

ASSYMETRICAL WARFARE AND TERRORISM

JUS1730/JUS5370 International
Humanitarian Law(Law of Armed
Conflict

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Introduction

- Asymmetries of war
- Asymmetries of warring parties
- Symmetries of law and application
- Asymmetries of force

War

- Assymteries of war and the typology of conflicts
 - The use of force and using force
 - International Armed Conflict
 - Non-international Armed Conflict
 - Violence that does not constitute armed conflict

ICTY – *Tadić* - Jurisdiction

- an armed conflict exists whenever there is resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts a peaceful settlement is achieved. Until that moment International Humanitarian Law continues to apply in the whole of the territory of the warring States or, in the case of internal armed conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”

ICTY – *Tadić* - Trial

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

ICTY - *Tadić*

- International/Non-International
- Intensity+
- Protraction+
- Organisation
- Duration
- Location
- Application to Terrorism

Warring Parties

- State Armed Forces
- Organised Armed Group
 - Additional Protocol II
 - ICTY *Haradinaj*
- Combatants
 - Lawful and Unlawful
- "Fighters"
- "Terrorists"

ICTY – *Haradinaj* on Intensity

- The criterion of protracted armed violence has therefore been interpreted in practice, including by the *Tadić* Trial Chamber itself, as referring more to the intensity of the armed violence than to its duration. Trial Chambers have relied on indicative factors relevant for assessing the “intensity” criterion, none of which are, in themselves, essential to establish that the criterion is satisfied.
- These indicative factors include the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.

ICTY – *Haradinaj* on Organisation

- “an armed conflict can exist only between parties that are sufficiently organized to confront each other with military means. State governmental authorities have been presumed to dispose of armed forces that satisfy this criterion. As for armed groups, Trial Chambers have relied on several indicative factors, none of which are, in themselves, essential to establish whether the “organization” criterion is fulfilled.”

ICTY – *Haradinaj* on Organisation

- “Such indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as cease-fire or peace accords.”

Law and its Application

- High Contracting Parties
- Parties to the Conflict
- Parity
- Reciprocity

”Terrorists” as an Organised Armed Group

- Military apparatus of party to the conflict
 - Legally distinct from party to the conflict
- Structure
- Connections
- Consequences
- Targets and Targeted Killings

“Terrorists” as Civilians Directly Participating in Hostilities

- As Civilians who lose protection
- Three issues then to address (ICRC)
 - Who is a civilian
 - What conduct amounts to DPH
 - Modalities
 - Duration of loss of protection
 - Precautions and presumptions
 - Use of Force
 - Consequences of regaining protection

OFFICE LEGAL COUNSEL MEMOS

- Legality of the use of Military Commissions to Try Terrorists
 - 6 November 2001
 - <http://www.justice.gov/olc/2001/pub-millcommfinal.pdf>
- Authority for the Use of Military Force to Combat Terrorist Activities Within the United States
 - 23 October 2003
 - <http://www.justice.gov/olc/docs/memomilitaryforcecombatus10232001.pdf>

Legality of Military Commissions

- Military Commissions are convened to enforce the laws of war
- Presidential/Political discretion to determine whether a "war" exists
 - "whether terrorist acts have created a situation to which the laws of war apply"
 - "are the terrorist acts subject to the laws of war at all or are they solely criminal matters to be treated under the municipal criminal law"

Legality of Military Commissions

- Answer to the questions
 - What the groups were engaged
 - "the number, power and organization of the persons who carry [the war] on"
 - What scale the attack(s) were of and what response they merited
 - "The scale of these attacks, the number of deaths they have caused, and the massive military response they have demanded makes it virtually self-evident that the present situation can be treated as an armed conflict subject to [LOAC]"

Contemporary US view as to application of IHL to operations

- Harold Koh Legal Adviser US Department of State
 - Use of Force
 - Ongoing armed conflict and inherent right to self defence
 - Domestic authorisation AUMF.
 - Detention Operations 3 legal foundations
 - Continuing war of self defence
 - Consent of host government
 - Security Council Resolutions
 - <http://www.state.gov/s//releases/remarks/139119.htm> ; <http://opiniojuris.org/2011/05/19/the-lawfulness-of-the-us-operation-against-osama-bin-laden/>

Contemporary US view as to application of IHL to operations

- John Brennan

- Nature and geographic scope of armed conflict
- Self defence and the notion of imminence

- <http://www.lawfareblog.com/2011/09/john-brennans-remarks-at-hls-brookings-conference/>

Force, Technology and its effects on law and action

- Drones
- Cyber
- Autonomy
- Conventional warfare