The United Nations has attempted for years to agree on a definition of terrorism but, up to now, it has proved impossible.

The solution adopted, therefore, has been to draw up treaties on individual acts that are usually committed for terrorist purposes, such as unlawful acts against the safety of maritime navigation (1988), hijacking and other unlawful acts against aircraft (1963 and 1971), hostage-taking (1979), crimes against internationally protected persons such as diplomatic agents (1973), terrorist financing activities (1999) and terrorist bombings (1998). All of this has been done through the prism of criminal law. The objective has been to enhance international cooperation in judicial enforcement. The treaties require States, where someone reasonably suspected of carrying out one of these prohibited acts is found on their territory, either to prosecute or to extradite to a State that will prosecute. To assist in this, a 'universal jurisdiction' clause has been inserted in the treaties, permitting all States to exercise jurisdiction for prosecution over such cases regardless of whether the acts were committed within their territorial boundaries or by their nationals. Any such prosecution would take place under the national law of the State concerned.

US law

All these changes require a degree of legislative flexibility. The common law, by its nature, has provided that flexibility but it has often been more difficult in countries where the traditional flexibility has been restricted through written constitutions. This has proved particularly true of the United States where the Constitution plays a major role in judicial thinking and the Supreme Court has tended to take a conservative line on constitutional interpretation, seeking to discover the intent of the founding fathers when the Constitution was drafted in 1787. Many procedural guarantees, including the right to trial by jury, are part of constitutional rights and are interpreted in a narrow manner. It has therefore proved much more difficult in the United States to introduce domestic legal innovations to reflect the challenges posed by international terrorism. Concern has been expressed both about the threat of jury intimidation and about evidential restrictions which may prevent the production of relevant, and in many cases highly persuasive, evidence before the court. Security concerns are also raised. It is argued that the mechanism for constitutional change is cumbersome and time-consuming, and there is a reluctance to introduce changes which might deprive US citizens of rights in response to what is seen as a foreign threat. Many of these rights are seen as fundamental in the founding of the American State against the tyranny of the English monarchy and therefore have iconic stature. It is of course correct that, in some areas, such as intercept evidence, the United States is less restrictive than the United Kingdom but the Constitution remains a straitjacket, limiting changes to national law.

US practice

It is partly because of the difficulties of tackling international terrorism by domestic law enforcement without such fundamental changes that the United States has abandoned it as the primary method of approach and adopted the war paradigm. But this in itself introduces tensions within the domestic constitutional arrangements. The balance of power between the Executive, the Legislature and the

Judiciary under the US Constitution is a delicate one. In time of peace, the Executive is held in check by the Legislature and it is to Congress that the Constitution gives the power to declare war. However, it is the President who is 'Commander-in-Chief' of the armed forces and, as such, has a degree of freedom to operate in time of war. The issue that the Supreme Court has recently had to decide is to what extent that freedom applies and what the interrelationship is between the powers of Congress and those of the President acting as Commander-in-Chief. It is accepted that, in time of war, the President has broad constitutional authority to protect the security of the State in the manner he deems fit but that does not amount to a 'blank cheque'.

US court decisions

The first issue to come before the Supreme Court in the cases of Razul v Bush and Hamdi v Rumsfeld was that of the right of extra-judicial detention itself. The Court found that Congress had authorized the President to use 'all necessary and appropriate force' against 'nations, organizations or persons' associated with the 9/11 attacks and that detention of certain individuals 'is so fundamental and accepted an incident to war as to be an exercise of the "necessary and appropriate force" Congress has authorized the President to use'. At the same time, the Court laid down certain parameters for detention and made it clear that the Presidential authority was not unlimited.

