

# **Symposium: Current Pressures on International Humanitarian Law**

## **Foreword**

The unconventional nature of the September 11 terrorist attacks represent to some observers a need to promote a fundamental and paradigmatic shift in the application of international humanitarian law. The classic international legal conventions regulating warfare were drafted when war was fought primarily between nation-states. The prospect of terrorists destroying skyscrapers or possibly wielding weapons of mass destruction was not something delegates could have foreseen at the Hague and Geneva Conventions. Arguments have therefore been presented since September 11 that non-state actors like al Qaeda whose terrorist actions closely resemble armed conflict in scale and intensity, nevertheless could not have been contemplated by the law of armed conflict, and that such actors do not deserve the protection of this body of law. Other scholars have replied that this position is a misconception of the law of armed conflict that could produce untoward results for international law and the rule of law in general.

Consequently, it is precisely at the point of encounter—in this complex, unfolding relationship between international humanitarian law, asymmetric conflict, and the response of nation-states—that issues have been joined. The United States insists simultaneously that while international humanitarian law does not cover individuals whom it calls “unlawful combatants,” such individuals are subject to its sanctions. Rejecting this position, others argue that neither terrorism nor terrorists deserve any recognition in international law other than that reserved for criminals. And other scholars, concerned with legal questions surrounding recent U.S. decisions to intervene in Afghanistan and Iraq, wonder whether the increasingly unilateral U.S. approach to the use of military force could have the unintended consequence of weakening the law regulating war in future international conflicts.

The purpose of this symposium is to present elements of the debate as it stands in academia and policy circles. The Legal Adviser of the U.S. State Department stakes out one position in his essay, *The Law of Armed Conflict After 9/11: Some Salient Features*. Proceeding from the twin premises that the laws of war are humanitarian in nature and recent events do not necessitate any change in the laws, William H. Taft, IV argues that it will disserve the law of armed conflict for terrorists to be granted status as lawful belligerents. He notes that terrorism violates international humanitarian law, but he argues that the law of armed conflict should still govern the use of force in the war on terrorism. Nevertheless, Taft contends that terrorism’s illegality does not preclude the application of the law of war where individuals or groups conduct belligerent terrorist actions without the privilege of uniform. This

principle informs the notion of “unlawful belligerents,” and acknowledges that “[t]errorism is [both a] negation of law . . . [and] of the fundamental humanitarian principles of the law of armed conflict.”

Professor Jordan Paust agrees with Taft that international humanitarian law requires no significant change or revision. However, Paust’s essay, *War and Enemy Status after 9/11: Attacks on the Laws of War*, takes this premise in a different direction. He differs strongly over the implications of even characterizing terrorist attacks like September 11 as creating a state of armed conflict. First, according to his view, members of al Qaeda—presumed perpetrators of various terrorist attacks on American, Kenyan, Tanzanian, and other targets—do not fulfill the criteria set by international law for parties in an armed conflict. Second, to Paust, to “expand the concept of war” is to upend the law of armed conflict by legitimizing illegal acts with nomenclature reserved only for recognized belligerents. He envisions a situation where “non-state actor violence and targetings that otherwise remain criminal” acquire a status that confers legitimacy in fact, if not in law. He concludes that terrorist acts deserve no more than to be seen as criminal conduct—and punished as such.

In *Clouds on the Horizon of Humanitarian Law?*, Professor Rudolf Dolzer poses several questions on “the suitability and acceptance” of international humanitarian law in the global antiterrorism campaign, where nation-states might tailor their reactions to terrorism based on the nature of the threat. He ponders whether the asymmetric nature of terrorism and possible responses to it might undermine the existing “fragile” system of international humanitarian law, because nation-states might feel compelled to abandon values that presumably restrain a robust response to terrorism in its lack of constraints. Dolzer identifies a possible linkage between *jus ad bellum* and *jus in bello*, and he worries that the recent erosion in the U.N. Charter rules regulating the use of force might produce similar deleterious effects on international humanitarian law. He concludes with a proposal for creativity in the antiterrorism campaign that matches diplomatic vigor with military might.

Finally, Professor Karl Meessen frames the debate within terms that flow from the title of his essay, *Unilateral Recourse to Military Force Against Terrorist Attacks*. Expounding on a concept of “society-induced terrorism” that emphasizes the asymmetric nature of terrorist attacks, he places antiterrorism measures within a context that acknowledges a nation’s right of self defense. Meessen articulates a theory predicting “an emerging rule of customary law” that could confront terrorism. This law finds its roots in both positive law and the imperatives of collective security. Within this framework, Meessen argues that “unilateral recourse to military action is permitted if effective multilateral action is unavailable.” He concludes by advocating for the eventual drafting of an international convention that restricts but does not preclude the unilateral use of force against terrorist targets, but he recognizes that the recent political and legal controversy surrounding the U.S.-led war against Iraq may have “seriously prejudiced the chances” of agreeing on new rules designed for the “fight against society-induced terrorism.”