

LEGAL ASPECTS OF ASYMMETRIC WARFARE



NATO SCHOOL
Oberammergau

Lt Col Chris Bennett
Legal Advisor
NATO School



Asymmetric Armed Conflict

Asymmetric Armed Conflict (4G Warfare): Use of illegal, not necessarily military, means and methods to overcome a qualitatively or quantitatively superior militarily adversary (terrorism, guerilla warfare, insurgency)

Primary Legal Concerns:

Who – Actors have uncertain legal status (civilian, lawful or unlawful combatant?)

What – Targets protected by LOAC attacked despite legal immunity

When – Adversary may not be aware of armed conflict

Where – Combat not limited to specific areas (battlefield front lines) because urban environments offer more and easier targets

How – Methods of attack (suicide vest, IED, car bomb) are illegal under LOAC due to civilian impact and treachery employed by attacker

Types of Asymmetric Armed Conflict

Terrorism: Threat or use of violence by a non-state actor against civilians or civilian objects in order to defeat a (militarily) superior adversary

No universally accepted international definition exists

Guerilla warfare: Non-State actor imposes material & psychological costs upon a militarily superior adversary to prolong conflict and force realization that conflict is too costly to continue

Insurgency: Organized movement to overthrow a constituted government through use of subversion and armed conflict; non-international armed conflict

More severe than rebellion which is a criminal law matter

Law of Armed Conflict (LOAC)

True asymmetry is when an adversary does things you either legally cannot or morally will not

Western States are highly averse to casualties

States can be coerced by threats to their citizens

Civilian deaths decrease public support for a conflict no matter who is responsible for them

International Law Primer

International law: “the body of rules and principles of action which are binding upon civilized States in their relations with one another” - SS Lotus case (France v. Turkey) 1927 PCIJ

International law is premised upon the increasingly outdated idea that States are the only actors within the international system

Technology enables subnational groups (al Qaeda, Hezbollah, Taliban...) to directly challenge State monopoly on the use of force

International Law Primer

Primary sources of International Law:

Treaty: “an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation” (VCLT, Article 2)

Customary Int’l Law: General and consistent State practice followed out of a sense of legal obligation (*opinio juris*)

Interpretive Guidance

State Practice – legislation, military manuals

Court Decisions – ICJ, Special Tribunals

Commentators – UN, ICRC, Academics

International Law Primer

What is State Sovereignty?

Exclusive, nearly absolute *de jure* & *de facto* authority over a geographic area and its population

States may not interfere in the internal affairs of other States

The [United Nations] is based on the principle of the sovereign equality of all its Members. (Art 2(1) UN Charter)

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter. (Art 2(7) UN Charter)

UN Guidance

Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of their Independence and Sovereignty

-- GA Resolution 2131 (1966)

- 1. No State has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.**
- 2. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements are condemned....**
- 3. The strict observance of these obligations is an essential condition to ensure that nations live together in peace with one another, since the practice of any form of intervention not only violates the spirit and letter of the Charter of the United Nations but also leads to the creation of situations which threaten peace and security**

UN Guidance

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations

-- GA Resolution 2625 (1971)

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements are in violation of international law.

Jus Ad Bellum

Jus Ad Bellum: Laws governing whether/when a State may resort to the use of military force

Two Sources:

- 1) UN Charter**
- 2) Customary International Law**

UN Charter is designed to remove most discretion regarding the use of military force from States

United Nations Charter

San Francisco, CA, 26 June 1945

Relevant Provisions:

Art 2(3): All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.

Art 2(4): All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations.

UN Charter

UN Security Council is the sole arbiter of military force within the international system

Art 39: The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression

Art 42: The Security Council ... may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security.

Exception to prohibition upon use of military force:

Art 51: Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council . . .

Self Defense Chronology

Preemptive SD

Anticipatory SD

Self Defense

1) Respond to armed attack that has already occurred

- strict interpretation of Art 51

2) Respond to an imminent armed attack that has not yet occurred (**anticipatory self defense**)

- CIL right documented in *Caroline* case

3) Respond to an armed attack that is not imminent, but may occur at some point in the future if action is not taken now (**preemptive self defense**)

Premised upon idea that threat from WMD + terrorism is so great that waiting for attack is foolish

- Bush Doctrine ~ 2002

Self Defense

NATO Treaty Art 5: The Parties agree that an armed attack against one or more of them in Europe or North America shall be considered an attack against them all . . . if such an armed attack occurs, each of them, in exercise of the right of individual or collective self-defence... will assist the Party or Parties so attacked by taking forthwith, individually and in concert with the other Parties, such action as it deems necessary, including the use of armed force, to restore and maintain the security of the North Atlantic area. Any such armed attack and all measures taken as a result thereof shall immediately be reported to the Security Council. Such measures shall be terminated when the Security Council has taken the measures necessary to restore and maintain international peace and security.