However, the Court found it much more difficult when, in the case of Hamdan v Rumsfeld, it had to consider a separate issue, whether the President could, in the exercise of his powers as Commander-in-Chief, establish military commissions to try some of those detained, outside the normal court structure and with different rules of procedure and evidence. In the words of Douglas Feith, Under Secretary of Defense for Policy, these extraordinary measures were required because it was necessary 'to design a procedure that would allow us to pursue justice for these individuals while at the same time prosecuting the war most effectively'. These procedures included restrictions on the right of the accused (and even his defending counsel) to attend certain parts of the trial, and rules of admissibility of evidence that were far laxer than those to be found in either the civil courts or the regular military courts. The wartime powers of the President as Commander-in-Chief were invoked to remove some of the legal protections contained within the ordinary judicial structure, both civilian and military. This attempt was unsuccessful. The Supreme Court held that this was an excessive use of the President's powers and that Congress had not given authorization for such steps. They found that there was indeed authority in existing legislation for the convening of military commissions but that their procedures must be the same as those which applied to regular military courts 'insofar as practicable'. They were not satisfied that any of the differences that they identified were caused by lack of practicability. It is fair to say that the Court was substantially split on this issue.

The Supreme Court also held that the military commissions were in breach of the laws of war, or the law of armed conflict, and it is to this that we must now turn.

Law of armed conflict

The law of armed conflict is made up of both treaty and customary law. Much of the law has now been codified but the differing levels of treaty ratification mean that customary law, binding on all States, still plays a major role. For example, the four Geneva Conventions of 1949 are ratified by virtually every State in the world. On the other hand, while the two Additional Protocols of 1977 to those Conventions have been ratified by around 150 States, there are some notable absentees including the United States and Israel. For the most part, the absentees limit their objections to a few specific issues and it is generally agreed that many of the Protocol provisions reflect customary law. The problems that have arisen over the 'war on terror' relate not so much to the content of the law as to its applicability in its current form.

In the nineteenth century, when attempts were initially made to codify the 'laws of war' as they were then known, lawful violence was considered to be the monopoly of States. International law applied to States and so these laws could only apply to wars between States. Internal conflicts – civil wars – were not the concern of international law. A State could do as it wished in its own territory. This view of the law applied into the twentieth century. Many of the treaties also had 'general participation' clauses that limited their application to wars where all the States involved were Parties to the treaty. The inefficacy of this approach manifested itself in the two great World Wars of the twentieth century. The almost universal nature of the conflicts meant that if only one State was not a Party to a particular treaty, then that treaty would not apply to the conflict at all and the warring factions would be bound only by customary international law.

The four Geneva Conventions of 1949 moved away from the concept of 'war', a legal term of art which could too often be avoided, to 'armed conflict', a question of fact rather than law, and from 'general participation' to application of the treaty provisions between parties even where other belligerents might not be parties. Also, 'armed conflicts' were divided into two types, international and non-international.

International armed conflicts were defined in Article 2, common to all four Conventions, as 'all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'. Non-international armed conflicts, on the other hand, were defined by Article 3, similarly common to all four Conventions, as 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.

In 1977, two Additional Protocols to the Geneva Conventions were adopted. Additional Protocol I extended the concept of international armed conflict, controversially, to '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 ….'. Although this might be thought relevant in relation to the insurgencies in Iraq and Afghanistan, the absence of US ratification of the Protocol effectively removes the Protocol from consideration. Additional Protocol II applied to non-international armed conflicts, but only to those which take place in the territory of a State Party 'between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'.

How does the 'war on terror' fit into these definitions? A study of them raises immediate problems. The 'war on terror' is not an inter-State conflict and treaties which depend on States being Parties therefore do not apply. President Bush is right when he says that Al-Qaeda is not a Party to the Geneva Conventions. On the other hand, this is a global struggle and not confined to the territory of a Party. This seems to take it outside the definition of a non-international conflict within the terms of either Common Article 3 to the Geneva Conventions or Additional Protocol II.

US position

The matter was further confused by the armed intervention in Afghanistan in 2001. Although the Taleban were not generally recognized by the international community as the legitimate government of Afghanistan, it was accepted that they were the *de facto* government and that the Afghan conflict amounted to an inter-State conflict within the definition of the Geneva Conventions. There was therefore considerable disquiet when the United States sought to differentiate among captured personnel as to whether they were 'Taleban' or 'Al-Qaeda'. To international lawyers, all personnel captured during the conflict fell within the terms of the Geneva Conventions and it was those Conventions that would define their categorization and their treatment. It was true that, alongside the international armed conflict, there was a pre-existing internal armed conflict between the Northern Alliance and the Taleban. But that merely complicated the detailed application of the Conventions; it did not touch upon their general applicability to the situation as a whole.

