

Description

Study Committee on the Use of Force

Mary Ellen O’Connell, chair

Since at least the time of Hugo Grotius and his seminal work, *THE LAW OF WAR AND PEACE* (1625), international law has been organized around the existence of the two categories he refers to: war and peace. Of course there is no immutable, scientifically-definable line between these socially-constructed concepts, and, therefore, a perennial challenge for international law has been understanding what armed conflict is and determining when the rules relevant to armed conflict apply.¹ The challenge might have been somewhat less during the age of legal formalism when governments formally declared war, and, upon that declaration, the law relevant to war was triggered. But even then, the challenge remained where states were plainly engaged in warfare but did not declare it—or declared it where it was plainly not occurring.

With the adoption of the United Nations Charter, the law relevant to armed conflict² is triggered upon facts of fighting, not declarations. With this change the challenge has shifted away from the problem of declarations to the problem of understanding what facts amount to armed conflict. We have a number of examples of governments denying that fighting on their territory amounts to armed conflict, arguing instead it is criminal activity that the government has under control and that the rules of war are therefore not applicable. With the September 11 attacks on the United States, however, we have a reversal of that more common issue—now we have an example of a government declaring war where many would call it crime.

One explanation for these controversies is that international law does not today contain an accepted definition of armed conflict. A definition or understanding can be built from a number of legal sources,³ but no widely-accepted standard exists against which to measure government claims. We lack such an accepted definition despite the fact that so much in the law turns on the meaning of armed conflict. In particular, a state’s right of response under the *jus ad bellum* is determined, in part, by whether it is confronting an armed conflict or a lesser provocation. The *jus in bello* is in its entirety triggered by the existence of an armed conflict. With the passage from peace to armed conflict, the right to life becomes circumscribed by the combatant’s right to kill; in armed conflict the enemy may be detained without trial until the end of hostilities, but those of the enemy who fight according to the laws and customs of war, should arguably be treated as prisoners of war, not criminals. Many other rights, such free navigation on the high seas, free trade, and asylum rights may be circumscribed in armed conflict but not in peace.

¹ Nathaniel Berman, *Privileging Combat? Contemporary Conflict and the Legal Construction of War*, 43 Col. J. Trans. L. 1 (2004).

² Also, with the adoption of the Charter, the term “armed conflict” was widely substituted for “war.”

³ Mary Ellen O’Connell, What is War?, <http://jurist.law.pitt.edu/forum/oconnell1.php>

Treaty obligations may be terminated or suspended by armed conflict. The obligations of neutral states are determined by the existence of armed conflict.

The lack of a widely-accepted definition may not have been a serious impediment to the proper functioning of the law when the problem was under-inclusion of armed conflicts. When a government contended it was not involved in armed conflict, it had to comply with the laws of peace, including the full panoply of human rights protections. True, some who should have been declared POWs were labeled common criminals, but that inequity pales in comparison to the rights violations that occur when a government claims the rights and privileges of wartime in non-war situations. In wartime, government forces have “combatant immunity” to kill without warning. They may detain enemy forces until the end of the conflict without the requirement to provide a speedy and fair trial.

The United States and other states, for example Russia, have claimed combatant immunity to kill suspected terrorists anywhere and the right to detain suspects indefinitely. Under this view the US – or any other state -- has the legal right to target and kill an Al Qaeda suspect on the streets of Hamburg, Germany, or any other peaceful place. While numerous governments have protested America’s detention policies, few have protested the killing of six persons in Yemen in 2002 as an exercise of the “combatant’s privilege.” It is not clear whether there is an emerging pattern of state practice and if so whether it is having a modifying effect on the meaning of armed conflict and/or the rules relevant to armed conflict. Antonio Cassese, in a short article published soon after September 11, decried what was being done to the categories of international law in the name of fighting terrorism.⁴ More recently Thomas Franck has written suggesting a new legal status for persons accused of terrorism—somewhere between the peacetime status of criminal and the wartime status of combatant.⁵ Judith Gardam has long held that we need no war/peace distinction, but that all uses of violence be governed by the principles of necessity and proportionality.

The International Law Association created a study committee to produce a report on the meaning of war. The committee will consider the law as it existed on September 11, 2001 and consider changes that have possibly occurred since that date. The committee has four years to complete the study. It submitted its work plan in June at the ILA meeting in Toronto (5-9 June 2006). The Committee held a preliminary drafting session in Berlin in December 2006. It plans its primary drafting session for Notre Dame, Indiana in September 2007 and will submit its final report at the biennial meeting in Rio de Janeiro in 2008.

⁴ Antonio Cassese, *Terrorism is Also Disrupting Some Crucial Legal Categories of International Law*, 12 EJIL 993 (2001).

⁵ Thomas Franck, *Criminals, Combatants, or What? An Examination of the Roles of Law in Responding to the Threat of Terror*, 98 Am. J. Int’l L. 686 (2004).