How many times has Art 5 been invoked?

First and only time was 12 Sep 01 due to 11 Sep 01 terrorist attacks

Legal Responsibilities

International military operations impose legal obligations upon three different levels of a military organization

State Responsibility – duty to implement, observe, and enforce LOAC & comply with *international mandate* (UN, NATO or both)

Command Responsibility – duty to maintain force discipline to preclude/stop LOAC violations and comply with *national mandate*

Individual Responsibility – duty to comply with LOAC and national mandate (ROEs)

Law of Armed Conflict (LOAC) Treaties

Treaties are the primary LOAC source today and are of three general types:

I. Targeting Method: Focus upon regulating the means & methods of warfare

Hague Convention of 1899

Hague Convention of 1907

1925 Geneva Gas Protocol

1972 Biological Weapons Convention

1993 Chemical Weapons Convention

LOAC Treaties Type II

II. Protect & Respect Method: Focus upon creating non-derogable protections for categories of individuals

GC I: Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field

GC II: Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea

GC III: Relative to the Treatment of Prisoners of War

GC IV: Relative to the Protection of Civilian Persons in Time of War

LOAC Treaties Type III

III. Hybrid Method: Combination of other types

AP I: Protection of Victims of International Armed Conflicts

AP II: Protection of Victims of Non-International Armed Conflicts

AP III*: Adoption of an Additional Distinctive Emblem

*Recent addition & not really a hybrid

Jus in Bello: Conflict Classification

When does LOAC apply?

International Armed Conflict (IAC) – GC Common Art 2

- 1) Declared war or any armed conflict*
- 2) Between 2 or more “high contracting parties”

*Recognition of state of war not necessary

Non-International Armed Conflict (NIAC) – GC Common Art 3 & AP II

- 1) Non-international armed conflict
- 2) Within territory of a “high contracting party”

Jus in Bello: Non-International Armed Conflict

Geneva Convention Common Art 3 specifies minimum protections during armed conflict not of an international character occurring in the territory of one of the High Contracting Parties

Additional Protocol II (NIAC) applies to armed conflicts in the territory of a High Contracting 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

LOAC Fundamental Principles

What are the core LOAC principles?

Distinction – Who/What/Where/When

Proportionality – How/Where/When

Military Necessity – Who/What/Where/When

Humanity – How/Where/When

Chivalry – How/Where/When

Fundamental Principles

Law of Armed Conflict

Distinction and Proportionality

**Military
Necessity**

Humanity

Chivalry

**Everything feasible must be done to avoid striking
civilians and civilian objects**

Distinction

“In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.” (AP I art 48)

“Indiscriminate attacks are prohibited. Indiscriminate attacks are: (a) those which are not directed at a specific military objective; (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol” (AP I art 51(4))

Distinction

“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 art 51(2))

“Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities.” (AP I art 51(3))

Lawful personnel targets: combatants (State military forces) & civilians directly participating

Members of a non-State armed group (terrorists, guerillas, insurgents) are not in any State’s military forces so cannot be lawful combatants and must be civilians

Civilians directly participating are deemed “unlawful combatants” by some States but that is not a term found in any treaty

Distinction: Civilians vs. Combatants

What criteria would members of a non-State armed group have to meet in order to assert combatant legal status in lieu of civilian status?

Under command of a person (legally) responsible for his/her subordinates

Use a fixed distinctive sign recognizable at a distance (uniform)

Carry arms openly (do not hide combatant status)

Conduct operations in accord with LOAC

Distinction

What is a “direct part in hostilities”?

“Direct” participation means acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of the enemy armed forces. It is only during such participation that a civilian loses his immunity and becomes a legitimate target. Once he ceases to participate, the civilian regains his right to the protection under this Section, i.e., against the effects of hostilities, and he may no longer be attacked. (ICRC Commentary)

There should be a clear distinction between direct participation in hostilities and indirect participation in the war effort. The latter is often required from the population as a whole. Without such a distinction . . . international humanitarian law could become meaningless. (ICRC Commentary)

Distinction

What is a “direct part in hostilities”?