Following contradictory lines of advice from the State Department and the Justice Department, the President drew a distinction, not between two categories of people but between two conflicts. He accepted that the conflict against the Taleban should be governed by the terms of the Geneva Conventions but stated that the conflict with Al-Qaeda 'in Afghanistan or elsewhere throughout the world' was outwith the Conventions and none of the 'provisions of Geneva' applied. Thus, so far as the United States was concerned, there were (at least) two separate conflicts going on in Afghanistan. One was a traditional 'Geneva' conflict with the Taleban; the second was a 'new paradigm', a non-Geneva conflict with Al-Qaeda, not limited to Afghanistan but taking place across the world. This was the 'war on terror'.

This interpretation of international law has not gone unchallenged. Even on the assumption, which is generally accepted in the United States on all sides of the political divide, that the 'war on terror' is indeed an 'armed conflict', is it correct to maintain that it falls outside the traditional treaty definitions? There has been considerable academic debate on this issue since the Presidential Memorandum came to light and the issue eventually came before the Supreme Court in the Hamdan v Rumsfeld case The majority of the Court, accepting for the purposes of the case that there was a separate conflict with Al-Qaeda, deliberately refused to rule on whether or not this was an international armed conflict incorporating the whole of that law that governs conflicts between States. They did so because, for the purposes of the case before them, it was unnecessary to do so. However, they did hold that the lesser standards contained in Common Article 3 to the Geneva Conventions were applicable. Despite the wording of the Article itself, which appears to limit its application to conflicts within the territory of a single State, the Court held that the 'term "conflict not of an international character" is used here in contradistinction to a conflict between nations' and thus applied to any armed conflict which was not between States. The Court also used, as an interpretative aid to Common Article 3, the fundamental guarantees outlined in Article 75 of Additional Protocol I to the Geneva Conventions, a treaty to which the United States is not a party. The Court, however, recognized this Article as 'an articulation of safeguards to which all persons in the hands of an enemy are entitled'.

The Court, in reaching its conclusion, relied extensively on the Commentaries to the Geneva Conventions published by the International Committee of the Red Cross and also decisions of the International Court of Justice. Its decision closes a loophole in that it provides a continuum of legal protection across the gamut of armed conflict. Common Article 3 provides a baseline for all armed conflicts regardless of their nature and is thus applicable across the board. Though limited in scope, it provides a foundation on which to build and the majority of the Court did not rule out the application of other parts of the law of armed conflict, though they restricted their decision to the needs of the specific case before them.

Hizbullah

This issue is not solely related to the United States. Israel's recent cross-border incursions into Lebanon were launched to 'destroy' Hizbullah, another non-State actor. While many see this, as with Afghanistan, as an international armed conflict between Israel and Lebanon, others argue that it is not. The 'conflict' is with Hizbullah, not the State of Lebanon. Thus many of the same issues that arise in relation to Al-Qaeda are applicable to Hizbullah, in particular the status of detainees.

Human rights law

Bridging the divide between national law and the law of armed conflict is the law of human rights. As has been shown earlier, the relationship between human rights law and the law of armed conflict is an uneasy one. Originally developed to curb the power of the State in relation to its own people, its application in times of armed conflict has been problematic. Many of its principles are reflective of those contained in the law of armed conflict but there is a major philosophical distinction. The law of armed conflict has developed recognizing the reality of conflict. It has sought to provide a balance between military requirements and humanitarian considerations. National delegations at treaty negotiations frequently include military personnel with a view to ensuring that the law does not get out of line with reality within the battlespace. Human rights law has evolved differently, with armed conflict being only a side concern. Inevitably, it becomes increasingly relevant in times of internal conflict within the confines of a single State. There, the relationship between the government and its own people is paramount – exactly the situation that human rights law was designed to cover. However, its application in international armed conflict has always been more controversial, although only in recent years has it become a major issue.

The right to life

Human rights law deals with armed conflict primarily by allowing States to 'derogate' from certain rights in time of war or other public emergency. Certain other rights are seen as so fundamental as to be applicable in all circumstances. Among these is the right to life. However, the European Convention on Human Rights allows for 'deaths resulting from lawful acts of war', provided that the State has entered a derogation in relation to that particular conflict. It is here that problems begin to arise. Under human rights law, there is an 'inherent right to life' and force may only be used when absolutely necessary. The contrary is true in international armed conflict, where an enemy combatant may be attacked at any time and in any place, including by lethal force, merely because of who he is. The situation has always been confused in non-international armed conflict where, strictly speaking, there is no combatant status. Under the law of armed conflict, it has been recognized that so long as participants in a non-international armed conflict limit their attacks to those who are directly participating in hostilities, at such time as they are so participating, they will not be breaching the law of armed conflict, whatever the position may be under national law. Thus dissidents who limit their attacks to military targets, including members of the security forces, would be acting within international law. Under human rights law, however, the situation may be different.

The problem is illustrated by an incident that took place at a checkpoint some nine miles south of Basra on 24 March 2003 during operations to capture that Iraqi city. An Iraqi had approached the checkpoint throwing rocks. The commander of the checkpoint made various attempts to persuade him to desist but failed. The Iraqi was eventually shot dead and the commander was also accidentally killed by his own colleagues. The case led to an investigation into the deaths but charges were not brought against the soldiers concerned. The Attorney General gave his reasons in a statement to the House of Lords on 27 April 2006. These were that 'the evidence of the soldiers involved in the shooting was that [the Iraqi] was attacking [the commander] and they acted to defend him.' This is classic human rights law. But the incident was taking place during an international armed conflict. Under the law of armed conflict, the right to use lethal force would depend on whether or not the Iraqi was a legitimate target. If he was a combatant, or a civilian taking an active part in hostilities, he was, as such, a legitimate target and there was no need to justify the soldiers' actions by reliance on self-defence, or the defence of anyone else.

From the Attorney General's comments, the legal basis for his decision – namely, which body of law he considered applicable to the situation – is not clear. This places soldiers in a difficult position. In situations where the law of armed conflict applies, their actions will be decided by the status of the person in front of them, i.e. whether he is a combatant or taking a direct part in hostilities. If he is either of those, he can be engaged with lethal force whether or not he poses a threat. On the other hand, where human rights law applies, the soldier will have to act in accordance with the threat with which he is faced and his response will need to be proportionate to that threat. Traditionally, the law of armed conflict has applied throughout the territory of a State at war. However, the influence of human rights law may be leading to a division between 'combat operations' where the law of armed conflict will apply with its more relaxed rules on the use of lethal force, and 'policing operations' where human rights law takes precedence. The difficulty will be in deciding where the borderline rests and the stark dichotomy between the two regimes means that there is little room for middle ground.

The relationship between human rights law and the law of armed conflict

The International Court of Justice has twice confirmed that human rights law continues to apply in times of armed conflict but has also confirmed the law of armed conflict as the '*lex specialis*', or 'special law', applicable in times of armed conflict. However, it is not entirely clear what is meant by '*lex specialis*' in this instance. Sometimes, it refers to a legal system that governs exclusively the specific area of activity in question. However, the Court seems to be using the expression here in a slightly different context. In the Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, the Court stated:

> As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.

This would imply that there is a substantial overlap between the two legal systems and while, in situations of armed conflict, the law of armed conflict would override, human rights law remains applicable except on those occasions when it is in direct conflict with the law of armed conflict. There is an understandable determination not to leave a legal vacuum, a determination that seems to be supported by the International Court of Justice, which does not allow for a situation where neither law is applicable. However, it leaves open to question when the law of armed conflict is applicable and the extent to which it can override human rights provisions.

The full applicability of human rights law in situations of armed conflict is also cast into doubt by a dispute as to its extraterritorial effect. As already noted, the purpose of human rights law was originally to control the way States treated their own people and, as such, its application was considered to be limited to within the borders of the State. However, the manner in which States increasingly seek to exercise authority outside their own territory has cast doubt on this limitation. There is now a general – though not universal – acceptance that human rights norms will also bind State officials when acting abroad in certain limited circumstances. The most important of these for the purposes of the interrelationship between the law of armed conflict and human rights law is in occupied territory. However, the United States is one of those countries that does not accept the extraterritorial application of human rights norms. This creates problems for those States bound by the European Convention on Human Rights in that the European Court of Human Rights, whose pronouncements are binding, has ruled that there can be extraterritorial application in particular circumstances.