The word "hostilities" covers not only the time that the civilian actually makes use of a weapon, but also the time that he is carrying it, as well as situations in which he undertakes hostile acts without using a weapon. (ICRC Commentary)

Civilians who spontaneously participate in the conflict are “real” civilians while those who belong to a non-State organized armed group are engaged in a “continuous combat function” and thus may be targeted at any time. (ICRC Commentary)

Continuous combat function ≠ combatant legal status

No entitlement to Prisoner of War protections

May be criminally prosecuted for participating in combat

Continuous Combat Function

What is not a Continuous Combat Function?

Member of a non-State armed group who participates in non-military ways such as administration, recruiting, financial support, or propaganda campaigns is still a “real” civilian (ICRC Commentary)

Accompanying an armed group and providing intelligence or weapons does not count unless connected to a specific combat operation likely to cause actual harm (ICRC Commentary)

What does the ICRC approach effectively require?

Trial: Case-by-case factual evaluation of every person suspected of membership/participation in a non-State organized armed group

Fundamental Principles

Law of Armed Conflict

Distinction and Proportionality

**Military
Necessity**

Humanity

Chivalry

Any anticipated civilian death/destruction must not be excessive relative to the expected military advantage gained

Proportionality

“An attack shall be canceled or suspended if it becomes apparent that the objective ... may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be *excessive* in relation to the concrete and direct military advantage anticipated.” (AP I art 57(2)(b))

“When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and to civilian objects.” (AP I art 57(3))

Fundamental Principles

Law of Armed Conflict

Distinction and Proportionality

**Military
Necessity**

Humanity

Chivalry

**Attacks are limited exclusively to military objectives that
will help defeat the enemy**

Military Necessity

“Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.” (AP I art 52(2))

“In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.” (AP I art 52(3))

Military Necessity

What is a military objective by purpose/use?

The criterion of 'purpose' is concerned with the intended future use of an object, while that of 'use' is concerned with its present function. Most civilian objects can become useful objects to the armed forces. Thus, a school or a hotel is a civilian object, but if they are used to accommodate troops or headquarters staff, they become military objectives.

Dual Use: Establishments or buildings which are dedicated to the production of civilian goods may also be used for the benefit of the army. In this case the object has a dual function [use] and is of value for the civilian population, but also for the military. (ICRC Commentary)

Fundamental Principles

Law of Armed Conflict

Discrimination and Proportionality

**Military
Necessity**

Humanity

Chivalry

Use of weapons or force intended to cause unnecessary human suffering is prohibited

Humanity

**In any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.
(AP I art 35(1))**

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.” (AP I art 35(2))

It is especially forbidden...to employ poison or poison weapons.” (Hague IV art 23(a))

Fundamental Principles

Law of Armed Conflict

Distinction and Proportionality

**Military
Necessity**

Humanity

Chivalry

Dishonorable (treacherous) means, expedients, and conduct are prohibited

Chivalry

What is Perfidy?

“It is prohibited to kill, injure or capture an adversary by resort to perfidy. 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, shall constitute perfidy. The following acts are examples of perfidy: (a) the feigning of an intent to negotiate under a flag of truce or of a surrender; (b) the feigning of an incapacitation by wounds or sickness; (c) the feigning of civilian, non-combatant status; and (d) the feigning of protected status by the use of signs, emblems or uniforms of the United Nations [or ICRC] or of neutral or other States not Parties to the conflict.” (AP I art 37(1))

Guerillas, Insurgents, Terrorists & LOAC

Detention?

PoW or Criminal basis?

Targeted Killing?

What about International Human Rights Law (IHRL) and the Right to Life?



International Human Rights Law (IHRL)

Right to Life: Nobody may be arbitrarily deprived of the right to life (full legal due process required)

IHRL is *lex generalis* applicable during peace & armed conflict

Targeted Killing: Deliberate killing of a person who has unlawfully participated in hostilities (extrajudicial punishment?)

LOAC is *lex specialis* applicable only during armed conflict

LOAC must be applied to targeting action: military necessity, proportionality, distinction, & precautions in attack

Summary

LOAC presumes both sides in armed conflict have equal rights and therefore equal responsibilities (reciprocity)

Non-State groups of highly motivated but poorly trained & equipped personnel cannot survive by following the rules against a State's military forces but sustained and widespread attacks against soft targets in the urban environment can achieve goals

LOAC is contradictory with the nature of modern warfare because one side is bound by rules without benefiting from them and the other benefits from rules without being bound by them

Questions?