A further complication is that whereas the International Court of Justice can foresee and deal with situations of overlap between the law of armed conflict and human rights law, human rights courts are in a more difficult position. There is conflicting authority to the extent that a human rights body can take into account the law of armed conflict when considering a case before it. Thus in a number of recent cases brought against the Russian Federation over the actions of their troops in Chechnya, the European Court of Human Rights made no reference to the law of armed conflict, deciding the cases simply on the basis of human rights law. As it happens, in those particular cases the result would probably have been the same whichever law had been applied, but it is not difficult to foresee cases where the results might be different, particularly given the different approaches to the legitimacy of the use of lethal force.

CURRENT PROBLEMS

The differences of opinion on the law have caused a number of practical problems in relation to the treatment of terrorists. These can be divided into three main parts: the conduct of operations, the detention of individuals and the prosecution of those individuals.

Conduct of operations

In the conduct of operations, there is, as has been shown, a large difference between the rules that apply to law enforcement, generally requiring a minimum use of force, and those that apply in armed conflict, particularly international armed conflict, which have a much more liberal regime on the use of force, relying more on the categorization of the individual or object against which the force is directed. Put in the simplest terms, can an identified terrorist be engaged with lethal force at will or is this only permissible as a last resort after efforts have been made to detain him or her? This can be illustrated by the attack in Yemen in May 2002 when a senior Al-Qaeda operative was killed by a missile fired from an unmanned Predator drone. If this was governed by the law of armed conflict, then the identification of the operative as a belligerent was sufficient to justify the use of lethal force. On the other hand, if it was governed by law enforcement rules, then the killing could only be justified if it could be shown that there was no other option available and the use of lethal force was absolutely necessary. The failure to provide clear guidance as to what legal regime applies inevitably causes stresses within the military. The increased use of international criminal law to regulate the conduct of hostilities, as exemplified by the International Criminal Tribunals for the Former Yugoslavia and Rwanda, as well as the International Criminal Court, means that the actions of service personnel are under far greater scrutiny. There is a need for greater legal certainty in order to protect service personnel from unwarranted accusations of illegal conduct.

Detainees

Similar questions arise in relation to detention. In time of international armed conflict, belligerents can be detained until the end of active hostilities, regardless of the legality or otherwise of their conduct. This is solely on the basis of their status as belligerents. On the other hand, if the situation is governed by law enforcement rules, then the right to detain will normally depend on the ability to prosecute and be governed by the rules of national law. There is power for 'administrative detention' in times of public emergency that threaten the life of the nation, but this would depend on the threat posed by the individual concerned. Unlike the situation with belligerents, administrative detention is governed by strict rules on review and judicial oversight to ensure that detention ceases as soon as the threat from that individual ceases.

Prosecutions

Prosecution also raises difficult issues. Under the law of armed conflict it is an option, but under law enforcement rules it is mandatory if the accused is to remain in detention. This creates evidential difficulties. Obtaining evidence in battlefield conditions is difficult. In many cases, it is not possible to access the scene until much later, if at all, and evidence that would normally be available in a domestic criminal investigation is impossible to gather. There is usually no question of 'scenes of crime' officers carrying out a detailed painstaking search of the area in question. Forensic evidence is unlikely to be available and even autopsies may prove impossible if bodies have been removed or already disposed of. Soldiers will inevitably be more concerned with the conduct of ongoing operations than the gathering of evidence and thus it may not be possible to record statements from individuals until some time after the event. Recollections will obviously be affected by the context. In simple terms, the usual rules applicable to national proceedings may be impossible to apply. But to what extent can they be relaxed or dispensed with altogether? Is there any alternative to criminal prosecutions and, if so, how can they be squared with the increasingly exacting requirements laid down by human rights bodies? It is precisely this conundrum that the United States sought to resolve by the use of military commissions.

CONCLUSION

Dr John Reid, when UK Secretary of State for Defence, said in a presentation at the Royal United Services Institute: 'Just as we continually reassess whether we have the right military structure to meet current and future threats, I am sure that we should do the same for the laws that seek to regulate conflicts.' International law is indeed constantly developing. But what we seem to be facing here is a change in the definition of conflict. It is this new type of conflict that has been putting pressure on the existing legal framework. The continuum of violence, through from isolated acts of violence, riots, internal disturbances and internal armed conflicts to full international armed conflicts, is not new. However, there have been difficulties on the edges in differentiating where

the boundaries are. Nevertheless, the fundamental structure has up until now been sound and the differing legal regimes, both domestic and international, have been well understood.

The 'war on terror' has cast doubt on this. It does not fit into any of the traditional definitions and thus it has proved difficult to place it within a legal framework. Is it an armed conflict and, if so, of what type? Where is the border between terrorism as a crime where the perpetrators are subject to arrest and detention under criminal law, with the appropriate protections against the excessive use of State power under human rights law, and terrorism as an 'act of war' where terrorists are 'combatants' and subject to lethal force? Such questions have in fact long existed in relation to non-international armed conflicts but have been kept mainly below the surface. These questions need to be faced and answered.

Care must be taken not to damage existing structures. It is often said glibly that 'hard cases make bad law' and this is as true on the international stage as on the national stage. Human rights law has long protected individuals from State authoritarianism and the law of armed conflict has laid down workable rules balancing the needs of the military to conduct operations with humanitarian considerations. Both systems have worked well in their particular areas and should be permitted to continue to do so. The difficulty is how to operate in the grey areas.

It must be clear that those parts of the 'war on terror' that are clearly international armed conflicts should continue to be governed by the traditional rules. Similarly, where national law is clearly applicable, then the structures of that law should be used, subject to any necessary modifications that may be required and are made in conformity with national law procedures and human rights law. The majority of cases will fall within those borders. This includes the use of international cooperation agreements where appropriate.

But there is still a grey area where neither the law of armed conflict nor the use of law enforcement mechanisms provides a satisfactory answer. There is a need to develop the law so that there is a holistic approach utilizing the best of both. Certainly, in so far as detention and prosecution are concerned, the United States Supreme Court may be edging towards such a solution. While their judgments are inevitably coloured by provisions of domestic law which may not be applicable in other countries in the world, the acknowledgment that at least the basic standards of the law of armed conflict apply to all armed conflicts, however they may be classified, and thus to all those captured, whatever their nomenclature, avoids the legal 'black hole' that some had feared was developing. Follow-up work is needed to ascertain what other basic principles of the law of armed conflict may also be relevant. Just as, in recent years, there has been a growth in acceptance that many of the principles of law which apply in international armed conflict between States should also be applicable in conflicts of a non-international character, so it may be possible to identify those principles which apply, like the basic standards of Common Article 3 to the Geneva Conventions, across the spectrum of conflict. This would involve not just the treatment of detainees but also the conduct of operations. At the same time, many of the basic standards of the law of armed conflict are mirrored in human rights and domestic law. The absolute prohibition against torture, for example, appears as a universal standard. By identifying those universal standards, it will be possible to develop a code of legal principles applicable in all circumstances, whether classified as armed conflict or not. These foundations will in turn provide the base on which a more comprehensive legal framework can be established. This will involve greater cooperation between armed conflict lawyers and human rights lawyers with an increased willingness to appreciate that both systems are aiming in the same direction.

Whether or not there is a 'new paradigm' of conflict, what is needed is a holistic approach to the law. In the international sphere, there needs to be some sort of rapprochement between the strict standards of human rights law and the more relaxed provisions of the law of armed conflict. Nationally, States need to agree on, and be aware of, the international law constraints on their conduct of operations in conflict and their treatment and prosecution of detainees, in ways that respect the rights of all as well as reflecting a proper understanding of the realities on the ground. The introduction of new treaties to deal with the problem may be a long-term ambition but there need now to be efforts to reach international consensus. There are still obstacles to be overcome but the debate has started. This is the challenge for the 21st century.

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